3-2024

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Interview

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Since 1999, Getting to Maybe has served as a key resource for first-year law students. Professors Michael Fischl and Jeremy Paul wrote the definitive guide on how to excel on law school exams and master legal reasoning. Professors Fischl and Paul have not only had a massive impact at UConn Law, but they’ve also influenced thousands of law students nationally and legal education as a whole.

UConn Law Professor Kiel Brennan-Marquez and Riley Breakell, UConn Law Class of 2023, sat down with the authors to discuss Getting to Maybe and the 2023 release of the second edition. The conversation features key insights into the book and a compelling discussion of the current state of legal education.
Getting to Maybe: An Interview with Michael Fischl & Jeremy Paul

KIYL BRENNAN-MARQUEZ* & RILEY BREAKELL**

INTRODUCTION

Since 1999, Getting to Maybe: How to Excel on Law School Exams¹ has served as a key resource for first-year law students. Professors Michael Fischl and Jeremy Paul wrote the definitive guide on how to excel on law school exams and master legal reasoning. Getting to Maybe is the go-to resource for law students who are beginning their studies or who are looking to boost their performance while in school.

Together, the authors have had a substantial impact on legal education both nationally and at the University of Connecticut School of Law, where the authors taught 1Ls for many years. Professor Fischl is Constance Baker Motley Professor of Law, and many UConn Law students initially encounter him as their first-year Contracts professor. Professor Paul, now at Northeastern Law School, served as Dean of UConn Law from 2007–2012 and was a member of the faculty for over twenty years, teaching, among other things, Property and Constitutional Law.

In 2023, the authors released a second edition of Getting to Maybe:² It features a wealth of new content to help law students write better exam responses. Despite the changes, the goal is the same: showing law students that taking law school exams and deftly deploying legal reasoning are skills they can develop and improve with guidance and practice. Fischl and Paul sat down for an interview with Professor Kiel Brennan-Marquez and recent UConn Law graduate Riley Breakell to discuss the second edition of the book and their thoughts on the current state of the legal academy and legal education.

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** Riley Breakell is an associate attorney at Motley Rice LLC. They graduated from the University of Connecticut School of Law in 2023 and served as Editor-in-Chief of the Connecticut Law Review for Volume 55.

¹ RICHARD MICHAEL FISCHL & JEREMY PAUL, GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS (1999).

² RICHARD MICHAEL FISCHL & JEREMY PAUL, GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS (2d ed. 2023).
BREAKELL: So, Professor Fischl, I’ve had the great opportunity to get to know you in the classroom. And Professor Paul, I know you also taught here for a long time—is that how you met?

PAUL: Well, actually the person most responsible for our eventually landing together at the University of Connecticut was the late George Schatzki, who served as Connecticut’s Dean from 1984 to 1990. He recruited me to Hartford in 1989 from the University of Miami, where Michael and I had been teaching together since 1983. We had both attended Harvard Law School at different times in the 1970s and took different routes from there to South Florida. I joined Miami’s faculty after clerking for Judge Irving Kaufman on the U.S. Court of Appeals for the Second Circuit—

FISCHL: And I spent four years with the National Labor Relations Board and then a year doing farmworker cases with the California Agricultural Labor Relations Board. When Jeremy and I landed at Miami, we became fast friends and partners in all sorts of crime, but George Schatzki’s impact on my life began well before he swooped in to steal Jeremy away. For one thing, he was my Labor Law professor, whose irreverence for authority and deep skepticism about the prevailing conventions of legal education I channel to this day. If that weren’t enough, he wrote a wonderful tenure letter that helped me keep my job at Miami despite the fierce opposition of some senior colleagues. I’m not sure whether Jeremy knows this, but—when Connecticut was looking to hire him in the late 1980s—George called me for a peer evaluation. I did not like the idea of losing Jeremy but admitted to George that I couldn’t think of a better teacher, scholar, or colleague and that if I were dean, I’d hire him in a minute. In the years that followed—when I’d see George at academic conferences—he would begin every conversation by thanking me for the best advice anyone had ever given him.

In the meantime, Connecticut poached another dear friend and admired Miami colleague, Tom Baker, who was hired to organize and run the Insurance Law Center. I didn’t like the idea of losing Tom either, but that departure prompted me to begin wondering just what kind of place could attract three of my favorite law professors of all time. Twenty years ago this fall, I took a visit here and experienced first-hand the uncommon collegiality and deep intellectual engagement of the place. So when Dean Nell Newton offered me the chance to join the faculty permanently in 2006, I accepted the offer before she could change her mind.

BREAKELL: And the rest is history! Of course, amidst those years of teaching aspiring lawyers like me, you also authored this notorious book,
Getting to Maybe, into existence. Why did you decide to revamp it? What is different in the second edition of Getting to Maybe?

PAUL: In the second edition, we offer better illustrations of the difference between weak and strong answers. We added a chapter on multiple-choice questions. But the biggest change is that we include a lot more preliminary material about case briefing, statutory outlining, and study techniques.

The book originated after Michael and I were on a panel on how to prepare for law school exams organized by the Black Law Students Association at the University of Miami. After that panel, we started to toss around the idea of writing this book. I asked the librarians at Miami—where we had a great library at the time—to do a quick survey of what books were out there about being a 1L and taking law school exams.

The library compiled the list very quickly. They wheeled in two giant carts full of books about what it’s like to be a 1L—there were at least a hundred. I started going through them to see what they said about exams, and there was no book that had more than a chapter on the subject. Most had nothing. And the majority of the advice that was there was woefully inadequate: go to the movies the night before; make sure to get exercise; don’t put everything off to the last minute.

Every now and then a book would say “work with a study group,” but there was no advice or details on how a law school exam is structured. This led us to conclude that there was a huge market for this book. Because we identified that market, we were quite conscious that we could not stray from that vision. I was relentless in our discussions and insistent that we had to stick to law school exam advice. This was our mission and how our book addressed a need. As a result, we always assumed that students would not read it until February, after they completed their first law school exams.

We had this specific audience in mind based on the many students who sought us out for assistance after receiving disappointing grades. Beyond that, we thought that most students (90% of them!) would discover they are now not in the top 10% of the class at the end of the first semester as they might have hoped, and then they’d be looking for an upgrade as well. So we wrote the book to be read after the first semester.

We dove into the opening hypothetical, which is a real UCC-based hypothetical, with that audience in mind. I remember I initially wrote a Star Trek example, and Michael looked at me and said, “Star Trek?! No professor is going to take this seriously if we write about Star Trek. We’ve got to start writing with law.”

What we discovered after publication was that the best laid plans oft go awry. Lots of schools put the book on the summer reading list, and many students read it before school even started. We thought the book would be
very daunting for that audience because it was very much not written for them. But people seem to enjoy it.

So when we sat down to write the second edition, that was something we rearranged almost entirely. The second edition assumes that people are going to read this in August before their 1L year. And, if they’re going to read it in August, we have got to write it for that.

