A Student’s Guide to Legal Analysis
Thinking Like a Lawyer

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Introduction

The law is likely to overwhelm beginning students with its scope and complexity. The standard law school curriculum offers dozens of courses—impressive enough in sheer number—and each is only an introduction to the subject it covers. The aura of complexity is confirmed by the thousands of books, reporters, and periodicals that line the shelves of every law library, examining issues as diverse as the political rights of Aboriginal peoples in Brazil to the proper interpretation of construction contracts in Florida.

This complexity of subject matter, however, contrasts sharply with the essential simplicity of legal analysis. The law does indeed cover hundreds of subjects, but lawyers and judges work with these subjects in very limited ways. They ask and answer only a handful of questions about any legal matter:

- Is there a law? (questions of obligation and right)
- Has it been violated? (questions of liability)
- What will be done about it? (questions of remedy)

These questions can appear in many guises, but they are always the same.

This book demonstrates how these three questions recur in different areas of legal study and practice, including the first-year curriculum of law school. Among other goals, the book gives law students a way of organizing and thinking about their coursework generally and about the individual cases, laws, and regulations they confront every day. It shows how “everything fits.” The book also introduces the dynamics of legal argument. Just as there are only a few legal questions, there are only a few reasons to answer those questions one way or the other. These reasons—the fundamental, often conflicting aspirations we have for legal regulation—make a great deal of legal argument predictable as well. By the end of the book, students will not only recognize the basic questions posed in a legal dispute, but the predictable reasons lawyers give for reaching one resolution or another.

Law deans and professors often say that one of the primary purposes of law school is to teach each student how to “think like a lawyer,” but we
are not always clear about what this means. The lack of clarity is unfortunate, because the meaning is simple. To think like a lawyer is to ask the kinds of questions lawyers and judges ask about the situations they confront, the questions described in this book.

As may be obvious by now, this book is quite different from other standard texts for law students. It is not a treatise in the normal sense, for it does not provide a summary of substantive legal rules, divided along traditional lines such as contract, property, and criminal law. Nor is it a study aid in the normal sense, for it does not explain how to brief a case, how to synthesize a group of cases, or how to prepare for and take a final examination. There is no substitute for detailed, substantive knowledge of the law or for clear-headed advice on how to study and take examinations, but they alone are not enough. What is missing, and what this book provides, is the "big picture"—the fundamental issues of law and the fundamental dynamics of legal argument. With these in hand, both the substance and mechanics of law study will be easier to grasp.

Some final words about scope and design. First, because the book is written for beginning students, no prior legal knowledge is presumed. A glossary of major, recurring terms has been provided at the back, in addition to an extensive index. For those who want to read more about the subjects raised in this book, a list of Suggested Readings has also been included. Second, because the book is written primarily for Americans, historically important branches of law, such as Roman law, and the domestic laws of other nations, such as British or Chinese law, have not been consulted systematically. This is an important limitation; a book set in the context of current American law makes assumptions about law and its practice that may seem natural, but are assumptions nonetheless. A book for Germans or Aleuts would be different. Finally, the book deals with only one, albeit crucial, aspect of the lawyer's work—legal analysis. Lawyers are more, however, than analytical thinking machines. They are counselors, confidants, and keepers of the peace; they are moral agents with professional responsibilities both to their clients and society more generally. We will see these other aspects of the lawyer's work in the course of this book, but the focus will be on legal analysis.

Despite inevitable limitations of context and method, the book's value should become apparent the first time a professor complains, after 30 minutes of confusing and frustrating classroom discussion, "But you're missing the forest for the trees!" This book is a map of the forest.
The Only Three Questions in Law

This Chapter

- Sets the groundwork for understanding legal analysis by explaining:
  - the essential nature of legal rights and obligations, and
  - how those rights and obligations are created

- Describes the three types of legal questions that judges and lawyers repeatedly try to answer in every situation they confront:
  - Is there a law?
  - Has it been violated?
  - What will be done about it?

- Explains how these three questions affect not only lawyers, but also:
  - clients (and what this means for their chances of success); and
  - law students (and how understanding these questions will help them read their assignments and prepare for classes more effectively)
THE LAW AND THE WORLD

All good questions, including legal questions, arise in a particular context. Before embarking on our examination of legal analysis, it will be useful to set the stage with some discussion about the law itself — how it works and what it seeks to accomplish. We begin with some fundamentals about what the law regulates and how those regulations arise.

