A BEDTIME STORY

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THIS essay has two parts. Part I contains a brief explanation of the ideas about teaching legal reasoning that led me to write an introductory story for my first-year students. Part II is the story itself.

I. BEYOND THE BRAMBLE BUSH: OF CABBAGES AND KINGS

Law professors often tell first-year students that they should concentrate less on learning the rules of a particular subject, such as property or contracts, and more on the elusive goal of “thinking like a lawyer.”¹ Entering students, whose impressions of law school may have been shaped by popular culture, often believe their teachers.² Yet despite this seeming consensus on the aims of law school’s first year, a surprisingly small percentage of the material actually presented to first-year students focuses explicitly on defining and communicating “lawyerly” reasoning skills. A typical property casebook, for example, devotes almost no attention to identifying techniques that would help the student master the subject through legal reasoning.³ Accordingly, many students rightfully complain that they are

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* Associate Professor of Law, University of Miami School of Law; A.B., 1978, Princeton University; J.D., 1981, Harvard University Law School. I am grateful to Madelyn Fudeman and Jennifer Jaff for their persistent help and encouragement; to Mary Coombs, Michael Fischl, Laurel Leff, Lili Levi, Bernard Oxman, Deborah Platt, and William Twining for their useful suggestions; and especially to Steven Winter for his thoughtful and provocative challenge to my approach. See S. Winter, It’s All in the Telling: Law as a Language for Social Thought (January 1988) (unpublished manuscript).

¹ Occasionally, this informal maxim is codified into explicit educational policy: “The first year of study introduces the student to the basic concepts of the law and teaches the student to ‘think like a lawyer.’” Albany Law School of Union University 1987-88 Bulletin 33. For a brief discussion of “thinking like a lawyer” as an educational concept, see infra notes 21-28 and accompanying text.

² John Houseman’s portrayal of Professor Kingsfield in the Paper Chase most readily comes to mind. He tells his fictitious first-year contracts class that they begin their studies with heads “full of mush” and must emerge “thinking like lawyers.” The Paper Chase (Twentieth Century Fox 1973).

³ See, e.g., J. Cribbet & C. Johnson, Cases and Materials on Property (5th ed. 1984); C. Donahue, T. Kauper & P. Martin, Property—An Introduction to the Concept and the
asked to acquire skills that are never fully explained.4

Law schools, law professors, and legal scholars have responded to these legitimate student concerns and to the intellectual problems they reflect in a variety of ways. Some schools have included separate courses in differing aspects of legal reasoning as part of the required first-year curriculum.5 Teachers in these courses have the luxury of considering legal method in depth without the (perhaps artificial) constraint of having to cover a fixed amount of material. Students in these courses, however, face the daunting challenge of attempting on their own to apply the techniques from the “methods” course to the doctrinal materials of the “core” curriculum. This difficulty is enhanced when a form of reasoning that appears crucial to the “methods” instructor receives little explicit attention in the students’ other courses. The success of “methods” courses, therefore, seems to depend in part on the extent to which their content is adequately

4 For a recent explanation of student discontent on this issue, see Jaff, Frame-Shifting: An Empowering Methodology For Teaching and Learning Legal Reasoning, 36 J. Legal Educ. 249, 258-61 (1986).

5 Columbia Law School begins its course of instruction with a nine-day intensive exposure to legal method and then continues that course throughout the first term. See Columbia University Bulletin, School of Law 1986-88, at 49-50. Boston College requires a course on legal process in which students are “to gain a perception of the complex interaction among legislative, administrative, and judge-developed law.” See Boston College Law School Bulletin 1987-88, at 9. Both the University of Chicago and the University of Miami include a course in Elements of the Law as part of the first semester curriculum. See Announcements, University of Chicago Law School 15 (Sept. 18, 1987); University of Miami School of Law Bulletin 1987-88, at 12. For a comprehensive outline of this approach, which stresses the inseparability of technical skill, legal theory, and the craft of lawyering, see S. Mentschikoff & I. Stotzky, The Theory and Craft of American Law—Elements (1981); S. Mentschikoff & I. Stotzky, Teachers’ Manual to Accompany The Theory and Craft of American Law—Elements (1983).

Many more schools attack the problem of teaching analytical techniques by including a legal reasoning component in a serious legal writing course during one or both semesters of the first year. The University of California at Los Angeles, for example, expects its five-credit legal research and writing course to teach students “how to find the law, how to analyze it, and how to communicate their conclusions in writing.” 26 U.C.L.A. School of Law Bulletin 20 (Aug. 1986) (emphasis added); see also University of Virginia School of Law Record 1986-87, at 70 (two-semester legal research and writing program). For a description of how legal reasoning might be taught within the context of the legal writing course, see Jaff, supra note 4, at 249-57.

Still another alternative is to permit first-year students to choose courses in legal reasoning or legal theory during the second semester. Boston University and Stanford have adopted this approach. See 76 Boston University School of Law Bulletin 51 (Sept. 15, 1987); Stanford University School of Law Bulletin 1987-89, at 24.

coordinated with the material considered in the remainder of the first-year curriculum.

