Legal Ethics and Classroom Teaching: The Apology

by Jeremy M. Miller +

(+ Professor of Law, Chapman University School of Law; B.A. Yale University; J.D. Tulane University; LL.M. University of Pennsylvania. The author gratefully acknowledges the support of Chapman University in the completion of this project, and Chapman law student Sandy K. Lam. Copyright 2003 Jeremy M. Miller.)

I. Introduction

Lawyers have, at least in the United States, always been under fire.[1] Presently the attack regards the supposed unprincipled ethical shortfalls of attorneys.[2] But the alleged lacking of ethics in the organized bar may not be simply a problem—it may also serve as a solution to the equally serious shortfalls in American corporate life.[3]

---

[1]This began, literally, with the Revolutionaries—many of whom were lawyers. But the apprenticeship system, the then method of legal education failed to produce lawyers who were given "respect." Even the loosening of the apprenticeship method under Jacksonian Democracy principles failed to positively change the reputation of lawyers. They were not perceived as an honorable *profession*. In the late 1800s and early 1900s, with the institutionalizing of law education into the academy—particularly Harvard—although the new descriptive that law was a "science" sounded well and good, the law was a second-rate profession. The next 100 years, which most of us know a bit better, has been characterized by an unwavering criticism of lawyers, except in times of crisis or war. *See generally* Robert Stevens, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (University of North Carolina Press 1983) [hereinafter referred to as "STEVENS"]; Gerry Spence, WITH JUSTICE FOR NONE (1989) [hereinafter referred to as "SPENCE"]; Catherine Crier, THE CASE AGAINST LAWYERS: HOW THE LAWYERS, POLITICIANS, AND BUREAUCRATS HAVE TURNED THE LAW INTO AN INSTRUMENT OF TYRANNY—AND WHAT WE AS CITIZENS HAVE TO DO ABOUT IT (2002); etc.

[2]*See also* John Grisham, THE KING OF TORTS (2003) (where one of the few remaining idealistic attorneys becomes a corrupt "ambulance chaser"). Although the book is ostensibly fiction, its vast readership may do more harm to the reputation of lawyers than an academic documentation. It is worth noting that former tort lawyer, Melvin Belli, called himself the "King of Torts."

[3]*See generally* SPENCE, *supra* note 1. Lawyers as trained amoral hired guns, initially used to fight for amoral corporations, might just as well . . . and have, in fact, turned against these

corporations. *See also* P.M. Forni, CHOOSING CIVILITY: THE TWENTY-FIVE RULES OF CORPORATE CONDUCT (2002); M. Scott Peck, WORLD WAITING TO BE BORN: CIVILITY REDISCOVERED (1994).

Many a book and article has been written on the shortfalls . . . or strengths of lawyers. That is *not* the focus herein. Instead, as professors, who are tenured, or desire to be, and treated with the respect due to those devoting their lives to academic truth,[4] our methodology must continually be examined. This examination is individual (via self-assessing our pedagogy, our peer

reviews and our student reviews), and collective, by querying whether it is *again* time for a "phase shift"[5] in the methodology of teaching the student of the law, "the law."[6]

---

[4]*See, e.g.*, Henry Brooks Adams, THE EDUCATION OF HENRY ADAMS ch.4, at 20 (1907). Countless others, of course, have extolled the virtues of learning.

[5]*See* Thomas S. Kuhn, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996) [hereinafter cited as KUHN]. Professor Tribe, and countless others either happened on this same understanding of "phase shifts" in the matrix to which we place our data of understanding particular facts, or they utilized Kuhn's system. *See* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

[6]Over history, versions of law, of "jurisprudence," have varied radically. *See generally* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977); Saint Thomas Aquinas, SUMMA THEOLOGICA (1273).

The thesis of this paper, inspired by not only years of teaching, but, more immediately, by a presentation to be made at the venerable Section of Professional Responsibility of the Association of American Law Schools,[7] is that the pedagogy, the *manner*, in which we teach our law classes impacts the ultimate behavior of each and every student towards his or her future clients. That is, there are two lessons, as it were, in each class, the substantive law and its methodology of expression; and the appropriate conduct of he or she who is in authority to those who are not. On this latter point, the law professor is "The Lawyer" . . . and the law student is "A Client."[8]

Reasonable minds by their nature disagree.[9] If as a reader, you believe this to be untrue,

---

[7]Professor Randy Lee, of Widener, is certainly owed my appreciation for his enthusiastic *acceptance* of the concept. "*Acceptance*" is italicized—because in no way is his agreement with the thesis implied. However, I am honored to offer this thesis, which is about a quarter century's consideration, reconsideration and refinement. As a paper for peers, I use as methodology, footnotes to expand inquiry—not usually as proof. Most of that which is offered herein will strike one as possible, worth trying, ridiculous . . . or correct. If correct, the notes may offer "sign posts" to further inquiry. With all humility, I borrow that pessimistic view of the power and lack of power of language from Ludwig Wittgenstein. *See generally* Ludwig Wittgenstein, TRACTATUS LOGICO-PHILOSOPHIUS (D.F. Pears & B.F. McGuinness trans., 1961).

[8]To some, this proposition needs no proof. I am of that group. Now 20 years after becoming a full-time law professor, many of my now-jurist students and multi-millionaire lawyer former students, still speak to me as if I am in charge. Although I appreciate the respect, it is obvious that a profound power relationship existed prior, so profound that it remains. The analogy of law professor as lawyer, and law student as client is a direct analogy when utilizing the so-called "problem" approach, and in preparation for clinical education. At the very least, it is the professor who has power over the student . . . and the lawyer who has power over the client. Whether consciously realized or not, this is the assumption of this paper. In passing, it is added that this, a peer-reviewed piece, unlike a student-edited piece (which has its place, too) is intended to be less pedantic, with fewer "glosses," and with more assumptions. . . .

[9]Many have said this epigram. As is often the case, Oliver Wendell Holmes said it best: "The life of the law has not been logic: it has been experience." Oliver Wendell Holmes, THE COMMON LAW 1 (1881).

respectfully, read no further—unless the thesis catches on and you feel compelled to refute it. However, it is axiomatic to this author that teachers are role models; and role models can be good or bad.

Taking this small leap, the modality of teaching law, be it "Socratic" or otherwise, is destined to have an effect on the future behavior of the once law student, now lawyer.

This paper will first set out the other assumptions of the thesis. Then the different teaching styles will be described and demonstrated via case and statutory analysis. Each style will be evaluated looking to its efficacy in aiding in the creation of a knowledgeable effective lawyer, and also a compassionate and ethical one. Most daringly, a conclusion as to appropriate styles will be reached. In addition, an Appendix, offering fifty spiritual rules of legal ethics will be offered. . . .

II. Assumptions

There are just a few types of traditional law papers. They include exposition of difficult law, arguing for law reform, arguing a contested area of law, and tongue-in-cheek humor. Since this paper falls within none of these categories,[10] it is more fit, and is, to be presented to a peer audience. Literally volumes of material have been written regarding teaching methodology. As it were, *the devil is in the details*. If anything at all can hoped to be gained via this paper, there are certain tenets which both the author and his readers must accept. If the following assumptions

---

[10]Any laughs are, for the most part, unintentional. . . . Legal education has its own style. Although one could write a piece on education in general, it is far more appropriate for this narrow topic—the teaching of law's impact on professional responsibility—to focus primarily on the present-day law academy.

are unacceptable, be they in part or whole, that is fine . . . and expected. In my quarter century[11] in the legal academia, both personally and in my observation, it is only the highly unusual paper which makes any difference on accepted beliefs in the law academy.

[11]The quarter century began as a freshman law student in 1978 and continued with now 20 years in the academy, teaching. Neither cynicism nor disrespect is meant by the statement that most law writing have minimal effect. Unfortunately that can be said of most of this perplexing life's activities. But, we do try. . . .

Thus, the assumptions of this thesis, with some authority, are set forth up front. In doing this, I intend to . . . and do exhibit respect to my readers. If you agree with most of these assumptions, it *may* be worth your while to continue reading. If you disagree with most of the assumptions, or at least a significant number, then I bid you peace. But, with that "up-front" disagreement, the paper is probably not worth reading—other than for the *afficianado* of the Criminal Law. An arcane aspect of Criminal Law is utilized to exhibit the different modes of teaching law. It is used simply because of my quarter century experience here.[12] I would not dare delve into "The Rule Against Perpetuities," "Breach by Anticipatory Repudiation," or the like.[13] So, follows now the assumptions on teaching and teaching law. . . .

A. Being Ethical is a Good Goal

[12] I remember still nothing short of *utter confusion* as a first year law student. I also recall that first semester teaching Criminal Law, no longer characterized by *utter confusion*—mere *confusion* is my recollection.

[13] I may be incorrect with this paper, but I am not so *stupid* as to delve into areas where I *know* I am incorrect in understanding.

Ethical approaches include utilitarianism/economic,[14] normative/religious,[15] categorical,[16] and assumptive.[17] At the very least, the attempt to do good is assumed to be at the core of ethical conduct.[18]

B. Ethics, to a Certain Degree,[19] Can be Taught

Although there is some disagreement here, most will agree that there have been, in each of our lives, individuals who have substantially aided us in being more ethical individuals. The methods of aiding others to be more ethical humans include verbal teaching, reading and example (examples can be via positive role model or via punishment).[20]

C. Law Professors Impact Law Students' Ethics Both as Students and Ultimately, as Lawyers

---

[14]For utilitarian, *see generally* Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (rev. ed. 1823). For its more modern offshoot, *see* Richard A. Posner, ECONOMIC ANALYSIS OF LAW (3d ed. 1986). The famous utilitarian axiom: greatest good for the greatest number, i.e., majoritarianism; translates modernly, to cost/benefit analysis.

[15]*See, e.g.,* THE BIBLE; THE KORAN; etc. Commandments, Divine in nature, are offered.

[16]*See, e.g.,* Immanuel Kant, THE METAPHYSICS OF MORALS (1797) [hereinafter cited as KANT]. Universal rules, emphasizing treating others never as means, and as beings worthy of respect, as ends unto themselves, is paramount here.

[17]*See, e.g.,* G.E. Moore, PRINCIPIA ETHICA (1903). Good, much like a Platonic "Form" or "Idea" is deemed to be a root worthy concept, capable of little more definition.

[18]*Supra note 17; see also* Plato, *Euthyphro*, THE COLLECTED DIALOGUES OF PLATO 169 (Edith Hamilton & Huntington Cairns eds., 1973) [hereinafter cited as PLATO].

[19]Although I do not believe this can be proven, and although I admit to the sophist/rhetoric argument technique of "hedging," if ethics cannot be taught our lives approach meaninglessness, or worse, evil. . . .

[20]*Supra notes 14-18.*

The easy issue is assumed: law professors can aid their students regarding their competence as lawyers.[21] However, it is also assumed that each of us has had at least two professors impacting our ethics as attorneys: the one who has aided us in becoming a more ethical attorney; and the other who has jaded us in the direction of becoming a less ethical attorney.[22]

D. The United States Legal System is Adversarial

[21] American Bar Association MODEL RULES OF PROFESSIONAL CONDUCT MR 1.1 (2003) mandates "competence" as the first of a lawyer's duties to his or her client. At the very least, the 120 hours of in-class legal education can aid in competence in the law. . . .

[22] This is assumed. Often an attorney will joke of this, but it is believed by this author that this is undoubtedly true.

Cases and controversies are at the heart of the law.[23] Enshrined in the Sixth Amendment,[24] and applied to the states by way of the Fourteenth Amendment,[25] as well as via state constitutions' parallel "guarantees,"[26] are confrontational rights and a trial and pre-trial system mandating opposing factions deemed necessary to arrive at a just resolution of the law case.[27]

E. Law Professors Must Teach Students the Skills Necessary to be Advocates

Although teaching would-be attorneys to be good people is not divorced from teaching law,[28] avoiding teaching the ability to effectively argue, is a disservice to *future clients* for all but the attorneys who are immediately cast in the role of ultimate and only arbiter of a dispute.[29]

---

[23]U.S. CONST. art. III. Our case law is not based on advisory opinions. Thus, at the least certain "pole stars" must be taught.

[24]*See, e.g.,* U.S. CONST. amend. VI: ". . . to be confronted with the witnesses against him . . .," etc.

[25]*See, e.g., Pointer v. Texas*, 380 U.S. 400 (1965) (wherein this clause of the Bill of Rights was deemed essential and part of the Fourteenth Amendment Due Process Clause).

[26]Pursuant to the Tenth Amendment, the several States are allowed to provide parallel and even *greater* guarantees to the criminally accused, pursuant to their own state constitutions. U.S. CONST.; amend X *see, e.g.,* CAL. CONST. §29, etc. (1879).

[27]*See generally* U.S. CONST. amend. VI, and the plethora of case progeny.

[28]This is somewhat axiomatic. *See generally* ABA MODEL RULES OF PROFESSIONAL CONDUCT 8.4 (2003).

[29]There is a tension between being a good person and being a good lawyer. Good lawyers defend evil people—but they do so within the set and settled structure of our adversarial legal system. They do *not* do so at the expense of defrauding the tribunal (among other limitations). *See, e.g., Nix v. Whiteside*, 475 U.S. 157 (1986) (Sixth Amendment right to effective counsel precludes counsel in suborning perjury which will aid the defendant). Good attorneys, in defending the factually guilty, insure all citizens receive a fair defense. This is not mere lip

service. Historically, from the time of Socrates to Jesus, to countless debacles and reigns of terror, government prosecution has been an engine of evil. . . . The allusion in the text is that some attorneys are never advocates. They become judges, or function as "pseudo-judges" *ab initio*.

F. There are Several Accepted Modes of Teaching Law

These modes include: "Socratic/Case;"[30] lecture;[31] clinical;[32] "problem;"[33] tutorial;[34] apprentice;[35] exam;[36] "Platonic/dialectic;"[37] and a combination of the above.[38] All of these are

---

[30]The Socratic or "Case Method"assumes that law can best be learned from appellate cases—which are primarily concerned with issues of law. Professor Langdell deemed law, as such to be a "science," and its laboratory the library of appellate opinions. STEVENS, *supra* note 1; Jerome Frank, COURTS ON TRIAL 226 (1973). As used in law school studies, a dialogue ensues between the student and professors. Although this dialogue has little resemblance to Plato's dialogues, which discuss, truth, beauty, duty, government, and other timeless philosophical issues—the law school dialogue discusses law. *Cf.* PLATO, *supra* note 18. It typically begins with the student summarizing an already edited case, via breaking it down to "Issue," "Rule," "Analysis," and "Conclusion." The professor, loosely playing the role of Socrates, de-constructs the student's analysis, asking questions so as to show flaws in reasoning. Unlike Plato's dialogues, most law classes are left ending with no answers. However, the student has learned there is more to the issues than he or she thought, and also learns that weak arguments are frowned upon in law school.

[31]Lectures are simply prepared speeches. A good law lecture introduces the topic, what are the difficult issues, how the lecture will proceed, and then answers the issues.

[32]Because of the perceived lacking in actual "hands-on" experience in the law academy, and because of the great need of legal services for the poor, law schools have in-house clinics, dealing with juveniles, elder abuse, tax needs, etc. In addition, some clinics "hook" law students to outside agencies. Clinical education is a needed adjustment to the once apprenticeship method, and is incorporated as a frequent mandate throughout the ABA STANDARDS FOR THE ACCREDITATION OF LAW SCHOOLS (2003).

[33]In the "Problem Approach," the professor prepares legal problems for the students. There may be cases directly on point. If so, the exercise is to develop the research skills necessary to find those cases. If not, the more typical case, the law student not only learns research skills, but also how to *analogize* cases to this similar, but not exactly the same, issue. The Problem Approach is a "kinder and gentler" version of the Socratic Method.

[34]The tutorial method is a time-honored technique of teaching, wherein the professor aids the student in refining and mastering an area of law. This will be discussed in more detail, *infra*.

[35]This older style of education mandates the student studying under a practitioner for several years, until the student is able to go it alone.

[36]In days long past, the bar exam consisted of a member of the Bar attesting to the good character and competence of the applicant. Presently, the bar exams of the several states involve

utilized and deemed viable in the present-day law academy.

G. Each Mode has an Unspoken Lesson as to Appropriate Ethical Conduct

These assumptions are the essential focus of this paper. The different methods will be demonstrated, *infra*, by utilization of a challenging concept in the law of criminal conspiracy.

H. Some Methods of Teaching Inspire Ethics and Some Inspire a Lack of Ethics

At the least, it is expected that just as abusive parents tend to create abusive children,

---

essay and multiple choice tests. The difficulty of the bar exam mandates a certain style of learning, and thus is appropriately listed as a teaching technique in the text, above.

[37]The "enlightened" law class utilizes the Socratic Case Method, and leads the discussion into increasingly subtle degrees of understanding—much as Plato did in his immortal dialogues. *See* PLATO, *supra* note 18. Fortunate is the law student who has experienced this in even one class.

[38]Most law professors, sensibly, utilize many, if not most, of the teaching methods. Aside from the fact that each method has something good to offer, the Socratic Method has the paradox of being extremely difficult to use effectively . . .and extremely easy if the professor is less than expert in an area he or she is teaching (since answers need not be given).

abusive law professors tend to create client-abusive lawyers.[39] This heading/assumption will be proven. However to some, this notion is so unacceptable that reading on might prove upsetting. . . .