The Law’s Concern

The law concerns itself with observable human action. Note first that the law is concerned with human action: the law regulates people and nothing else. A city ordinance providing that dogs shall be leashed at all times is not addressed to the dogs but to their human owners. We speak of a “law of property,” but that law does not regulate houses, office buildings, or public parks; it regulates people in their dealings with those things. Legal analysis, no matter how difficult or complicated it becomes, must eventually return to earth and answer the question, “What exactly are we asking people to do?”

WHAT THE LAW REGULATES

| Observable  | Regulated behavior must have visible elements; no regulation of purely mental states |
| Human       | Regulates people, not buildings, automobiles, drugs, or dogs |
| Action      | Regulates what people do and refrain from doing |

“People,” however, are regulated in two ways: (1) directly, as individuals; and (2) indirectly, through the groups and associations they form. The law does not regulate just any group or association, but only certain types, few in number and carefully defined: international organizations, nation-states and their political subdivisions (states, counties, cities), certain business entities (corporations, partnerships, proprietorships, unincorporated associations), and a few others (e.g., estates and trusts). These formal groups and associations are commonly known as juristic persons; you and I are known as natural persons. Together, we are subjects of the law.
At first blush, the legal regulation of juristic persons seems to contravene the principle that the law regulates only human action: a nation-state is not a human and neither is a corporation. For each kind of juristic person, however, the law has developed a set of rules that connects the entity’s actions and responsibilities with that of individuals. For each kind of juristic person, there are always rules about how and when to attribute individual action to the group (each partner in a general business partnership, for example, can bind the partnership), and how to distribute group responsibility among individuals (when a general partnership can’t pay its bills, for example, each of the partners is individually liable). In this way we connect individuals to the group and the group to individuals. Ultimately, it is individuals who are regulated.

When the law regulates human beings, individually or in groups, it regulates only what is physically observable to others: shaking the candy machine; failing to pay taxes; selling groceries. There is no regulation of purely mental or internal states of affairs. This limitation on the law is not driven by a concern for freedom of thought, but is a matter of practical necessity. We cannot regulate what we cannot see (or hear or smell or touch or taste). We could not regulate pure thought even if we tried. This makes the law highly materialistic, tethering it firmly to the world of physically observable facts, of what was said and done. This does not mean that the law never refers to mental or internal states of affairs; the difference between first- and second-degree murder, for example, turns on the precise mental state of the accused. But there would be no murder at all without at least one physical
act, observable (even if not observed) by others. Physical, observable human acts are the necessary prerequisites for legal regulation.

Obligation and Right

The law can only do three things with observable human action — require it, prohibit it, or permit it. Most of the time, the law either requires or prohibits action rather than permits it. It either forces conduct of certain kinds or limits the conduct otherwise possible. This constraining cast of the law is not the result of malevolence, but reflects the context in which the law works, a context dominated by the principle of legality. This fundamental principle provides that all actions are legal unless made illegal. As a consequence, the law spends little time gratuitously granting permission for things that are permissible in the first place. The principle of legality has important practical consequences as well. When a lawyer is asked whether a client can take a particular action, the lawyer's first and most common reaction is to ask, "why not?" No law is needed to make an act legal, just the absence of any prohibition.

Still, the law does explicitly grant permission in several contexts. Explicit permission is often given to clear up ambiguities, when the legality of an act has been drawn into question, or to carve out an exception from a more general prohibition. Beyond ambiguities and exceptions, one of the most common occasions for permission-granting concerns juristic persons. Traditionally, the principle of legality has applied only to individuals; juristic persons, unlike individuals, generally cannot act unless specifically authorized by law to do so. A corporation, for example, may not engage in a particular line of business un-
less its charter permits it. The federal government of the United States cannot do anything under domestic law unless the Constitution says it can.