Law schools that have eschewed6 or abandoned7 the “methods” course, perhaps because of the burdens of curriculum coordination, may introduce students to legal reasoning by assigning or suggesting any of several significant scholarly works. Professor Edward Levi’s An Introduction to Legal Reasoning8 and Professor Karl Llewellyn’s classic, The Bramble Bush,9 are perhaps the most renowned beginning texts, and students who struggle through them will find the effort many times repaid. Professor Steven Burton’s more recent An Introduction to Law and Legal Reasoning covers much of the same territory in a commendably readable and well-organized fashion.10

6 Duke University, for example, prefers to focus on the traditional basic courses in its first-year curriculum, including constitutional law, and relegates legal writing and advocacy to “minor course” status. See 58 Bulletin of Duke University School of Law 54 (Sept. 1987).

7 Harvard Law School’s first-year curriculum once included a course in legal process focusing on the intellectually rich materials prepared by Hart and Sacks, but the course is no longer offered. Harvard Law School Catalog 1985-86, at 60-61.

8 E. Levi, An Introduction to Legal Reasoning (1949). Levi’s strength is his use of detailed doctrinal development to illustrate the ambiguity of language, the importance of legal categories, the technique of reasoning by example, and the art of interpretation. For an explicit effort to expand on Levi’s work outside the context of introductory material, see Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. Legal Educ. 518 (1986).

9 K. Llewellyn, The Bramble Bush: On Our Law and Its Study (1960). Professor Llewellyn’s work ambitiously offers a broad introduction to a life in the law. Accordingly, The Bramble Bush covers many subjects not traditionally associated with legal reasoning per se. Readers will find, for example, a discussion of the relationship between law and civilization, id. at 107-18, comments on the search for fulfillment in a life at the bar, id. at 141-51, an analysis of the law school curriculum, id. at 92-106, and even tips on note-taking, id. at 57. Llewellyn’s book succeeds, however, at tiring the reader. His brilliant discussion of, and repeated insistence upon, the ambiguity of precedent makes the book an invaluable teacher of the elements of legal thought. See id. at 64-69, 70-75, 156-57.

10 S. Burton, An Introduction to Law and Legal Reasoning (1985). Professor Burton does an excellent job of illustrating the uses and limits of analogical and deductive reasoning, and he is careful not to overdo the distinction between following precedent and interpreting statutes. See id. at 25-82. More important, his commitment to the indeterminacy of language renders him a cogent, vividly critical of the view that simple deductions or analogies actually decide cases. See id. at 31-39, 50-56, 181-84. Unfortunately, however, Professor Burton has chosen to combine his introductory aims with the considerably more difficult goal of “justifying the practice of adjudication in light of the explanation offered [in the beginning of the book] and the values embodied in the ideal of a rule of law.” Id. at 6. For a telling critique of his effort to establish the legitimacy of legal thought through reliance on the interpretive views of a legal community committed to order and justice, see Abrams, The Deluge: A Trial and Judgment in One Act (Book Review), 65 Tex. L. Rev. 661 (1987); see also Ross, Introducing Law, 87
These instructive roadmaps of law school's educational terrain, however, share the mixed blessings of length and intellectual ambition. An extended introduction to legal reasoning offers the possibility of acquainting students with the complexity of the subject, and properly strives, as Professor Llewellyn put it, not for the "simple-via-the-shallow," but the "simple-via-the-deep." Encouraging first-year students to undertake the substantial effort of mastering a book-length treatment of legal reasoning may, however, prove difficult. These books will appear abstract, no matter how filled with everyday examples. Student resistance will be increased unless particular profes-

Colum. L. Rev. 859 (1987) (criticizing Professor Burton's book for ignoring the politicized, irrational, and unknowable aspects of law and thereby presenting a false, idealized image).

Professor Levi's book begins with the somewhat daunting, but fascinating, description of the case law development of the rule governing the seller's liability to third parties for injuries caused by defective manufactured articles. See E. Levi, supra note 8, at 7-19. It leads to and through Judge Cardozo's famous opinion in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). Although the examples include familiar events such as automobile accidents and misfiring pistols, Levi's emphasis is on the important difficulty of devising verbal formulations that accurately capture the meaning of a series of concrete disputes. To the newcomer struggling to follow the complicated doctrinal story, this lesson may not be entirely clear.

The depth and breadth of Professor Llewellyn's work also requires resort to abstract description. He insists that students strictly separate five levels of discussion (two of which have two subparts), but he provides no illustrations of how this might be done. See K. Llewellyn, supra note 9, at 76-77. Llewellyn does nicely portray the social roots of procedural rules governing the forms of action: "Peter, I will not listen to you when you whine!" (John, this is neither the time nor the place. See mother after dinner.)" Id. at 28. But even his finest discussion of the so-called "Janus-faced" doctrine of precedent would benefit from concrete examples that Llewellyn conspicuously omits. See id. at 68-69. (For a well-crafted illustration of one of Llewellyn's ideas, see Fischl, Some Realism About Critical Legal Studies, 41 U. Miami L. Rev. 505, 515-17 (1987)).

Of course, Llewellyn's reluctance to provide examples may stem from his strong condemnation of teaching and writing that leaves too little work for the student. See K. Llewellyn, supra note 9, at 104 (entertaining professors risk dulling student initiative); id. at 127-28 (valuable reading occurs only where the reader does the majority of the work); id. at 138 (straightforward professorial presentations resemble canned soup, "[j]ack with a little pepper, and devoid of vitamins[.]"").