I. Law Teaching has Varied and Continues to Vary

This is the subject of the next section. . . . The paper will then proceed to "F" and "G," above (the "ethic" of each method), then "H," above (that certain methods produce a lack of ethics). Admittedly, as such, these "assumptions" are strictly not "assumptions"—there will be proofs involved. Of course, to no surprise, the conclusion as to appropriate teaching methodology, will follow from the extended analysis of subsections "I," "F" and "G," and "H," above.

III. A Brief History of Paradigm Shifts in the Teaching of Law

The purpose of this section is to illustrate that the method of teaching law has not been stagnant in the United States. For many, this is obvious. But there are those who, brought up one way, take for granted that it has always been that way. It has not.

---

[39] *Supra* note 1; *cf.* Diane J. Willis *et al.*, CHILD ABUSE (Vol. 2, 1st ed. 1991).

In fact, most every discipline . . . in fact, most every part of life, changes in accepted substantive values and accepted modes of conduct. For example, evaluation of the female gender has radically changed in the law.[40] Where once women were precluded from practicing law in this country,[41] they now comprise about one-half of most schools' entering classes.[42] That is a substantive change. In addition, where once females were overtly treated as second-class lawyers and citizens, the legal system not only disapproves of this social more, but has made substantial strides in relegating it to antiquity.[43]

Yet, old views tend to die hard. Humans tend to be creatures of comfort. Humans do not like change—unless the change directly betters their situation. Change comes by pressure from an aggrieved group that forcefully makes their position. In a related manner, change comes when the old mores are so replete with inconsistency and contradiction that a simpler underlying philosophy is much easier to use.

It is axiomatic[44] that the simpler theory which fully explains the facts is likely to be the one which is more true.[45] This is a practical necessity of efficient procedure.[46] It has been

---

[40]Women were excluded from law school and from the practice of law as late as the early 1900s. *See* Monroe H. Freedman, UNDERSTANDING LAWYERS' ETHICS 4 (1990).

[41]*Id.*

[42]This has been the case for some time now. *See, e.g.,* THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 2002 (Law School Admission Council 2002).

[43]*Id.* In addition, where once gender neutral language was the exception, it is now the norm in law; and most law schools, in one form or another, teach *Feminist Jurisprudence*.

[44]There are certain things of which we must agree, so as to converse. Thomas Jefferson called these "self-evident" truths, in the Declaration of Independence. Obviously, if foundations are not set, all arguments devolve into triviality.

[45]The choosing of the simpler solution to the problem is at the root of Kuhn's

simplified in the realm of the discipline of Philosophy as "Ockham's Razor."[47] However, whatever name one desires to give it, is as accepted as most of our modes of conduct. It is easier than an unthinking love of complexity. It works.

---

methodology. *Supra* note 5.

[46]Complexity, for its own sake, is not only likely to be a fall premise—but it makes learning and discourse nearly impossible.

[47]DICTIONARY OF PHILOSOPHY 218 (Dagobert D. Runes, ed. 1962).

In his timeless classic, Thomas S. Kuhn, in THE STRUCTURE OF SCIENTIFIC REVOLUTIONS,[48] set out in detail the process of paradigm shifts.[49] Perhaps the easiest to follow example he alluded to was in the field of astronomy.

The older Ptolemaic system postulated that the earth was the center of the universe, and in particular, the center of our solar system.[50] As such, the Sun and other planets revolved around the earth. It was quite an artistic system, with each planet moving in dramatic celestial "spheres," with loping, retrograde, forward, backward, and fascinatingly intricate cosmic motions predicted.[51] Linked to this Ptolemaic system was Christian Church belief that God created the Earth as the center of the universe.[52] As a correlate to the system was an involved astrological system, whereby the destinies of humans were set by the movements of the heavenly bodies, such as, the planets.[53]

However, from ancient Indian[54] times, to Platonic philosophy,[55] ultimately to Copernicus,[56] there was a "rival" approach. That approach was that the Sun was the center of our

---

[48]*Supra note* 5.

[49]*Id.*

[50]*Id.*

[51]*Id.*

[52]*Id.*

[53]*Id.*

[54]Arya, or Aryavarda, was their chosen name. *See generally* Eva Rudy Jansen, THE BOOK OF HINDU IMAGERY (1993); *see generally* Swami Sri Yukteswar, THE HOLY SCIENCE (1972).

[55]PLATO, *supra note 18*, at CRITIAS p. 1212.

[56]*Supra note 5.*

“solar” system.[57] Copernicus suffered persecution due to his arguably anti-religious views.[58]

---

[57] *Id.*

[58] *Id.*

Nevertheless, at some discreet point, the Ptolemaic system became so complex (in order to explain the movement of the planets), and the Copernican system became so "painfully" simple, that a paradigm shift occurred. The Copernican system became accepted.[59] As it were, "the 'emperor Ptolemy' had no clothes."[60] The Church and astrologers made peace . . . and each continued under the new paradigm.[61]

---

[59] *Id.*

[60] *Id.*

[61] *Id.*

There have been a plethora of other paradigm shifts. These include Western Medicine moving away from the homeopathic system to the allopathic system. Homeopathy, believed that ailments could effectively be treated by a substance which was, at root, directly deleterious to the symptoms of the offending disease. Of course, a hefty dose of that "poison" was inappropriate. So, the "poison" was dissolved, first at one part poison to 99 parts milk or talc solids. This new mixture was further dissolved, with one part to 99 parts milk solid. The process was repeated again and again.[62] Evidently, there was a belief that the "energy" of the poison, neutered as it were, would stimulate the body to fight off the imbalance.[63] Although many in our cousins across the Atlantic still believe this system has merit, and, in fact, many a neighborhood health food store, offers this type of remedy still; it is in disrepute by the medical establishment.[64] This is not withstanding its similarities to present-day modes of treating chronic allergies.[65] There was a paradigm shift.

The list could go on. Let us close, however, with the concept of evolution. Darwin's initial theory of evolution and change of species due to the axiomatic need to survive has undergone several modifications. However, Darwin's theory, as opposed to a Divine Creation of humans, is accepted science.[66] Many still believe the old paradigm (Divine Creation), but it is out of favor.

---

[62] THE COMPLETE MEDICAL DICTIONARY 204 (Bantam 1990).

[63] *Id.*

[64] *Id.*

[65] *Id.* at 213.

[66] WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 210 (1965); Charles Darwin, THE ORIGIN OF SPECIES (1859).

The point of the preceding is that “paradigm shifts” are a part of human cultural change. It is hoped that the new paradigm, suppressed for years, decades or even centuries, then—at once—accepted, are more reflective of “truth.”[67] But the point here is more modest. The point here is that holding on to what was taught us is a short term approach, evidencing rigidity and a troubling scepticism as to the ability to better understand reality.

---

[67]*Supra note* 5. We can hope the simpler is more true—but at the least, it is easier to deal with!

Paradigm shifts are not limited to the physical sciences. A persuasive case can be made, applying Kuhn's Thesis/Law to political systems. . . . At the least, we can agree that the Marxist/Stalinist version of Communism failed.[68] The oft-quoted maxim that to each according to his ability; from each according to his ability,[69] may have sounded good in principle. Its correlate effectuating clause indicating a need for a dictatorship of the masses[70] sounded terrifying even on paper, and played out via Stalin as one of humanity's most horrific reigns of terror.[71]

But, the other extreme, an unbridled "free market," empowered by immortal fictional persons, "trusts," also known as "corporations," also limited individual freedom, productivity and satisfaction. This, too, was limited by the *Sherman Antitrust Act*.[72] "Ordered Liberty" has come to be the goal.[73] The prior paradigms of government were proven unsatisfactory.

Now let us turn our attention to the teaching of American law. The American colonists learned law via BLACKSTONE'S COMMENTARIES and via apprenticing with a respected lawyer.[74]

---

[68]The dissolution of the U.S.S.R. in the 1980s, if not disproving communism as a viable form of government, certainly injured its followers' positions. *Cf.* Leonard M. Salter, IN SEARCH OF CONSENSUS; THE NEED FOR A UNIVERSAL GOAL (1989).

[69]*See generally* Karl Marx and Frederick Engels, MANIFESTO OF THE COMMUNIST PARTY (1848).

[70]*Id.*

[71]WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 852 (1965)

[72]*See generally* Lawrence A. Sullivan & Warren S. Grimes, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK (2000).

[73]As a starting point, *see generally Rochin v. California*, 342 U.S. 165 (1952). Society needs laws but there are limits—human dignity must be part of the law of all lands.

[74]STEVENS, *supra note* 1, at 3.

In a small set of colonies, the system worked well enough . . . and it seemed to work quite well in England.[75] Apprenticing has its advantages: would-be lawyers are placed in practice, observing an experienced attorney practice law and finally, having accrued enough experience that they are able to "go it on their own."

[75] *Id.* at 1-18.

However, unlike the domicile of their English cousins, the American Colonies, were neither old nor established. Similarly, the American zeal for freedom and the accordant distaste for formalization led to a de-emphasis on the intensity of the apprenticeship method.[76] Although, in spirit, this may then have seemed like a good thing, and in keeping with the freedom tenets of "Jacksonian Democracy,"[77] the result was an unschooled body of lawyers who serviced primarily their own pocketbooks—not the public.[78]

Traditionally, there were deemed to be three noble professions: theology, medicine and the law.[79] But in the early 1800s in the United States, lawyers were rightfully under fire.[80] They were incompetent, unethical and unregulated.[81] What to do?

Slowly, a "patch" was made. Although law may have lost its status as a profession, it nevertheless could be an acceptable "trade."[82] Trade schools arose—most of them for profit.[83] Slowly these schools grew in number, eventually entering prestigious halls of learning such as Harvard and Yale.[84] But, much like the peripheral programs extant in many a fine university, law

---

[76]*Id.*

[77]*Id.*

[78]*Id.*

[79]These were the so-called "learned professions." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY1437 (1970).

[80]*See generally* STEVENS, *supra* note 1.

[81]*Id.*

[82]*Id.*

[83]*Id.*

[84]*Id.*

education, was relegated to, in essence, “an afterthought.”[85]

[85] *Id.*

To exacerbate matters, the States, growing in commerce, increasingly had a need for lawyers, good lawyers.[86] So, in the late 1800s and early 1900s, Harvard University took the lead. It formalized legal education. Christopher Columbus Langdell, not the only creator, but the name we remember best, proclaimed law to be a "science."[87] The mode of learning that science was via the reading of appellate decisions (which by their nature focused on legal principles).[88] This was called the "case method."[89] Cases were, as it were, the laboratory of the science of law.[90]

Dean Langdell's forerunner casebook, CONTRACTS,[91] came to foreshadow the preeminent mode of teaching law, via the case or "Socratic" dialogue method.[92] Students recited case facts

---

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

and law, and were expertly queried as to the meaning and applicability of the case analyses and holdings.[93]

[93] *Id.*

Apprenticeship, as a mode of becoming a lawyer, diminished—although it still exists . . . and still exists in some small degree.[94] The law degree, first called Bachelor of Law (LL.B.), then later Doctor of Law (J.D.) Became the impramatur of expertise and entrance into the again noble profession.[95] Apprenticeship, though not quite an afterthought, was certainly no longer central. Where before a statement as to good character was the "exam" prior to law licensure, increasingly a substantive, difficult and formalized exam became a necessary prerequisite to practice law.[96]

Presently, although an increasingly few states allow the so-called "diploma privilege,"[97] most every state rigorously tests would be law school graduates in *six* ways: 1) the MPRE (Multistate Professional Responsibility Exam); The Essay Portion (consisting of six difficult one-hour essays); The Multistate Portion (consisting of 200 difficult multiple choice substantive law questions); The Performance Exam (consisting of two "libraries" of case and statutory packets with a need to evaluate the efficacy of the queried case); The Moral Fitness Exam (a background check evidencing good moral character); and a nationally-accredited J.D. degree.[98]

Indeed, there has been a paradigm shift in the teaching of would-be attorneys. It is not a matter of choice. The system must be followed in order to practice law . . . and be a lawyer.[99]

---

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

IV. The Present-Day Teaching Modes

A. Introduction

In order to illustrate the present-day modes, exposition of an aspect of Criminal Law conspiracy will be utilized.[100] As will be recalled, the methods include: "Socratic;" lecture; clinical; "problem;" tutorial; apprentice; exam; "Platonic/dialectic;" and a combination of the above.[101] Each mode will be illustrated by a microcosm of a class focusing on the distinct mode. In order to facilitate each method, both cases and statutes will be set forth now. Then the methods will be used. After this, the effect of each method on *ethics* will be analyzed. . . .

1. Statutory Authority

a) *California Penal Code* (2003)[102]

§20 **Crime; unity of act and intent, or criminal negligence**

TO CONSTITUTE CRIME THERE MUST BE UNITY OF ACT AND INTENT. In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence. *(Enacted 1872).*

* * *

CHAPTER 8. CONSPIRACY

---

[100] *See generally* Joshua Dressler, UNDERSTANDING CRIMINAL LAW (2001); Wayne R. LaFave, PRINCIPLES OF CRIMINAL LAW (2003); Rollin M. Perkins and Ronald N. Boyce, CRIMINAL LAW (3d ed.1982); Jeremy M. Miller, CRIMINAL LAW: STUDENT INTERACTIVE PROBLEM APPROACH (1st Draft ed. 2003).

[101] *Supra notes* 30-38.

[102] CALIFORNIA PENAL CODE (West 2003). Please note that the double underline portions intermittently throughout are for the aid of those readers who have had quite enough Criminal Law already—but are nevertheless interested by the thesis of this paper.

§182. Definition; punishment; venue; evidence necessary to support conviction
(a) If two or more persons conspire:
(1) To commit any crime.
(2) Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.
(3) Falsely to move or maintain any suit, action, or proceeding.
(4) To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform those promises.
(5) To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.
(6) To commit any crime against the person of the President or Vice President of the United States, the Governor of any state or territory, any United States justice or judge, or the secretary of any of the executive departments of the United States.

* * *

b) *Model Penal Code* (1962)[103]

§5.03. Criminal Conspiracy.
(1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
(a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.
(2) Scope of Conspiratorial Relationship. If a person guilty of conspiracy, as defined by Subsection (1) of this Section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.
(3) Conspiracy with Multiple Criminal Objectives. If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.
(4) Joinder and Venue in Conspiracy Prosecutions.
(a) Subject to the provisions of paragraph (b) of this Subsection, two or more persons charged with criminal conspiracy may be prosecuted jointly if:
(I) they are charged with conspiring with one another; or
(ii) the conspiracies alleged, whether they have the same or different parties, are so related that they constitute different aspects of a scheme of organized criminal conduct.

---

[103] *See* MODEL PENAL CODE AND COMMENTARIES (Official Draft and Revised Comments) Part I §§5.03, 5.01 and Commentary (1985).

(b) In any joint prosecution under paragraph (a) of this Subsection:
(I) no defendant shall be charged with a conspiracy in any county [parish or district] other than one in which he entered into such conspiracy or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired; and
(ii) neither the liability of any defendant nor the admissibility against him of evidence of acts or declarations of another shall be enlarged by such joinder; and
(iii) the Court shall order a severance or take a special verdict as to any defendant who so requests, if it deems it necessary or appropriate to promote the fair determination of his guilt or innocence, and shall take any other proper measures to protect the fairness of the trial.
(5) Overt Act. No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.
(6) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.
(7) Duration of Conspiracy. For purposes of Section 1.06(4):
(a) conspiracy is a continuing course of conduct that terminates when the crime or crimes that are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired; and
(b) such abandonment is presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation; and
©) if an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein.

EXPLANATORY NOTE (2001 Main Volume)

Subsection (1) establishes the definition of conspiracy. Guilt as a conspirator is measured by the situation as the actor views it; he must have the purpose of promoting or facilitating a criminal offense, and with that purpose must agree (or believe that he is agreeing) with another that they will engage in the criminal offense or in solicitation to commit it. It also is sufficient if the agreement is to aid another in the planning or commission of the offense, or of an attempt or solicitation to commit it. The purpose requirement is meant to extend to result and conduct elements of the offense that is the object of the conspiracy, but whether or how far it also extends to circumstance elements of that offense is meant to be left open to interpretation by the courts. The mens rea does not include, however, a corrupt motive or an awareness of the illegality of the criminal objective.[104]

* * *

[104] Courtesy Westlaw, copyright 2003. I have edited their version for readability—key numbers . . . and the like, have been omitted.

2. *Definition of Conspiracy.* Subsection (1) sets forth the elements of the offense of conspiracy. Basically, it consists of an agreement to engage in or to bring about a criminal offense, entered into with the purpose of promoting or facilitating the crime's accomplishment. The most significant departure from previous doctrine lies in the fact that the actor's liability is measured from the situation as he views it, i.e., it is not a defense that the other party did not have the requisite purpose. It is sufficient, in other words, for the actor to believe that he is agreeing with another for the requisite criminal objective. . . .[105]
* * *

Section 5.02. Criminal Solicitation.

[105] MODEL PENAL CODE AND COMMENTARIES, Part I §5.03, at 394 (The American law Institute 1985).

