Testing for Analytic Ability in the Law School Admission Test

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TESTING FOR ANALYTIC ABILITY IN THE LAW SCHOOL ADMISSION TEST *

MONROE H. FREEDMAN †,

I

INTRODUCTION

THE Law School Admission Test, in conjunction with college grades, has, for many years, provided a significant prediction of performance in law school. We are, however, at present conducting a study of a section of the Test known as “Principles and Cases” to determine in what ways it might be improved. Specifically, we have considered whether the question forms that are currently being used in this section provide the best possible test of a student’s ability to cope with the precise kinds of intellectual problems involved in the study of law.

II

THE PROCESS OF LEGAL ANALYSIS

Our initial problem is to determine in what distinctive way a student must be able to think in order to be successful in law school. The answer is suggested by a passage in The Nature of the Judicial Process, in which Justice Cardozo discusses the intellectual functions of the judge:

[Some judges seldom get beyond] the work of deciding cases in accordance with precedents that plainly fit them . . . a process of search, comparison, and little more. . . . Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. . . . It is when the colors do not match . . . when there is no decisive precedent that the serious business of the judge begins.

*This paper was originally prepared as a preliminary report on the current program to consider modification of the present question forms and the addition of new ones. Dora Damrin, Elisabeth Kimball, and John Winterbottom, of the Educational Testing Service staff, have made valuable contributions.

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Justice Cardozo then goes on to discuss, among other things, the way in which logical progression, or analogy, and historical development, or evolution, may be the lines along which “the directive force of a principle may be exerted . . .”.

Given a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize.

[However] the tendency of a principle to expand itself to the limit of its logic may be counteracted by the tendency to confine itself within the limits of its history.

The lawyer, we infer, must be able to do several things with facility. First, he must be able to compare a group of stated legal principles with a particular set of facts. This involves, primarily, the selection and matching of significant elements in one statement with the significant elements in another. Second, the lawyer must be able to induce from a series of cases the legal principle or principles that were controlling. And, finally, he must deduce the extent to which these principles can logically be said to control a new set of facts. To analyze a problem in such a manner is, of course, a very different thing from choosing the most applicable principle to go with a particular set of facts. Matching is an important part of this more complex analytical process, but it is only a preliminary part.

The case method, utilized with various modifications in most law schools in the United States, is a valuable teaching device for the very reason that, while imparting a knowledge of substantive law to the student, it, at the same time, trains him in the analytical techniques that he will need in practice. The student is usually given a series of complementary and even conflicting cases relating to a particular social or commercial situation that requires legal regulation. The facts will vary from case to case, and the legal results will vary with them.

Matching is required in the first instance to segregate and understand the significant aspects of each case. The student, however, must then go on to induce from these cases, with their varying facts and legal results, one or more general legal principles that will unify and rationalize the cases and serve as a guide when a new set of facts is presented. Often, a case book will provide problem cases—variations on the cases studied—to be solved by the student after each set of related cases has been read. Even more often, the instructor in class will suggest problem

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2 Id. at 29.
3 Id. at 31.
4 Id. at 51.
cases in order to stimulate this kind of analysis. Here, again, an ability
to match is necessary, but only as a part of the analytical process.

Presumably the law student's examination grades will depend upon
his ability to analyze problems by a combination of matching, induction,
and deduction. This ability should, of course, mature after the candidate
enters law school. The predictive accuracy of the Admission Test, how-
ever, must relate directly to the accuracy with which it credits an aptitude
to perform this kind of analysis. We want to know first, therefore, the
extent to which the present question forms test the student's facility in
this respect.

III

THE LAW SCHOOL ADMISSION TEST

The section of the Test with which we are concerned employs three
forms of question, called Matching, Principle-Case-Reason (P-C-R),
and Case-Principle-Reason (C-P-R).

A. The Matching Question

The Matching type consists of five legal principles and five, six, or
seven sets of facts. The student is required to select the legal principal
that is "most applicable" to each case. A fairly typical case is the fol-
lowing:

On January 7, 1952, Toby signed a typed document leaving $10,000 each
to his son and daughter and the residue of his estate to his church. The
document was subscribed by his son and two neighbors, as witnesses. On
February 1, 1952, Toby and his daughter were in an accident. He died
immediately, and she died a few hours later.

The correct answer was the principle:

Except to the extent that a similar bequest appears in a valid will drawn at
an earlier date, any bequest is void that is made to a religious or charitable
organization within thirty days of the testator's death.

The principle that attracted almost all of the incorrect answers was:

If a beneficiary of a bequest predeceases the testator, his gift lapses, that is,
it passes not to him, but to the residuary legatee.

