Rule Based Legal Writing Problems: A Pedagogical Approach*

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I. INTRODUCTION

Instruction in legal research, legal analysis, and legal writing varies considerably from school to school,[1] not only in name,[2] but in focus, content, and required texts.[3] Nevertheless, all Legal Methods courses have one thing in common: designing or se-

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[1] *See, e.g.,* Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245, 249 n.7 (1996) (noting that any writing program "must be tailored in the particular institution, given each school's administrative, economic, and political constraints"; Susan L. Brody, *Teaching Skills and Values During the Law School Years (quoted in* THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM: CONFERENCE PROCEEDINGS 4, 22, 24 (1994)); Allen Boyer, *Legal Writing Programs Reviewed: Merits, Flaws, Costs, and Essentials*, 62 CHI.-KENT L. REV. 23, 25-26 (1985) (examining variables that produce different programs).

[2] Besides Legal Research and Writing, these courses "may be called 'Legal Process,' 'Legal Method,' 'Lawyering Skills,' or 'Legal Skills.' While it seems intuitive that the course name should reflect the course's pedagogical philosophy, this is not universally true." Lucia Ann Silecchia, *supra* note 1, at 250 n.15. This article refers to all such courses as Legal Methods because this title more accurately reflects their modern content. This article refers to all Legal Methods teachers as professors.

[3] In the early 1980's, only a few texts devoted to legal research, writing, and analysis were available. Two popular early texts were JOHN C. DERNBACH & RICHARD V. SINGLETON II, A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD (1981), and MARJORIE DICK ROMBAUER & LYNNE B. SQUIRES, LEGAL WRITING IN A NUTSHELL (1982). Today, the field has exploded with available texts, each containing its own pedagogy, whether defined or implicit. *See infra* note 16.

lecting writing problems for first-year law students. Legal Methods professors should select writing problems with a pedagogy in mind, rather than picking problems merely because professors intuitively think they will "work" or that the students may find them interesting.

This article presents a pedagogy based on progressing from simple to complex, utilizing various rule structures, and building skills in a logical way. Part II explains the pedagogy underlying problem selection. Part III presents the authors' progression model in detail. Part IV provides illustrations of problems based on this progression paradigm. Part V concludes the article.

II. THE PEDAGOGY UNDERLYING PROBLEM DESIGN

Legal Methods is thought of in the legal academic community as a "skills course," in contrast to "doctrinal" or "substantive" courses.[4] Legal Methods does, however, teach the same skills taught in doctrinal courses.[5] It does so within the context of many doctrinal areas, and adds a writing component.[6]

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[4] Writing courses do not teach only writing and research, style and mechanics. We do have to teach those things, certainly, but in addition, the legal writing courses are the only courses in which legal analysis is systematically taught. We have to teach, in the writing courses, the structure of analysis: how to analyze cases, how to connect one case to the other, and how to apply them by deduction or analogy to a client's problem, a client's story.

Joseph Kimble, *On Legal-Writing Programs*, 2 PERSP. 1, 2 (1994) (*quoted in* Lucia Ann Silecchia, *supra* note 1, at 255 n.35 (1996)). *See also* Lewis D. Solomon, *Perspectives on Curriculum Reform in Law Schools: A Critical Assessment*, 24 U. TOL. L. REV. 1, 38 (1992) (expressing hope that legal educators will "perceive that theory and practice are not polar opposites (dichotomies), but rather complement each other. . . [and] will choose to strike [an appropriate] balance. . . ").

[5] By doctrinal education, I mean this:

the law student should acquire a capacity to use cases, statutes, and other legal texts. . . . This person is also skilled at interpretation: the reading of a case or statute, or a mass of case law, or a complex regulatory scheme. Finally, this person can communicate the interpretive understanding, both orally and in writing.

The Hon. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 57 (1992).

[6] The more serious problem in legal writing, however, is what I would call a lack of depth and precision in legal analysis. For example, too many lawyers demonstrate a lack of familiarity with or understanding of controlling or analogous precedent. Too many advocates are unable to focus an argument, so as to highlight and concentrate on the principal issue(s); and too many attorneys fail to assess how an action in a particular case may affect future cases or future developments in the law. These failings, I think, are attributable in no small measure to failings in "doctrinal education."

Id. at 64-65.

The advantage that Legal Methods has over doctrinal courses is the ability to teach legal analysis through a highly structured progression. Because they are not tied to the cases and concepts that drive doctrinal courses, methods professors can teach the component parts of legal analysis in incremental steps, incorporate writing assignments designed to reinforce those steps, and can do so in a progression from simple to complex. With such a progression, the student can self-correct before advancing to more complex steps. Additionally, the professor can aid a students' learning by providing highly structured oral and written instruction before each step, as well as feedback on each student's execution of those steps. Once the students have a full office memorandum as a graded assignment,[7] then the professor assesses the student's grasp of the entire process by grading. Subsequent assignments introduce analytical complexity and writing sophistication in a gradual build-up.