FISCHL: I love that. I hazard to add another perspective on the origin story. As law students, Jeremy and I fell in love with a group of professors whom we had in our first year and beyond. At the time, critical legal studies didn’t even have a name yet, but it was very much a happening thing, and the professors who caught our fancy were the ones making it happen. These professors were focused in on legal reasoning—on taking it apart and mapping its patterns—in a way that nobody else teaching us was. They took doctrine seriously, while what was on offer in the rest of our classes was mostly “policy lite.” The soon-to-be “crits”—Duncan Kennedy foremost among them, but also Morton Horwitz, Roberto Unger, and Derrick Bell—

PAUL: Yes, and by the time I got there, Jerry Frug, a master teacher and scholar whom we sadly lost this past year.

FISCHL: He was a wonderful and generous person who will be deeply missed. And Richard Parker was a fellow traveler, too. They all were “deconstructing” doctrine, and—when I got into practice—I found those lessons to be the most important take-aways for my day-to-day lawyering work. Indeed, if I had a critique of my legal education, it was that there wasn’t more of it. Granted, I was working as an appellate attorney, and doctrine-crunching, rather than developing a factual record and all the rest, looms much larger when you’re arguing appeals. But I was developing much of my legal thinking—and Jeremy was too—based on this scaffolding we’d gotten from first-generation crits.

As Jeremy said, when we talked to each other about what we wanted to do with a book on exam taking, we had a particular student profile in mind—a 1L who had worked really hard during fall semester and would come to our offices in January, distraught and even in tears over disappointing grades and eager to learn what they needed to do to improve. Of course we wanted to make their tears go away, but what did we have to say that was more than “get a good night’s sleep”? The answer was simply this: Law exams test legal reasoning. So if you want to do well on law exams, you need to master legal reasoning. In particular, you need to master the way legal reasoning is tested on law school exams. To be sure, exam questions are not live cases you’re doing out in the real world; they have artificial constraints and elements to them—like the

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3 In the heyday of critical legal studies, “crit” was the term used—affectionately by insiders, less so by others—to denote academics associated with the scholarly movement.
need to do a month’s worth of legal thinking in the space of an hour—and you’ve got to come to grips with those challenges as well. But what was the singular intellectual contribution at the time—and we still corner the market on this—is that Getting to Maybe offers a systematic explication of the structure of legal argument as well as four-million-and-one specific illustrations of how the various reasoning moves show up on exams and what the heck to do with them when they do.

BRENNAN-MARQUEZ: I’m curious what you think about what happens in the law school classroom. Often, it’s imagined in a form that’s more like having something modeled for you—the way that one might apprentice with a sculptor or something, as opposed to having it laid out in the way you’ve done it in this book. And I wonder if you think that’s a good thing or a bad thing.

There are times when, tonally, it feels like you’re sort of celebrating what goes on in a traditional law school classroom. I mean the focus of the book is not what happens in the law school classroom, but what I took from the book was that maybe you think it’s a good thing law school exams aren’t explicated in the form you’re giving to us in Getting to Maybe. That it’s a mark of sophisticated pedagogy and so on.

Then, there are other times when you are more critical of classroom teaching. It’s kind of like, what’s going on that professors can’t get it together to give first-year students a little bit more of this? It’s almost like, we had to write this book, because, you know, teachers aren’t taking up the mantle of this in the classroom.

And one of the great parts of our profession is that it proceeds, both in the classroom and in things like clerking and in practice, as an apprenticeship profession. That’s really, in my view, the only way that real deep learning takes place. We wouldn’t want the classroom to just be writing flowcharts. Maybe occasionally, but we wouldn’t want to reduce it to this. And it’s useful to have a supplement for that reason. But I’m curious what you think.

FISCHL: When I got old enough that my parents were less guarded about their sharper interactions, I sometimes got to watch them in action, and there was a time when my mother was upset with my dad for not doing some household task that she’d expected him to do. He seemed genuinely pained—“I just didn’t know you needed that done”—and she replied sharply, “You’re right, I only told you five times. It’s my fault.” Especially once you become a parent, you realize that sort of exasperation—at the distance between what you say and what others hear—can be born in equal parts of love and the considerable burden of raising kids or, I suppose, husbands.

So one way to get at Kiel’s question is to look at the difference between what professors are doing in the classroom and how students hear them. What we do throughout the book, which can be read and maybe should be
read as a critique of contemporary legal education, is to say, “The mistakes you’re making on exams are completely understandable because of this shift in education modalities, from undergraduate learning styles that tend to be far more focused on information absorption and regurgitation to a model in which you need all that information—don’t leave home without it—but it’s what you do with it that counts.” There is a critical skills component to using the material not to regurgitate but to construct arguments.

At Miami Law, we hired a huge number of people between the time I got there and the time I left. The full-time faculty went, I think, from thirty-two to fifty-two during that period—and a lot of people also died and retired, so it wasn’t just twenty hires but a lot more than that. And we’ve done a bit of hiring at UConn since I’ve gotten here. Part of the process is watching job talks but also visiting classrooms as people are on their way to tenure and watching them teach. And for the most part, I’ve been really impressed with what I’ve seen and have thought that a lot of what we convey in a more straightforward manner in Getting to Maybe is what they’re doing in the classroom. They’re not purposely “hiding the ball”—the ball is complicated.

This predicament is captured wonderfully well in an exchange that Jeremy and I had at least three dozen times at various academic conferences we attended while working on the first edition. When those in other lines of work go to professional conferences, they drink a lot, indulge in dangerous liaisons, and enjoy a wild time in the hosting city—or so I’ve been told. But when law professors go to conferences, what they do instead is ask each other, “What are you working on?” And then they have serious conversations about whatever it is they’re working on.

Jeremy was saddled with the slowest co-author in the history of the universe, and it took us three years to finish the manuscript. So for three years, our answer to the inevitable question was, “We’re working on a book on law school exams.” Those who had more faith in us than we did ourselves would respond: “Wow! You’re going to be rich.” But most of our professional colleagues offered one form or another of a different and very pointed response: “For heaven’s sake, tell them to answer the question asked, would you?” I developed a sassy reply (Jeremy was much too polite for this) which was, “You mean, ‘Do as we say, not as we do?’”—since law professors are notorious for not answering the questions our students ask.

But now I want to extend the same spirit of generous interpretation to professors. Students are asking questions that don’t have black-or-white, yes-or-no answers. This is perfectly understandable, for they’re working really hard to reinscribe the information-focused synthetic learning style of their undergraduate experience onto their legal education. Now some of us can be mean, and all of us have bad days, but mostly we may not answer a student question because it can’t be answered in the form it’s asked. The student naturally feels like, “Well, then, what good is this?” And when we tell them, “Relax, it will make more sense to you later,” we sound to an
uncanny degree like our parents did when they were putting us in our place: “You’ll understand this better when you grow up.”

Jeremy and I have not discussed Kiel’s question. It’s a fantastic question, and no one’s ever asked it before, so I’m really eager to hear what Jeremy has to say. But I want to make one more point about changes I’ve seen in legal education since we published the first edition in 1999. What I’ve witnessed recently is that more and more professors are doing practice exams and similar in-class exercises. And—in the run-up to or aftermath of those exercises—more and more professors are talking explicitly about how this stuff will show up on the final, with or without flow charts. Jeremy and I had exactly one professor who did this when we were students, and that was Duncan Kennedy. And we modeled him from the get-go, giving practice exams in our first-year courses from the time we started teaching in the early 1980s. Back then, the idea of sitting down with 130 exams that you didn’t actually have to grade and providing individualized feedback just seemed insane—which it was. But now I think that sort of effort is much more common—especially at schools, like UConn, with smaller classes. So these days there’s much more of an attempt to do what we do in the book in the classroom.