5 As appears in the discussion in part 4 infra, this question is somewhat easier
than most matching questions currently in use and, therefore, it is not a perfect ex-
ample. In other respects, it is adequate as an illustration.
B. The Principle-Case-Reason Question

The P-C-R type consists of one legal principle followed by three or four factual situations. For each case, the student is required to answer whether the principle is “applicable” or “inapplicable,” selecting the correct reason out of the four that are suggested after each case. A typical principle is the following:

Fraud consists of an explicit or implied misrepresentation of past or existing fact, which is made for the purpose of inducing another to act in reliance on it in a business transaction; and the defrauded person may recover for the harm caused by his justifiable reliance upon the misrepresentation.

One of the cases, with the four statements of reason from which the one most appropriate choice must be made, is as follows:

Lipmann and his wife bought a large tract of land, planning to use it for a farm on which to retire. Baracinni, who operated a farm on the adjoining land sold them the tract in reliance on their promise to use it only for farming. Shortly thereafter Mrs. Lipmann died and Lipmann began to build a potato chip factory on the property.

The above principle is

(A) applicable because Baracinni sold the property in reliance on the promise to use it only for farming.
(B) applicable because the Lipmanns' intention was an existing fact.
(C) inapplicable because Lipmann made no misrepresentation of past or present fact.6
(D) inapplicable because Lipmann changed his mind for justifiable reasons.

C. The Case-Principle-Reason Question

The C-P-R type is similar to the P-C-R. A statement of fact is followed by three or four legal principles. The student must decide whether each principle, taken alone, is applicable or inapplicable, selecting the most appropriate of four given reasons. The only difference between the P-C-R and C-P-R questions is that in the former the principle is more complex and the cases simpler than in the latter. An example of the C-P-R type is the following:

Kramer, upon finding certain merchandise missing from his store and having for some time been impressed by the inability of Miss King, one of his employees, to “look him in the eye,” called her into his private office after working hours, closed the door, and accused her of stealing. In spite of Miss King’s tears and her repeated denials of his accusations, Kramer ques-

6 This is the correct answer.
tioned her for over an hour. When Miss King started to reach for the telephone to call her father, he quickly withdrew it from her reach; and when she stood up to go, Kramer heatedly shouted, "sit down, you thief, I won't let you leave till I'm through with you." A half hour later, Kramer told the girl she was fired and could leave.

The following week Kramer telephoned McDonald, another businessman who he heard was contemplating hiring Miss King, to tell him, "I fired her because I think she's a thief." Since McDonald had no regard for Kramer's opinion, he hired Miss King anyway.

One month later Thomas confessed to the theft.

This case was followed by several principles, each accompanied by four choices, such as:

A private person has a privilege to make an arrest if the person arrested has committed a crime or is about to commit one.

The above principle is
(A) applicable because Kramer honestly, though mistakenly, believed that Miss King had committed a crime.
(B) applicable because Kramer was trying to obtain a confession.
(C) inapplicable because Kramer's grounds for believing Miss King to be a thief were at best insubstantial.
(D) inapplicable because the thief turned out to be Thomas. 7

IV

THE ADVANTAGES AND DISADVANTAGES OF THE PRESENT FORMS

In addition to the important fact that questions based on the present forms have helped to predict future law school performance with a significant degree of accuracy, these forms have yielded several practical advantages. Only relatively simple instructions need be given; the time allotted to each question can be relatively short; the student can demonstrate his ability irrespective of any knowledge of substantive law; and an "item" (a case in the P-C-R, a principle in the C-P-R, or a case in the matching question) that produces unreliable results can be eliminated without affecting the remainder of items in the question. These forms, however, provide questions that do not probe fully the reasoning facility necessary in the study of law.

The matching questions are exactly what the name signifies. In the example given above, for instance, the following factual elements are found in the case: (1) a testator signed a will; (2) the will was typewritten; (3) the beneficiaries were (a) his son, (b) his daughter, and

7 This is the correct answer.
his church; (4) the will was witnessed by his son and two neighbors; (5) the testator died twenty-five days after signing the will; (6) a beneficiary died a few hours after the testator. The candidate had only to determine which principle had one or more significant elements that matched those stated above, and no elements conflicting with them. The correct answer, relating to the invalidity of a bequest to a religious organization, has elements matching (3)(c) and (5). The candidates who were misled by the principle relating to the prior death of a beneficiary, correctly matched the fact that a beneficiary died, but failed to appreciate the fact that she died after the testator.

This question proved on pretesting to be somewhat too easy. Of 300 candidates, 196 answered correctly. The segregation of candidates, however, in terms of groupings from the top fifth to the bottom fifth, correlated well with the candidates' rankings on the "criterion" or control test. The mean score of those choosing the correct principle was well above average, while the ranking of those choosing the lapse principle (sixty-eight candidates) was below average.