Professor Burton's use of examples is exceptional and well-suited to the goal of introduction, perhaps partly because he had the good sense forthrightly to borrow many classic illustrations from earlier works. S. Burton, supra note 10, at 20 (ambiguity of statutory language demonstrated with example from Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 662-66 (1958)); S. Burton, supra note 10, at 32-39, 112-16 (case law development illustrated with example from Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 375-76 (1978)); S. Burton, supra note 10, at 132-36 (existence of hard cases described with example used in R. Dworkin, Taking Rights Seriously 81-131 (1978)). The beauty of Burton's own fine examples, which include a nice chapter concerning a trespasser's effort to recover for injuries caused by a property owner's spring gun, S. Burton, supra note 10, at 145-63 (describing Katz v. Briney, 183 N.W.2d 657 (Iowa 1971)), is that they illustrate jurisprudential techniques and problems, while calling into question Professor Burton's own jurisprudential conclusions. I remain unconvincing, for example, that "theories embedded in the statutory text with its context" will produce the conclusion that the farmer/producer contract Burton discusses was "between merchants" pursuant to the Uniform Commercial Code. See S. Burton, supra note 10, at 44-56, 116-22. But cf. Terminal Grain Corp. v. Freeman, 270 N.W.2d 806, 812 (S.D. 1978) (holding that a farmer was not a "merchant" within the meaning of the Uniform Commercial Code). See generally E.A. Farnsworth, Contracts 418 n.31 (1982).

Professor Levi, for example, advances a highly controversial view of precedent in cases involving the interpretation of constitutional provisions. He argues that judicial construction of legislative language should be strictly followed, unless the constitution is later interpreted to command an alternative reading. See E. Levi, supra note 8, at 27-58. This approach, he suggests, will force legislators to take responsibility for amending statutes when judicial interpretations contradict the legislative will. See id.

The detailed example he presents, however, provides support for a contrary point of view. Levi tells the story of Caminiti v. United States, 242 U.S. 470 (1917), in which the Supreme Court upheld the conviction of persons engaged in the transportation of women for the purpose of participating in paid cohabitation. The Court broadly interpreted Mann Act language to prohibit transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose." White Slaver Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (1982)). Levi then seemingly applauds later cases adhering to Caminiti's broad reading despite doubts about its wisdom. See E. Levi, supra note 8, at 36-38 (discussing Cleveland v. United States, 329 U.S. 14 (1946), in which the Court applied the Mann Act to Mormon polygamists whose wives were recruited from out-of-state).

The Mann Act, however, seems to raise the precise situation in which adherence to a mistakenly broad reading will produce adverse consequences. The political dangers of supporting such efforts to relax morals legislation may outweigh the actual support for such efforts to relax the statutory restrictions. Accordingly, vocal minorities may be able to ensure their will long the statutory restrictions. Nor will constitutional law always provide a rescue. A ruling that the statutorily prohibited activity is constitutionally protected may go further than necessary and produce difficulties later. It is unclear, then, why Levi's own position deserves extended development for the beginning student.

The Bramble Bush may be read fairly as a book-length brief opposing the idea that law can best be described as a body of rules and principles. See, e.g., K. Llewellyn, supra note 9, at
ing in aspects of life with which they are already familiar. Instead, they are asked to confront legal reasoning from the subjective perspective of thoughtful and subtle participants. Accordingly, what is gained by respecting students' intellectual capability may be lost by ignoring their experience. It is, of course, impossible to present a description of legal reasoning that is wholly devoid of jurisprudential stance. Nor can authors fairly be faulted for defending their own views. The point, however, is to develop a method of presentation that enables and encourages students to evaluate critically the teacher's beliefs, not to accept them blindly.

Part II's somewhat playful introductory story that I distribute to my first-year property students implicitly reverses the strategy of the classic introductions. It seeks to welcome students quickly to some of the rhetorical strategies lawyers employ by describing an everyday situation in which similar argumentation might easily be found. Clearly

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12-14, 20-23, 75-81. Professor Llewellyn perhaps rightly chafes at critics who make too much of his statement that "What these officials do about disputes is to my mind the law itself." Id. at 5-10, 12 (emphasis in original). His harsh language suggesting that law professors who disagree with him "do not see far enough beyond their noses to measure even their own jobs in life." Id. at 23, however, indicates his willingness to join and provoke controversy. Although I share Professor Llewellyn's perspective on the role of rules within American law, beginning students are, in my view, unlikely to understand the significance of the jurisprudential debate until well into their first year.

Professor Burton is perhaps most guilty of mixing introductory material with jurisprudential stance. From the outset, he views his task as restoring the virtues of legal reasoning that have been lost in the wake of the realist attack on formalism. See S. Burton, supra note 10, at xiv. He paints legal realists and Critical Legal Studies adherents as unfair critics who measure law against an unsustainable formalist ideal. Id. at 188-93. For a more sophisticated development of the same point, see S. Stick, Can Nihilism Be Pragmatic?, 100 Harv. L. Rev. 332 (1986). The true lesson derived from formalism's failure, Burton argues, is that judges may appeal to theories embedded in the context of the law to reach legitimate decisions based on the legal community's commitment to the pursuit of order and justice. See S. Burton, supra note 10, at 204-15. Beyond the obvious point that order and justice will conflict so often as to render Burton's explanation tenuous at best, there is a well-developed alternative side to the story. See, e.g., Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 563, 573-76 (1983) (challenging the idea that moral consensus and fidelity to institutional role can satisfactorily draw lines between acceptable revisions and dangerous change and suggesting that relentless critique of formalism and objectivism will lead to constructive reform); see also Kennedy, supra note 8, at 546 (arguing that there is no way to know at the time of decision whether a case seems clearly settled by context because alternative outcomes would be improper or simply because the judge possesses limited imagination); Peller, The Metaphysics of American Law, 73 Calif. L. Rev. 1152 (1985) (suggesting that the contexts that limit American legal decisionmaking stem from metaphorical assumptions with definite and questionable political content).