When attached to a person, requirements and prohibitions (the constraining side of law) generate obligations of various sorts. Depending on the circumstances, they might be called obligations, or instead duties, disabilities, requirements, or liabilities. When attached to a person, permissions (the confirming or enabling side of law) generate rights of various sorts. Depending on the circumstances, they might be called rights, or instead claims, privileges, licenses, powers, immunities, or liberties. Over the years, there have been some important and interesting attempts to define and regularize this terminology. In 1913, in one of the most influential efforts, Professor Wesley Hohfeld suggested a standard nomenclature of eight "lowest common denominators" for describing and classifying legal relations — right, no-right, privilege, duty, power, disability, immunity, and liability — the details of which will not concern us here.¹ Despite the analytical power of such efforts, however, neither Hohfeld's system nor anyone else's is employed consistently by lawyers and judges. To this day, American legal argument is filled with loose talk of "rights" and "duties," all sufficiently imprecise to set the late Professor Hohfeld spinning in his grave. But this doesn't mean that today's lawyers and judges are wrong. On the whole, we are just as precise as we need to be: Hohfeldian and other distinctions are useful for resolving difficult problems, but they are not needed most of the time. In this book, we will adopt the practice of the legal community, making only those distinctions we have to, when we have to, and using the words most commonly used by lawyers and judges themselves. When the law requires or prohibits an action, we will call this an obligation; when the law permits an action, we will call this a right. When finer distinctions are needed we will make them.

Many rights and obligations apply to persons without any effort or voluntary action on their part: I enjoy the right to free speech, for example, even though I never applied for it, and I am obliged not to commit murder, even though I never expressly agreed to limit my behavior in that way. Many other rights and obligations, on the other hand, are conditional: I am obliged to act in certain ways if (but only if) I wish to achieve a certain objective. No one is obliged, as a general matter, to form a corporation, but if I wish to do so, I must file certain papers with a government office. If I want the privilege of driving, I must apply for a license and take the required tests. Indeed, most of a lawyer's work outside the courtroom involves conditional rights and obligations, helping people to achieve objectives that they are not required to achieve, but once sought, require the fulfillment of particular obligations. As one can imagine, these rights

and obligations, though "conditional," are of utmost importance to the people concerned, for it is in this way that children are adopted, homes purchased, and businesses founded.

Rights and obligations, whether conditional or not, are clearly related. If someone has a right to receive a thing, someone else (generally speaking) has a correlative obligation to provide it. If, for example, I have a right to the mobile home I have just bought from you, you have an obligation to deliver it. Likewise, if someone has a right to do something, others (generally speaking) have a correlative obligation not to interfere. Thus, if I have a right to criticize my government for a recent action, the government has an obligation not to hinder or prosecute me. In sum, every right entails the existence of a complementary obligation; every obligation, a complementary right.

The close, reciprocal relation of rights and obligations does not mean that we can sensibly or usefully rid ourselves of one kind of talk or the other. Even if it were conceptually possible to translate all rights-talk into obligations-talk or vice-versa, the translations would often be unwieldy. "Joe has the right to possess his house," does mean (more or less) that "everyone is obliged to refrain from interfering with Joe's possession of his house," but why substitute thirteen words for eight? And why risk the error of translation? But there is more to the matter than linguistic economy. In many instances, one side of the right/obligation correlation is held by one person, the other side by an amorphous class of persons — not a very suitable subject for a right or obligation. Joe's right to possess his house turns into everyone's obligation not to interfere, but is only meaningful for that subset of persons who are actually in a position to interfere: neighbors, passers-by, the state of Texas, as the case may be. Likewise, Susan's obligation as a doctor to perform her work in a competent manner turns into a right to receive competent care, held by those whom Susan treats in her professional capacity, a class of persons whose membership changes daily.

In any particular instance, how do we know whether to formulate the relevant question as a rights problem or an obligations problem? As suggested above, the answer may come by deciding which formulation is simpler or more direct. Tradition, too, may play a role, as some formulations of a question may have been better accepted over time than the alternatives. Most likely, however, the formulation will depend on who has the problem. Any legal relation is properly understood as a relation between two or more people — with corresponding rights and obligations — but usually only one of them walks through the lawyer's door with a question. Only one of them marches to the courthouse to seek relief. And when that happens, it is most natural and effective to formulate the legal question from the puzzled or angry person's perspective, not the perspective of a person or persons unknown who may or may not hold a corresponding right or obligation. For example, if a client comes to ask whether she can
build a second story on her house, the legal question is easily and meaningfully formulated from her perspective in “rights” language: does she have the right to build a second story? We are not focused on whether a particular person has a corresponding obligation to refrain from stopping her; but whether anyone can. In this particular case, to put the client’s question in the language of obligations — “Does everyone, who is in a position to stop her, have an obligation to refrain from stopping her?” — admirably suggests why it is usually best to follow the client’s or litigant’s lead in deciding between rights-talk and obligations-talk.