And the snark that Kiel rightly detected in the book is not so much that I’m mad at others. I’m mad at us, for I don’t think we’ve anywhere near perfected this. In some ways, we legal educators have reinvented the problem we’re trying to solve with the split between academic success programs and so-called doctrinal classes, and I think that split is the source of some of the most serious challenges we ignore at our peril today. Legal reasoning is hard. Teaching it is extremely labor-intensive, and individualized work doesn’t “scale” well. So as our students seek the secrets to law exams from overwhelmed, overburdened, underpaid, and understaffed academic success people, they are frequently introduced to shortcuts that appeal to those longing for a simple answer but bear scant resemblance to the legal reasoning rewarded by most of their doctrinal professors—think IRAC, TRAC, TREAC, CREAC, and the rest of the “one-size-fits-all” exam-taking acronym œuvre.4

PAUL: That was great. You can tell we’ve been working together a long time, because a lot of the things that Michael said are similar to what I’m going to say. But it’s always good to have two perspectives.

What I love about the question is the way you spotted both sort of a celebratory, “your classes are going to be better than you think” tone in the book, but also, sort of an undertone of, “but your professors are never really going to show you what they are really teaching you,” and “you’re going to

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4 For the uninitiated, IRAC is short for “Issue, Rule, Application, Conclusion”; TRAC for “Thesis, Rule, Analysis, Conclusion”; TREAC for “Thesis, Rule, Explanation, Application, Conclusion”; and CREAC for “Conclusion, Rule, Explanation, Application, Conclusion.”
have to figure it out on your own, and, unless you have our book to read to help you, then you’re not going to get it.” I think that both of those points are right.

I’m going to start at the same place that Michael did. Whenever you walk into a class for the first time, you’re going to start with the expectations and pre-existing understandings of the students. If I’m teaching a course called “Property,” students want to be able to tell people at the end of class, “I used to not know Property, and now I know Property.”

So if I were to go into the class and say, “well, instead of teaching you Property, I’m going to teach you forks in the law, czars of the universe and all that,” I’m going to get enormous resistance and pushback. In fact, when we had Duncan make legal reasoning skills explicit—I had Duncan for Torts, he was the best professor I’ve ever had—a third of the class hated him and thought that he was not really teaching them the law, which is what they came to learn.

So from the very beginning, the style that we adopted—emphasizing recurring patterns of legal argument—is counter to what learners in the United States expect out of a class. One of the geniuses of the critical legal studies approach was to figure out a way to inject policy and morality and theory into the most mundane presentation of “A sues B over the fact that a chair got pulled out and the person fell.” That’s what we aspire to do.

So when I first started teaching Property at Miami, I introduced students to various kinds of arguments. And the students would say to me, “Will these kinds of arguments be on the exam because you’re teaching them?”

I would say, “Well, yes.”

And then they would say, “In that case, you need to give us a list and a series of definitions because it’s going to be on the exam. We need to be able to memorize it.”

And I would then say, “No, I don’t want you to memorize it. I want you to understand it.” So then I wrote an article that I published in the Virginia Law Review.5 In it, I first described a babysitter arguing with a child and then a child arguing with their parents about bedtime. In the course of that story, I worked in all of the arguments that I taught to the students in my Property class. The child wants to stay up past her usual bedtime to watch the three-hour season premiere of a favorite series and might, for example, remind the sitter of a previous occasion on which she was permitted to stay up to watch the World Series. (Follow Precedent!) But the sitter replies that season premiers are a dime a dozen, and the World Series happens only once a year (Distinguish Precedent!) and that the sitter will get in trouble with the parents if she makes too many exceptions to the bedtime rule (Legislative Supremacy!) My intent was to say, “Here, read this! This will show you what I mean.”

So if we tried to just teach all the stuff stressing names of arguments, maybe directly to the students, number one, they would resist it. Number two, they wouldn’t really get it because it wouldn’t be connected to anything familiar to them. And number three, it would be really boring. It would almost seem like it was a philosophy class, in which some didactic religious leaders say, “I’m going to teach you how to think.” That would be terrible, right?

What we want in the law school classroom is for the students to figure out that they already know how to think. That’s why I use the bedtime story. The best defense of modeling I can come up with is that you would never teach music without playing music. Right? If you taught a music class, and you never played any music, that would be incredibly boring. We wouldn’t get guitarists or pianists out of that. Nor would you teach an art class without showing paintings or sculpture.

On the other hand, if you only taught by modeling, it would be a lot harder for the students to remember what they were seeing and replicate it. As the instructor is modeling a certain profession, whether it be painting or legal argument, there’s tremendous value in breaking the performance into components and providing recognizable labels. The artist may call attention to a brushstroke of a certain type. In a law context, the teacher may identify something as a slippery slope argument. And since people make slippery slope arguments from an early age (if I share my dessert with you today, you’ll want half my lunch tomorrow), a lot of what teaching techniques and argument names accomplishes is allowing students to recognize them when they encounter the moves on their own: “Oh, yeah, I’m doing this again. Right? And here’s the pattern. I didn’t see it as a pattern before, but now the book is allowing me to see this as a pattern. When I see it again, I will be able to say, ‘Oh, yeah, that’s a thing, and it even has a name.’”

What would never help anybody is if students think they can memorize all the various approaches one might take to a legal problem, because you couldn’t possibly memorize this stuff. It’s sort of an experience of self-recognition. And that’s what happens in the classroom. That’s the beauty of nuance.

I think where I might push back a little on Kiel’s point about the sophistication of teaching through modeling is by noting that modeling can sometimes be an excuse for laziness. So you know—Michael talks about being in a generous mood—I’m not in a generous mood. When we were working on this book, I would talk to people about it, some very famous people, some people I deeply admire, and I would describe our project to them. They would say, “You can’t teach that stuff.”

I had a very lefty, very famous professor, tell me, “The students learn this on the playing fields of Andover and Exeter. And that’s where they get it, they’re not going to get it from your book.”
I was shocked. I wondered, “What happened to you? You’re supposed to be a lefty, and this is what you think?” So the goal is to get students to see that they all can do it. This is very much a democratizing effort, right? It’s anti-elitist, not only the very top students can figure this out.

But the laziness I’m talking about is when professors say things like, “Well, I’ll model it for them, and the best ones will get it, and the other ones don’t. Well, that’s what we have grades for.” That’s exactly what we’re trying to fight. Modeling is all well and good, it’s great to model things, but it’s not enough.

Christine Littleton, a colleague who taught at UCLA, once said to me, “The goal of a great classroom is not to get your students to trust you, it’s to get them to trust themselves.” I thought that was a great way of describing what teaching is about. The techniques that we really spell out in detail in both versions of the book, but particularly the second version, are designed to give students guidance on how to learn and how to do these things themselves.

We do not dole out prescriptions where if you read this book, you will now know how to think, because you won’t. You’ll have just tried it once and every subsequent time you do it, you’ll get better at it. So modeling is crucial, but labeling—I call our efforts labeling as opposed to modeling—is also crucial. And labeling not merely of snippets—everybody does snippet labels like “slippery slope” or the “camel’s nose in the tent.” But instead, we label things that are slightly more complicated so that people can tackle more complicated material with them. That’s really what we do in the book.