Although this kind of question is a reasonable test of the candidate's ability to isolate the relevant elements of several statements and relate them to each other, there is little if any test in the matching question of his ability to reason inductively or deductively. Perhaps matching is all that is necessary; if a student cannot match the significant elements in cases and principles, he certainly cannot begin to carry analysis further.

However, there were a substantial number of candidates in each division, from the poorest fifth of the group to the best, who had the correct answer: 30 candidates in the lowest one-fifth, 34 in the next, and 37, 46 and 49 respectively in the next higher divisions. A similar progression, although somewhat more pronounced, is produced by the more difficult questions. It is certainly possible, therefore, if not likely, that some greater degree of refinement could be obtained in the group as a whole by a broader test of analytic ability.

The Principle-Case-Reason and Case-Principle-Reason questions seem, at first glance, to provide such a test. Here, a general legal principle is stated, and the student apparently must deduce the effect of this principle in a particular case. Unfortunately, however, such a seemingly inconsequential matter as the use of the words "applicable" and "inapplicable" has severely limited the potential of these questions.

First, "applicable" is an ambiguous word in this context. In the P-C-R illustration given above, for example, although the correct answer was (C), the principle certainly would be "applicable" in the sense that it indicates that no fraud occurred. This kind of ambiguity has forced us to discard many items that otherwise appeared to be superior.
More important, however, is the fact that the use of "applicable" and "inapplicable" tends to reduce the testing scope of these questions to that of simple matching. Instead of asking the student, "What result would you have in this case under this principle?" and "Why?," we are asking him, "Under these facts, have all the requirements set forth in the principle been complied with?" and then, "Is requirement (a) present?", "Is requirement (b) absent?", etc. For example, in our P-C-R illustration given above, the student, in effect, must decide no more than whether the principle matches, either because of (A) reliance, or because of (B) a representation of an existing fact; or whether the principle does not match because of (C) the absence of a misrepresentation of existing fact, or because of (D) the buyer's change of mind for justifiable reasons. The only thing that distinguishes this from a matching question is that the distractors are reasons rather than other principles.

An attempt to fit a slightly more complex analytical problem into this framework was of limited success in pretesting. A principle in the C-P-R example given above, was the following:

A person is privileged to publish what might otherwise be a defamatory statement if he communicates information to benefit the person he informs, as, for example, where a former employer, in response to an inquiry, gives his reasons to a prospective employer for having discharged an employee.

The above principle is

(A) **applicable** because Kramer honestly, though erroneously, believed Miss King to be guilty.

(B) **applicable** because Kramer hoped to benefit McDonald, a prospective employer.

(C) **inapplicable** because Kramer volunteered his opinion to McDonald.

(D) **inapplicable** because Kramer's grounds for believing Miss King to be guilty were, at best, insubstantial.

The student here had to do several things. First, he had to isolate the significant elements of the principle, of the example given with it, and of the new case. Second, he had to recognize that the example implied a possible limitation on an issue as to which the principle is silent. Third, he had to decide whether there is such a degree of importance in the additional limitation that it should control the broader purport of the principle.

The principle, of course, relates primarily to the intention of the person making the statement to benefit the person he tells. Whether the information is volunteered is hardly determinative of this issue. A re-

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8 On the facts, it is possible that Kramer had no intention to benefit McDonald, and this may be a flaw in the question. He apparently was sincere, however, in his
quest for information tends to indicate that a benefit was intended, but the act of volunteering is in no way inconsistent with such an intention. Under choice (C), however, the fact alone that the informant is a volunteer would completely override the dominating consideration expressed in the principle.

A good student, though, might well have been misled by the applicable-inapplicable formula. On all other parts of the test he had been expected to mark “inapplicable” a principle that did not contain elements that matched all the elements in the case; as we have seen, this is what “applicable” implies. Here the element of volunteering was present in the case, referred to in the example, but not referred to in the principle: thus, it does not “match.” A candidate might well have inferred that he was expected to stop thinking at this point. On the other hand, his choice would have been clearer had he been instructed to predict the outcome of the new case in the light of the previously established principle—e.g., “In an action against Kramer for defamation, he should win because he hoped to benefit a prospective employer.” This choice would be preferable to an alternative such as: “In an action against Kramer for defamation, he should lose because he volunteered the information.”