(1) Definition of Solicitation. A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.[106]

* * *

2. Case Authority

a) MORRISON et al. v. PEOPLE OF STATE OF CALIFORNIA[107]
No. 487. Supreme Court of the United States
Argued Dec. 12, 13, 1933.
Decided Jan. 8, 1934.
291 U.S. 82; 54 S.Ct. 281; 78 L.Ed. 664

George Morrison and H. Doi were convicted of a conspiracy to violate the Alien Land Law of California. From a judgment of the Supreme Court of California affirming the conviction (22 P.2d 718), the defendants appeal.

Judgment reversed, and cause remanded in accordance with opinion.

Mr. J. Marion Wright, of Los Angeles, Cal., for appellants.

Mr. James S. Howie, of Los Angeles, Cal., for the People of State of California.

Mr. Justice CARDOZO delivered the opinion of the Court.

The appellants have been convicted of a conspiracy to violate the Alien Land Law of the state of California.

The indictment charges that the two appellants, Morrison and Doi, feloniously conspired to place Doi in the possession and enjoyment of agricultural land within the state; that possession was obtained, and the land used and cultivated, in execution of the conspiracy; and that Doi was an alien Japanese, ineligible to citizenship, and not protected in his possession by any treaty

---

[106] *Id.* at §5.02, 364.

[107] Courtesy Westlaw. Copyright 2003 Westlaw—edited so as to omit most Westlaw© markings. Also, double underlines were added so as to facilitate later discussion. . . .

between the government of the United States and the government of Japan. These acts, if committed with guilty knowledge of each defendant, make out a criminal conspiracy under the statutes of the state.

On the trial the state proved that Doi had gone upon the land and used it under an agreement with Morrison, but did not attempt to prove that he was not a citizen of the United States or that he was ineligible for citizenship. The statutes of California provide that as to these elements of the crime the burden of disproving guilt shall rest on a defendant. By section 9a of the Alien Land Law, as amended in 1927 (California Statutes, 1927, pp. 880, 881, c. 528, s 1), it is enacted that, 'in any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by defendant, or any of such fact(s), and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant.' At the same session of the Legislature, the Code of Civil Procedure of the state was amended by the addition of a new section (1983) which in substance and effect restates the same rule. California Statutes, 1927, p. 434, c. 244. Applying these statutes to this case, the trial judge held (a jury having been waived) that both the defendants, Morrison as well as Doi, were guilty of conspiracy. They were sentenced to be imprisoned for two years, but the sentences were suspended, and the defendants placed upon probation. There was an appeal to the District Court of Appeal for the Fourth District, where the judgment was affirmed. The court overruled the defendants' contention that, by the application of section 9a of the Alien Land Law and section 1983 of the Code of Civil Procedure, there had been a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States. 13 P.2d 803. The cause was then transferred to the Supreme Court of California. There defendants' contention under the Fourteenth Amendment was again overruled, and the conviction was affirmed, three judges dissenting. 22 P.2d 718. An appeal to this court followed.

A person of the Japanese race is a citizen of the United States if he was born within the United States. United States v. Wong Kim Ark, 169 U.S. 649, 18 S.Ct. 456, 42 L.Ed. 890. He is a citizen, even though born abroad, if his father was a citizen, provided, however, that this privilege shall not exist unless the father was at some time a resident of the United States as well as a citizen, and provided also that such a child, who continues to reside abroad, shall, in order to receive the protection of this government, be required upon reaching the age of eighteen years to record at an American consulate his intention to become a resident and remain a citizen of the United States, and shall be further required to take the oath of allegiance to the United States upon attaining his majority. R.S. s 1993; 8 U.S.C. s 6 (8 USCA s 6); Weedin v. Chin Bow, 274 U.S. 657, 47 S.Ct. 772, 71 L.Ed. 1284; see also R.S. s 2172; 8 U.S.C. s 7 (8 USCA s 7). But a person of the Japanese race, if not born a citizen, is ineligible to become a citizen, i.e., to be naturalized. The privilege of naturalization is confined to aliens who are 'free white persons, and to aliens of African nativity and to persons of African descent.' R.S. s 2169; 8 U.S.C. s 359 (8 USCA s 359). 'White persons,' within the meaning of the statute, are members of the Caucasian race, as Caucasian is defined in the understanding of the mass of men. Ozawa v. United States, 260 U.S. 178, 43 S.Ct. 65, 67 L.Ed. 199; Yamashita v. Hinkle, 260 U.S. 199, 43 S.Ct. 69, 67

L.Ed. 209; United States v. Bhagat Singh Thind, 261 U.S. 204, 214, 43 S.Ct. 338, 67 L.Ed. 616; Terrace v. Thompson, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; Porterfield v. Webb, 263 U.S. 225, 44 S.Ct. 21, 68 L.Ed. 278; Webb v. O'Brien, 263 U.S. 313, 44 S.Ct. 112, 68 L.Ed. 318; Cockrill v. California, 268 U.S. 258, 45 S.Ct. 490, 69 L.Ed. 944. The term excludes the Chinese (United States v. Wong Kim Ark, supra; 8 U.S.C. s 363 (8 USCA s 363)), the Japanese (cases supra), the Hindus (United States v. Bhagat Singh Thind, supra), the American Indians (Ozawa v. United States, supra), and the Filipinos (Toyota v. United States, 268 U.S. 402, 45 S.Ct. 563, 69 L.Ed. 1016), though Indians and Filipinos who have done military or naval service may be entitled to special privileges (8 U.S.C. ss 3, 388 (8 USCA ss 3, 388)). Nor is the range of the exclusion limited to persons of the full blood. The privilege of naturalization is denied to all who are not white (unless the applicants are of African nativity or African descent); and men are not white if the strain of colored blood in them is a half or a quarter, or, not improbably, even less, the governing test always (United States v. Bhagat Singh Thind, supra) being that of common understanding. Dean v. Com., 4 Grat. (45 Va.) 541; Gentry v. McMinnis, 3 Dana (Ky.) 382; In re Camille (C.C.) 6 F. 256; In re Young (D.C.) 198 F. 715, 717; In re Lampitoe (D.C.) 232 F. 382; In re Alverto (D.C.) 198 F. 688; In re Knight (D.C.) 171 F. 299; 2 Kent Comm. (12th Ed.) 73, note. Cf. the decisions in the days of slavery. Gentry v. McMinnis, 3 Dana (Ky.) 382; Morrison v. White, 16 La.Ann. 100, 102; see Scott v. Raub, 88 Va. 721, 727-729, 14 S.E. 178. [FN1]

The California Alien Land Law must be read in the light of these rulings as to the effect of birth and race. Section 1 of the act (Cal. Stat. 1923, p. 1020, s 1, amending Cal. Stat. 1921, p. lxxxiii) provides that all aliens eligible for citizenship may acquire and occupy real property to the same extent as citizens. Section 2 (as amended by section 2 of act of 1923) provides that aliens not eligible for citizenship may use and occupy real property to the extent prescribed by any treaty between the Government of the United States and the nation or country of which such alien is a citizen or subject, 'and not otherwise.' There is a Treaty between the United States and Japan (Feb. 21, 1911, 37 Stat. 1504) by which the Japanese may own or lease houses, manufactories, warehouses, and shops, and may lease land for residential and commercial purposes. The treaty does not confer a privilege to own or use land for the purposes of agriculture. Webb v. O'Brien, supra, 263 U.S. 323, 44 S.Ct. 112, 68 L.Ed. 318; Frick v. Webb, 263 U.S. 326, 44 S.Ct. 115, 68 L.Ed. 323. Section 3 of the act (as amended by section 3 of the act of 1923) prescribes the rule applicable to the acquisition of shares in corporations organized by aliens for the occupation or use of land; sections 4 and 5 (as amended by sections 4, 5 of the act of 1923) prescribe the rule for alien trustees and guardians; sections 7, 8, and 9 (as amended by sections 6-8 of the act of 1923) provide for the escheat to the state of any interest in real property unlawfully acquired. Section 10 (as amended by section 9 of the act of 1923) provides that: 'If two or more persons conspire to violate any of the provisions of this act they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years or by a fine not exceeding five thousand dollars, or both.' This is the section under which the defendants have been convicted. There is nothing in the statute whereby unlawful occupation of land by an alien ineligible for citizenship is declared to be a crime unless the occupation has been acquired by force of a conspiracy.

This court in Morrison v. California, 288 U.S. 591, 53 S.Ct. 401, 77 L.Ed. 970, [FN2] passed upon a controversy as to the validity of section 9b of the California Alien Land Law, which, though akin to section 9a, has important elements of difference. This section (9b)

provides in substance that, when it has been proved that the defendant has been in the use or occupation of real property, and when it has also been proved that he is a member of a race ineligible for citizenship under the naturalization laws of the United States, the defendant shall have the burden of proving citizenship as a defense. [FN3] We sustained that enactment when challenged as invalid under the Fourteenth Amendment of the Federal Constitution.

The state had given evidence with reference to the defendant, the occupant of the land, that by reason of his race he was ineligible to be made a citizen. With this evidence present, we held that the burden was his to show that by reason of his birth he was a citizen already, and thus to bring himself within a rule which has the effect of an exception. In the vast majority of cases, he could do this without trouble if his claim of citizenship was honest. The people, on the other hand, if forced to disprove his claim, would be relatively helpless. In all likelihood his life history would be known only to himself and at times to relatives or intimates unwilling to speak against him.

The ruling was not novel. The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. Cf. Wigmore, Evidence, vol. 5, ss 2486, 2512, and cases cited. Special reasons are at hand to make the change permissible when citizenship vel non is the issue to be determined. Citizenship is a privilege not due of common right. One who lays claim to it as his, and does this in justification or excuse of an act otherwise illegal, may fairly be called upon to prove his title good. In accord with that view are decisions of this court in proceedings under the acts of Congress for the deportation of aliens. A Chinaman by race resisted deportation on the ground that, though a Chinaman, he had been born in the United States. The ruling was that as to the place of birth the burden was upon the alien, and not upon the government. The ruling also was that the imposition of that burden did not deprive the alien of his constitutional immunities. Chin Bak Kan v. United States, 186 U.S. 193, 200, 22 S.Ct. 891, 894, 46 L.Ed. 1121. 'The inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed.' Id. See, also, Ah How v. United States, 193 U.S. 65, 76, 24 S.Ct. 357, 48 L.Ed. 619; Christy v. Leong Don (C.C.A.) 5 F.(2d) 135. Cf. Ng Fung Ho v. White, 259 U.S. 276, 283, 42 S.Ct. 492, 66 L.Ed. 938. We adhered to that principle in Morrison v. California, supra. Upon that basis, we approved the ruling of the Supreme Court of California (People v. Osaki, 209 Cal. 169, 286 P. 1025) that section 9b of the Alien Land Law casting upon a Japanese defendant the burden of proving citizenship after proof of his race had been given by the state was not an impairment of his immunities under the Federal Constitution. No point was made in the statement of jurisdiction or the supporting brief that the crime was conspiracy, and that one of the defendants belonged to the white race. The case was submitted as if both were Japanese.

The question is now as to section 9a. obviously there is a wide difference between the scope of the two sections. Possession of agricultural land by one not shown to be ineligible for citizenship is an act that carries with it not even a hint of criminality. To prove such possession without more is to take hardly a step forward in support of an indictment. No such probability of

wrongdoing grows out of the naked fact of use or occupation as to awaken a belief that the user or occupier is guilty if he fails to come forward with excuse or explanation. Yee Hem v. United States, 268 U.S. 178, 183, 184, 45 S.Ct. 470, 69 L.Ed. 904; Luria v. United States, 231 U.S. 9, 25, 34 S.Ct. 10, 58 L.Ed. 101; Casey v. United States, 276 U.S. 413, 418, 48 S.Ct. 373, 374, 72 L.Ed. 632; Mobile, etc., R. Co. v. Turnipseed, 219 U.S. 35, 42, 43, 31 S.Ct. 136, 55 L.Ed. 78, 32 L.R.A.(N.S.) 226, Ann.Cas. 1912A, 463; Bailey v. Alabama, 219 U.S. 219, 233, 238, 31 S.Ct. 145, 55 L.Ed. 191; Manley v. Georgia, 279 U.S. 1, 49 S.Ct. 215, 73 L.Ed. 575; People v. Cannon, 139 N.Y. 32, 34 S.Ct. 759, 36 Am.St.Rep. 668. 'The legislature may go a good way in raising (a presumption) or in changing the burden of proof, but there are limits.' McFarland v. American Sugar Co., 241 U.S. 79, 86, 36 S.Ct. 498, 501, 60 L.Ed. 899. What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' McFarland v. American Sugar Co., supra; Bailey v. Alabama, supra; Manley v. Georgia, supra. There are, indeed, 'presumptions that are not evidence in a proper sense but simply regulations of the burden of proof.' Casey v. United States, supra. Even so, the occasions that justify regulations of the one order have a kinship, if nothing more, to those that justify the others. For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance (Yee Hem v. United States, supra; Casey v. United States, supra), or, if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception. Greenleaf, Evidence, vol. 1, s 79. [FN4] The list is not exhaustive. Other instances may have arisen or may develop in the future where the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient. The decisive considerations are too variable, too much distinctions of degree, too dependent in last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises.

We turn to this statute and endeavor to assign it to its class. In the law of California there is no general prohibition of the use of agricultural lands by aliens, with special or limited provisos or exceptions. To the contrary, it is the privilege that is general, and only the prohibition that is limited and special. Without preliminary proof of race, occupation of the land is not even a suspicious circumstance. The inquiry must therefore be whether occupants so situated may be charged with the burden of proving themselves eligible and thus establishing their innocence.

First. The indictment is for conspiracy, and, indeed, the Alien Land Law creates no other crime. In re Akado, 188 Cal. 739, 742, 207 P. 245; Mott v. Cline, 200 Cal. 434, 448, 253 P. 718; California Delta Farms v. Chinese American Farms, 207 Cal. 298, 308, 278 P. 227. Morrison and Doi are charged to have conspired, but Doi alone is charged to be ineligible for citizenship. One might suppose from a reading of the statute that the burden of proof, even if shifted as to him, would be unaffected as to Morrison. The California courts, however, have cast the same burden upon both; and both have been convicted. None the less, in applying the presumption, we must keep before us steadily the quality of their crime. It is impossible in the nature of things for a man to conspire with himself. Turinetti v. United States (C.C.A.) 2 F.(2d) 15, 17. In California as elsewhere conspiracy imports a corrupt agreement between not less than two with guilty

knowledge on the part of each. People v. Richards, 67 Cal. 412, 7 P. 828, **28656 Am.Rep. 716; People v. Kizer, 22 Cal.App. 10, 14, 133 P. 516, 521, 134 P. 346; People v. Entriken, 106 Cal.App. 29, 32, 288 P. 788; Sands v. Commonwealth, 21 Grat.(Va.) 871, 899; Pettibone v. United States, 148 U.S. 197, 203, 205, 13 S.Ct. 542, 37 L.Ed. 419. [[underlines added by this author]]

Now, plainly as to Morrison, an imputation of knowledge is a wholly arbitrary presumption. He may never have seen Doi before the transfer of possession or afterwards. He may have made his agreement by an agent or over the telephone or by writings delivered through the mails. Even if lessor and lessee came together face to face, there is nothing to show whether Doi was a Japanese of the full blood, whose race would have been apparent to any one looking at him. Moreover, if his race was apparent, he may still have been a citizen, for anything that was known to Morrison or others. The statute does not make it a crime to put a lessee into possession without knowledge or inquiry as to race and place of birth. The statute makes it a crime to put an ineligible lessee into possession as the result of a willful conspiracy to violate the law. Nothing in he people's evidence gives support to the inference that Morrison had knowledge of the disqualifications of his tenant or could testify about them. What was known to him, so far as the evidence discloses, was known also to the people, and provable with equal case. Only an arbitrary mandate could charge him with guilty knowledge as an inference of law if it were proved that Doi was not a citizen or eligible to become one. Still less can he be charged with such knowledge when Doi's disqualification is itself a mere presumption. In such circumstances the conviction of Morrison because he failed to assume the burden of disproving a conspiracy was a denial of due process that vitiates the judgment as to him. Nor is that the only consequence. Doi was not a conspirator, however guilty his own state of mind, unless Morrison had shared in the guilty knowledge and design. Pettibone v. United States, supra; Gebardi v. United States, 287 U.S. 112, 123, 53 S.Ct. 35, 77 L.Ed. 206, 84 A.L.R. 370. The joinder was something to be proved, for it was of the essence of the crime. Without it there was a civil wrong, but not a criminal conspiracy, the only crime denounced. In re Akado, supra. The conviction failing as to the one defendant must fail as to the other. Turinetti v. United States, supra; Williams v. United States (C.C.A.) 282 F. 481, 484; Gebardi v. United States, supra.

Second. The result will not be changed if we view the case on the assumption that possession by one ineligible, when it is the product of agreement, may be criminal as to the tenant who holds with guilty knowledge, though innocent as to the landlord who believes that all is lawful.

We have pointed out before that a lease of agricultural land, unaccompanied by evidence of the race of the lessee, conveys no hint of criminality. For the moment we assume, without intending to decide, that strong considerations of convenience, if they existed, might cast upon the tenant the burden of proving his qualifications and thus disproving guilt. The question will then be whether the normal burden of proof will so thwart or hamper justice as to create a practical necessity, without preponderating hardship to the defendant, for a departure from the usual rule.