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15 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).
16 Id. at 179.
Class time might be devoted to the perennial character of the debate between the majority and the dissent, with emphasis placed on the conceptual structure of that debate. Students can be taught that whenever they encounter a judicial opinion that attempts to establish a clear rule, the reasoning should be examined to discover whether exceptions to the rule will undermine its purported ease of administration. To the extent students grasp this idea, they grow in their ability to pose their own hypothetical challenges to the opinions they read. Of course, much more may be gained from a case like Pierson v. Post, to view the case only as an example of the theoretical contest between strict rules and flexible standards is to miss the unique role of possession in property law, the historical and social context of the case, and the numerous other enduring debates reflected in the opinion. The point, however, is that some teaching technique is necessary to identify the legal reasoning lessons of each case so that students may be consciously learned rather than left to imitation, trial and error, or mythical osmosis.

The teaching method I use is based on the simple idea that a vocabulary of argumentative techniques serves to help students recognize particular arguments within appellate opinions and to remember

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17 For the now classic description of the conflict between rules and standards within American private law, see Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976).
19 Pierson v. Post beautifully illustrates the conflict between our desire to reward labor and investment and our faith in the value of enhanced competition. This tension can be developed as a clash within economic theory or as part of a complicated vision of rights that includes both a right to security and a right to freedom of action. See Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfield, 1982 Wis. L. Rev. 975, 980-84. Moreover, Justice Livingston’s dissent evokes the complex relationship between law and custom, and students might note ways in which the legal system needs both to follow custom and to remain independent of it. Finally, the case introduces students to the idea of harm without legal redress, thereby posing the question of the relationship between law and morality. No wonder so many property casebooks include Pierson v. Post at or near the beginning! See, e.g., J. Dukeminier & J. Krier, supra note 3, at 34-38; C. Haar & L. Liebman, supra note 3, at 33-37.

20 Neither this method nor the vocabulary are uniquely my own. Indeed, I perceive a growing trend toward efforts to systematize legal reasoning within traditional first-year classes. I have been most heavily influenced by, and borrowed terminology from, Professor Duncan Kennedy’s unpublished torts materials and the legal reasoning techniques developed by Professor Irwin Stotzky and Miami’s late Dean Soa Mentschikoff. See S. Mentschikoff & I. Stotzky, supra note 5. For a more detailed description of Professor Kennedy’s terminology and an informative explanation of how one professor uses it to teach legal reasoning in his torts class, see Boyle, The Anatomy of a Torts Class, 34 Am. U.L. Rev. 1003, 1051-63 (1985).
21 For an early argument that judging and lawyering are based more on intuitive than rational powers, and properly so, see Hutchinson, The Judgement Intuitive: The Function of the "Hunch" in Judicial Decision, 14 Cornell L.Q. 274 (1929).
22 Challenges to conventional legal reasoning must separate two distinct claims. My text addresses the argument that there is no meaningful or productive way to separate legal thinking from other forms of reasoning. Professor Burton specifically attacks this view, see S. Burton, supra note 10, at 868-87. An alternative challenge accepts legal reasoning as very real, but labels it the enemy. Johnson and Scales, An Absolutely, Positively True Story: Seven Reasons Why We Sing, 16 N.M.L. Rev. 433 (1986). According to this view, legal reasoning falsely celebrates the rational over the irrational, order over chaos, etc., id. at 446-48, and asks students to bring their bodies (and their minds) to law school but to “check their souls at the door,” id. at 439.

I have no quarrel with the idea that there is more to life, and law, than linear thinking. I remain unpersuaded, however, that the mind is profitably viewed as possessing a limited amount of space that can be so filled with rationality and logic that no room remains for poetry and music. Indeed, the story presented here is an effort to facilitate the learning of law school’s rationalistic techniques so that more energy remains both for deeper study and for alternative perspectives. Students who are unable to craft broad and narrow holdings are...
clever review of Professor Burton's introductory book to challenge the claim that lawyers possess a unique way of thinking about dispute resolution. As prescriptive jurisprudence, her argument is enormously persuasive. While Professor Burton explicitly attempts to defend legal reasoning as a coherent and useful activity, Professor Abrams identifies an intractable dilemma. She concedes that judges who rely exclusively on legal materials and the views of the legal community can plausibly lay claim to a distinct method for settling controversies, but argues that sole reliance on past wisdom risks perpetuating an unjust status quo. Alternatively, judges might look beyond conventional legal materials toward goals other than consistency. But then, Professor Abrams points out, it becomes extraordinarily difficult to distinguish legal reasoning from other forms of complex decision making.