It is impossible to say, without further testing, just why this question proved harder than most (only eighty-one out of 295 candidates answered correctly) and why it had a somewhat low correlation with results on the criterion test. Perhaps Kramer’s intention was too ambiguous; perhaps a change in the applicable-inapplicable language would present a different result; and it may be that the item failed to correlate more closely because it provides a more rather than a less accurate test of the student’s ability. It is worth noting that among the eighty-one students who correctly chose (B), the mean score was substantially above average, while the 151 who chose (C) had a mean score just under average. The low correlation factor apparently is due to the fact that in the top one-fifth of the group twenty-six chose (B) and twenty-six chose (C), and in the next one-fifth, eighteen chose (B) and twenty-nine chose (C). Although a majority of the upper forty percent went off, it is only in the top fifth that the number of correct answers even approached the number of incorrect answers. In other words, only the best students showed a fair degree of success, as a group, with the more complex analysis. The poorer the group, the lower was the proportion of correct answers.

belief in the girl’s guilt, and this is suggestive of his good faith in informing the other employer. There was, of course, no choice provided explicitly on grounds of lack of good faith.
This experiment indicates, at least, that the C-P-R and P-C-R forms are not necessarily limited to testing matching ability alone. Modification of these forms, by elimination of the applicable-inapplicable formula and otherwise, might well provide tests of deductive facility. This, however, will only be accomplished by purposeful efforts on the part of those who prepare the questions and will require more than simply rephrasing the words "applicable" and "inapplicable." For example, one P-C-R set has actually been changed in this respect. The result, however, was exactly the same as if, in the P-C-R given above, it read: "Baracinni will win because . . ." and "Baracinni will lose because . . ."—that is, the question has remained essentially a test of a matching.

V

Development of New Question Forms

Several new question forms are in early stages of development and experimentation. The problem, as we have seen, is to broaden the analytical scope of the test, without losing the many advantages of the present forms. Most difficult, perhaps, will be to provide this additional breadth, without unduly increasing the difficulty of the questions. Because of the large number and diverse aptitudes of the candidates, a test will not be suitable if it discriminates closely among the top fraction of the group but is beyond the comprehension of the remainder. We should also try to avoid forms that would require long and complex instructions and that would substantially reduce the number of questions that can be completed by the candidates in the time available.

A. The Case Method Questions

One obvious line of experimentation is the case method itself. If a student in law school must be able to read a group of cases, extract a legal principle, and apply this principle to new situations, a test that could duplicate this process may be expected to have significant predictive value.

We are trying to do this by providing a set of "Decided Cases," each of which includes a brief statement of facts and a legal result, followed by several "Problem Cases." Each Problem Case consists of a brief statement of facts followed by four choices of the proper result. Each result is stated in the form of a legal principle, and the correct choice is that principle which is most consistent with the underlying reasoning of the Decided Cases, taken as a group.
An illustrative set of Decided Cases is the following:

_Patterson v. Dome:_ Patterson retired on a piece of land in the country and underwent considerable expense to landscape it. Not far away Dome owned an undeveloped field on which thistle-bearing weeds grew in abundance. In the fall, clouds of thistles blew from Dome's property onto Patterson's, seeding his lawn and gardens liberally with ugly weeds. Patterson sued Dome for maintaining a nuisance. *Held,* Dome is not liable for damages and cannot be prohibited by injunction from maintaining the weeds on his land.

_Peters v. Downing:_ Downing built a stone wall on his land near to Peters' boundary line. Over a period of many years, the wall deteriorated, and large stones from the wall from time to time fell out onto Peters' garden, killing some plants. Peters sued Downing for maintaining a nuisance. *Held,* Peters is entitled to compensation for the plants that were destroyed, and to an injunction prohibiting Downing from maintaining the wall in such a way as to cause further injury.

_Paul v. Davis:_ Paul owned a drive-in motion picture theater near a super-highway. Nearby, Davis operated a dog race track. New floodlights that were found necessary at the track so illuminated the surrounding area that the visibility of the picture on Paul's screen was impaired, resulting in a loss of attendance at the theater. Paul sued Davis for maintaining a nuisance. *Held,* Davis is not liable for damages and cannot be prohibited from using the floodlights.

_Parsons, et al. v. Dover:_ Dover owned a drive-in motion picture theater in a suburban neighborhood. Parsons and a group of other homeowners in the vicinity sued Dover for maintaining a nuisance. *Held,* Parsons and his neighbors were entitled to an injunction prohibiting Dover from using his property in such a way as to cause the heavy traffic, noise, and bright lights that were interfering with the plaintiffs' use and enjoyment of their land.

_Pincus Mink, Inc. v. Danton:_ Danton, in the course of digging an artificial lake, set off several charges of dynamite. Half a mile away, at a secluded mink farm, the mother mink were so panicked by the noise and vibrations that they devoured their young. The mink farm sued Danton for damages resulting from maintenance of a nuisance. *Held,* Danton was not liable for this consequence of his blasting activities.