In the vast majority of cases the race of a Japanese or a Chinaman will be known to any one who looks at him. There is no practical necessity in such circumstances for shifting the burden to the defendant. Not only is there no necessity; there is only a faint promotion of procedural convenience. The triers of the facts will look upon the defendant sitting in the

courtroom and will draw their own conclusions. If more than this is necessary, the people may call witnesses familiar with the characteristics of the race, who will state his racial origin. The only situation in which the shifting of the burden can be of any substantial profit to the state is where the defendant is of mixed blood, the white or the African so preponderating that there will be no external evidence of another. But in such circumstances the promotion of convenience from the point of view of the prosecution will be outweighed by the probability of injustice to the accused. One whose racial origins are so blended as to be not discoverable at sight will often be unaware of them. If he can state nothing but his ignorance, he has not sustained the burden of proving eligibility, and must stand condemned of crime.

Reflection will satisfy that the chance of this injustice is not remote or shadowy. Let us assume a charge that agricultural land has been occupied by Filipinos not born in the United States, and not entitled to the privileges growing out of service in the army or the navy. 8 U.S.C. s 388 (8 USCA s 388). They are then ineligible for citizenship, and subject to indictment under the laws of California if they have gone into possession in aid of a conspiracy. But Filipinos have intermarried with many other peoples. They have intermarried with whites and with Negroes and mulattos. A laborer, born in Canada, his parents apparently mulattos, but one of his grandparents a Filipino, according to the charge in an indictment, would be ignorant in many cases whether he was a Filipino or an African. The admixture of oriental blood might be too slight for his race to be apparent to the eye, and family traditions are not always well preserved, especially when the descendants are men and women of humble origin, remote from kith and kin. The same possibility of injustice would be present where the occupant of the land is a descendant of Mexicans and Indians, [FN5] or an Eurasian, his ancestors party Europeans and partly Asiatics. [FN6]

The probability is thus apparent that the transfer of the burden may result in grave injustice in the only class of cases in which it will be of any practical importance. The statute does not say that the defendant shall be acquitted if he does not know his racial origin and is unable to make proof of it. What the effect of such a law would be, we are not required to consider. To the contrary, the statute says in substance that, unless he can and does prove it, he will have failed to discharge his burden, and will therefore be found guilty. Moreover, if he were to profess ignorance, and ignorance were an excuse, the trier of the facts might refuse to credit him. Holmes, J., in Ah How v. United States, supra, 193 U.S. 76, 24 S.Ct. 357, 48 L.Ed. 619. There can be no escape from hardship and injustice, outweighing many times any procedural convenience, unless the burden of persuasion in respect of racial origin is cast upon the people.

What has been written applies only to those provisions of the statute that prescribe the rule for criminal causes. Other considerations may or may not apply where the controversy is civil. We leave that question open.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

FN1 The opinions in Jeffries v. Ankeny, 11 Ohio, 372 and Gray v. State, 4 Ohio 353, rest upon peculiar provisions of the Ohio Constitution.

FN2 The appeal was dismissed for the want of a substantial federal question upon a statement as

to jurisdiction, and without argument of counsel.

FN3 ‘Sec. 9b. In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the complaint, indictment or information, alleges the alienage and ineligibility to United States citizenship of any defendant, proof by the state, or the people thereof, of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property or any interest therein, or the having in whole or in part of the beneficial use thereof by such defendant, or of any such facts, and in addition proof that such defendant is a member of a race ineligible to citizenship under the naturalization laws of the United States, shall create a prima facie presumption of the ineligibility to citizenship of such defendant, and the burden of proving citizenship or eligibility to citizenship as a defense to any such action or proceeding shall thereupon devolve upon such defendant.’ Cal. Stats. 1927, c. 528, p. 881, s 2.

FN4 Instances of the application of this principle can be cited in profusion. The cases that follow are typical examples: King v. Turner, 5 Maule & Sel. 206, where a defendant, having game in his possession in violation of a statute whereby possession was generally a crime, was held to have the burden of proving his special qualifications (cf. Yee Hem v. United States, supra; also Spieres v. Parker, 1 T.R. 144, per Lord Mansfield); Fleming v. People, 27 N.Y. 329, a prosecution for bigamy, where, on proof that the defendant had contracted a second marriage during the lifetime of his first wife, the burden was laid upon him to prove exceptional circumstances that would have made the marriage lawful; and finally such cases as Potter v. Deyo, 19 Wend.(N.Y.) 361, 363, and United States v. Turner (D.C.) 266 F. 248 (typical of a host of others) where a defendant has been subjected to the burden of producing a license or a permit for a business or profession that would otherwise be illegal. Cf. United States v. Hayward, 26 Fed.Cas. 240, No. 15,336; Board Com’rs Excise of Auburn v. Merchant, 103 N.Y. 143, 8 N.E. 484, 57 Am.Rep. 705.

FN5 Indians not born in the United States and not entitled to the special privileges growing out of service in the war (8 U.S.C. s 3, 8 USCA s 3) are ineligible for citizenship. There is a strain of Indian blood in many of the inhabitants of Mexico as well as in the peoples of Central and South America. Robert F. Foerster, The Racial Problems Involved in Immigration from Latin America and the West Indies to the United States, Report to Secretary of Labor, 1925, pp. 7, 10, 15, 17, 18, 21, 22, 23, 24, 28, 29, 41. Whether persons of such descent may be naturalized in the United States is still an unsettled question. The subject was considered in Matter of Rodriguez (D.C.) 81 F. 337, but not all that was there said is consistent with later decisions of this court. Ozawa v. United States, and United States v. Bhagat Singh Thind, supra. Cf. In re Camille, supra. Mexicans have migrated into California in increasingly large numbers (T. F. Woofter, Jr., Status of Racial and Ethnic Groups in 'Recent Social Trends,’ vol. 1, pp. 553, 562, 572, 573); and there have developed racial problems which have been considered by official bodies. California Departments of Industrial Relations, Agriculture and Social Welfare, ‘Mexicans in California,’ Report by Governor C. C. Young’s Mexican Fact Finding Committee, San Francisco, Cal., 1930, pp. 41, et seq. The Treaty of Amity, Commerce, and Navigation of 1831 between the United States and Mexico gives to the nationals of either country the privilege of owning personal estate

in the other (article 13), but contains no provision in respect of the ownership of land. This treaty was revived after the Mexican War by article 17 of the Treaty of Guadalupe Hidalgo (1848). It was terminated by Mexico in November, 1881. See Malloy, Treaties, vol. 1, p. 1085 (8 Stat. 414; 9 Stat. 935).

FN6 As to the appearance of children of marriages between Japanese and the white races, see: S. C. Gulick, The American Japanese Problem, p. 153; Iyenaga v. Sato, Japan and the California Problem, p. 157.[108]

* * *

b) Robert Genaro PALATO, Appellant (Defendant), v. The STATE of Wyoming, Appellee (Plaintiff).[109]

Shellie Jo Cottam, Appellant (Defendant), v. The State of Wyoming, Appellee (Plaintiff).

Supreme Court of Wyoming No. 97-76. Oct. 12, 1999. 988 P.2d 512

Thomas, J., dissented and filed an opinion.

Before LEHMAN, C.J., and THOMAS, MACY, GOLDEN, and TAYLOR, [FN*] JJ.

LEHMAN, Chief Justice.

This case involves a certified question arising out of two criminal actions currently pending in the District Court for the Eighth Judicial District of Wyoming. Both defendants are

[108]Although this case is cited regarding its statement as to criminal conspiracy and the great force of Justice Cardozo's writing, it is interesting . . . and painful . . . to note in passing, two points: First, the matter-of-fact racism which was commonplace in the past culture of this country; second, just how much of a case is edited for students in the typical application of the "case method."

[109]Courtesy Westlaw. Copyright 2003 Westlaw. The case has been mildly edited and reformatted. In addition, double underlines were added to facilitate discussion.

alleged to have conspired with a government agent to deliver a controlled substance in violation of Wyo. Stat. Ann. <section> 35-7-1042 (Lexis 1999), raising the issue of whether Wyoming follows a unilateral or bilateral approach with respect to conspiracies involving controlled substances. This court agreed to answer the following certified question of law: Can a defendant be found guilty under W.S. <section> 35-7-1042 of conspiring to deliver a controlled substance when the only other member of the alleged conspiracy is a government agent?

We hold that the legislature intended for Wyoming to follow the bilateral approach with respect to drug conspiracies, and thus answer the certified question "no."

FACTS

The relevant facts are undisputed. Appellants Robert Genaro Palato and Shellie Jo Cottam are defendants in separate criminal actions before the Eighth Judicial District Court. Appellant Palato is alleged to have conspired with a special agent of the Wyoming Division of Criminal Investigation to have a third-party deliver to the agent three-quarters of an ounce of marijuana. Appellant Cottam is alleged to have conspired three separate times to deliver methamphetamine to a confidential informant. Palato was charged with one count and Cottam with three counts of conspiracy to deliver a controlled substance in violation of Wyo. Stat. Ann. <section> 35-7-1042. In each instance, the only members of the alleged conspiracy were the appellants and a government agent. Both appellants filed a motion to dismiss with the district court, which prompted the certified question set out above.

DISCUSSION

The question we must resolve is whether Wyoming's controlled substances conspiracy statute, <section> 35-7-1042, embraces the unilateral or bilateral theory of conspiracy. "Under a unilateral formulation, the crime is committed when a person agrees to proceed in a prohibited manner; under a bilateral formulation, the crime of conspiracy is committed when two or more persons agree to proceed in such manner." Miller v. State, 955 P.2d 892, 896 (Wyo.1998) (quoting State v. Rambousek, 479 N.W.2d 832, 833-34 (N.D.1992)). Therefore, under a unilateral theory, a conspiracy count is viable even when one of the participants is a government agent or is feigning agreement. Miller, at 897; Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law <section> 6.4(d) (1986).

This court recently considered the unilateral-bilateral question as it pertains to our general conspiracy statute, Wyo. Stat. Ann. <section> 6-1-303 (Lexis 1999). Miller. Based on the language and legislative history of the statute, as well as public policy considerations, we held that <section> 6-1-303 adopts the unilateral approach to conspiracy. Id. Our evaluation of those same considerations, and others, leads us to conclude that the legislature had a different intent when it enacted <section> 35-7-1042.

This court's primary focus when interpreting a statute is to determine the legislature's intent upon enactment. Tietema v. State, 926 P.2d 952, 953 (Wyo.1996). "The initial step in arriving at a correct interpretation * * * is an inquiry respecting the ordinary *514 and obvious meaning of the words employed, according to their arrangement and connection." Parker Land & Cattle Co. v. Game & Fish Comm'n, 845 P.2d 1040, 1042 (Wyo.1993) (quoting Rasmussen v. Baker, 7 Wyo. 117, 133, 50 P. 819, 823 (1897)). If the language of the statute is plain and unambiguous, we apply its plain meaning and need not consult rules of statutory construction.

“[W]hile a determination that the meaning is not subject to varying interpretations will usually end our inquiry, we may resort to extrinsic aids of interpretation, such as legislative history and rules of construction, to confirm our determination.” Houghton v. Franscell, 870 P.2d 1050, 1054 (Wyo.1994) (citing Parker, 845 P.2d at 1045).

[I]n ascertaining the legislative intent in enacting a statute * * * the court * * * must look to the mischief the act was intended to cure, the historical setting surrounding its enactment, the public policy of the state, the conditions of the law and all other prior and contemporaneous facts and circumstances that would enable the court intelligently to determine the intention of the lawmaking body.

Carter v. Thompson Realty Co., 58 Wyo. 279, 291, 131 P.2d 297, 299 (1942); see also Parker, 845 P.2d at 1044. We presume that the legislature enacts statutes with full knowledge of the existing condition of the law and with reference to it. Parker, at 1044.

Wyoming’s controlled substances conspiracy statute provides: Any person who attempts or conspires to commit any offense under this article [the Wyoming Controlled Substances Act] within the state of Wyoming or who conspires to commit an act beyond the state of Wyoming which if done in this state would be an offense punishable under this article, shall be punished by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense the commission of which was the object of the attempt or conspiracy.

Wyo. Stat. Ann. <section> 35-7-1042 (Lexis 1999) (emphasis added). We find that <section> 35-7-1042 is ambiguous with respect to whether it adopts a bilateral or unilateral theory of conspiracy. The ambiguity in the statute arises from the use of the singular “[a]ny person” language, which since the adoption of the Model Penal Code has been said to be indicative of the unilateral approach to conspiracy, and the traditional, common law view that it takes at least two guilty parties to “conspire.” See, e.g., Jasch v. State, 563 P.2d 1327, 1332 (Wyo.1977) (quoting Goldsmith v. Cheney, 447 F.2d 624 (10th Cir.1971)) (“A conspiracy is an agreement between two or more persons to do an unlawful act.”).

The history of Wyoming’s drug conspiracy statute provides some insight into the legislature’s intent at the time of its enactment. Section 35-7-1042 was derived, not from the general conspiracy statute or the Model Penal Code, but from the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, codified at 21 U.S.C. <section> 846. [FN1] When the Wyoming legislature adopts a statute from another jurisdiction, that jurisdiction’s case law construing the statute is considered persuasive authority and an aid to determine legislative intent. Apodaca v. State, 627 P.2d 1023, 1027 (Wyo.1981); Woodward v. Haney, 564 P.2d 844, 845-46 (Wyo.1977). As such, we have looked to the case law interpreting the federal conspiracy provision as persuasive authority when interpreting <section> 35-7- 1042. Apodaca, 627 P.2d at 1027; Dorador v. State, 768 P.2d 1049, 1053- 54 (Wyo.1989).

The federal courts have consistently adhered to the Sears rule, a Fifth Circuit Court of Appeals holding that there can be no conspiratorial liability imposed when the only other person involved is a government agent. Sears v. United States, 343 F.2d 139, 142 (5th Cir.1965); see also United States v. Rosenblatt, 554 F.2d 36, 38 n. 2 (2d Cir.1977); United States v. Escobar de Bright, 742 F.2d 1196, 1198-99 (9th Cir.1984). The federal rule, which takes a bilateral approach, is grounded in the traditional definition of conspiracy as “an agreement between two or more people to commit an unlawful act.” Escobar de Bright, 742 F.2d at 1199. The reasoning behind the federal approach is that the act of agreeing is a group act requiring at least two

people, and when one of two persons merely pretends to agree, there is neither a true agreement nor a meeting of the minds. Id. This was the conventional view of conspiracy law, and the view espoused by a majority of states, including Wyoming when <section> 35-7-1042 was enacted in 1971. [FN2] In Miller, we determined the modification of the language in Wyoming's general conspiracy statute from the traditional "[i]f two (2) or more persons conspire" to the Model Penal Code formulation of "[a] person is guilty of conspiracy to commit a crime if" evidenced the legislature's intent to move to the unilateral approach. In contrast, <section> 35-7-1042 has not been amended since its enactment, and we find no similar evidence of legislative intent to depart from the federal bilateral position.

We acknowledge that this construction results in divergent treatment of conspiracies in Wyoming, depending on whether controlled substances are involved. However, the adoption of the Wyoming Controlled Substances Act, <section><section> 35-7-1001 et seq., suggests the legislature intended to treat drug crimes differently. The preamble of the Act describes it as "providing a comprehensive codification and revision of the laws of the State of Wyoming relating to controlled substances and the use and abuse of drugs," providing for, among other things, "crimes and offenses."1971 Wyo. Sess. Laws, ch. 246. At the time it was enacted, the legislature removed from the criminal code those provisions governing crimes and enforcement relating to controlled substances and placed them in the Act. Id.

In addition, we note that <section> 35-7-1042 has already been determined to alter the general law of conspiracy in an important respect. Apodaca, 627 P.2d at 1026-27.Specifically, the drug conspiracy statute includes no overt act requirement. When a defendant is charged under <section> 35-7-1042, the government is not required to allege and prove an overt act to sustain a conviction. Apodaca, 627 P.2d at 1027. An overt act requirement affords at least a minimal added assurance, beyond the bare agreement, that a socially dangerous combination exists and that a person is not punished for a mere evil state of mind. Dierdre A. Burgman, Unilateral Conspiracy: Three Critical Perspectives, 29 DePaul L.Rev. 75, 102 (1979). With respect to unilateral conspiracies, the overt act requirement is conceivably a protection to insure that police activity is not abused. See id. at 101. The Model Penal Code does not require an overt act for conspiracies to commit first and second degree crimes. Model Penal Code, supra, <section> 5.03(5). Although the legislature generally followed the Model Penal Code approach when it modified the general conspiracy statute in 1982, the legislature saw fit to retain the overt act requirement for all conspiratorial objectives. Wyo. Stat. Ann. <section> 6-1-303(b). That being the case, and given the omission of an overt act protection in the drug conspiracy statute, we cannot ascribe to the legislature the intent to adopt the unilateral conspiracy theory absent a clear expression of that intent.

<u>For the reasons stated above, we hold that the controlled substances conspiracy statute embraces the bilateral theory of conspiracy, in accordance with federal case law</u>. The certified question, whether a defendant can be found guilty, under Wyo. Stat. Ann. <section> 35-7-1042, of conspiring to deliver a controlled substance when the only other member of the alleged conspiracy is a government agent, is answered "no."