**Status and Contract**

Both rights and obligations arise in essentially the same two ways: by status and by contract. One hundred years ago, Sir Henry Maine famously remarked that, “the movement of the progressive societies has hitherto been a movement from Status to Contract.” By this he meant that legal rights and obligations have come to be determined more and more by the will of the individuals, in agreement with each other (contract), rather than by membership in preexisting categories that define one’s station or rank (status). Despite this movement, however, it remains true even today that status generates far more rights and obligations than does contract.

![Diagram of How Rights and Obligations Are Created](image)

The law has a thousand statuses, of extraordinary, fascinating variety — stockholder, mother, Vice-President of the United States, tenant, citizen of Alabama, plaintiff, etc. — and each is associated with a body of legal rights and obligations. Legal statuses vary dramatically in their width, that is, in how many people they cover. Width ranges from “person” at one end of the spectrum to (for example) a “party to a reorganization” as defined by section 368(b) of the federal tax code. There are over 250 million persons in the United States, but only several thousand parties to a reor-

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ganization in any one year. Legal statuses also vary in their depth, that is, in the number of rights and obligations they carry with them. One's status as a person imports a great many rights and obligations, while one's status as a party to a reorganization imports only a small group of tax-related consequences under the Internal Revenue Code. Width and depth are often related, as in the examples just given — some statuses are both wide and deep, others both narrow and shallow. But there is no necessary relation between width and depth. Trustee, for example, is a relatively narrow status (how many trustees do you know personally?), but the status comes with a relatively large number of explicitly delineated rights and responsibilities. "Male" and "female," in contrast, are both very wide statuses, but carry with them very few legal rights or obligations per se.

Each person occupies several different statuses simultaneously. On a particular morning, for example, one can wake to find oneself a stockholder, mother, Vice-President of the United States, tenant, citizen of Alabama, and plaintiff, subject to all of the rights and obligations carried by each status. But not all statuses are relevant at every moment of the day, and indeed most statuses are irrelevant almost all of the time — except when there is a legal problem. Lawyers and judges must know which statuses are relevant and when. If Susan wants to sue Joe because he sold her shoddy goods, for example, Joe's status as the executor of his grandmother's estate and as the father of two children are likely to be irrelevant; his status as a "merchant dealing in goods of that kind" might be pivotal. Lawyers and judges must therefore know what statuses there are, that is, which are legally recognized, and what rights and obligations are connected with each status. A great deal of law school training involves just this — learning about legal statuses and their relevance to common situations.

Rights and obligations are created not only by status, but also by agreement. When I agree to buy your 1978 Chrysler New Yorker for $500, you become obliged to transfer title and possession to me (conditioned on my payment of the agreed purchase price) and I, correlativey, become obliged to pay the purchase price (conditioned on your transfer of title and possession). In the broad scheme of things, however, the contractual creation of rights and obligations is much rarer than their status-driven creation. This disparity is reflected, among other places, in the law school curriculum. Of the all the courses typically offered in the first year, only one — contracts — is concerned primarily with the creation of rights and obligations by agreement. In none of the others — torts, property law, criminal law, and civil procedure — does agreement play a central role.

Even so, the contractual source of right and obligation is vitally important in selected areas of human endeavor, particularly in the buying and selling of goods and services. And that is no small matter in a society as thoroughly commercialized as our own. From a purely self-interested perspective, the contractual source of right and obligation is important to
lawyers because business people generate a lot of work for them. But there are also more general, less mercenary reasons for contracts' significance. First, contracts and agreements create law where there was none before, and thus permit the stabilization and regulation of human interaction whenever two or more people wish it to occur. Second, contracts and agreements are the great safety valve of the law, permitting (at least sometimes) the modification of rights and obligations that would otherwise have existed by status. And finally, contracts and agreements can clarify what would otherwise have been doubtful or ambiguous. Contracts and agreements work at the margins of legal regulation, but are essential nonetheless.