FISCHL: One additional thought. If you are watching a first-year class at the beginning—and I’ve had an opportunity to do that quite a few times now—you can tell that when a student gives an answer to a question that the professor likes, embraces, or builds on, the rest of the class is going: “What did she say? That must be important, I’m going to write that down.” For many, these “right” answers might as well be random and seem to come entirely out of the blue. It’s like the lucky students, or maybe the really gifted ones, reach up into Answer-Land and pull one down, serve it up, and the professor loves it. The countervailing insight is that students have actually heard this all before—that’s the genius of Jeremy’s Bedtime Story, and that’s why a lot of schools use it during orientation or during the early part of the first year.

There’s a reason why people told us while we were growing up that we’d be good lawyers. It was almost never a compliment. What it usually meant was, “You’re impossible.” But it also meant “You’re argumentative.” And there is no inflection point better suited for the deployment of these familiar argumentative strategies than bedtime for a child, right? The sudden displacement of authority—with the parents out and a sitter taking charge—
permits you to pull the curtain back on moves like “Who says? You’re just a babysitter.”

So teaching students that they’ve “been there before” is part of what Jeremy called the labeling project and what crits called “demystification.” What we’re labeling are rhetorical **moves**. They are not simple moves, but they are recurring moves, producing not just patterns of argument but patterns of paired opposition—think plain meaning versus purposive readings of statutes or broad versus narrow readings of cases—that are in the toolkit of every good lawyer. This focus, by the way, is a reflection of the early critical legal studies embrace of structuralism. In its later iterations, you saw a bit more post-modernism in work associated with the movement. But under the influence of structuralism, first-generation crits emphasized these patterns in their teaching and their writing.

Yet the point was decidedly not to dumb down legal reasoning or to reduce it to soundbites or what Jeremy referred to as snippets. Anyone who tried to substitute a simple parroting of a paired opposition—“You gotta stick to the plain meaning” versus “No, go for the underlying purpose”—for a careful and detailed analysis of the factual hypothetical or the statute at issue is going to fall flat. But if you recognize a “move” when you see it, you know a good place to start in response and can begin fleshing out the idiosyncrasies and the nuances of how argument and counter-argument can play out in the particular context.

Jeremy has it exactly right. Getting to Maybe is designed to be empowering. It is designed to counter the belief that only some sacred few students can gain access to this knowledge of how to excel on exams. It points a way for students to open their eyes and, more importantly, open their ears because they are going to hear these arguments again and again and again. Make ’em yours, so when you hear a plain-meaning argument (“Just what part of ‘no vehicles allowed’ do you not understand, Mr. Hart?”), you needn’t cower in the face of even its most muscular deployment. Instead, you can see it for what it is—a move, not a trump card—and you know exactly where to start pokin’ and pinchin’ in order to lawyer your way back to equipoise.

PAUL: If you think justice is on your client’s side, then you should take heart that there will be good counter-arguments to what the opposition puts forward. Now, if you don’t think justice is on your client’s side, then that’s

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a whole different set of ethics and morals having to do with how our profession works, which our book doesn’t tackle. But to the extent that you find yourself with a set of clients whose causes you champion, the goal is don’t give up. This is because there are almost no arguments that fail to give rise to potential counter-arguments. And you wouldn’t feel as though your client was in the right if there wasn’t something on your side to say.

BRENNAN-MARQUEZ: I was really struck by something when I was reading Getting to Maybe this time around, where you say—“The most common mistake on law school exams is a failure to address the similarities as well as the differences between a precedent and an exam problem. In our experience, that mistake springs not from a failure to see both sides but from the exam-taking reflex developed during prior schooling that finds the key to good performance in figuring out which side is ‘right’ and which side is ‘wrong’—blah, blah, blah, maybe the math teachers are to blame.”

Aside from cases of abject failure, where something completely went wrong, there are two extremely common problems students run into on exams. They either just regurgitate rules and principles in the abstract, burning through their words and their allotted time in the process, which you talked about elsewhere. Or they fall into a second type of problem. These students talk a lot about similarities, and they’re able to spot issues, and see that such and such new fact-pattern is at least kind of glancingly analogous to some cases that we read. But they don’t get into the possible distinctions. These students are clearly getting it in some measure. And over the course of the term, I had the feeling that they were really engaged, and they were really in it, but their exam just fell flat.

I wonder whether this is connected in some way to the democratization and accessibility point. I’ve often felt disappointed even with students who I have a sense are getting it—students who’ve put in the work, who were sort of engaged in the right way. But perhaps part of what’s going on here is that students feel like, “Far be it for me to start drawing new distinctions,” because what I (speaking here as a student) may have seen is a pattern of case law that has authoritative holdings. And I’m going to try to find which holding I can use as the umbrella in this new fact pattern. I wouldn’t make the mistake of overlooking differences if you gave me parallel lines of doctrine that cut in different directions. If the question was to choose between A or B and draw analogies, I’d have an easier time with that. But if you’re just giving me something that is within cluster A and all we’ve seen is cluster A, the most sophisticated answer would be one that engages with whether this fact pattern should fall within the ambit of A or not—in other words, should a new line, or sub-line, of doctrine be developed. That’s where students seem to get all paralyzed.

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7 FISCHL & PAUL, supra note 2, at 112.
So part of it’s about combating a sense of, like, “Who the heck am I?” It’s about feeling free to challenge authority and erasing this feeling that, you know, I’m out to sea if all I’m doing is just randomly drawing distinctions. Because anyone can find a distinction. The court has said something authoritative, and I’m just me, I’m just Kiel in the classroom. I’m just 22 years old! But we want them to think that they can draw distinctions. There’s almost a tragic quality to some of this. As a professor, there’s a sense that if students are feeling paralyzed in the face of all the distinctions they could possibly draw, they won’t draw any. In some sense, they’ve done 90% of the work but still haven’t analyzed anything.

As I was reading through the book and thinking about this as an educator, it struck me. Regurgitating principles in the abstract is probably the single problem that I wish I could reach students on more. I mean, not all of them are going to listen to me, but I’m pretty explicit. Riley’s had me as a professor and they know that’s not what I want. That’s not what we’re doing. That’s not what’s on the practice exam. If you came out of four months of this, and that’s what you thought you’re supposed to do, something has gone wrong. But the other problem is harder, because it happens for students who are really quite engaged, and engaged in the right ways. For them, I almost want to say, “You don’t have to just follow, you know? The impulse to follow rather than pursuing a different path is holding you back.”

The whole point is that we can all think for ourselves. I mean, in the world, you’re going to have to. Sure, there’s going to be an actual court that has a structure of authority, and you have to pay attention to that. But for these purposes, and in the practice, once you develop a sophisticated sense of it, you get to just draw distinctions.

I sat in on Michael’s class once when I was first learning how to teach. And he had this great heuristic that I’ll never forget. He says there are three elements to the classical test about something contracts-related and then, you know, it turns out we’re going to add a fourth element in the modern restatement.

And he says, “Where did this fourth element come from? Like, literally, who came up with this fourth element,” and he puts a multiple-choice quiz on the board that says, “Who came up with this fourth element? A: God; B: the brooding common law; C: Blackstone; or D: some random lawyer.” And the answer is that it’s just D. Somebody, at some point, had the feeling that Jeremy was just describing that justice was on their client’s side. And it was just kind of crazy that the doctrine was going to require some other results.