THOMAS, Justice, dissenting.

I would answer "Yes" to the certified question posed in this case. The majority resolution

structures an inconsistency in the substantive law of Wyoming for the sake of being consistent with a federal substantive rule that manifests consistency within the federal law. To maintain a unilateral theory of conspiracy for all other crimes, but continue with a bilateral theory of conspiracy for controlled substances crimes injects an unwarranted complexity into the criminal law of Wyoming. I am satisfied that the legislature intended to adopt the unilateral theory of conspiracy as we held in Miller v. State, 955 P.2d 892 (Wyo.1998).

I attach no significance to the proposition that the legislature did not change the set of statutes creating offenses with respect to controlled substances at the same time. Probably the legislature did not believe it necessary to do so. Our reliance on federal authority as persuasive is misplaced here because our statutory scheme relating to the conspiracy offense has been adjusted while the federal statutory scheme is the same as it has been for years. The majority opinion adopts the stance that we are bound by the interpretation given to the federal statute at the time our controlled substances statute was adopted. Indeed we do have authority supporting that position.

The two statutes are remarkably similar: Any person who attempts or conspires to commit any offense under this article within the state of Wyoming or who conspires to commit an act beyond the state of Wyoming which if done in this state would be an offense punishable under this article, shall be punished by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense the commission of which was the object of the attempt or conspiracy. Wyo. Stat. Ann. <section> 35-7-1042 (Lexis 1999) (emphasis added). Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by * * *. 21 U.S.C. <section> 846 (emphasis added). Neither statute, however, offers a definition of the word "conspires."

Perhaps my position is too simplistic, but I conclude that there is only one definition of a conspiracy in the Wyoming statutes. It is: (a) A person is guilty of conspiracy to commit a crime if he agrees with one (1) or more persons that they or one (1) or more of them will commit a crime and one (1) or more of them does an overt act to effect the objective of the agreement. Wyo. Stat. Ann. <section> 6-1-303 (Lexis 1999) (emphasis added). Similarly, there is only one definition of a conspiracy in the federal statutes. It reads: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy * * *. 18 U.S.C. <section> 371 (emphasis added).

The language of the federal statute tracks the language of the Wyoming statute prior to the amendment of the Wyoming statute in 1988. That statute read: If two (2) or more persons conspire to (a) commit a felony in the state of Wyoming or to commit an act beyond the state of Wyoming which if done in this state would be a felony, and (b) one (1) or more of such persons do any act, within or without the state of Wyoming, to effect the object of the conspiracy, each, upon conviction, shall be fined not more than one thousand dollars ($1,000.00) or imprisoned in the penitentiary not more than ten (10) years or both. A conspiracy may be prosecuted in the county where the conspiratorial agreement or combination was entered into, or in any county where any act or acts evidencing the conspiracy or in any county wherein the furtherance of its purpose took place. Wyo. Stat. Ann. <section> 6-1-117 (1977).

In Miller, 955 P.2d at 897, we said: When we compare the first sentences of the earlier and current statutes in Wyoming, we find that the old statute began "[i]f two (2) or more persons

conspire to (a) commit a felony in the state of Wyoming * * *, “while the new statute reads, “[a] person is guilty of conspiracy to commit a crime if he agrees with one (1) or more persons that they or one (1) or more of them will commit a crime * * *.” (Emphasis added.) Our research discloses that most states that have adopted this second definition of the crime of conspiracy have embraced a unilateral approach to conspiracy, and we hold that is appropriate in Wyoming. (Emphasis in original.) Given the fact that the revision of the Wyoming conspiracy statute post dates any of our earlier precedent relating to a conspiracy to violate the controlled substances statutes, we must acknowledge a change in Wyoming statutory law that has not occurred in the federal legislation. I would recognize that change as extending to any conspiracy to commit a crime in Wyoming, including a conspiracy to violate the controlled substances statute.

The federal cases simply follow a theory of conspiracy found in the federal statute that has remained unchanged since the adoption of the statutes regulating controlled substances. Under the federal conspiracy rule, all conspiracies must be bilateral. Sears v. United States, 343 F.2d 139, 142 (5th Cir.1965). This is the view that has been applied to all federal conspiracy statutes, including the general conspiracy statute, the Sherman Anti-trust Act, and RICO. The policy justifications for this rule, as summarized in United States v. Escobar de Bright, 742 F.2d 1196, 1198-1200 (9th Cir.1984), are antithetical to those adopted by this court in Miller, 955 P.2d at 897-98. This federal approach maintains consistency within the federal law.

In United States v. Shabani, 513 U.S. 10, 115 S.Ct. 382, 385, 130 L.Ed.2d 225 (1994), the Supreme Court of the United States maintained the bilateral theory of conspiracy, but explained the absence of a requirement for an overt act. It relied upon the common law definition of conspiracy, as recognized in constructions of the Sherman Act, 15 U.S.C. <section> 1, and the Selective Service Act, and ruled that the language of 21 U.S.C. <section> 846 was modeled intentionally after those statutes rather than the general conspiracy statute. That rationale has to be suspect in Wyoming because our legislature specifically abolished common law crimes and provided, “[n]o conduct constitutes a crime unless it is described as a crime in this act or in another statute of the state.” Wyo. Stat. Ann. <section> 6-1-102(a) (Lexis 1999). In light of that language, it seems a far reach to rely upon federal precedent that invokes a common law definition of conspiracy.

I am satisfied that Wyoming no longer should follow federal precedent that invokes a bilateral theory of conspiracy in controlled substances cases. Our legislature has spoken on the issue, while Congress has not. We should serve cohesiveness in Wyoming law by having only the unilateral theory of conspiracy coupled with an over act for all criminal cases. The overt act specifically is required by our conspiracy statute and serves, in an instance such as this, to protect the individual from any overly zealous law enforcement officer.

The certified question in this case should be answered “Yes” so that the sovereign State of Wyoming can maintain the same consistency in its law of conspiracy that the federal courts have maintained in the federal law of conspiracy.

FN* Chief Justice at time of oral argument; retired November 2, 1998.

FN1. The federal provision provided: Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the

object of the attempt or conspiracy. 21 U.S.C. <section> 846 (amended in 1988 substituting "shall be subject to the same penalties as those prescribed for the offense" for "is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense").
FN2. The American Law Institute approved <section> 5.03 of the Model Penal Code in May 1962. Model Penal Code, supra, <section> 5.03 n.*. However, it was not until the early and mid-1970s that state legislatures began to incorporate the Model Penal Code recommendations into their criminal codes. Note, Conspiracy: Statutory Reform Since the Model Penal Code, 75 Colum. L.Rev. 1122, 1125 n. 8 (1975). Wyoming did not modify its general conspiracy provision until 1982. 1982 Wyo. Sess. Laws, ch. 75. Although no decision of this court expressly decided the question, prior to 1982, Wyoming's statute employed the traditional "[i]f two (2) or more persons conspire" language, indicating the bilateral approach. See Miller, 955 P.2d at 897.

* * *

c) James Dean MILLER, Appellant (Defendant), v. The STATE of Wyoming, Appellee (Plaintiff)[110]

No. 96-89. March 27, 1998. 955 P.2d 892 Supreme Court of Wyoming

Before TAYLOR, C.J., and THOMAS, MACY, GOLDEN and LEHMAN, JJ.

THOMAS, Justice.

The policy issue presented by this case is whether Wyoming is to adopt the unilateral theory or the bilateral theory of the crime of conspiracy. James Dean Miller (Miller) contends that regardless of the resolution of the policy question he was entitled to have the jury at his trial for conspiracy to commit the crime of kidnaping, in violation of WYO. STAT. <section><section> 6-1-303(a) and 6-2-201(a) (1988), instructed on the bilateral theory of conspiracy. He argues that, since the bilateral theory was given to the jury in his first trial, the bilateral theory became the law of the case, which should have been followed when the conviction at his first trial was reversed, and the case was remanded for a new trial. Collateral issues are presented concerning the sufficiency of the evidence to establish the crime of conspiracy under the bilateral theory and prosecutorial misconduct. We hold that Wyoming follows the majority of states in applying the unilateral theory to the crime of conspiracy, and the district court correctly instructed the jury on that theory in Miller's second trial. The record is sufficient to support the conviction of conspiracy to commit kidnaping, and no prosecutorial misconduct occurred that was prejudicial to Miller. The Judgment and Sentence entered in the

---

[110]Courtesy Westlaw. Copyright 2003 Westlaw. Many aids to research have been omitted, double underlines have been added to aid reading and minor reformatting has been made. As indicated prior, the double underlining is to spare all but the *afficianado* of Criminal Law some laborious reading. . . .

district court is affirmed.

In the Brief of Appellant, Miller presents the issues in this way:

I. Whether the trial court erred in failing to adhere to the law of the case established in the defendant's first trial, and in adopting a new and conflicting theory of conspiracy at the defendant's retrial.

II. Whether there was sufficient evidence of a conspiracy to kidnap between the defendant and Ingersoll.

III. Whether the trial court erred in refusing to grant a mistrial after the prosecutor engaged in misconduct by making prejudicial statements regarding the defendant in the prosecution's closing rebuttal arguments.

The Brief of Appellee defines the three issues in this way:

I. Does the law of the case doctrine require that a trial court, upon reversal and remand for a new trial by an appellate court, give the same jury instructions at the second trial as were given at the first trial?

II. Did the State present sufficient evidence of a conspiracy to commit kidnaping involving appellant and Steven Ingersoll?

III. Did the district court properly refuse Appellant's Motion for a new trial after objection was made to the prosecutor's closing argument?

Miller's case comes before this Court for the second time. In Miller v. State, 904 P.2d 344 (Wyo.1995) (Miller I), Miller's conviction for conspiracy to commit the crime of kidnaping was reversed, and the case was remanded for a new trial. At the first trial, the district court instructed the jury on the bilateral theory of conspiracy. One ground for the reversal was instructional error relative to the role of Powell, an individual who had become an informant for the Wyoming Division of Criminal Investigation (DCI). A second ground for the reversal was the failure to grant a mistrial when a potential juror announced that he harbored bias against Miller because he believed Miller to have been implicated in the theft of a horse from him.

Relative to the instructional error, we ruled that, on the instructions given to the jury, Powell could not be a co-conspirator after he became a government agent. We also held that the jury was not adequately instructed with respect to that distinction, leaving open the possibility that the jury found a conspiracy between Miller and Powell after Powell became a government agent. In the course of our first opinion, the Court did not articulate the proposition that the bilateral theory of conspiracy was the law of the case. We spoke to law of the case only with respect to the instruction that advised the jury that there could be no conspiracy with a government agent. By analogy the comment could be extended to other instructions given to the jury, but we carefully articulated the proposition that the instruction was the law of the case only for purposes of that appeal.

Miller I relates the factual background leading to the charges. As reported in Miller I and substantiated in this record, Miller was confined in the minimum security wing of the Wyoming State Penitentiary at Rawlins. There he became acquainted with Steven Ingersoll (Ingersoll), another inmate. Ingersoll told Miller that he had access to some firearms, and Miller endeavored to arrange to purchase weapons from him. The first opinion of the Court discusses Miller's explanation of his involvement by pointing out that he wanted to report Ingersoll's furnishing of the weapons to achieve a reduction of his sentence. Miller previously had turned in weapons at the penitentiary, and his cooperation with the State in that and other ways had caused several

officials to recommend that he be granted a sentence reduction.

Ingersoll contacted his friend, James Stacy Powell (Powell), in Sheridan to see if Powell could get the firearms. Powell said that he could, and their arrangement called for the weapons to be delivered to Rawlins. Powell then would be paid $2,500. Miller's plans expanded beyond the weapons transaction, however, and he decided to pay Powell to "watch somebody." That proposal developed into a scheme for Powell to kidnap Miller's ex-wife and children.

Miller offered to let Ingersoll escape from prison with him in exchange for Ingersoll's help with the kidnaping. Ingersoll again contacted Powell by telephone and asked Powell if he would be interested in the kidnaping, advising him that it would pay $50,000. Following a series of phone calls, Powell advised DCI of this plan, and, that same day, a DCI agent went to Powell's home and arranged to record future phone calls that Powell received from Ingersoll and Miller. Several such calls were recorded between July 14 and July 21 of 1993.

The parties are in accord that the recordings of the telephone conversations with Powell were made while he was acting as a government agent and under the direction of law enforcement officers. Neither party disputes the fact that during these conversations Powell and Miller discussed the floor plan of Miller's ex-wife's home; the place where the hostages would be held; the method of financing the kidnaping; and the possibility that Miller's niece or Miller's brother would help in the abduction. During this same time frame, Ingersoll mailed floor plans to Powell, doing this for Miller who was unable to find a stamp.

On September 13, 1993, Miller was charged with conspiring to kidnap his ex-wife. He initially was tried in Sheridan County and convicted. The jury instructions at the first trial adopted the bilateral theory of conspiracy. The jury also was advised by those instructions that a government agent cannot be a co-conspirator. Following a reversal by this Court and a remand of the case for a new trial, Miller was tried again in February of 1996. At the second trial, the district court, relying on public policy reasons, adopted the unilateral theory of conspiracy and so instructed the jury. Miller made an appropriate objection to that instruction. The district court rejected an instruction proposed by Miller that a government agent could not be a co-conspirator on the ground that the instruction would simply confuse the jury. Miller again was convicted and sentenced to a term of seven to fourteen years in the Wyoming State Penitentiary. Miller now appeals from that conviction.

If accepted, Miller' argument that the bilateral theory of conspiracy had become the law of this case would be dispositive. If the district court was required to instruct on the bilateral theory of conspiracy, it obviously did not do so. We hold, however, that the bilateral theory of conspiracy did not become the law of the case for purposes of the second trial. Miller's claim is refuted by the rules applicable to new trials generally, which also reach the situation in which a case is reversed on appeal and remanded for a new trial.

It is accepted law in the jurisdictions where there has been occasion to consider the question in the last thirty years that when a new trial is granted in a criminal case, the case is tried de novo and rulings made in connection with the first trial are not binding in the second trial. U.S. v. Akers, 702 F.2d 1145, 1148, 226 U.S.App.D.C. 408 (1983); State v. Darwin, 161 Conn. 413, 288 A.2d 422, 425-26 (1971); Bell v. State, 650 So.2d 1032, 1034 (Fla.App.1995); People v. Brown, 222 Ill.App.3d 703, 165 Ill.Dec. 176, 183, 584 N.E.2d 355, 362 (1991), appeal denied, 144 Ill.2d 636, 169 Ill.Dec. 145, 591 N.E.2d 25 (1992); State v. Osburn, 216 Kan. 638, 533 P.2d 1229, 1233 (1975); Hobbs v. State, 231 Md. 533, 191 A.2d 238 (1963); State v.

Cooper, 140 N.J.Super. 28, 354 A.2d 713 (1976), rev'd by, 165 N.J.Super. 57, 397 A.2d 702, 706 (1979), cert. granted, 81 N.J. 56, 404 A.2d 1155 (1979), appeal and cert. dismissed by, 81 N.J. 261, 405 A.2d 806, (1979) (plea of guilty was entered prior to ruling); Com. v. Hart, 479 Pa. 84, 387 A.2d 845, 847 (1978); State v. Squires, 248 S.C. 239, 149 S.E.2d 601, 605-06 (1966); State v. Kinsey, 7 Wash.App. 773, 502 P.2d 470, 471 (1972). Unless specific direction is encompassed in the ruling of the appellate court, the remand of a case for a new trial invokes the same propositions. We are satisfied that this approach is consistent with those cases in which we have reversed an order granting summary judgment and returned the case to the trial court. For example we have said: Husman relies upon the general rule as stated in 5B C.J.S. Appeal and Error, supra, <section> 1950 at 511 [1958], to support its claim: The effect of a general and unqualified reversal of a judgment, order, or decree is to nullify it completely and to leave the case standing as if such judgment, order, or decree had never been rendered, except in so far as rights to a new trial or further proceedings may survive. We agree with the rule cited by Husman and repeated by a large number of jurisdictions around the country. See, e.g., Shilts v. Young, 643 P.2d 686 (Alaska 1981). Triton Coal Co. v. Husman, Inc., 846 P.2d 664, 668 (Wyo.1993). These propositions lead to the conclusion that the district court in this case was not inhibited by rulings made during the first trial, and was free to try the case as though it had not previously been tried. It follows that the reliance by Miller upon the law of the case is erroneous and furnishes no basis for a claim of error upon appeal.

While Miller primarily relies upon his claim of entitlement to relief under the law of the case doctrine, the instruction on the unilateral theory of conspiracy poses a novel question for Wyoming. For that reason we consider whether that instruction was a correct instruction on the law. The Supreme Court of North Dakota has distinguished the bilateral theory of conspiracy from the unilateral theory in this way: "Under a unilateral formulation, the crime is committed when a person agrees to proceed in a prohibited manner; under a bilateral formulation, the crime of conspiracy is committed when two or more persons agree to proceed in such manner. See Note [Conspiracy; Statutory Reform Since the Model Penal Code, 75 Colum.L.Rev. 1122, 1136 (1975)]. Under either approach, the agreement is all-important to conspiracy. Under the unilateral approach, as distinguished from the bilateral approach, the trier-of-fact assesses the subjective individual behavior of a defendant * * *. Under the traditional bilateral approach, there must be at least two 'guilty' persons, two persons who have agreed" State v. Rambousek, 479 N.W.2d 832, 833-34 (N.D.1992), citing State v. Kihnel, 488 So.2d 1238, 1240 (La.App.1986).