The distinction between contract and status is not quite the same as that between voluntary and involuntary. First, rights and obligations founded in status are not always forced. Many statuses are optional, and one can enter or leave them at will — "theater patron," for example, or "stockholder." Still, there are many statuses about which one has no choice ("person," "Caucasian"), and statuses that, once entered, are hard to leave ("parent," "spouse"). Even those statuses that are relatively easy to enter and leave retain an element of coercion, since statuses typically come with a package of rights and obligations: if you wish to enjoy the rights of property ownership, for example, you must take on the obligation to pay property taxes.

Second, and conversely, many agreements are implied or imposed by the law, robbing them of any serious claim to voluntariness despite their nominal status as "agreements." For example, in residential leases, most states imply a warranty of habitability, that is, a promise from the landlord to the tenant that the premises are and will be maintained at a minimal level of safety and comfort. And courts will imply this promise even if the lease is silent or says something different. In such a case, the language of the obligation appears promissory, contractual, and voluntary, but is really compulsory and involuntary. (In such cases, one can argue that the obligation is really founded in status: the landlord in our example must maintain and repair the premises by virtue of being the landlord.) It is therefore useful to guard against two errors in one's study of law: the assumption that the holder of a status-based right or obligation had no choice in the matter and the assumption that a right or obligation cast in contractual language is thereby voluntary or consensual.

The Known and the Unknown

Rights and obligations, whether arising out of status or contract, are imposed both explicitly and implicitly. They are imposed explicitly whenever a legislature or court associates a particular right or obligation with a particular status, or whenever private parties agree to rights and obligations described in a particular document. From that base of explicit rights and obligations, others can be generated. If I have a right to keep you from setting foot on my
property, I have a right to keep you from living there, too — the prohibition of the lesser intrusion implicitly including the greater one. Some extensions and additions are based on the correlative character of rights and obligations. As we have already seen, if Susan has a right, Joe (or someone else) has a corresponding obligation. Still other extensions and additions are based on analogies with similar statuses and contracts. Thus, for example, duties imposed on used-car dealers might, over time, "seep out" and be imposed on completely private parties who sell their cars to others.

Generally speaking, and within limits, we are willing to countenance extensions and additions to explicit rights and obligations. We do so in the name of interpretation and the methods we employ can roughly be described as legal logic. (Both topics will be addressed in later chapters.) Even at this point, however, it should be clear that extending and adding, moving beyond what we know to be the case, runs the risk of error and injustice. As lawyers and judges, therefore, we must try to get things right. This is why so much time in law school is spent on hypotheticals — new, imaginary cases whose resolution requires us to push beyond the rights and obligations that we know. Hypotheticals develop judgment, the ability to move reliably from the known to the unknown and to learn which extensions of known law are warranted and which are not.

THE ONLY THREE QUESTIONS IN LAW

We now know that the law regulates observable human action. It does so by creating obligations and rights, either out of status or by contract, either explicitly or implicitly. Against this background the fundamental nature of legal analysis snaps into focus.

THE THREE GREAT QUESTIONS OF LAW

Obligation and Right

Liability

Remedy
The Questions

There are only three legal questions. That is to say, there are only three kinds of questions that lawyers and judges try to answer:

1. Is there a law?
2. Has it been violated?
3. What will be done about it?

Not every legal situation raises questions of all three types, and indeed, even if all three types are raised initially, the answer to one question may eliminate the need to proceed further. If no law has been violated, there is no reason to worry about remedies; if there is no relevant law, neither questions of violation nor remedy are relevant. Still, every legal situation will raise at least one of these questions, or it's not legal. That doesn't mean a lawyer shouldn't answer it, or that the lawyer's answer won't be a good one. It just means that, in answering such a question, the lawyer moves beyond her distinctive calling as a lawyer, to a different field — perhaps of business or finance — where wisdom and truth will be judged on different grounds.

The three questions listed above have a particular cast. They are the questions of lawyers and judges involved in a lawsuit, in litigation, and litigation has the peculiar feature of looking both backward and forward. A problem has already arisen; certain actions and facts come to us from the past and cannot be changed. (We will say more later on the contingency of facts.) The resolution of the problem is still open; some result lies in the future and is yet unknown. This past-to-future, neck-twisting perspective is reflected in the way the questions are formulated: "Has the law been violated?" "What will be done about it?"