Law professors, however, must remember that books like Professor Burton's serve a descriptive as well as a prescriptive function. The types of reasoning he describes are actually used by lawyers in today's world, and students must learn how to practice clear "legal thinking" even while they learn to criticize it. Accordingly, we all must search

unlikely to be sympathetic to truly profound critiques that more successfully challenge the purported rationality of legal thought. See, e.g., Peller, supra note 14 (attempting to show that learned ideology does separate legal reasoning from other forms of thought but that this professional training produces a rationality that is epistemologically and politically slanted); Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. (forthcoming July 1988) (explaining how the cognitive strategy of reducing a legal concept to one simplistic metaphor has distorted our ability to grasp the problem the concept was designed to address); see also F. Olsen, The Sex of Law (unpublished manuscript) (embracing feminist claims both that the law is not rational and that we would not necessarily be better off if it were).

23 See Abrams, supra note 10, at 667.
24 Her review consistently forces discussion to the prescriptive level by framing the issue in terms of whether lawyers would have anything unique to add to a new society being built after an imaginary reincarnation of the Flood. Abrams, supra note 10, pasim.
25 See S. Burton, supra note 10, at 204-35.
26 See Abrams, supra note 10, at 680-84.
27 See id. at 684-87.
28 Professor Burton's unconvincing comparison between Brown v. Board of Educ., 347 U.S. 483 (1954), which he sees as a fine example of legal change, and San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), which he presents as a decision that may be appropriately deferential to legislative supremacy, gives Professor Abrams good cause to ask whether Professor Burton believes whatever is is right. See Abrams, supra note 10, at 679-86; S. Burton, supra note 10, at 222-29. The alleged failure of Professor Burton's normative claims, however, should not wholly detract from his quite accurate portrayal of today's collective, albeit perhaps slightly muddled, legal mind.

for devices like the story in Part II that will aid our efforts to improve students' ability to reason in contexts that we expect them to encounter during law school and, more importantly, following graduation. Moreover, we need not overreact to the claim that lawyers have no way of resolving disputes superior to those of trained reasoners from other professions. Many students begin law school with virtually no experience at complex problem solving of any type and have chosen legal training as the means to develop advanced analytical skills. If our students are not thinking at least somewhat differently and at a somewhat higher level upon completion of their formal legal training, then we are guilty of profound failure.

A second and more serious caveat: I have glided much too quickly over the exquisitely complex relationship between the teaching of legal reasoning and the teaching of moral values. My challenge to the classic introductions, therefore, may convey the erroneous impression that Part II's story is an attempt to embrace some provisional moral neutrality. Similarly, two aspects of the story itself may suggest further that a sharp focus on legal reasoning techniques deemphasizes the controversial moral questions central to serious study of law school's first-year subjects. First, by choosing an everyday dispute, with relatively low stakes, I risk falsely portraying law as more of a game than a grave human activity with serious, even life and death consequences. Second, I have crafted a story that contains a glossary of rhetorically matched arguments without comment on the moral strength or plausibility of opposing views. Thoughtful law professors, who anguish over whether emphasizing both sides of every argument fosters student cynicism, may wonder therefore whether explicit focus on legal reasoning techniques will merely strengthen the message that the client is always right. To respond fully to these

29 Professor Winter reminds his students of the serious nature of law with this haunting quote from the late Robert Cover: "Legal interpretation takes place in a field of pain and death... . A judge articulates her understanding of a text, and as a result, someone loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred [sic] or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another."
30 See, e.g., K. Llewellyn, supra note 9, at 148-50; S. Winter, supra note 29, at 2-3.
related concerns would require more space than this brief introduction allows; to ignore them completely, however, would be to neglect the obvious duty to consider the moral as well as intellectual consequences of my enterprise.

A few points are crucial, if not ultimately satisfactory. First, students come to law school to learn the lawyering craft, and our fear that the profession's tools are ethically questionable is no excuse for poor teaching. If students are to succeed as lawyers, they will discover the relative indeterminacy of legal argument sooner or later. The sooner they master the intricate patterns of argument, the more time they will have to devote to viewing law from a broad moral standpoint. Accordingly, the introductory story that follows is primarily designed to speed the students' learning process. Second, an introduction to legal reasoning need not highlight every facet of the legal process. The beauty of teaching legal reasoning within the first-year subjects is that it presents the opportunity to explore the use of legal arguments in a broad range of important moral controversies. For example, students confronted with the question of when a landlord may evict a tenant are unlikely to overlook the high stakes, even if a tenant stressing her need for a home to maintain steady employment is compared with a child emphasizing the social advantages of watching a late-night television show, and both are described in legal jargon as engaging in long-run cost-benefit analysis. Finally, the two-sided character of legal argument will engender student cynicism only to the extent that classroom presentations alter students' preexisting moral positions. Many students may choose to employ their new analytical and rhetorical skills in the service of passionate moral commitments they bring to law school, rather than to use their heightened sense of moral ambiguity as an excuse for placating the powerful.

At root, however, a classroom focus on patterns within legal argument is a teaching plan based less on confidence in students' preexisting moral positions than on faith in their moral potential. Even a clear, unthreatening introductory device must begin with the undisputed premise that no method of teaching law, or anything else, is neutral in the sense that it is void of all moral messages. Although no responsible law professor wishes to force her views on her students, none can escape presenting her own peculiar perspective. Accordingly, great care must be taken to avoid undue preaching, while nevertheless accepting moral responsibility.