Prior to its revision in 1982, as amended in 1983, the statute making conspiracy a crime in Wyoming read: If two (2) or more persons conspire to (a) commit a felony in the state of Wyoming or to commit an act beyond the state of Wyoming which if done in this state would be a felony, and (b) one (1) or more of such persons do any act, within or without the state of Wyoming, to effect the object of the conspiracy, each, upon conviction, shall be fined not more than one thousand dollars ($1,000.00) or imprisoned in the penitentiary not more than ten (10) years or both. A conspiracy may be prosecuted in the county where the conspiratorial agreement or combination was entered into, or in any county where any act or acts evidencing the conspiracy or in any county wherein the furtherance of its purpose took place. Wyo. Stat. <section> 6-1-117 (1977). As revised in 1982, and then amended in 1983, this statute now reads: (a) A person is guilty of conspiracy to commit a crime if he agrees with one (1) or more persons

that they or one (1) or more of them will commit a crime and one (1) or more of them does an overt act to effect the objective of the agreement. (b) A person is not liable under this section if after conspiring he withdraws from the conspiracy and thwarts its success under circumstances manifesting voluntary and complete renunciation of his criminal intention. (c) A conspiracy may be prosecuted in the county where the agreement was entered into, or in any county where any act evidencing the conspiracy or furthering the purpose took place. Wyo. Stat. <section> 6-1-303 (1988).

The new version was adopted from both the Model Penal Code and the laws of neighboring states. See THEODORE E. LAUER, Goodbye 3-Card Monte: The Wyoming Criminal Act of 1982, 19 Land & Water L.Rev. 107, 119 (1984). The Model Penal Code, like the new version of the Wyoming statute, defines conspiracy in the context of a single actor agreeing with another, and this language is said to adopt the unilateral approach. MODEL PENAL CODE & COMMENTARIES <section> 5.03(b) at 382-398 (Official Draft & Revised Comments 1985). While federal courts have continued to follow the bilateral theory of conspiracy, the modern trend in state courts is to rule that a conspiracy count is viable even when one of the participants is a government agent or is feigning agreement. See generally, MODEL PENAL CODE & COMMENTARIES <section> 5.03(b) at 382-398 (Official Draft & Revised Comments 1985); 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., Substantive Criminal Law <section> 6.4(d). Compare U.S. v. Barboa, 777 F.2d 1420, 1422 (10th Cir.(N.M.) 1985) with State v. Null, 247 Neb. 192, 526 N.W.2d 220, 229 (1995); Com. v. Sego, 872 S.W.2d 441, 443 (Ky.1994); State v. Conway, 193 N.J.Super. 133, 472 A.2d 588 (1984); State v. Hohensee, 650 S.W.2d 268, 275 (Mo.App.1982) (rev'd in part on other grounds). The focus under the unilateral theory is on the culpability of the defendant, without any necessity to establish the guilty mind of one or more co-conspirators.

When we compare the first sentences of the earlier and current statutes in Wyoming, we find that the old statute began "[i]f two (2) or more persons conspire to (a) commit a felony in the state of Wyoming * * *," while the new statute reads, "[a] person is guilty of conspiracy to commit a crime if he agrees with one (1) or more persons that they or one (1) or more of them will commit a crime * * *." (Emphasis added.) Our research discloses that most states that have adopted this second definition of the crime of conspiracy have embraced a unilateral approach to conspiracy, and we hold that is appropriate in Wyoming.

Other states have justified the unilateral theory of conspiracy as sound public policy. A person who believes he is conspiring with another to commit a crime is a danger to the public regardless of whether the other person in fact has agreed to commit the crime. As one text writer has expressed the proposition, "such an approach is justified in that a man who believes that he is conspiring to commit a crime and wishes to conspire to commit a crime has a guilty mind and has done all in his power to plot the commission of an unlawful purpose." FRIEDMAN, Mens Rea in Conspiracy, 19 Modern L.Rev. 276, 283 (1956), adopted in, 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., Substantive Criminal Law <section> 6.4(d) n. 109 at 73. Miller's case furnishes a textbook example of the justification for a unilateral approach. Miller's guilty mind was not diminished by the fact that Powell had made an agreement to serve as a law enforcement informant. It is true that Miller's chance of succeeding in kidnaping his family under the circumstances was minimal, but Miller has "nonetheless engaged in conduct which provides unequivocal evidence of his firm purpose to commit a crime." 2 WAYNE R. LAFAVE &

AUSTIN W. SCOTT, JR., Substantive Criminal Law <section> 6.4(d) at 73 (footnote omitted). It is our conclusion that we should follow the majority rule of our sister states, and we hold that valid public policy as well as the language and the legislative history of our conspiracy statute make the unilateral approach to conspiracy the law of Wyoming.

In his second issue, Miller argues that there is insufficient evidence to establish a conspiracy to commit the crime of kidnaping between Miller and Ingersoll. This argument is premised upon the assumption that the bilateral theory of conspiracy is the law of the case, and the concession on the part of the State that Powell could not be a member of the conspiracy. In light of our conclusion that the instruction on the unilateral theory of conspiracy is correct, we have examined the record and are satisfied that there is more than sufficient evidence to sustain Miller's conviction for the crime of conspiracy since under a unilateral theory of conspiracy, the capacity of Powell to engage in the crime of conspiracy is not an issue.

In his final argument, Miller contends that the trial court erred in refusing to grant a mistrial because of prosecutorial misconduct during closing arguments. The denial of a motion for a mistrial is a ruling made within the sound discretion of the court, and can be reversed only when that discretion has been abused. Paramo v. State, 896 P.2d 1342, 1346 (Wyo.1995). As described in Martin v. State, 720 P.2d 894, 897 (Wyo.1986) judicial discretion is: a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Further, the party asserting prosecutorial misconduct is charged with the burden of establishing that substantial prejudice occurred. Armstrong v. State, 826 P.2d 1106, 1115 (Wyo.1992).

Miller’s complaint is premised upon statements the prosecutor uttered during rebuttal argument at closing. The prosecutor said to the jury that Miller's Counsel “asked you to look at the Defendant’s actions through the eyes of a reasonable, realistic and sensible human being. If this Defendant was reasonable, realistic and sensible, he never would have been in the penitentiary in the first place.” Miller’s attorney immediately requested a conference at the bench. Counsel then moved for a mistrial stating that the prosecutor had implied “that because my client had been convicted of other crimes in the past he should be convicted of this crime. “The trial court denied Miller’s motion, but in response to the complaint, furnished a cautionary instruction to the jury which stated: The fact that this Defendant may have been convicted of a prior crime is not evidence that he committed the crime for which he is charged in this case; therefore, you must not consider conviction of a prior crime when reaching your verdict in this case. We hold that the prosecutor’s statement was not improper in the context of the entire argument, but even if it were, any prejudice was cured by the cautionary instruction which the court promptly furnished to the jury. Under these circumstances, there was no abuse of the court's discretion in denying the motion for mistrial.

We hold that when a case is reversed and remanded for a new trial, it stands for trial as though the first trial had not occurred subject to any specific direction by this Court. The trial court was not bound to give an instruction on the bilateral theory of conspiracy because that theory was followed in the first trial, and the unilateral theory of conspiracy is reflected in the statute now in place in Wyoming. Under the unilateral theory of conspiracy there was ample evidence to sustain Miller’s conviction. The trial court committed no abuse of discretion in denying the motion for mistrial. The Judgment and Sentence of the district court is affirmed.

* * *

3. The Socratic "Case Method"

The broad issue is the particular inchoate crime known as conspiracy. In particular, focus is placed on the necessary parties/defendants involved, and the required mental state or mental states. The Socratic method uses a professor, here known as "Socrates."[111] The students are known as "Ms. Jones" and "Mr. Smith."

A dialogue will ensue, meaning to ferret out the law and its tensions in the area of "unilateral" versus "bilateral" conspiracy approaches. Primarily appellate case, but also statutory law, will be used. . . .

SOCRATES: Ms. Jones, avoiding the troubling racism, could you please set out the facts of the MORRISON case, followed by the conspiracy issue, analysis and holding?

MS. JONES: Morrison and Doi were convicted of violating the Alien Land Law of California. This law involved a conspiracy to illegally sell land to an non-citizen.

SOCRATES: That's close enough. But what is a criminal conspiracy?

MS. JONES: It's an agreement between two or more people with the purpose of doing a crime.

SOCRATES: Where did you find that definition?

(Pause.)

MS. JONES: From your class notes last year.

(Laughter.)

SOCRATES: Mr. Smith, can you help with the definition of conspiracy?

MR. SMITH: Well, Gilbert's says about the same thing.

[111] Who else? But no arrogance whatsoever intended. Truly!

(Laughter.)

<u>SOCRATES</u>: Let's return to Ms. Jones. Ms. Jones, although a bit more verbose, I think you'll find that both the California Penal Code and Model Penal Code say about the same thing. Don't they?

<u>MS. JONES</u>: Yes.

<u>SOCRATES</u>: Returning to the MORRISON case, did the court hold there to be a conspiracy to illegally sell the land?

<u>MS. JONES</u>: No, they did not.

<u>SOCRATES</u>: Why?

<u>MS. JONES</u>: Because although Morrison could be guilty of a conspiracy, Doi could not—based on his lack of citizenship. The court reasoned that one person cannot conspire alone.

<u>SOCRATES</u>: Does that make sense to you?

<u>MS. JONES</u>: Yes. It seems obvious.

<u>SOCRATES</u>: But didn't you do the remainder of the reading?

(Blush. Pause.)

<u>MS. JONES</u>: Some of it. I ran out of time due to the Legal Writing paper due today.

(Socrates makes a threatening note in his own notebook.)

<u>SOCRATES</u>: Well, let's continue anyway. If you take a look at section 20 of the California Penal Code, you will note, "to constitute crime there must be unity of act and intent." Ms. Jones, do you know what that means?

<u>MS. JONES</u>: I think so. You spoke earlier in the semester that all crimes require mens rea, or guilty mind/mental state, combined with actus reus, which is bad act/result. These two must occur together. A bad mental state, by itself, is no crime. And, similarly, a bad act, without mental awareness is no crime.

<u>SOCRATES</u>: Mr. Smith, is that about right?

<u>MR. SMITH</u>: Approximately, professor. There really doesn't have to be an act—an omission may suffice; and some crimes require only reasonable person "negligence" or even less of a mental state.

SOCRATES: Gilbert's again?
MR. SMITH: Basically.

SOCRATES: Mr. Smith, you would agree, that Ms. Jones had the definition approximately correct?

MR. SMITH: Yes.

SOCRATES: Okay. So please tell us, what the mental state, or mens rea, of conspiracy is?

MR. SMITH: It is the intent to do the ultimate crime.

SOCRATES: What is the ultimate crime in the MORRISON case?

MR. SMITH: To sell land illegally.

SOCRATES: Isn't there another mental state, another "intent?"

MR. SMITH: I'm not sure.

SOCRATES: Well, take your time. Gilbert's probably has it somewhere.

(Ms. Jones raises her hand.)

SOCRATES: Yes, Ms. Jones.

MS. JONES: I believe it is the intent to agree with another. That is a second intent required of conspiracy.

SOCRATES: Good. Are both necessary for there to be guilt?

(Pause.)

MS. JONES: Yes.

SOCRATES: Why?

MS. JONES: Because all elements must be present for there to be a just finding of the defendant's guilt.

SOCRATES: That is right. But, our discussion is not complete. What is the criminal act, or actus reus, of conspiracy?

MS. JONES: It is the agreement between the two people.
SOCRATES: Is an agreement an act?

MS. JONES: It's usually verbal. So, no.

SOCRATES: But isn't conspiracy a crime?

MS. JONES: Yes.

SOCRATES: So, an agreement to do a crime, must constitute, legally, an act or actus reus.

MS. JONES: Yes.

(Mr. Smith raises his hand.)

SOCRATES: Yes.

MR. SMITH: That makes no sense.

SOCRATES: Doesn't Gilbert's enlighten you on this?

MR. SMITH: Not yet.

SOCRATES: Maybe crimes do not require physical acts or physical omissions; maybe the focus is on prohibited, bad, results.

MR. SMITH: I don't get it.

SOCRATES: Think about it. But now let's take a look at the PALATO case. Mr. Smith, what happened here?

MR. SMITH: Sorry, professor—I did not get a chance to read it.

SOCRATES: Too busy with Gilbert's? Okay, Ms. Jones, can you tell us the facts?

MS. JONES: It's a Wyoming case. The defendant below agreed to buy illegal drugs with an individual, who unknown to him, was an undercover police agent.

SOCRATES: But the defendant was serious?

MS. JONES: Yes.

SOCRATES: Was the officer serious?

MS. JONES: He was serious about arresting the defendant, but not about entering a drug deal.

SOCRATES: Well, it is the latter point that matters. So, was there a conspiratorial agreement?

MS. JONES: No. Since the agreement is the actus reus of conspiracy, there was no conspiracy.

SOCRATES: And, didn't Justice Cardozo indicate something about this?

MS. JONES: Yes: A defendant can't conspire alone.

SOCRATES: Good. Let's turn to the MILLER case.

(Mr. Smith raises his hand.)

SOCRATES: Yes?

MR. SMITH: I can do this case.

SOCRATES: I thought you said you were not prepared.

MR. SMITH: Well, while you were talking to Ms. Jones, I took the opportunity to read it.

(Laughter.)

SOCRATES: Okay. Just the facts, first.

MR. SMITH: Defendant Miller conspired with a government agent to buy illegal firearms.

SOCRATES: Well, that is about the long and short of it. One question: was the government agent corrupt, or was he ferreting out defendant Miller?

MR. SMITH: He was an honest agent.

SOCRATES: So, there really was no agreement.

MR. SMITH: Right—but Miller thought there was.

SOCRATES: Does that make Miller guilty of conspiracy?

MR. SMITH: Yes. This case follows the newer unilateral approach.

SOCRATES: What does that mean?

MR. SMITH: It means that the defendant has to believe he is agreeing to a criminal conspiracy,

but it does not matter if, in fact, he is.

SOCRATES: So, here, our defendant thought he was agreeing . . . and intended to agree to a gun deal, but the other party, an officer, was not really agreeing. He was just making believe. Is there any authority for this view?

MR. SMITH: The case and the Model Penal Code.

SOCRATES: So the focus is on the defendant's intent. The other party becomes almost irrelevant. Right?

MR. SMITH: Right.

SOCRATES: Did you see the movie *The Sixth Sense*, with Bruce Willis and Haley Joel Osmont?

MR. SMITH: Yes.

SOCRATES: If you can remember, what was the key line?

MR. SMITH: I Think it was when the little boy confided in his psychologist that he saw dead people.

(Laughter.)

SOCRATES: So, under this unilateral conspiracy, which has caught on, can we convict a defendant for conspiring with dead . . . or even imaginary people, provided he believes it?

(Pause.)

SOCRATES: Well?

MR. SMITH: Yes.

SOCRATES: And that's the law.

MR. SMITH: I hope not.

SOCRATES: Ms. Jones, is there another crime that would more logically fit Miller's request to the officer.

(Pause.)

MS. JONES: I think there is. It would be criminal solicitation—which is seriously asking another to commit a crime.

SOCRATES: Okay. Our time is up. Next class we will move on to attempt and other forms of accomplice liability. And, incidentally, should the crime itself, which is the object, matter—when deciding whether it takes an actual agreement or not? Well, that's how it is sometimes. . . .

4. The Lecture Method

"Today we are going to continue our discussion of the inchoate crimes. Inchoate literally means incomplete, but the three traditional inchoate crimes: solicitation, conspiracy and attempt were punished as true crimes . . . and in that sense were complete. The focus of today's lecture is on conspiracy. . . .

"Like the other inchoate crimes, conspiracy requires the defendant possess the intent to perform a traditional substantive crime, such as murder, arson, burglary . . . or a newer crime such as drug dealing. The intent can be proven by confession or by the facts and circumstances surrounding the case—the so-called 'circumstantial evidence.'

"Also like the other inchoate crimes, a physical harm has not necessarily occurred. Granted, however, the fact that there is a criminal conspiracy, i.e., an organized group bent on disobeying the laws of the land, is something of a completed act, in and of itself. For that reason, there are many present-day crimes which address punishing criminal enterprises. Perhaps the most important of these is *RICO—Racketeer Influenced Corrupt Organizations*. However, *RICO* is better left to an advanced course in Criminal Law, such as Federal Crimes. But, when you study it, you will note it has its roots in the law of conspiracy.

"Now we need to back track a bit. . . . All crimes in our Anglo-American system are comprised of two types of element: a mental state; and an act. Traditionally, at the old English common law, we called the mental state, mens rea. We called the act, actus reus. The large body

of crimes include many different types of mental states, such as: actual intent to perform the prohibited act; premeditated and deliberate intent to perform the prohibited act; knowledge or belief that the prohibited act will occur; conscious disregard that the prohibited act will occur; or negligence/sloppiness regarding the prohibited act occurring. However, the three basic inchoate crimes, and relevant to us today (conspiracy), mandates that there be actual intent that the object of the conspiracy occur.