So they said, “Okay, that seems crazy. The judges probably think it’s crazy. How can we reconfigure the doctrine to make it work for the actual felt sense of what’s going on here?”

I love that part of the discussion. I’m wondering if you share my experience and if you agree about the connection to authority. I’m always
striving, and I imagine others in the profession are always striving, to bring the aspiration of the democratized, accessible ideal, alive. In some ways, that is the most important thing of all. If students could learn no legal rules, that would be fine, as long as they step into the profession with a sense of emboldenment.

FISCHL: I want to embrace that disabling moment of “Who am I to speak back to authority?” And I would have to say that, early in my teaching, that was the most jarring thing I encountered. I don’t think there was anything special about the generation of folks who went to law school starting in the late ’60s through the mid ’70s, though I also don’t think it’s a coincidence that they gave birth to critical legal studies. The idea of going toe-to-toe with authority? That’s why we were in law school.

When I was too naïve to know better, I took Archibald Cox for Constitutional Law because I thought he was a hero. Most famously, he went toe-to-toe with Richard Nixon and got fired for it during the infamous “Saturday Night Massacre.” Long before that, he had been the Solicitor General for Democratic administrations in the 1960s and had successfully defended the constitutionality of the Civil Rights Act of 1964. But I got to class and found this guy was so thoroughly imbued with Lochner-phobia that he couldn’t really defend even his most impressive achievements except in the most tedious, compromised ways.

In the meantime, we were rarin’ to go on a progressive legal agenda, and so when there were these other professors who said, “Guess what, there’s almost surely a good counter-argument,” that really inspired me. I figured, “I’m a smart guy, I’m going to be able to figure out how to come up with that. It might sell, it might not. But I’m gonna give it a try.”

In practice, I was an appellate attorney who won some, lost some—and nothing beat getting the right panel, I’ve never kidded myself about that. But arguments mattered. So when I started teaching, I was ready to share that insight with a classroom full of people who turned out to be scared to death to try it. I think Kiel is so right that if we offered a student two competing lines of precedent and invited a choice, we’d get a better answer. But things go south if you give students a hypothetical that is a whole lot like only one of the cases we studied and ask—in effect—can you escape its gravitational pull? Many just can’t.

Some students who do “see the other side”—but are afraid to deploy it—do this fascinating thing in their answers. They make this move where they critique the conventional argument but can only do so outside their role as the would-be lawyer. They have to step outside of their exam response to say there’s something wrong with this result or that it doesn’t make any sense as a matter of policy or whatever. But the idea of being a lawyer and making that point in a courtroom to a judge is too difficult for them to fathom.
It’s scary to talk to judges. For example, after a Fourth Circuit argument that had been really rambunctious, the judges stepped down from the bench and headed my way, and I thought they were taking me off to jail for contempt! But it turned out that in the Fourth Circuit, they shake your hand after your argument—no one had told me that was going to happen. I’d had a set-to with Judge Murnaghan on a point of law and was worried that I’d gone too far and was about to get spanked. But the punch line is that my students can go toe-to-toe with authority as civilians but not as lawyers.

I read an exam answer once whose author felt trapped into reflexively enforcing a surrogacy contract. Surrogacy agreements were brand new when I first started teaching, and so my very first Contracts exam question was a surrogacy problem. This student followed the provisions of the Uniform Commercial Code right off the cliff and then wrote me a note saying, “Professor Fischl, I really like your class and I like your teaching. But I just can’t believe you think that babies are a sale of goods.”

Just imagine the answer that might have resulted if she’d made that point not to me personally—stepping outside the lawyering role assigned in the exam question—but instead tried to make it as a lawyer, finding support for the position in the legal materials. So I think Kiel is onto something that we capture to some extent when—early in the book—we pose the rule-book account of legal analysis against the judge-as-loose-cannon approach. Some students react to the insecurity of the decisional moment by embracing rules—following them wherever they go, damn the torpedoes—and others just ignore the rules and analyze the problem from the perspective of policy or morality or politics, which they think of as “outside” the law. But the idea that most lawyering happens in between those approaches may in the end be the hardest thing for students to grasp and believe.

PAUL: So I guess I would break your question apart in the sense that part of it is about, how does one in the classroom battle student submissiveness beyond what we have in the book? My response is that my whole class is like that. Everything about what I do in class is designed to punish silence and acquiescence toward whatever happens to be coming down. Now at Northeastern, particularly in my Con Law classes, I don’t need to work very hard at that because the culture of my school is extremely anti-authoritarian, and Michael’s right that students are better at it when they’re out of role.

But my students came to school to shake up the world; they can’t wait to get started. They’re sometimes frustrated that they have to go through these three years that they might describe as a “painstakingly slow set of rituals,” which is why we send them out to practice right away. So in class, I won’t leave a topic until someone has tackled the conventional wisdom.

You know, I do a whole class on questioning authority. It is my version of Michael’s great multiple-choice example. I teach a case in which the court
rules that prior law was wrong. The court changes the law but nonetheless rules for the party who would have prevailed under the prior law. The court concludes they can’t apply the new law because of reliance interests. Yet there’s a dissenting opinion, which points out quite convincingly that there is a very easy way to read the old law in a way rendering it wholly inapplicable to the facts at hand.

Under this scenario, I then ask the students, “All right, the client that wins the case based on the old law is Exxon. They clearly have endless money for lawyers. So imagine now you’re the counsel for Exxon, and before this case gets started the CEO comes to you and says, ‘I’m thinking about engaging in this conduct, can I do it?’”

And if the students are thinking at all, they’ll say, “Oh my God, now that I’ve seen this really powerful argument that the prior law might not protect you, I’m going to advise you not to do it, because you can get into real trouble, right?” Therefore, the stare decisis argument upon which the court relies to deny the plaintiff any relief doesn’t work. So I try to do a lot of things like that to get them to see the power of someone discussing this completely out-of-the-blue position, which when you think about it is kind of right. The prior law doesn’t cover this case. So I just do a lot of that. You really want to make the students all feel as though every time they come up with something new and different, that what they are doing is great.

But as far as the book is concerned, we have a theme, like every book, so we can’t cover everything. And the theme is that pre-law school academic culture is crippling for being a great lawyer. If you live in a “right answer” culture, you’re not going to be successful. So it’s just an extension of what you’re saying about regurgitating the rules and principles. The professor wants more than the rules and principles. They want students to make analogies and counter-arguments.

We are relentless from page 1 to page 508 on this point. That’s why the book is called Getting to Maybe. It is a very explicit attempt to give students more knowledge about what counts as a right answer on a law school exam. It stresses that this is not what you thought of as a right answer beforehand, which doesn’t mean that there aren’t right answers. Because there are right answers, but the right answers are bifurcated and contain complicated counter-arguments. And I think that’s the best we can do. We don’t succeed in what you’re hoping that we will do in freeing students of their passivity and tendency to think, “Who am I to do this?”

This is just the first step down the road. But we hope that by the end of law school and going into practice, students will have seen repeatedly, how people can succeed by making arguments that upend longstanding precedent. Judges who do that are valorized, and perhaps one of these students may also be someday.
BREAKELL: I read *Getting to Maybe* a little bit like a restatement of legal education, in that it’s very much observing and synthesizing a bunch of realities in law school. But also, as we talked about, it is sort of playfully declining to embrace all of those realities.