To help draw the line between self-aggrandizement and self-effacement, Part II's story is designed to facilitate a strategy of evenhandedness toward competing general principles that supports moral stands concerning very concrete disputes. It would be arrogant and foolish to attempt to convince a class of first-year law students that equality is more important than liberty or that rights to security should prevail over rights to freedom of action. In contrast, to conceal deliberately from students that you care deeply about the result in a particular case

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31 I make no claims here concerning the heated jurisprudential debate over the meaning or extent of the law's indeterminacy. I assert only what I take to be the uncontroversial fact that in many cases plausible legal arguments can be constructed to support each side of a legal dispute. For a fuller discussion, compare Fischl, supra note 12, at 513-21, and Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1 (1984) (exploring and defending claims of indeterminacy within the law) with Solom, On the Indeterminacy Crisis: 54 U. Chi. L. Rev. 462 (1987) and Stick, supra note 14 (analyzing and criticizing efforts to demonstrate law's indeterminacy). See generally Yablon, The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation, 6 Cardozo L. Rev. 917 (1985) (attempting to link critical theory's use of indeterminacy to broader questions of philosophical and historical explanation).

32 If law school graduates enter practice reluctant to influence client attitudes or happy to sell their talents to the highest bidder without regard to the consequences, then law schools are partially responsible. Compare Kennedy, How the Law School Fails: A Polemic, 1 Yale Rev. L. & Soc. Action 71, 77-78 (1970) (typical student responses to law school include passivity, cynicism, and distorted psychological compartmentalization) with Stone, Legal Education on the Couch, 85 Harv. L. Rev. 392, 398-401 (1971) (attributing negative student reactions to law school in part to generational conflict and student need to establish professional identity). See generally K. Llewellyn, supra note 9, at 146-47 (fears concerning student demoralization enhanced by historical context, in which student despair arose partly from World War I's failure to secure peace and democracy). As institutions of higher learning, however, law schools can never retreat to the view that moral dilemmas must be simplified to prevent students from choosing the wrong side. Sole reliance on the moral purity of our entering students would be both naive and indefensible. It is theoretically possible to imagine successive generations of law students possessing moral passion fueled by religious or other sources unrelated to the society's legal structure. It is more realistic, though, to expect that the moral attitudes of the legal profession, which to some extent are shaped by the law professorate, will have an impact on the moral positions of the broader society. Accordingly, law professors who fail consciously to strive for morally responsible teaching risk a long-run future of students who are equally uninterested in the pursuit of moral goals. Cf. J. Habermas, Legitimation Crisis 20-24, 36-37 (1975) (liberal capitalist societies have depended on religious and family traditions to generate meaning in daily life despite the steady attack on those traditions inherent in capitalist progress; advanced capitalist societies therefore face legitimation crisis generated by the increased weakness of family and religious life).
case under study would deny the gravity of legal disputes. To the extent students recognize that you have illustrated arguments opposing the conclusion you favor, your students will have gained both intellectual confidence and increased appreciation of moral dilemmas. In this sense, a teaching method that quickly introduces a series of opposing arguments increases the instructor's ability to assume moral responsibility for his material without wrongly attempting to convert students to a particular point of view.

Above all, the story that follows begins with an appreciation of the context in which many law students are first exposed to legal reasoning. For most students, significant personal stakes surround their efforts to master legal skills and thus to secure a path to a satisfactory livelihood. Many students perceive the talented questioning from their professors as an attack on their ability to defend any moral position. Moreover, since exams demand intellectual rigor, moral scrutiny is likely to become a secondary concern. We, as professors, should hope that students recognize the extent to which the two-sided nature of argument embraces moral as well as legal controversy and that they find this recognition emotionally challenging. Accordingly, the introductory story presented here is designed to give students confidence in their ability to master the structure of legal argument and invite them to continue to engage their moral faculties. Building intellectual confidence is not all I try to accomplish in my first-year classroom, but perhaps it would be enough.

II. A Bedtime Story

Imagine you are twelve years old and your parents have left you with a babysitter. Your primary concern is that you be permitted to stay up until 11 o'clock so that you can watch a special two-hour episode of Miami Vice on television. (Note here that since this example will focus on achieving your own objectives, it is already once removed from the real world where a lawyer who represents herself has a fool for a client. Courses in your second and third years will particularly stress methods for learning your client's wishes, which you should thoroughly understand before doing anything.)

As you approach the sitter to discuss the situation, you might ask yourself a few questions. Perhaps most importantly, you would like to know what your parents told the sitter concerning your bedtime. (CHECK THE RULES). Suppose you find a note on the table with detailed instructions telling the sitter that he should put you to bed at 11 P.M. (STATUTES). You seem to be in luck and your chances of getting what you want have increased. Suppose instead that there is no note, but that this sitter has stayed with you a few times before and has always put you to bed at 11 P.M. (PRECEDENT). You still seem to be in good shape.

Life, however, is seldom so simple. Suppose that most of the other times the sitter has stayed with you have been Saturday nights. Only once has he stayed with you on a weekday. On that particular night he let you and your friend, who was sleeping over, stay up until a bit past eleven to watch the end of a World Series game in which your friend's favorite team was playing. You argue to the sitter that although it is a Tuesday night, you should be able to stay up late to see Miami Vice, just as you and your friend were permitted to stay up to see the World Series. You might start off by stressing that because the sitter let your friend stay up late to see something very special to her, it's only fair that you should get to stay up late to see something special to you. (LIKE CASES SHOULD BE TREATED ALIKE).