As he reads these Decided Cases, knowing that he will be required to answer the Problem Cases in the light of the Decided Cases, the candidate should be assimilating the facts and the results of the Decided Cases into some sort of coherent system. The extent to which he is able to accomplish this should be a decisive factor in his performance in the test.

With varying degrees of success, the candidates will become aware that there is something called “nuisance” or “maintaining a nuisance”; that one who is affected by a nuisance can, in some, but not all, cases, obtain relief in the form of an injunction and/or damages; that all the
cases relate to the use of one piece of land in a manner that interferes with the use and enjoyment of another piece of land; that thistles blown from one property to another do not constitute a nuisance, while stones falling from a wall are a nuisance (because of proximity? because stones are more dangerous? because one defendant built the wall but the other did not plant the thistles?); that a race track is not a nuisance when it interferes with a drive-in movie, while a drive-in movie is a nuisance when it interferes with homelife (because there is something basically wrong with drive-in movies? because any commercial use is permissible near a highway, but not all are permissible in a residential area? because bright lights do not constitute a nuisance, while lights, traffic, and noise do?); and that when blasting causes mother mink to eat their young, the blaster is not liable for "this consequence" of his activity (because of the lack of physical proximity? because the blaster could not have expected such an odd result?).

These and other conclusions and uncertainties might run through the mind of the candidate as he reads the cases. The uncertainties need not be resolved immediately; they might be immaterial to the particular Problem Cases. But in evolving a set of propositions such as those outlined above, and in reflecting on the possible reasons that underlie them, the candidate will certainly be doing what we have called induction.

He then will turn to the Problem Cases:

**Problem Case 1:** Dooley owns a worthless tract of hilly, rocky land. At a point overlooking Portnoy's neighboring cottage, soil erosion on Dooley's land substantially uncovered and removed the support from under a huge boulder, which threatens to roll down a steep incline into the cottage. In a suit by Portnoy against Dooley,

(A) Portnoy will be granted an injunction, because a threatened injury to property or person can be as substantial an interference with land use as an actual injury.

(B) Portnoy will be granted an injunction, because the use to which he is putting his land is of greater social value.

(C) Portnoy will be denied an injunction, because the dangerous condition has come about without any affirmative act on Dooley's part.

(D) Portnoy will be denied an injunction, because there has as yet been no interference with the use and enjoyment of his property.

The correct answer is (C). It harmonizes *Patterson v. Dome* with the other cases and is in other respects superior to the alternative choices. Reason (A), for example, is a logical statement and is supported implicitly by the fact that injunctions have been granted as well as damages, but it does not serve to incorporate the new case into any coherent rationalization of the previous cases. If Portnoy wins, why should not
Patterson have prevailed? It is not enough that the Problem Case and the Peters case both involved stones: the injury caused by the thistles was at least as substantial as that caused by the deteriorated wall. Nor is the fact controlling that in Patterson the properties were not adjacent, since the plaintiffs in Parsons v. Dover were simply “in the vicinity.”

Reason (B), of course, even more clearly fails to square with Patterson v. Done. Reason (D) is simply an inaccurate statement of fact, for the reason given in (A).

**Problem Case 2:** Pitt owns a lovely old mansion near Allentown, Pennsylvania. In the course of mining operations at Daisy Mine shaft about a half mile away, large amounts of coal dust are necessarily sent into the air, endangering the health of Pitt and his family, and coating his house and its contents. In a suit by Pitt against the coal company

(A) Pitt will be granted damages and an injunction, because his injury is at least as great as that of the plaintiff in Peters v. Downing.

(B) Pitt will be granted an injunction, because his case falls directly under the decision in Parsons et al. v. Dover.

(C) Pitt will be denied damages and an injunction, because Daisy’s mining activity is a reasonable land use in the community.

(D) Pitt will be denied damages and an injunction, because the distance between his house and the mine is so great that the result could not reasonably have been foreseen.

This question is a good example of what we are trying to accomplish. Each of the distractors, or incorrect answers, has some degree of validity on the basis of matching.

In Reason (A), the Problem Case is related to one of the Decided Cases on the ground of injury, which is by no means an irrelevant factor in granting relief. The candidate should readily realize, however, that injury is not in itself conclusive, since it was present in the Patterson, Paul, and Pincus cases, in which relief was denied.

Reason (D) refers to the fact that the plaintiff was situated a half mile from the defendant’s activity, which was also true in the Pincus case. The distance in Pincus, however, was only a minor aspect of the unforeseeable nature of the injury. Regardless of the distance, the particular injury in the Problem Case was reasonably foreseeable.