I was curious whether in writing a second edition some years later, were you, on the one hand, relieved that certain things have not changed in legal education? And on the other hand, were there things that you felt frustrated by having to continue to cover them in the book because they are not yet fully integrated into the classroom?

PAUL: You know, it’s hard to know what’s been integrated into classrooms. I see my colleagues’ syllabi, but I don’t have a really great sense of everything that’s happening.

One of the things that we talked about in the book, only tangentially, is that one of the biggest changes in legal education since the time that we were students is the increasing professionalization of the legal research and writing component of being a student. When I was a student, I had a 3L teaching me a pass-fail version of Legal Research and Writing, which lasted only one semester and was really shoddy and uninteresting. Now we have dedicated full-time faculty who are doing very interesting stuff in their legal research and writing classes, and the rest of us only sort of peripherally know about what’s going on there.

This has diffused the responsibility between the faculty doing that work and those who are teaching doctrinal courses regarding who gets into the kind of depth about legal reasoning that we discuss in the book. Many doctrinal faculty, who used to have full-year classes, are teaching the same material in one semester. They have to cram in a lot of material and rules as a result, which causes those classes to be more indirect about the sorts of skills that are in *Getting to Maybe*.

The obvious thing about legal education—which has been a tradeoff for decades that I’m unsure will change—is that because we don’t use teaching assistants or graduate students to do any grading, the entire grade for a typical law school class is based on the final exam. And every single educator understands that that’s a terrible way to evaluate students—there’s no opportunity for feedback and improvement.

The new phrase that everyone uses now is: “Do you have a growth mindset?” A growth mindset is the idea that you actually can get better at what you’re doing, as opposed to the task employers expect of law schools, which is sorting out people who are good and not good. The idea of fixed capacity is what Michael and I are trying to fight against.

So that should change, but to do that the whole final exam approach would also have to change. Yet if it changes in a way that takes professors out of grading altogether, I’m not sure that is a good thing. I think having professors grade adds a lot to legal education. You never understand any
topic as well as when you sit down to teach it. To go further than that, you
don’t understand what you’re teaching until you sit down to test it. Because
when you try to figure out what you are going to test, you can’t even begin
to think about that without first examining what you’ve taught. So I think
it’s good for professors to be involved in that. But the “all the eggs in a single
basket” final exam is something that I think, ultimately, will have to change.
It is so manifestly counter to all educational theory that legal education
should only be what they call “summative feedback.” There has to be some
formative feedback.

I’d also like to see a lot more courses focused on the big picture. The
genius of critical legal studies was that the faculty figured out ways to find
policy and philosophical themes buried in these tiny disputes. But wouldn’t
it be great if instead of merely finding these themes buried within cases,
there were more courses that looked at the legal system from a whole variety
of perspectives?

There ought to be a required course at every law school addressing the
nature and structure of the profession. Not legal ethics, but what role do
lawyers play in this society? What do most lawyers end up doing? You
know, you’re joining a profession, what has it accomplished? What is its
mission?

I think one of the biggest challenges that law schools have not embraced
is, what really is our discipline? What do you know as a lawyer that you
didn’t know beforehand—to which I think there are real answers—but law
school doesn’t tackle them.

And to go back to the question about institutional legal reasoning in
depth. Our approach is very great for 1Ls. There’s a great book by Pierre
Schlag and Amy Griffin called How to Do Things with Legal Doctrine,
which they sometimes call legal reasoning for 3Ls. And it’s significantly
more sophisticated. I’d like to see more of that and to require every student
to take Legal History and Comparative Studies. All of those things could be
done if we were able to condense the amount of energy and effort it takes
for students to learn the common law classes. I think we could achieve that
if some of the tools and techniques in Getting to Maybe were incorporated
more directly.

FISCHL: I’m going to stay on the sunny side of the street. One thing
that has changed dramatically for the better—and here too the first-
generation crits had a lot to do with it—is that the Kingsfield style of
teaching captured in The Paper Chase is just about dead. 8 And if you tried

8 The reference is to the 1973 film portraying a year in the life of James T. Hart, a deer-caught-in-
the-headlights 1L at Harvard Law School. The film featured an unforgettable (and Academy Award-
winning) performance by the highly acclaimed British-American actor John Houseman as Professor
Charles W. Kingsfield, Jr., whose shameless delight in deploying the Socratic method as an instrument
of torture was at the time more than occasionally on offer in many United States law schools. THE PAPER
CHASE (Twentieth Century Fox 1973).
it at most schools, the students would giggle because it wouldn’t have the support of the rest of the culture and the faculty.

But now I’m going to rain on my own parade here. I was touting a generation that was ready to go toe-to-toe with authority. But there were a lot of students who were actually interested in a different body part to worship when they were dealing with authority in the classroom, and they loved the predators. They thought the predators were wonderful. They thought they were really teaching us the law. Jeremy and I had a professor who was notorious in his first-year courses for being the Darth Vader of the Socratic method. He was cruel and cutting and sharp. We’ll call him Professor X.

On the first day of my own class with Professor X, a student was trying to explain the difference between “trespass” and “trespass on the case”—no small thing for any first-year, first-day student—and he had, just like the rest of us, looked it up in Black’s Law Dictionary. “Well, case has to do with indirect injury,” he managed, “and trespass is more direct.” Professor X walked right up to where the student was sitting and—waving his pencil theatrically—hovered over his victim and loudly exclaimed, “So if I threw my pencil at you, that would be ‘trespass’? But if in getting up out of the seat, you clumsy oaf, you tripped over it on the way out, that would be ‘case’?”

I was sitting like five feet away from this exchange. It was something to behold: the lion was eating the Christians in this coliseum of a classroom. We don’t do that anymore. These days, we all have this neurotic need to be loved, and the culture has shifted. On one level, the shift was simply: “Be nice to students; is that really so hard?” But on another level, it was a critique of the view that authority-fetishism was part of what passed for rigor and was what was required in order to excel in the law.

A few years later, I was talking with a classmate who was clerking for the Seventh Circuit while I was working for the Labor Board. We were exchanging “adventures in legal practice” stories, and he said, “You know, when we were in law school the ‘law jocks’ would dismiss Duncan Kennedy’s teaching as ‘just theory’ and would praise Professor X as the model for legal practice. But have you found X’s teaching useful for even one moment in practice?” And my answer was an emphatic “no.” And then he said, “But I use Duncan’s stuff on legal reasoning [and we both said the next part together] every single day.” By revealing the recurring structures of legal argument, the crits taught us law in a way that was extremely practical. Yet those same lessons were, well, critical too, for they challenged the pretensions of authority in the classroom and in the law as well.

It is also the case that law school faculties and student bodies are infinitely more diverse today than they were when we were in school. I think my class had the largest percentage of women that Harvard had by 1975, and I believe the figure was 26 or 27%. We had a substantial presence of Black
students—including Charles Ogletree, who just recently passed and was
dear to everyone who knew him—but still a tiny percentage compared to
what it might have been. Although there have been great strides toward
gender equality in legal education, we now have a much richer and more
complex notion of what gender justice even means, and I don’t think we’re
anywhere near achieving that. And it’s two-steps-forward, ten-back on the
racial front, which is not cause for any self-congratulation. But picking up
on the theme Jeremy mentioned, if justice is on your side, there’s always a
way forward. We’ve come a long way, and we can press on. I find that all
very, very encouraging.