The sitter, of course, will try to explain to you that the previous occasion when you stayed up late is very different from tonight. He might say that when he let you and your friend stay up late to watch the World Series, there were several very unusual circumstances that caused him to depart from his general sentiment that 10 P.M. is a good weeknight bedtime for children your age. He claims that he was only willing to let you stay up late to see the World Series, which occurs only once a year, on an evening when you had a friend staying over, also not an everyday event. It would be wrong to conclude from that, the sitter may argue, anything more than that the next time the World Series is on and you have a friend over, you may stay up to see the end again. (NARROWING PRECEDENTIAL HOLDING). You are not pleased by the sitter's view and would probably point out why. From your perspective, the sitter is being arbitrary. After all, the previous time you, and particularly your friend, were allowed to stay up late
for a special television event. You say the rule should be that whenever there is a special event on TV, you may stay up until it's over. (BROADENING PRECEDENTIAL HOLDING). Of course, even if the sitter agrees that you can stay up late for special events, you will still have to convince him that Miami Vice fits into that category. The sitter may ask what is so special about Miami Vice. It's on every week and if Miami Vice counts as special, won't you be able to stay up late whenever you can find something on TV you want to watch? (CATEGORY CHARACTERIZATION). You respond that, on the contrary, this Miami Vice is extremely unusual. First, Miami Vice normally runs one hour, and this is a special two-hour episode that gives the writers more time to develop a better plot. Second, Miami Vice is normally on Friday nights, so its appearance on Tuesday is not likely to recur. Moreover, because characters from one episode frequently show up later in the season, if you miss this one special premiere episode, you'll have greater difficulty understanding later episodes. (CATEGORY CHARACTERIZATION).

And this is only the beginning. So far we have mostly assumed that the sitter has been free to establish your bedtime without instructions from your parents. Suppose now that your parents have a standard note for all sitters, which says you are to go to sleep at 10 P.M. on weekdays and 11 P.M. on weekends. Today is Tuesday, so you're in trouble. Were you not a budding lawyer, you might just decide to settle for an A Team rerun. You remember, however, that school is starting two hours late tomorrow because of the annual teachers' meeting. You alert the sitter of your opportunity to sleep late and await a reaction.

The sitter, of course, may check his own school schedule and demonstrate that you have mistaken the date for the meeting, which will not be held until the following week. (WRONG ON THE FACTS). More likely, the sitter may know nothing of the schedule and be faced with the difficult problem of deciding whether you are telling the truth about the meeting or indeed even about why you desire to stay up late. (PROVING THE PROOF PROBLEM). You persist, however, knowing that the sitter knows you to be generally trustworthy. You explain to the sitter that the normal bedtime rule should not apply tonight because it's clear that the reason you are supposed to go to bed early on weeknights is so that you will awaken early for school. (SPOTTING A GAP IN THE RULE). The sitter might try to argue that

the note says weeknights, and therefore, it means weeknights. (LITERALISM). You will insist, however, that the sitter should look to the reasons behind the rule when making a decision. (PURPOSIVISM).

If the sitter is particularly resourceful, he will attempt to engage you in a general discussion of his role. (INSTITUTIONAL COMPETENCE). He might say, listen here, you might be right about the purpose of this rule, but it's your parents' job to make the rules and my job to apply them. (JUDICIAL DEFERENCE). How can I know for sure what the purpose is? All I can see is the word "weeknight." (AMBIGUITY OF LEGISLATIVE INTENT). Indeed, if you force me to guess at purpose, it seems reasonable to conclude that by using the word "weeknight" your parents actually meant to exclude all other possibilities. (NEGATIVE IMPLICATION). Moreover, if we take your view, then next week a mean sitter who simply wants you out of her hair might make you go to bed at 10 P.M. on Friday because you have to wake up early for football practice. (DANGERS OF JUDICIAL BIAS). Not only that, but if your parents are unhappy, they can rewrite the rules, (ENCOURAGE LEGISLATIVE CLARITY), or buy you a video cassette recorder. (RESORT TO TECHNOLOGY).

You want to see Crockett and Tubbs, however, and so you reply that the sitter has a poor understanding of the importance of his job. (INSTITUTIONAL COMPETENCE). There is no point in applying the rules, you insist, unless the sitter is accomplishing what your parents want. (JUDICIAL SUPPORT). The sitter cannot know for sure what your parents meant, but if he doesn't try to ascertain their meaning, you argue, he will be flouting their authority and ducking an issue he has to decide. (AMBIGUITY OF LEGISLATIVE LANGUAGE). If a mean sitter further personal goals using reasoning based on the alleged purpose of your parents instructions, you point out, your parents can always rewrite the rules then. (ENCOURAGE LEGISLATIVE CLARITY). In the meantime, you ask, how can you be sure that the sitter's refusal to let you watch Miami Vice doesn't stem from the sitter's own bias against prime time television? (DANGERS OF JUDICIAL BIAS).