Reason (B) “matches” somewhat better. The Problem Case, in which a homeowner is suing to prevent a business enterprise from interfering with the use and enjoyment of his residence, is analogized to a Decided Case involving a similar suit. The candidate will prefer the correct answer, (C), only if he is able to recognize in the latter the rationale of the Paul and Parsons cases. It will help if he has sufficient independent judgment to realize, first, that the only land require-
ment for a drive-in is available space, while coal can be mined only where coal deposits are; and, second, that coal-mining necessarily affects residential uses in the vicinity.

Perhaps this question goes too far in requiring a "policy" decision rather than a "logical" answer from the candidate. In spite of the quotation from Justice Cardozo, we have no intention of asking a candidate to choose among stare decisis, commercial realties, judicial convenience, and equity between the parties in a case involving the liability of a negligent manufacturer to someone other than the buyer. On the other hand, it does not seem too much in the above question to expect a candidate to induce and choose the principle: "Coal mining in Allentown is a reasonable commercial use, and is superior to and cannot be enjoined for the benefit of neighboring residential use," in preference to the principle: "A residential owner can enjoin even a reasonable commercial activity that necessarily interferes with the use and enjoyment of his land."

A related problem arose with regard to Problem Case 1. Originally Reason (A) read: "Portnoy will be granted an injunction because the threatened interference with the use and enjoyment of his land is more substantial than that in Patterson v. Dome." This was considered incorrect because Patterson can only be distinguished by the fact that unimproved land was involved and because the Decided Cases justify no distinction on the grounds of degree of injury. On reflection, however, we decided that this distractor would be unfair to a candidate who might reason as follows: "It is true that Patterson is distinguishable on the ground that the defendant's land was unimproved. In that case, however, only property damage was involved, and the injury was such that the plaintiff rather than the defendant might reasonably be called upon to bear the expense. Here, on the other hand, the threatened injury is to people as well as property, and, while it appears to be practically impossible for the plaintiff to protect himself, the defendant probably could remedy the situation with relatively little expense. Reason (A) is, therefore, a reasonable result, and is not in conflict with any of the Decided Cases, including Patterson v. Dome."

This distractor illustrates another problem in preparing questions for a Law School Admission Test. The candidate who reacts emotionally rather than rationally to a problem, will probably not obtain top marks at Law School. It is, therefore, a valid testing device to pose the hard cases that make bad law. At the same time, however, as the discussion above indicates, we must be careful in setting up such questions not to penalize the candidate who is able to justify the emotionally desirable result by displaying more imagination than his examiners.

**Problem Case 3:** D'Angelo, a retired Army officer, recently installed an antique cannon on his country estate and has adopted the practice of firing
it seven times every morning at dawn when he raises the flag. Paris is a neighboring dairy farmer. One of his Guernsey cows has been so startled, that she has gone dry, and Paris is fearful that the noise will similarly affect others of his herd. In a suit by Paris against D'Angelo

(A) Paris will be granted damages and an injunction in accordance with the reasoning apparently underlying Parsons et al. v. Dover.

(B) Paris will be granted damages and an injunction, because one may not make extremely loud noises when injury to others or their property is a reasonably foreseeable consequence.

(C) Paris will be denied damages and an injunction in accordance with the reasoning apparently underlying Pincus Mink, Inc. v. Danton.

(D) Paris will be denied damages and an injunction in accordance with the reasoning apparently underlying Paul v. Davis.

This Problem Case goes one step beyond the prior case in forcing the candidate to discover and apply the rationale of the Decided Cases, individually and as a group. Reason (B) should be readily dismissed as too broad for practical application. Reason (C) is incorrect because Pincus depended upon the unforeseeable nature of the injury; it would not be controlling in the Problem Case, at least in so far as an injunction is concerned, because the effect on the cows is now apparent.

Reason (A) might appear not to “match.” In Parsons, the homeowners were the plaintiffs, not the defendants, and, moreover, the homeowners prevailed. Similarly, Reason (D) matches, superficially, because in Paul, a commercial plaintiff was unsuccessful in preventing interference with his business use. The candidate should be able to recognize, however, the importance of the physical context and social significance of the land uses in each case and to choose (A) as the correct answer: In the community in question, the plaintiff’s particular land use is entitled to priority over and protection against the harmful effects of the defendant’s less appropriate activity.

B. The Cumulative Cases Questions

A second experimental question form that can be illustrated at this stage has been referred to as the Cumulative Cases question. The candidate is given a number of cases consisting of a set of facts and a statement as to which party prevailed. Following each case are four statements of reason, in the form of suggested legal principles, purporting to explain or justify the given result. The candidate must choose the principle that best expresses the rational foundation of the given result, giving preference to the narrowest statement of principle that reasonably explains the result. The cases are cumulative in the sense that each principle chosen must not only rationalize the case it accompanies, but also be consistent with any prior cases in the same set—that
is, the principle chosen for Case 2 must be consistent with the result in Case 1 as well as Case 2; the principle chosen for Case 3 must be consistent with the results in Cases 1 and 2 as well as 3; etc.