PAUL: So I’m going to respond to that. The pencil throwing people are
gone. But the implicit style that uses fear of getting things wrong as the
electricity in the classroom still exists. And the challenge for people like us
is to figure out well, what can replace that as a mechanism for keeping
people as engaged as that fear did? All we really do in Getting to Maybe is
expand what it means to get things right. Students can shine by encapsulating
both sides of the question without necessarily searching for the magic bullet.
Students understand that they can be a very valued participant, even if they
miss a lot. That no single person—this is why diversity is so important—no
single person can have a monopoly on the truth about almost any topic. And
that’s a huge advance.

Now you can be venerated and respected and motivate the class by being
funny. But there are other professors who are venerated for being serious. If
a student tried to make a joke in one of those professors’ classes, the whole
class would bail on the jokester. And there would be silence in the room. So
you know, not everybody is questioning authority.

But one of the things that makes the Socratic classroom work is that
people are competing. It’s just as simple as that. And what Getting to Maybe
says is that if you’re going to compete, at least compete for sophistication
and nuance. Don’t compete for bullets. But we haven’t escaped that realm
of competition yet.

One of the things that happens when you get out of school—which is
very rewarding, and we should be training people for this while they’re in
school—is that competition isn’t the end goal. We all come to realize that
no matter how talented Person A is, and no matter how untalented Person B
is, these are situation-dependent. There are going to be some circumstances
in which Person B is going to get to the heart of the matter and Person A is
off in the clouds. I try to have enough chances within my classes so that
some days, this person seems like they’re on top of the world and other days,
another person seems on top of the world, but that’s hard to do.

In my very first class at Miami, I had a student who talked a lot. He was
struggling, so he asked a lot of questions. I was very patient with this student
instead of yielding to the annoyances of the class. Meaning, “Why isn’t the
professor crushing this person and having them shut up so that we can get back to the real stuff?"

Instead, I would find something in the question. I would reformulate it. As the class progressed, he got better and better and better. By April, his questions were fantastic. That’s where I want us to get to—a place where everybody’s voice can be celebrated.

BRENNAN-MARQUEZ: I’m curious about how the competitive aspects of law school and of the profession fit in with the highly democratized vision you present in Getting to Maybe. I was really taken with your illustration of an engineering class at the beginning of the book—about the kind of engineering class, you know, where you have all the equations that you’ve learned, and then the final is just a box of objects, and you have to make a widget using the equations and principles.

As I was reading that part of the book, I was thinking that this example drives home the point that it would be a failure to just model without any sense of pattern recognition or analytic reconstruction. In fact, as you said, that’s often just cover for certain kinds of laziness. I totally agree with that. But likewise, if you only had the analytic reconstruction, you wouldn’t really be able to do what is being asked. You still have to see it modeled to some extent.

We’ve also been discussing how there aren’t “right answers,” in the traditional sense. It’s just that there are better and worse ways to put the widgets together. You want to emphasize that the “right answer” is often exploring the nuances, understanding the ambiguities and indeterminacies. Even when a student provisionally puts forth one answer, it’s kind of right, you understand why they’re making that kind of argument, all that stuff. But in the end, the professor’s going to decide which widgets are best.

It’s also generally true that it’s going to be an ordinal ranking of some kind, and there’s going to be a curve. It doesn’t have to be a curve, per se. But the curve tracks a general sort of structural theme within the profession, which is that we’re trying to sort people. We’re not trying to weed people out in this kind of draconian way. I think we’ve moved beyond that or largely beyond that as a profession, which is good, but we’re still trying to sort for all kinds of reasons. To have pipelines, different opportunities, and to be able to understand which members of the class we need to target for more help and other virtuous reasons.

But if I were a student reading Getting to Maybe, I might think, “Okay, this is helpful, but I still have a sense that some of my peers are going to be better equipped than I am. Or there’s still a mystery left to solve after learning to make widgets. Meaning, what kind of widget do I make that will be especially impressive?”

I’m completely on board with the vision of legal education at large, and the use of this book in particular, that will help make the enterprise of legal
reasoning genuinely feel more accessible and ready at hand and in a way that redounds to a sort of democratizing benefit across the profession and is in some way kind of radically egalitarian. But it does feel like there’s still some aristocratic residue, some mystique that can’t quite be captured. It’s not that the capacity for thinking has to be learned on the fields of Andover. I mean of course, that’s preposterous, right, but there’s still a widespread idea—for a long period of time, almost universal among the elites, and still alive today, I think—that talent is inequitably distributed and elusive.

There are definitely professors who are teaching right now who basically believe that. But there is a way in which your ability to put together the right kind of widget—or especially if we translate it to something that’s more aesthetic, the ability to sort of put together a musical composition or a painting—that is going to be pleasing to the sensibilities of the professor. It is also pleasing to the sensibilities of the profession that the professor is channeling. Part of that’s just acculturation, sure, but I think it’s deeper than that.

I think the best preparation for excelling at the widget production aspect of law school exams, and being excellent at the production of legal argument, is similar to deep immersive acculturation in the humanities. It’s like classical liberal education and experience, which is traditionally the province of privilege. It doesn’t have to be that way, but that’s how it works in our current social order.

This is more of a thought or provocation that I’m interested to get your reactions to. It does strike me—especially as Jeremy was talking a few minutes ago about legal history and what an ideal curriculum would look like—that all three of the professors on this call are often very dismayed by the whole “practice-ready lawyer” trope. As if we’re just going to translate everything to algorithms, and pretty soon we won’t even need the lawyers. It’ll just be A.I. or ChatGPT-7.

But this is dismaying to me because practice-ready lawyering ignores the fact that lawyering is so much more than formulae. Taking courses in things like Legal History is great prep for actually doing the day-to-day work of making arguments that are going to be maximally plausible in the language game of our profession. That’s how we discover which widgets are going to code as excellent versus just okay. Yeah, all these are widgets, but this one is great and able to manage some incredible functional feat—winning the cause of justice for your clients or some social movement. Whereas these other ones are not malpractice, they’re fine, but they’re just plain widgets.

I’m putting my cards on the table here in terms of my own view of all of this—and I imagine they’ll be sympathetic in this audience—it’s like, you just have to read literature. You have to have a lot of human experiences, travel, and be exposed to many different humanistic data points in order to learn. This exposure is what allows a student to discern which kind of widget
is going to be best and that ultimately comes back to the law school exam setting.

PAUL: I have a couple of things to say about that. First, I agree with everything you said. I think, that as a practical matter—I say this to all of my colleagues at every school I’ve ever been to—the reason you have your job, and the reason you get the salary that you get, is that the elites in the country are paying you to sort the students, and that is your number one function. And the pretense that you are imparting information or changing the world with your research is just something that we all tell ourselves so that we feel good about ourselves, but the money comes from firms like Ropes and Gray.

At business schools, Goldman Sachs and JPMorgan Chase are paying universities to tell them who they should hire so they don’t have to do it themselves. If we were to stop doing the sorting, firms would take it over, and universities would crumble, because we would no longer get the kind of funding that we need.