Legal questions look different, however, from the perspective of lawyers who do not litigate, but instead help their clients plan future activities — lawyers helping clients buy a house, adopt a child, construct a highway, or dissolve a partnership. Such work, sometimes called transactional work or office practice to distinguish it from litigation, is entirely forward-looking and filled with contingencies. For someone engaged in office practice, the three questions look more like this:

1. Are there any potentially relevant laws?
2. Would any of them be violated?
3. What might be done about those violations?

If a client wishes to take a particular action, the planning lawyer will often work through all three questions before giving advice.
Legal questions look different still in some planning situations, where legal violations can largely be avoided if the lawyers do their work right. In the drafting of a will or the transfer of property by deed, for example, the three question will look more like this:

1. What are the relevant laws?
2. How do we comply with them?
3. What happens if we don't?

Although the precise form of the three legal questions varies slightly from context to context, their essential character never changes. That is, in one form or another, lawyers and judges always raise questions about: (1) the law's existence; (2) its application; and (3) its consequences. This insight generates our final form of the three legal questions. When we ask about the law's existence, we know from our earlier discussion that we are asking about the existence of a relevant obligation or right. If such an obligation or right exists, we next want to know whether it was or will be violated by a course of conduct (past conduct in litigation, future conduct in planning). If such a violation has occurred or will occur, the person who violates the right or obligation will be liable, and thus it is proper to speak of the second inquiry as raising the issue of liability. Even after a person's liability has been established, it is not always easy to decide what to do about it, for there are several options. We can, for example, require the miscreant to pay money to the person harmed, pay money to the state, put everything back the way it was, or go to jail. We might even do nothing at all. This is the issue of remedy. Thus, no matter what one's legal job — judge, litigator, or transactional lawyer — every legal question will necessarily raise an issue concerning: (1) obligation and right; (2) liability; or (3) remedy. In the next three chapters we will examine each of these issues in turn.

The Three Questions, As Seen by Clients and Law Students

Before exploring each of the three legal questions in depth, it is important to see how they affect two groups of people — clients and law students. We turn first to clients, and more specifically to litigants (those involved in a lawsuit). It's hard to be a plaintiff, that is, the person who initiates a lawsuit. Plaintiffs consider themselves harmed or damaged and want action. They want heads to roll, large sums of money to be paid, things put back the way they were — probably all three. But they won't get these remedies unless they are proper. And there won't be any remedy at all unless there is liability. And there is no chance of liability unless a relevant obli-
gation or right was violated in the first place. Plaintiffs, in short, must get a favorable answer to all three legal questions or they lose. Conversely, it is much easier to be a defendant (the person who is sued). Defendants win if they get a favorable answer to just one legal question, and any one will do: no law, no violation, or no remedy.

Clients in the planning stages have the easiest road of all. First, the planned actions — the adoption of a child, the building of a highway — might be permissible. They probably are. Like defendants in a lawsuit, planning clients “win” if they get a favorable answer to just one of the three legal questions. If there is no relevant law, or if the relevant laws would not be violated, or if the violated laws generate no effective remedy, the client can proceed as planned. Second, even if the planned actions are not permissible — the client having gotten “wrong” answers to all three questions — several options remain. The client can drop the current plans, modify them to expunge or minimize the legal difficulty, or charge ahead with the plans unchanged, but knowing the risks involved. (The last option is never one the client’s lawyer can recommend, but it is often countenanced.)

**DIFFERENT PERSPECTIVES ON LEGAL ANALYSIS**

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Law students face different challenges. We have already seen that practicing lawyers face different sets of questions regarding obligation and right, liability and remedy, depending on their role as litigators or transactional attorneys. Furthermore, because even die-hard litigators sometimes do planning and committed transactional lawyers sometimes litigate, most lawyers can see any type of question at any time. This is all sufficiently confusing, but the position of law students is even worse — not just because they don’t know what to expect or when to expect it, but because law school training is confusing and sometimes flatly misleading on this point. There is a deep and important division between the reading of assignments, on the one
hand, and classroom discussion, on the other. The failure to notice this division and to account for it during class preparation generates painful but needless anxiety. So here’s the story; read carefully.