“There may be a reason to require actual intent for all of the inchoate crimes. That is, since the criminal goal was not necessarily brought to completion, we want to insure that there was, at the least, the evil intent.

“Now with conspiracy, the actus reus, or act, is simply an agreement with another person to commit a crime. If we examine this closely, we will find that an agreement is not an act in the literal sense. It is a verbal ‘act.’ This verbal act, to compound confusion, has within it the intent to agree. I hope you can live with that, although it does indicate that the criminal law concept of actus reus is really ‘short form’ for *responsibility for the bad result*.

“Please allow me to elaborate on that latter point. The actus reus is satisfied if the defendant hires an agent to, let’s say, do a killing. Undoubtedly, he or she is responsible. Additionally, a parent must feed his or her infant child. If the parent fails to do so, this *omission* constitutes, as a matter of law, a legally sufficient actus reus. So, there can be verbal ‘acts,’ provided the spoken word is reasonably adequate to cause a criminal result. The agreement element, sometimes called a ‘criminal combination,’ is the actus reus of conspiracy.

“Before delving into this agreement in more detail, please note that many of the present-day conspiracy statutes also require at least one of the co-conspirators to perform some minimal

preparatory act (and here ‘act’ is used literally) in order to ‘set up’ the ultimate crime. For those jurisdictions so utilizing this, this preparatory act serves as a safeguard to insure that criminal punishment is appropriate. . . .

“Now let us return to the agreement. We have already realized that for a conspiracy agreement there is inferred an intent to agree. An interesting fact pattern occurs when one of the alleged co-conspirators, in fact . . . or law, does not agree. Let us say, that conspirator B is brought to trial, and due to poor prosecutorial conduct is acquitted of the conspiracy. Or, let us say that conspirator B turns state’s evidence in return for a lesser charge, and is thus not prosecuted for conspiracy with co-conspirator A.

“In such an instance, can A be found guilty of conspiracy? The old English and early American ‘common law’ position was that A could not be found guilty. The reasoning was elegant and simple: one cannot conspire/agree all by him or herself.

“But the result is unsatisfactory. There was, in fact, an agreement. It is just a ‘technicality’ that one co-conspirator was either incompetently prosecuted, or was let off the hook, for legitimate reasons. For that reason, most present-day jurisdictions require proof only that A and B agreed and that each had the intent that the ‘target’ crime, such as murder, be committed.

“However, as you have noted in the semester thus far, the criminal law is complicated, not altogether consistent and is replete with many terms which are complex, at best. For example, the term ‘malice’ means much more . . . and less than ‘evil.’

“So, like many of the other areas in American law, attempts were made to make the law among the several states uniform. Restatements were written. You have read portions of these in

your other courses. Additionally, in the law of Contracts, a Uniform Commercial Code was drafted. It was greeted with acclaim. All but one state has adopted it as the new law of Contracts. In Criminal Law, a Model Penal Code was drafted and offered in 1962. Although it has had substantial influence, not even one state has adopted it in whole. Most states remain primarily influenced by the common law, their own experimentations and United States Supreme Court pronouncements indicating the limitations of criminal punishment in a free society. Incidentally, the constitutional limitations are the subject of the two term Criminal Procedure course which you will take later in your studies. . . .

"Now back to the Model Penal Code. . . . In your readings you will note that the Model Penal Code allowed an interesting twist to the requisite conspiracy agreement. Although the conspirator had to intend that the target crime be perpetrated, and had to intend to agree with another—there need not have been an actual agreement. The conspirator had to *believe* there was an agreement, but that 'agreement' could have been imagined or faked by the other 'co-conspirator.' This is called the 'unilateral' approach to conspiracy. A few minutes ago, I alluded to the situation when there was, in fact, no agreement.

"At the common law, were there no agreement, there was no conspiracy. The actus reus was missing. But using the Model Penal Code approach, there is a conspiracy. For example, if A agrees with undercover officer B to sell illegal drugs, since A intended to sell the drugs, since A intended to agree with B . . . and since A believed there was an agreement, A is guilty of conspiracy.

"We would all probably agree that A is criminally culpable. The disagreement comes in naming the appropriate crime. Many, and the common law traditional position, would hold A not

guilty of conspiracy—since there was no agreement, in fact. However, A would be guilty of another different inchoate crime 'solicitation.' Solicitation is enticing another to commit a crime (here illegal drug dealing), with the intent to drug deal.

"It might be argued that since A is guilty of some crime, what does it matter? Well, let us say that A, delusional, sees a demon and then agrees with the demon to perform a murder. After illegally purchasing a gun, A is caught. Under the Model Penal Code 'unilateral' approach, A is guilty of conspiracy to commit murder. Under the common law it would be a solicitation, an asking . . . or perhaps an attempt (were there a substantial step to completion of the murder).

"Some of you might be thinking, how silly—A is legally insane and thus not guilty. Though perhaps silly, A is probably not legally insane. Insanity, as a matter of law, requires not only a mental disease, obviously present, but the inability to know right from wrong (or in some jurisdictions, the ability to control him or herself). A is probably *legally* sane.

"All things being equal, we would like the law to be grounded in common sense. It is problematic to most that our insane defendant A is guilty of conspiracy to commit murder . . . with an imagined demon. Less problematic, though still troubling, is convicting sane defendant A of agreeing/conspiring with an honest undercover police officer to distribute drugs, when the officer, in fact, really did not agree.

"Be that as it may, you now know both positions on the 'agreement' element of conspiracy. In addition, perhaps you have gained an insight as to why the Model Penal Code was not uniformly adopted. Finally, it is hoped that the complexity of the law cannot be divorced

from common notions of reality. . . ."[112]

5. The Clinical Method

Undoubtedly this method is needed. As, at one time, the *only* method, it is a throwback to the apprentice method. However, used in combination with another method, it allows the student to deal with real clients with real problems, and be tutored by the supervising clinical director so as to aid the client. It is certainly an essential part of legal education. In addition, it serves as a "patch" to the legal confusion borne of the use of a solely Socratic/case approach; and it serves as a "patch"—in a different way—to the lecture method, by mandating interaction, as opposed to passive listening, which will result in a more thorough understanding and ability to use the material. Finally, since most law school clinics serve the poor, the unspoken, but the very real, underlying lesson is that lawyers can and do positively aid society.

6. The Problem Approach

This is not so different from the Socratic/case approach, *supra*. It has the disadvantage of not providing key sources. Paradoxically, it has the advantage of forcing the law student to learn research skills . . . so as to find those sources.

7. Tutorial

Popular both in England and Continental Europe is the so-called tutorial approach. As a practical matter, it is simply not economically feasible to teach all courses this way—since the

[112] *Supra note* 100.

student-professor meetings are much more demanding of professor time, and the intensive research is more demanding of student time. With a law school of three years and several hundred students, it can be utilized in only a few courses.

The approach proceeds as follows. . . .[113] The following four factors are utilized: 1) organization; 2) research; 3) creativity; 4) clarity. In addition, there should be 10-15 pages final product per unit and 25 pages, at a minimum, for the research to be substantial. In fact, masters and doctoral theses should range in the vicinity of 200 pages.

Tutorials require picking/narrowing an appropriate topic, one to three outlines, many personal or email conversations regarding progress and direction, and two to five drafts.

Regarding choosing the topic, it is important to pick a topic that is relatively new and lacking in scholarly work. Seek to write on a topic that is interesting and relatively unaddressed in legal academia.

Regarding the research, good places to begin include law review articles and journals. There must be adequate research to support all of the paper's propositions and legal arguments. The Internet might also help . . . and can be cited via date and web site.

The paper, itself, must be well-organized. The introduction should set a clear road map for the reader. In addition, background information must be provided so as to let the reader know the framework of the paper, i.e., the context. All substantive arguments must be supported by case law, statutes, law reviews, journals—or indicated that they are original arguments which

[113]My experiences as a philosophy undergraduate, law student, graduate law student, and professor indicate that this is a fair statement of the "tutorial" method.

"break new ground." Of course, conclusions should logically follow from the premises.

Quotations, non-original ideas, back-up for thesis ideas, and digressions should *all* be footnoted. Footnotes serve two major functions: First, they specify to the reader the exact sources for the propositions and quotes; Second, and equally as important as citing, footnotes should be used to digress from the text. Anything that does not fit neatly into the text may be discussed in the footnotes. Furthermore, related issues may be identified and discussed. Footnotes provide a meaningful opportunity to discuss personal opinions and views on the issues without taking away from the logic of the main arguments in the text.

The editing stage is a highly important stage in writing. Great papers are not written in one draft. Rather, it is the redrafting of a paper that takes it to the next level. Use the editing process to make sure that all of your citations are correct, to fix any transitional errors or "flow" problems throughout the text, and edit to correct any spelling and grammatical flaws. Furthermore, use the editing process to fill-in gaps in the argument and to add additional new ideas. A good rule of thumb is that a final paper will be the fifth version.

Communication with your tutor/professor is essential. Brainstorm about ideas. Use the professor's knowledge to help you gain insight into your topic and explore possible avenues that you may want to pursue in your paper. The professor's "criticism" is designed to allow you to create a cogent "seamless" statement worthy of reading and a piece which contributes to the growing body of knowledge.[114]

---

[114]Dangers in tutorials include: ineffective teachers, lax teachers and power hungry teachers. Creation of the term "A.B.D.," indicates such. Many a student has been caught in "the bowel of the academic beast," unable to complete the doctoral tutorial—"All But Doctorate." Of course, "Ph.D" is the goal.

8. The Apprentice Method

In a small community, with highly ethical practitioners, the apprentice method is ideal. Here, the experienced lawyer chooses a student who he or she believes to possess great potential. The apprentice then "shadows" the lawyer throughout his or her law work: phone calls, email, writs and motions, court appearances, research, negotiations, etc. In ideal form this is the ideal way to learn law.

And, in fact, most law school graduates, do, in fact, apprentice both during law school and in their first one or two law jobs. However, even as such, it has many limits, to follow.

Some "bosses" are not only poor teachers, but they are rude. This sets a poor role model for the new attorney. Additionally, apprentices are, as a rule, not paid well. Although it is obvious that they do not deserve the money paid to an expert law practitioner, abuse in pay is rampant.[115]

Perhaps most fundamentally, our country, and the several states, are too populous to allow this system to effectively work. Absent a thorough exam—and even a three day exam can do only so much regarding competence and ethics—many an apprentice will "slip through" with the aid of the corrupt or lax mentor. In addition, there are not enough mentors to go around.

Thus, apprenticing, at best, can be only an ancillary aid to the practice of law. Its best parts are included in clinical legal education. Its worst parts are relegated to unsuccessful

---

[115] *Bates v. State Bar of Arizona*, 433 U.S 350 (1977) indicates that prior state bar fee setting was, in part, a way to mandate too low pay for new attorney "apprentices.

experiments in the history of American legal education.[116]

9. The Bar Exams

[116] *See* STEVENS, *supra note* 1, on this aspect of Jacksonian Democracy.

A diminishing few states allow graduation from one of their own law schools, having taken delineated courses and having received honors grades to be admitted, without further exam, into that state's bar—the so-called "diploma privilege."[117] The practice, by and wide, is to test students six ways: a) prior to graduation, the multiple choice 50 question Professional Responsibility/Legal Ethics exam called the MPRE (Multistate Professional Responsibility Exam);[118] b) to mandate that the student attended and graduated from an American Bar Association approved school;[119] c) just prior to graduation that the student complete a detailed history of their lives, focusing on "moral fitness;"[120] d) that the law graduate pass the Multistate portion of the bar exam consisting of 200 challenging multiple choice questions;[121] e) that the student pass six one-hour essays on diverse parts of the law—closed book;[122] and f) that the

[117]*Id.* at 26-27.

[118]National Conference of Bar Examiners.

[119]Most all of the 50 states require this.

[120]*Id.*

[121]*Id.*

[122]*Id.*

student pass two “performance” tests—closed book “libraries,” where advice is sought, typically from a fictional supervising attorney, as to the merits of the case.[123]

[123]*Id. See, e.g.,* California Bar Exam.

It is essential with a large population such as our own that there be uniform bar testing. However, bar pass rates vary from as high as 90% for first time takers, to as low as 50% for first time takers.[124] This indicates either poor education . . . or that the bar exam is for some states an entry barrier.[125] Be that as it may, it is not disputed that a bar exam is needed. Now let us proceed to discuss the six parts. . . .

a) The Multistate Professional Responsibility Exam (MPRE)

This 50 question standardized national test, produced by the National Conference of Bar Examiners, is known by students for two things: 1) it is an extraordinarily tricky multiple choice test; 2) paradoxically it has a high passage rate.[126]

The test utilizes the *American Bar Association Model Rules of Professional Conduct*,[127] which is the majority code adopted by the several states,[128] the *American Bar Association Model Code of Judicial Conduct*,[129] also the several states' majority code, United States Supreme Court constitutional pronouncements impacting lawyers,[130] and generally-recognized principals of law (as background).[131]

---

[124]Fifty percent is a typical California first-time taker figure.

[125]STEVENS, *supra note* 1.

[126]National Conference of Bar Examiners.

[127]*Id.*

[128]*Id.*

[129]*Id.*

[130]*Id.*

[131]*Id.*

Mandating a general ethical norms test is good. Of course, only fools believe that knowing the rules creates automatic compliance with same![132] But the test, and it is hoped unintentionally,

has a truly dangerous aspect. It poses, usually laboriously, a fact pattern; then demands choice of “A,” “B,” “C,” or “D.”

[132]Laws are created because people do not follow acceptable norms. Laws then give “notice” as to punishment if the “law” is disobeyed. But, it is naive to believe that the enactment of the law cures the problem. Certainly some are dissuaded from corrupt conduct due to fear of punishment—but the law is, at best, a start to solving the problem—not an end.

As a general thesis, legal ethics demands obedience to the court and its rules, loyalty to the client, and *suggests* aiding the over-all well-being of society.[133] Certainly some rules may not be obvious at first blush, e.g., a written informed disclosure is required when there is a potential conflict of interest,[134] or that new sexual relationships with clients are *per se* forbidden[135]—but for the most part, the rules are simple.

---

[133]*See generally*, Jeremy M. Miller, THE EXAM SOLUTION: PROFESSIONAL RESPONSIBILITY (Fleming's Fundamentals of Law 2002) [hereinafter cited as MILLER].

[134]*See, e.g.,* ABA MODEL RULES OF PROFESSIONAL CONDUCT 1.2(c); 1.6(a); 1.7(b).

[135]*Id.* at 1.8(j).

However, a passing score of 35 right . . . and 15 wrong is rather shameful! If the unspoken point is that attorneys should not take understanding of ethics rules for granted, this author can grudgingly approve of the underlying philosophy. But, since it is well-documented that a lack of *diligence*,[136] a lack of *competence*[137] and actual *corrupt* overreaching[138] are the true ethical flaws shown by the "bad apples" in the community of attorneys, is it not a bad, a culpable, thing to indicate that these ethical rules are, at best "tricky," and at worst, "unknowable?"[139] Many a student is left with a sense of legal ethics best described in one word: "amoral."[140]

b) Graduation from an American Bar Association (ABA) approved law school

Accreditation of schooling, as a good until itself, might well have been placed in the "Assumptions" portion of this paper. For the most part, ABA approved schools are structured as 501(c) not-for-profit corporations. This allows a substantial donor base, and accordingly allows the less affluent, but gifted, student to study law.

---

[136]*Id.* at 1.2.

[137]*Id.* at 1.1.

[138]*Supra* note 1.

[139]This anecdotal, admittedly. However, of the several thousand students to whom I have MCLE lectured, classroom taught and bar review lectured . . . I hear this comment upwards of 25% of the time. It is not that I oversimplify, nor is it that I am "that good." The method is bad, pure and simple.

[140]*Id.* I really mean no harm to my peers. But, Legal Ethics is an area which should be simply taught.

In addition, the ABA Standards for Accreditation,[141] mandate substantial libraries, a 25:1 student to full-time faculty ration, minimum objective criteria for student admission, and an impressive building and library for students and professors to study.[142]

[141]They have undergone revision due to pressure from the United States Department of Justice, the United States Department of Education, and changing times—but these basic guidelines still hold true.

[142]*Id.*

How could there be a problem—real or imagined? Unfortunately there are problems. Would-be schools cannot be accredited when they open their doors to students for the first time. A minimum of one year operation is mandated.[143] That makes opening a law school a risky business for all but the well-connected and well-endowed university.[144] Since the ABA Standards are somewhat amorphous, it has been felt by many that this process of accreditation serves not only to promote quality in education; but also serves to limit the number of law schools and lawyers—thus keeping legal fees higher than necessary.[145]

As such, the ABA has suffered many a law suit and settlement from the United States Department of Justice.[146] Although the ABA is not "pure as the driven snow," in this less than perfect world, it appears that ABA approval is, nevertheless, a necessary "evil." It more properly

---

[143]*Id.* This is the "nasty" one!

[144]There are only 180 ABA approved law schools in the United States. This author, as a founding dean, felt the arbitrary quality in the Standards. Fortunately, my university could withstand an initial setback.

[145]STEVENS, *supra note* 1.