Notice the incredible outpouring of debate once you identified what might be described as gaps in the bedtime rules. These gaps resulted either from the uncertain meaning of a previous decision or an arguable ambiguity in the bedtime instructions. Had it been a Sunday night, for example, you could argue both that it is a weeknight or a weekend, and arguments similar to those discussed above would
ensue. Spotting gaps is therefore a key skill that we will repeatedly emphasize. Sometimes, however, there is no rule at all covering a particular topic, and you must address yourself to the decisionmaker of first impression, a legislature or, in some cases, an appellate court.

Suppose you had caught your parents on the way out the door and were trying to get them to write the instructions so that you could see *Miami Vice*. You might begin by asserting your independence, claiming you were old enough to make your own decisions about when to go to bed. Letting the sitter decide would encourage dependence on your part, shackle your decisionmaking abilities, and interfere with your right of self-determination. (FACILITATION). Your parents would counter by pointing to your lack of information concerning your health, your tendency to discount long-term risks, and the damage you might cause to yourself and others (parents who would have to stay home with you and pay for your doctor) by staying up late and getting sick. (PATERNALISM). Your parents might also stress the rights of the sitter to do his homework with you peacefully asleep, (RIGHTS AS SECURITY), the fact that the sitter will charge less if you are awake fewer hours, and the good you can accomplish if you get a good night's sleep. (LONG-RUN COST-BENEFIT ANALYSIS). You might counter by asserting the right to move freely about in your own home. (RIGHTS AS FREEDOM OF ACTION). You might also stress that you will be better able to make friends if you have watched *Miami Vice*, since all the kids will be talking about it. And you might say that the sitter will charge the same whether you have a fixed bedtime or not because he probably needs the job. (LONG-RUN COST-BENEFIT ANALYSIS). Finally, you might emphasize that when your parents have gone out in the past, they have never left instructions for the sitter. In the absence of instructions, you have always been able to convince the sitter to let you stay up until 11 P.M. and were expecting to do so again tonight. (EXPECTATIONS). Indeed, you were so confident that you agreed to speak to your entire English class tomorrow about the program. (RELIANCE). Your parents, however, may be unmoved by this line of reasoning and tell you that if you had wanted to be sure you could stay up late, you should have asked them in advance. (SOURCE AND LEGITIMACY OF EXPECTATIONS).

If you are forced to agree to some limit on bedtime, you might suggest a more flexible approach. For example, the sitter might be told to put you to bed when you looked tired. (STANDARD). This would have some advantages to you since you might always be able to argue that you don't really look tired. (LITIGANT MANIPULABILITY). And you might perceive it as more consistent with the idea of having a bedtime imposed. (FAIRNESS). On the other hand, you would fear that the sitter could say you looked tired anytime. (JUDICIAL MANIPULABILITY). Also, it would be difficult for you to plan your TV watching since you would not know in advance when you would have to go to bed. (UNPREDICTABILITY).

You might be willing to settle for a fixed bedtime of 10 P.M. on school nights and 11 P.M. on other nights, (RULE), with a special provision explaining that the 11 P.M. rule would apply in case there is a morning teachers' meeting the next day. (EXCEPTION). This has the advantage of being easier for the sitter than the "looking tired" test. (EASE OF APPLICATION). It also makes it relatively easy for you to guide your activity. (PREDICTABILITY). (EASE OF APPLICATION + PREDICTABILITY = FORMAL REALIZABILITY). But it has the danger from your perspective of forcing you to go to bed sometimes when you are not tired, (OVERINCLUSIVE), and from your parents' perspective, of letting you stay up sometimes when you are exhausted. (UNDERINCLUSIVE). It also fails to account for the fact that your schedule at school is different every day, and thus you do not have a standard wake-up time. (RIGIDITY OF RULES).

You might ask your parents to write in more exceptions so that you can stay up later when you don't have to get up early. The more your schedule varies, however, the more categories the rule must have and the more difficult it will become for the sitter. (EXCEPTIONS RIDDLE THE RULE). If early morning French classes are on the third, seventh, and twelfth day of months with thirty days, the sitter might prefer rigidity to exceptions, while your parents might prefer to go back to the "looking tired" standard rather than have to chart your busy schedule for sitters. You might try suggesting an exception that would permit the sitter to let you stay up past the regular time if there is a good reason for doing so and otherwise not. This type of exception, however, will lose almost all the advantages of ease of application gained by a rule in the first place. (EXCEPTION SWALLOWS THE RULE). If you are going to go for the fixed bedtime, therefore, you will have to put up with some lack of precision.

You might never have guessed that so many different factors might be at stake in setting a bedtime. The ability to consider these various
factors and, more importantly, to craft arguments for particular solutions to problems based on the kinds of considerations described in this story, however, precisely parallels crucial legal skills. The more systematic your ability to generate such arguments, the better lawyer you will be.

This little example is interspersed with legal sounding words in capital letters and in parentheses. These words will become part of the terminology of this course. I imagine, however, that they strike you as being inappropriate in the context of this “bedtime story,” and they should. You could tell this story to most people, and they would understand precisely what you meant without resorting to jargon. This course will devote a great deal of time to familiarizing you with the uses of jargon, because it provides a shorthand for nearly all the basic forms of legal argument and analysis. The jargon, however, is merely an aid to help you master that argument and analysis. Attaining such a mastery is the primary objective of all your first-year courses combined. In this course, we will pursue that goal by applying arguments very similar to those used in the bedtime story to difficult questions of property law.