Law school assignments come from casebooks, and casebooks are filled with reports of cases decided in the past. Case reports are the “fossils” of litigation. Everyone involved in those cases, including the judges who wrote the opinions, were thinking like litigators, asking and answering questions from our original list: Is there a law? Has it been violated? What will be done about it? These were the questions that could be asked by those in the case. But law students are not the lawyers or judges involved. For them, and for anyone else reading the cases today, all the questions are in the past tense: Was there a law? Was it violated? What was done about it? These are the only questions that can be asked about a case. We will call this the “archaeological” perspective.

The archaeological perspective is the one necessarily taken by any reader of a case report. Completely backward-looking, it differs from the litigation perspective, which is both forward- and backward-looking, and from the planning perspective, which is entirely forward-looking. The archaeological perspective is the one necessarily taken by any reader of a case report, but it is not the one taken by any lawyer in handling any legal matter. The archaeological questions and answers are useless by themselves. It does no lawyer any good, by itself, to know that on May 17, 1954, Judge Clayton of the Missouri Court of Appeals refused to reverse the trial court decision holding Carlos Esquivel liable to Friedrich Heimhofer on breach of contract for $62,500. These archeological facts must be translated into questions and answers needed by lawyers today.

What does this mean for studying cases and preparing for classes? First, one must begin with good archaeology. When reading a case, it is crucial to understand precisely what legal questions were raised and answered. This is the point of briefing the case, and the talent is essential. Without a firm archaeological understanding, nothing else will be possible. Second (and this is the key point), one must work at switching perspectives. For example, one could ask, “If exactly the same case (same facts, same parties) were litigated today, would the result be the same?” — the contemporary litigation perspective. Or ask, “If a client today wanted to do what the defendant did, would it still be prohibited?” — the contemporary planning perspective. These questions will tip you off to think about the possibility of changes in the law or perhaps changes in society that put a crucially different cast on the facts. From there, more difficult changes can be attempted, altering more than the dates (because, of course, no two cases are exactly alike). The point is to get in the habit of, and to gain skill in, moving from one perspective to another.

This should also explain the mystery of the law school classroom. In that forum, we are always concerned with archaeology (because, again,
without a firm grasp of the archaeological facts, nothing else is possible). But the amount of time devoted to archaeology varies during the year. It is often the primary concern in the earliest weeks of the first year. During those weeks students will find the strongest correlation between what they read before class and what they talk about in class. As the weeks progress, however, classroom attention to archaeology diminishes not because it has lost its importance, but because there is (and always was) a great deal more to do. Classroom attention turns more frequently to the work of switching perspectives, to the work of making the fossils of litigation useful to litigators and transactional lawyers today. More and more, what is read before class and what is talked about in class diverge.

Again, the divergence is no mystery; and the new discussions can be prepared for with almost the same effectiveness as the earlier ones. Now the classroom question will often be, "What does this case (or administrative ruling or statute or regulation) tell us for someone litigating or planning today?" It is the sort of question that can be anticipated and therefore asked and answered at home. It just takes good archaeology and a growing talent for switching perspectives.

IN SUMMARY

- The law regulates two kinds of persons, natural and juristic.
- The law regulates only physically observable behavior, although mental states can affect how that behavior is treated.
- The principle of legality holds that all actions are legal unless made illegal, but applies only to natural persons, not juristic ones.
- Obligations arise when the law requires or prohibits an action; depending on the context they can also be called duties, disabilities, requirements, or liabilities.
- Rights arise when the law permits an action; depending on the context, they can also be called claims, privileges, licenses, powers, immunities, or liberties.
- Obligations and rights are closely related, but we still need both ways of talking about legal relationships.
- Obligations and rights can be created:
  - by status or contract (with status the predominant method)
  - voluntarily or involuntarily
  - explicitly or implicitly
- Lawyers and judges consistently ask the same questions about any situation, questions about the laws:
  - existence (questions of obligation and right)
  - application (questions of liability)
  - consequences (questions of remedy)

- The precise form of the question depends on context, primarily on the distinction between litigation and transactional work.

- In law study, one must take the archaeological facts of decided cases and make them useful in litigation and planning today, by learning to switch perspectives.