The theoretical value of such a question form is that it tests the candidate's ability to develop a consistent series of legal principles from an expanding set of interrelated cases. Just as in many casebooks, each additional case requires the deduction that a previous principle is controlling, with or without refinement or expansion, or the induction of an entirely new principle. In addition, certain practical advantages over the Case Method form derive from the fact that in the Cumulative Cases questions, every case provides a question; whereas in the Case Method form, at least two or three cases are required to produce one question. The Cumulative Cases will, therefore, be easier for the examiners to prepare and can be answered with greater economy of time. On the other hand, an entire Cumulative Cases set may be affected if a single item is unsuccessful in pretesting and has to be removed.

The following set of questions is adopted from the first chapter of cases in A. James Casner and W. Barton Leach's *Cases & Text on Property* (1950).

*Case 1:* Pierson was fox hunting for pleasure. His dogs trailed a fox for several miles and Pierson shot it, wounding it severely. As the fox was limping along, about to collapse, with Pierson and his dogs almost upon it, Post, a furrier, easily seized the fox and carried it off. In an action by Pierson against Post for recovery of the fox's pelt, *held,* for Post.

The narrowest principle that reasonably explains this result is:

(A) One who hunts for a livelihood has superior rights to one who hunts for pleasure.

(B) Possession is nine-tenths of the law.

(C) A wild animal belongs to the first person who captures it.

(D) The pelt of a wild animal belongs to whoever owns the animal at the time it dies.

The candidate might recognize first that Answer (A) is not inconsistent with the case, but he should also immediately observe that the statement is unduly broad. Standing alone, this principle would justify a judgment for Post even if he had wrested the dead carcass from Pierson's arms as the latter carried it triumphantly homeward. This choice can be correct only if there is no more narrow or more reasonable principle that is consistent with the result.

Because the legal principles build on each other in both of the new forms, those who prepare the questions should be able to draw from more areas of law than is possible with the current forms.
Answer (B) is gibberish, unless it is intended to refer to the practical disadvantages of being a plaintiff and carrying the burden of instituting suit and the burden of proof. Since these practical problems are not indicated in this case, this answer should be readily discarded.

Answer (D) is incorrect because the statement assumes that Post owned the animal when it died—the very question in issue—but does not state why he owned it.

Answer (C), the correct choice, reasonably explains the result and is considerably less broad than Answer (A).

Case 2: Keeble, a poultry dealer, owned a pond to which he attracted ducks by means of wooden decoys and artificial duck calls. He then would capture the ducks by netting them. Hickeringill, a neighbor who held a grudge against Keeble, began to frighten off the sitting ducks by firing a gun at them from neighboring property. In an action by Keeble against Hickeringill for loss of profits due to Hickeringill's actions, held, for Keeble.

The narrowest principle that reasonably explains this result, and is consistent with the preceding case, is:

(A) A wild animal belongs to the first person who captures it.
(B) One who maliciously interferes with another's business must pay damages for loss of profits.
(C) A wild animal belongs to the first person who employs all commercially reasonable means to capture it.
(D) One who once has a wild animal on his property is entitled to ownership of the animal thereafter.

Answer (A), although correct in Case 1, is inadequate here because neither party has captured the ducks.

Answer (C), although a reasonable refinement of the previous correct principle, is incorrect because when Hickeringill frightened the ducks, Keeble had not yet employed all reasonable means of capturing them.

Answer (D), although consistent with the result, is unreasonably broad.

Answer (B) is correct.

Case 3: Mullett was engaged in the business of capturing sea lions and disposing of them to persons interested in exhibiting them. One of the animals was kept by Mullett at Glen Island, on Long Island sound, but one day escaped. Mullett made no effort to recapture the sea lion, but a few weeks later discovered that it had been found by a fisherman named Bradley, who was exhibiting it on Nantucket. In an action by Mullett against Bradley for the return of the sea lion or its fair value, held, for Bradley.
The narrowest principle that reasonably explains this result, and is consistent with the preceding cases, is:

(A) As between two parties who fish or hunt for a living, possession is nine-tenths of the law.

(B) The most recent owner of a wild animal need not return it to a former owner.

(C) Since Bradley was a fisherman himself, he did not act maliciously in capturing Mullett's sea lion.

(D) A wild animal that is free of artificial restraint belongs to the first person who captures it.

Answer (A) is incorrect here for the reasons stated above.

Answer (B) is incorrect because, as in Case 1(D), the answer is assumed rather than explained.