So to write a book of the kind that we did, we’re operating in a world where to get people to read it, it had to be about exams. If we wrote the same book about critical thinking, we might get a better review in the New York Review of Books (if we ever made it to that level). But we would sell ten copies, as opposed to the 125,000 copies that we have already sold, and we expect to sell a lot more. We are taking advantage of the competitive, elitist, aristocratic structure of society to have a way to undermine it. That’s, I think, just how it is.

Now, as far as studying the humanities, I tell all my students, when they ask me what they should do before law school to prepare, that if they are reading anything of substance including fiction, they’re working. Expanding your mind in any way will increase your ability to invent interesting analogies and good comparisons.

I once sat in on a lecture at one of these CALI conferences, where an extraordinarily erudite person gave a beautiful lecture, in which he made analogies to classical music and entomology. The point of his lecture was that what we were doing in universities was anachronistic. That we were doing something which he referred to as “just-in-case learning,” meaning, this is stuff I’m going to learn, and maybe someday I’m going to need it, “just in case.” But the whole world is going to shift to what he called “just-in-time learning.” He said that where we’re going to end up is when you need to learn something in order to get something done, that’s when you’re going to learn it. To him, there is no point of learning it until then.

And of course—as the irreverent, questioning-authority type of person that I am—I raised my hand and I said, “You know, I just want to point out

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to you that the reason your lecture was so successful, and the reason why we all were persuaded by it, was because during the course of it, you made four or five wonderful analogies to things that you know about. You discussed classical music and entomology, all of which you knew because you did just-in-case learning. So you should reconsider your position.” And of course, he was very embarrassed.

That’s the basic point Kiel is making about what goes into the great widget. I completely agree. We don’t fully get there. But our book is written for people who are taking their first-year exams. And my prediction is that if we gave students and faculty ten exams and told them that they were the best, they would read them, and they would go “Yeah, those are great.” It’s not the aristocratic predilections and preferences of the professors that allow us to tell the difference between these really good ones and others. It’s the students who do the things that we described in *Getting to Maybe*, which will then be recognized by everyone, when they read them, that will tell us the difference between a top 1L exam and not a top 1L exam. So even though I agree 100% that a repertoire of past experience is useful to crafting legal arguments, at the end of the day we readily acknowledge that being a great lawyer is about a lot more than just what we described in *Getting to Maybe*.

Michael is great about this in the book. In other words, there actually are moments where I’m reading through a section and I’ll write back to him and say, “Well, Michael, you were able to come up with these great things as examples, but how are our students going to come up with them?” And he would write back, “see my next section,” and send it to me. And the next section would be, here’s how you can do this too. So I do think that we are quite aware that there are some cultural backgrounds that make this stuff come more easily to some people than others.

But our goal is to accelerate the process for people for whom the cultural background is not there. I think that our examples are very down-to-earth. You do not need to know Kant and Rousseau in order to read our book or figure this out, and that’s the best we can do.

FISCHL: What I love about the question is that it asks quite forthrightly either “What’s the role of the demystification-democratization project in the context of an institution and profession where we devote a lot of time, effort, and energy to replicating hierarchy?” or “What’s the role of hierarchy and its replication in a project that is striving to be democratic?”

While I agree with everything Jeremy said, if I could wave a magic wand and change legal education, I would do my best to ensure that people with different strengths that in fact play out very importantly in different parts of the practice of law—I would have those strengths recognized, valorized, and rewarded in the way we reward really good appellate-judge fetishism. Which is how we were taught, and it’s how we teach. And far be it for me to throw stones, for I’m a repeat offender: I was an appellate lawyer, and now I’m a
law professor. I keep doin’ it because this is what I can do, and so of course I care about these skills. And I also think that while they are not sufficient skills to guarantee success in every area of law, I think they are really important skills in any area, and so I feel it is important to teach them. How much of a difference do they make in day-to-day professional life in a context in which empathy and listening, tenacity, knowing how to bury the other side with discovery requests—all sorts of other things may loom larger? I can offer a pretty good answer in my own areas of expertise, but I wouldn’t pretend to have a global view.

Here’s how I deal with this predicament, psychologically and emotionally. I do something I call “prodigal son” teaching. I get no greater joy than having a person in my first-year Contracts class who bombs the practice exam and then books the course—when they “get to maybe” right there in front of me. And sometimes all they needed to see was, “Oh that’s what you were looking for.” When there’s that kind of trajectory, it’s often because the student takes up my invitation—which I issue to people who have a really bad time on the practice exam—to come to see me, and we’ll do a series of additional practice questions before the final. And if they’re willing to put in the work and to listen to the critique, it’s amazing what can happen.

I’ve had the same experience on a larger scale in teaching a Spring term academic success course for people who had a rough time in their first semester. It was an optional course when I taught it, so I would get a dozen or more students who desperately wanted to fix it. We worked our way through Getting to Maybe from beginning to end. And the last time I taught it, which was right before the pandemic, I watched a group of students who had all started with GPAs in the low 2.0-range achieve a 3.0 in the second semester of law school. All but one had a 3.0 cumulative GPA by the end of their third semester in law school; and the last one caught up the following term. To me, it’s a mix of willingness to do the work and a willingness to listen. It’s not quite the same thing as “anyone can do it”; leave it to a labor lawyer to substitute the virtues of hard work for native ability or “things learned on the verdant fields of Andover.” But that’s how I “democratize” one-at-a-time, by helping struggling students get where they need to go.

That said, placement is a critical function. This is the supply side of the demand side that Jeremy described. I want—both out my sense of loyalty and commitment to my students, but also out of my love for UConn Law—to get lots of our students clerking for the Connecticut Supreme Court and the Appellate Court and going to the National Labor Relations Board and doing other kinds of highly regarded and challenging work. So I spend a great deal of time mentoring and writing seven-page letters of recommendation that go into detail about the particular student. In some ways, these letters actually make the same move I was describing earlier about recognizing and rewarding different skills. What I do with my letter is
identify the points of excellence and find ways to tell stories about the points of excellence, and the stories naturally differ from student to student.

All of this is enormously labor intensive. The idea of doing this for 150 students in a UConn graduating class—let alone doing it for 450-to-500, which used to be the Harvard model and the Miami model—it’s really difficult to scale. It also impacts rewards in the teaching profession. Jeremy is right about what leads to institutional rewards. But what leads to rewards for individual professors is scholarship. And there is nothing costlier to your scholarly agenda than spending time grading practice exams, giving individualized feedback to students who bombed it, and spending all your free time between Thanksgiving and the final exam helping anxious students boost their grades. So what we’re rewarded for and what we could do to best serve the democratizing goal of giving every student a fair shot at success—that’s another built-in tension, and I struggle with it every day.

BREAKELL: Well, we certainly covered a lot of ground. I don’t think I have other questions. To close, I do have a suggestion though: You might consider replacing Dorothy with Barbie on the book cover to boost sales—Barbie is doing a lot of collaborations these days.

PAUL: One thing that I did recently was look online at a whole series of books offering an introduction to law school. And when you see our cover in a sea of fifty other covers—mostly nondescript, and all making what is pretty much an identical pitch—it’s very striking, like something straight out of Barbie Land! And it clearly sends a message: “These people think about the world a little differently.” At least that’s our hope.