[146]*Id.* And, the author only touches the proverbial "tip of the iceberg."

can be stated that it is, when all is said and done, a good thing.[147]

c) The Moral Fitness Inquiry

[147] Unfortunately power corrupts. That is the nature of groups. But, taking a long and hard look at the American Bar Association, undoubtedly, it has been a positive force in legal education and the law. However, to ignore its shortfalls is to cast distrust on the thesis of this paper and this author's good faith.

Although completing a history of one's home addresses, jobs, schooling, law suits, and law convictions is a daunting task—particularly for the older student; this, too, is a necessary "evil." Subject to abuse, yes,[148] it nevertheless insures that felons and those of corrupt or incompetent life history,[149] be shielded away from an unsuspecting public. In addition, if a future complaint is made by the public, bench or bar, the on-record "moral history" may indicate a pattern of disingenuity deserving of suspension or disbarment.[150] In sum, this is a good thing.

d) The Multistate Bar Exam (MBE)

These 200 multiple choice questions cover the basic areas of law: Contracts, Torts, Criminal Law and Procedure, Constitutional Law, Property, and Evidence.[151] Minimum competence in these areas is essential. However, although the multiple choice format lends itself to both uniform and efficient grading, it has little or nothing to do with ethical and competent legal practice. Competent lawyers research, spend the time necessary, do not guess at a client's expense, and "score" far better than the 70% needed to pass this test.

Please allow me to illustrate with a hypothetical question, based on the prior readings,

---

[148] *Cf. Spevack v. Klein*, 385 U.S. 511 (1967). Lying, cheating, stealing, irresponsibility with money and engagements, a proclivity to violence, a disrespect of clients, and the like are the proper realm of Legal Ethics/Professional Responsibility. Gender, religious and political bias have nothing to do with "moral fitness."

[149] Certainly a fraudulent and/or criminal past . . . as well as a shown inability to handle money *should* disqualify one from the fiduciary job of being an attorney.

[150] Discipline of attorneys is not for punishment, in a criminal or tortious sense. It is to protect the public from dangerously corrupt or incompetent attorneys. Therefore a shown pattern, although in the past, is relevant. *See generally* MILLER, *supra note* 133.

[151] The Multistate Bar Exam, prepared by the National Conference of Bar Examiners

supra. . . .

QUESTION 101

Don is a drug dealer. In order to maximize his trade and income, he frequents school playgrounds. When he notices teenage students smoking cigarettes, he approaches them, using his best charms. If the conversation proceeds well, he offers them marijuana. If they refuse, he leaves.

Undercover officer Olivia, having heard of Don's misdeeds, infiltrates the group of students. One day, Don offers her marijuana for free. She accepts.

The next day, Don suggests that Olivia and he distribute marijuana to willing students at the high school. Olivia feigns agreement. Don and Olivia set up a profit-sharing agreement, and Don furnishes Olivia five ounces of marijuana. Don is arrested on a charge of conspiring to distribute marijuana. Assume this jurisdiction follows the common law. Is Don guilty of the conspiracy charge?

A) Yes, because he intended that the drugs be distributed.

B) Yes, because he intended to agree with Olivia, did agree, and intended to distribute the drugs.

C) Yes, because there was an overt act in furtherance of this conspiracy.

D) None of the above.

D is the correct answer. Although multistate questions, as a rule, assume the law to be the common law, that is stipulated here. A is incorrect because it is incomplete. A criminal conspiracy requires more than intent to perform the object. In addition, A is incorrect, because the common law followed the "bilateral" approach to conspiracy, and here there was no actual agreement. B is incorrect for similar reasons. In addition, B overtly states that there was an actual agreement between Don and Olivia. There was not. C is incorrect not only in its conclusion, but in its indication that an overt act in furtherance of the conspiracy is necessary. The overt act requirement is applicable to modern law, not the common law. Therefore, D, although incomplete, is the best choice.

("NCBE").

* * *

Query: although success on this question does require a certain mastery of the law, does it truly promote lawyer ethics and competence? It may be the best that can be done. But, research and diligence will promote a better attorney than this question. An underlying concern is that a premium is placed on the use and discovery of trickery. Is that "skill" at the heart of being a "good" lawyer?[152]

e) The Six Essays

[152] I have yet to meet one attorney who has been asked . . . or offered to show competence and ethics to a client or judge by filling out a multiple choice test. It may be again, that this mode of testing is "the best we can do," but I doubt. It seems to this author that instead of devising a better test, we are fitting sentient humans into machine-gradable forms . . . pretending we are testing lawyer skills. *We are not.* This is human minimization, reduction, of status.

Most bar exams require six essays, giving usually one hour to complete them. They are closed book. As a frequent official writer of essay questions and answers[153] and a bar review writer, the problems with this mode are obvious. First, good attorneys research before giving opinions. This closed book test does not allow that.

Second, the test, even without research materials, takes far more than an hour to complete. Thus, corners must be cut. That is a bad ethical lesson on just what it is to be a competent attorney.

Finally, like the pattern established in law school of assigning more than can be read, by all but a few, students learn to "fake it." The bar readers, inexpert regarding most of the exams,[154] are sensitive to a paper that appears orderly, i.e., it has headings, it begins with rule statements (mostly right or "sounding" right), and ends in an orderly way. A student receiving a "70" or "75"will pass the exam—but with an unspoken lesson that incompetence can be disguised.

---

[153]I do not know that this indicates anything other than experience. However, for 15 years I have written questions and answers for several bar review companies . . . and one sister state. Although I do not approve ethically of the test, I take a certain ethical pleasure in de-constructing its most devious parts. And, the exams I write are, though difficult, anything but devious.

[154]Bar readers are new attorneys, paid low wages for reading, spending little time per "blue book," while searching for a law job.

f) The Performance Exam

Though most difficult to prepare and grade, this is the closest test to that reflecting the ability to competently and ethically practice law.

10. The Platonic/Dialectic Method

As an unfortunate rule of thumb, the great philosophers did not write their thoughts. What we have is from their students.[155] This holds true of Socrates. However, it is commonly believed that Plato's first three dialogues detailing the teaching and sentencing to death of Socrates (for "corrupting" youth), are close to Socrates' philosophy. In the central of these three, *The Apologia* or sometimes called, *The Apology*, Plato sets out Socrates' defense and methodology.

The defense was simple: Socrates was a good citizen and a good influence.[156] The method was the "dialectic."[157] The dialectic was an intellectual technique of discussion whereby

---

[155]The knowledge in the books may well stay in the books. *Cf.* Lewis Carroll, ALICE'S ADVENTURE'S IN WONDERLAND ch. 1 (1865). [If nothing else, that is a book long in need of citing in an academic law article.] Socrates, Aristotle, Jesus, Confucius, and countless others left to their students the task of recording. This may indicate why Plato used a dialogue method, and why law teaching is interactive. This mode works better.

[156]PLATO, *supra note* 18, at 3. THE APOLOGY is also often called SOCRATES' DEFENSE and THE APOLOGIA. It sets out the very likely fact that Socrates, charged with corrupting youth, was a great moral teacher. Put to death, and bravely accepting his fate, he inspired his dazzling disciple, Aristocles (pen name Plato) to form the basis of Western Philosophy. Of course, Socrates made no apology. *This paper is dedicated to both Socrates and his student Plato—for seeking truth, in humility, and being willing to pay the price for going against the tide of the times. Time is the true measure in this realm–but few see their victories. All of us law professors try, in our own small ways, to make the law better. Socrates and Plato did. We know of their success. They did not. For most of us, we can only hope we do no damage.*

[157]The dialectic was a highly demanding intellectual discipline, whereby falsity was

the "razor" of logic used in intellectual conversation to disprove internally contradictory answers to a certain query.[158]

---

driven out by internal contradiction. The goal of the Platonic dialectic was discovery of the eternal "forms" or "Ideas"—such as The Good. The great Vedic sage, Shankara, used a similar method, in THE CREST JEWEL OF DISCRIMINATION, as did Veda Vyasa in THE BRAHMA SUTRAS. (Dates are not furnished since translations are plentiful . . . and no specific page cites are herein provided.)

[158] PLATO, *supra note* 18.

In later dialogues, widely believed to be Plato's own thought,[159] he further elucidated this method. It began with a query, proceeded to postulate, disproof, narrowing of the question, disproof, some agreement . . . and finally a lecture by typically "Socrates" as to the most logically correct conclusion.

Applying this to the method of law teaching is simple: begin with the so-called Socratic/Case Method, and end with a summary lecture.[160] Certainly, as well, there is a valuable place for clinical education, tutorial and apprenticeship.

V. Conclusion

Although we have much to be proud of as legal academics, the plethora of criticism leveled at lawyers suggests we take a hard look at our methods of teaching. It has been assumed here that we, as teachers, not only ultimately impact the *competence* of our students, but also the *ethics* of our students. It has also been assumed that our manner of teaching, our personal interface with students and the examples we set, become a significant part of the students' world view as lawyers. Finally, it has been assumed that the adversary system of justice is a good one, and requires intellectual toughness and argument skills.

However, the characteristic over-assignment of reading, as demonstrated by most every law professor who pays attention to his or her students' responses, encourages "brinkmanship"

---

[159] *Id.*

[160] Law teaching methods 3 and 10 combined, *supra.*

and ultimately lawyers who “skimp” on client work. That is one negative effect of the Socratic/Case Method.

In addition, although Socratic/Case Method dialogue is intellectually stimulating, it is often intimidating to many students (to the point of felt humiliation), and confusing to most students—since conclusions are typically not furnished by the professor. The ability to argue, *rhetoric*, a necessary lawyer skill is maximized. This is good. But competence in the law is often minimized.

Additionally, the professor as role model, when leading the discussion to untenable confusing areas, without clearing up the morass, is abusing his or her power. At worst, the professor is not only teaching the future lawyer how to intimidate clients, but also how to bill more for areas which may not be all that demanding.

Combining method three, *supra*[161] with method ten, *supra*[162] is not only a quick fix, but a thorough one. Socratic/Case Method dialogue is a good beginning and middle—but it needs to be completed via learned summary lecture. In addition, other time-honored techniques derived from the apprenticeship method, such as tutorial and clinical legal education will be a real part of all good legal educations.

As for examination, it is naive to believe this is not a real and lasting technique of teaching. Arbitrary multiple choice questions, and those which are difficult, simply because they are tricky, should be eliminated. It is also suggested that closed book, time-pressured bar essay

---

[161]The Socratic Case Method—with compassion.

[162]The Platonic lecture conclusion to the dialogue—with clarity and compassion.

questions be abolished in entirety. Only open-book library "performance" questions should be used on the bar exams.

Lastly, although it can be frustrating and seemingly futile to treat all students with respect, as "ends unto themselves"[163] this is fundamental to producing lawyers who are integral to a just and free society.

VI. Appendix

In the early 1800s, the idealist jurist, David Hoffman, perceived a need to codify a professional responsibility legal ethics code. As a first attempt, it is wonderful. However, it "volleys" between hard-core ethical rules,[164] and spiritual ethical rules: ". . . I will be always courteous . . .[165]" This "code" became known as *Hoffman's Resolutions* or *Hoffman's Fifty Resolutions*.[166]

As of this writing there are now more than enough legal ethics codes.[167] However, there is a perceived lacking in a *spiritual* legal ethics code, i.e., a "code" which will pragmatically inspire the lawyer-reader to be a better lawyer and person. What is offered here is inspired by Judge Hoffman, but it is more esoteric. Of course it is not meant to be binding. However, it

---

[163]*See generally* KANT, *supra* note 16.

[164]*See* David Hoffman, RESOLUTIONS IN REGARD TO PROFESSIONAL DEPORTMENT IN A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY XLIII (2d ed. 1836) (regarding converse with represented clients).

[165]*Id.* at Rule V.

[166]STEVENS, *supra* note 1, at 4, 12.

[167]These include the ABA model codes and the codes of the several states.

traces the life of the lawyer from beginning to end, through learning, success, failure, and meaning. Like the earlier part of this paper, it means to make better lawyers, via a different angle. Well, it either speaks for itself, or not at all. . . .

VII. Fifty Resolutions on Ethics and Law

I. I will not do anything in or out of law practice that I know to be unethical.

II. I will not do anything in or out of law practice that I believe may be unethical.

III. I will carefully read all the state codes on lawyer conduct once each year.

IV. I will read both the State Constitution and United States Constitution once per year.

V. I will read one book per year by a great lawyer—of my choice.

VI. I will read one book per year by or about a great human—of my choice.

VII. I will read one book per year simply for enjoyment.

VIII. If I am uncomfortable with the general legal ethics hierarchy of honesty to the judicial system, loyalty to my client, and as a tertiary goal, aid to society; I will seek another means of livelihood . . . or an aspect of law which allows me to continue with my own code of personal ethics.

IX. Although I may under bill, I will never over bill, or lie as to the means of calculation.

X. Although I will take pride in being a fine advocate, I will discredit opposing parties only insofar as is legally appropriate—and I will never take joy of discrediting any man, woman or child.

XI. Although I have earned my law degree, my license to practice law and a supervisory position, I will always remember that, we all leave this world as we came: "penniless and

powerless.” Therefore I will treat all humans with respect.

XII. I will never treat a fellow lawyer, client or opposing party as an object—a means to an end. Though I may oppose them, I will treat them with the same dignity that I would wish to be treated.

XIII. Though painful, once I realize I am incompetent in a matter, I will withdraw; and take all reasonable measures to protect my client’s position.

XIV. If ever, I find that I have lost my emotional stability, or am abusing chemicals, I will immediately seek professional help; and insure that my disease does not hurt others—both clients and acquaintances.

XV. I will refrain from humor and comment involving bias of any kind. Too much of the world’s sorrows have come from this bias.

XVI. I will gently disapprove of another’s bias, verbally and openly, for it takes positive action to effect positive change.

XVII. Although I will forgive myself the human foibles of anger and the like, I vow to wait 24 hours before verbalizing, writing or acting on the anger—even if I perceive it to be righteous.

XVIII. Although I will not vow to, I will hope that I report to the State Bar truly corrupt or incompetent lawyers, judges and law students.

XIX. I will forgive myself and others when forgiveness is warranted.

XX. When faced with wicked souls whose conduct is outside my control, I will strive for detachment.

XXI. When faced with good souls whose conduct is unrelated to my life, I will inwardly, and outwardly when appropriate, praise them.

XXII. When in the company of the truly Wise, I will bow in my heart, saluting their accomplishment.

XXIII. I will never walk out of an MCLE lecture, absent it being corrupt. Although the lecture may be poorly done, I am dishonoring the lecturer, the audience and the system mandating this.

XXIV. Although I may have learned much, I will not force on others my views, absent being asked.

XXV. I will venture to do one random act of kindness each day.

XXVI. I will venture to do one random act of legal kindness, *pro bono*, each month.

XXVII. I will never seek stature or fortune if my motives are corrupt for the seeking.

XXVIII. Although I will not deny myself the pleasures of the world, I will never take these pleasures as a theft from another, or in a way evidencing contempt for those who have not earned them.

XXIX. Although teaching law to law students and young lawyers may not be my occupation, if the opportunity thrusts itself upon me, I will not shirk it; and will give it a moderate degree of time and effort.

XXX. Although, as a human, in my deepest of hearts, I know I likely harbor incorrect, cruel, ignorant, selfish . . . and the like motives, when I become consciously aware of one, I will disclaim it in my heart . . . and fill my mind with a thought of my choosing, but one of goodness.

XXXI. I will question the ethical validity of each of the four seasons, as it relates to me, if I have not once earnestly apologized to another, so deserving.

XXXII. If ever I judge another with anything but detachment or praise, I will know the flaw that angers me is hiding also inside me.

XXXIII. I affirm that being a lawyer is a noble profession.

XXXIV. I affirm that I can be a competent lawyer.

XXXV. I affirm that I can be a diligent lawyer—and still maintain a balanced life.

XXXVI. I affirm that I can be an honest lawyer.

XXXVII. I affirm that I can be an honest lawyer and a successful one—both qualities aiding the other.

XXXVIII. Life being what it has proven to be throughout all of history, I acknowledge that I will experience personal crises both in and out of law.

XXXIX. Life being what it has proven to be throughout all history, I affirm that all crises are but the alternate chapter headings in the course of a human's life.

XL. That being so, all thoughts of self pity I will relegate to comedy.

XLI. That being so, I affirm that all crises have a good that can be learned from them.

XLII. That being so, I will seek the company of the Wise in times of crisis. I will not try to fend off the cold winds of seeming ill fortune alone.

XLIII. That being so, I affirm the time of crisis is finite. It will end, and I will be a better human for the lessons it taught me.

XLIV. That being so, although I do not so vow, I aspire to aid others in their times of crisis. This aid is the quintessential spiritual value in being an attorney at law.

XLV. Having joined the profession of law, I aspire never to condemn it, and never to resign from it.

XLVI. At the end of each day, I aspire to remember one good thing I did, or that I observed another do.

XLVII. In so doing this pattern of remembrance, I am conscious that I am writing, as it were, the history of my own life. I am fully conscious that I am composing the history of my own life.

XLVIII. Space may be infinite, but the human life time is short. I vow not to let its finitude escape me. I know that my good acts are their own reward.

XLIX. I will seek to find a spiritual pattern in life.

L. I will hope that the law becomes, in the last analysis, a spiritual discipline weaving a pattern of meaning and goodness; and that I can so attest, at life's end.