Answer (C) is correct only in a negative sense. It is typical of many correct answers we have used under the applicable-inapplicable formula of the C-P-R, P-C-R forms. That is, it involves the selection of a "matching" element within the problem, but does not really express the rationale of the case.

Answer (D) does provide the rationale of this case. It is, in addition, a refinement of the correct principle in Case 1 because it holds, in effect, that to capture a wild animal confers ownership only so long as the animal is not permitted to escape artificial restraint. The candidate who reads hastily or without perception, however, may fail to recognize the importance of escape, and incorrectly think of Mullett as remaining "the first person" to capture the animal.

Case 4: One day a very large school of mackerel came into the Bay of St. Ives. Young's boat put out and shot her sean. The sean was then drawn in a semicircle around the school, encircling the fish completely except for a space of about ten fathoms, in which Young's men were splashing their oars to frighten the mackerel from escaping through the opening. However, before Young could draw his net closer, Hickens' boat rowed through the opening, shot her sean, enclosed the fish, and captured all of them. In an action by Young against Hickens for loss of profits, held, for Hickens.

The narrowest principle that reasonably explains this result, and is consistent with the preceding cases, is:

(A) The decision in Keeble v. Hickeringill is inapplicable because the fish were still in the sea, and not on the plaintiff's property.

(B) The rule of Mullet v. Bradley is not satisfied by anything less than complete possession and control.

(C) The decision in Keeble v. Hickeringill is inapplicable when both parties are commercial fishermen.
As between two parties who fish for a living, the one who carries the fish to shore will prevail.

Answer (A) should appeal only to those candidates who incorrectly chose (D) in Case 2, or who were uncertain enough in rejecting 2(D) to be confused by this reference back to it. This point raises a question that is not always easy to resolve. Is it fair to put a candidate in the position of compounding an initial error and thereby losing twice for the same mistake? In the present context, at least, it does seem fair. Among the candidates who went wrong the first time, there should be some who will realize the error on reviewing the issue. On the other hand, if there are any who answered correctly the first time, but who would be confused by the reference back to an incorrect answer, it would seem better to have them miss two out of two than hit one out of one. In addition, two other choices in this question also refer back specifically to a previous case. The total effect, therefore, should be to compel the candidate to reassess generally his previous answers and to make certain that his answer in this case harmonizes with them.

(B), the correct answer, states the necessary corollary of the Mullett rule, which is in fact implicit in Pierson v. Post.

Answer (C), like 3(C) supra, is accurate only in that it states why the plaintiff did not prevail; it does not tell us why the defendant won.

Answer (D), which would condone piracy, is too broad.

Case 5: Hough set a lobster trap, attaching a float identifying the trap as his own. The lobsters in the trap could escape only through a small opening at the top of the trap when the water became disturbed by wind and storm. Just prior to the normal time for pulling the trap, Shaw took out a boat, hauled in the trap, and sold the lobsters. In an action by Hough against Shaw for the market price of the lobsters, held, for Hough.

The narrowest principle that reasonably explains this result, and is consistent with the preceding cases, is:

(A) A fish or animal in its natural state belongs to the first person to enclose it, subject to capture at his pleasure.

(B) One who steals the property of another is liable to civil damages as well as criminal penalties.

(C) One who takes advantage of another's labor will not be permitted to profit thereby.

(D) A fish or animal in its natural state belongs to the first person who employs all commercially reasonable means to capture it.

Answer (A) would be an extremely close choice with the correct answer, (D), if it were not for the preceding case. What distinguishes this case is that the use of lobster traps would be commercially imprac-
tical if a contrary result were reached. The fact that the actual result in Case 4 may also be commercially and socially undesirable is immaterial. The facts in the present case are different enough in degree to support the principle. The candidate must realize, too, that commercial necessity also has resulted in a refinement of the Pierson-Mullett rule.

Answer (B) is a variation of 1(D) and 3(B), which also begged the question.

Answer (C) would also be a close choice, were it not for Pierson v. Post and Young v. Hickens. Especially in the former, the unsuccessful plaintiff had provided most of the effort. Shaw, in the present case, may well have expended as much or more labor than Hough.

VI

CONCLUSION

Although the Law School Admission Test provides a significant forecast of performance at law school, we are attempting to improve it by introducing a broader test of the candidate's analytic ability. The scope of the current question forms has been restricted primarily to the selection and matching of the significant elements in a stated case with the significant elements in a stated principle. Law school teaching methods indicate, however, that a student's success will depend to a great extent on his ability to induce the rationale of a case or cases and to deduce the proper result in a new case by applying the rationale. Rather than asking whether specific facts are present, therefore, we want to ask which party would prevail, and for what underlying reason. In so far as we are successful in preparing such questions, we have reason to hope for a significantly higher correlation between performance on the Law School Admission Test and subsequent performance in law school.