III. THE PROGRESSION MODEL—TEACHING SKILLS[8]

A. The First Skill: reading cases and recognizing rules—a three-step process

The first skill required of a student in all first-year courses is rule recognition. Indeed, doctrinal courses utilizing the case book method,[9] as well as Legal Methods problems,[10] require con-

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[7] Breaking down the analytical process into discrete and incremental steps helps all first-year law students who have problems with idea organization, process integration, sequencing, and the recursive process necessary to produce a logically linear office memorandum or brief. *See* Nancy Millich, *Building Blocks of Analysis: Using Simple "Sesame Street Skills" and Sophisticated Educational Learning Theories in Teaching a Seminar in Legal Analysis and Writing*, 34 SANTA CLARA L. REV. 1127 (1994), for a description of a remedial legal analysis seminar applying the legal analysis Metacognition and Autonomous Learning Model gathered from Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471 (1988), and Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409 (1986).

[8] This progression model assumes that students have been introduced to the three-tier model of court structures, as well as the concept of mandatory and persuasive primary authority. *See, e.g.*, JOHN C. DERNBACH, ET AL., A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 9-15 (2d ed. 1994).

[9] For a detailed history and criticism of the case method of instruction, see Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121 (1994).

[10] Briefing cases is essential to understanding the proper rule to apply to a hypothetical problem. Case briefing charts and charts breaking a common law rule or statute into its component parts (such as elements, categories, factors) assist the first-year student in the analytical process. *See, e.g.*, DERNBACH, *supra* note 8, at 54-58, 72-73; Millich, *supra* note 7, at 1131-35 (describing an exercise for an upper-level remedial course in legal analysis that requires matching a problem's facts with the elements of a simple stat-

stant briefing of cases to recognize legal rules.[11] The purpose behind briefing cases is to understand what the legal rule is from a case (issue, rule), why the court arrived at that particular rule (rationale and policy), and how the court applied that rule to the facts of the case before it (facts, holding, outcome).

Doctrinal professors spend class time extracting rules from assigned cases and exploring their internal and external contours.[12] Briefing cases is essential to this process, but doctrinal professors rarely spend class time instructing the students how to do it.[13] Without the ability to extract the rule of a case and correctly identify its rule structure, a student cannot perform legal analysis in class, on exams, and in memoranda or briefs. Legal Methods must teach rule and rule structure recognition as the beginning step in a writing process that may require coherently restating the rule or synthesizing rules prior to application to the specific facts of a problem.

Legal Methods should incorporate a three-step process for teaching rule recognition and application. The first step is to teach a comprehensive case briefing system that works for both doctrinal courses and Legal Methods. The second step is to introduce and systematically examine the different rule structures that students will encounter in the cases and statutes read throughout law school.[14] The third step is to actively engage the students in applying the first two steps: they brief a case[15] with

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ute as an aid in issue recognition and resolution).

[11] *See* Lorne Sossin, *Discourse Politics: Legal Research and Writing's Search for a Pedagogy of Its Own*, 29 NEW ENG. L. REV. 883, 890 (1995).

[12] The internal contour of a rule (or statute) is its structure as an element, category, balancing, or factor test. A rule's external contour describes the gamut of possible applications of the rule. Professors generally explore these contours through Socratic questioning and offering oral hypotheticals for analysis. *See* Saunders & Levine, *supra* note 9, at 128-29.

[13] Of course, by the trial and error method of being called upon in doctrinal classes or mentally answering questions asked of others, a student supposedly figures out how to brief. Unfortunately, this method often fails students who could be better prepared for class with early and systematic instruction on that formidable task. Many writing texts devote space to this skill, *see infra,* note 16.

[14] These rule structures, often known as "tests," include elements, exceptions, categories, factors, and balancing. *See infra* text accompanying notes 22-25. Because statutes incorporate the same rule structures as common-law rules, statutory analysis can be taught concurrent with common-law analysis. Thus, students will see the similarities and differences between common-law analysis and statutory analysis. However, a systematic explanation of the methods peculiar to statutory interpretation, including canons of construction, could be included at some logical point in the Legal Methods program.

[15] Ideally, this case should come from a West reporter, which includes a syllabus and key numbered headnotes, unlike some official reporters. This case provides an op-

a complicated rule structure.

1. The First Step—Instruction on How to Brief a Case

Legal Methods professors usually give instruction on how to brief a case[16] and explain the sections of a brief and how to read a case to find them. Providing the students with a comprehensive listing of the briefing categories is essential.[17] Because most cases that students encounter in both doctrinal courses and Legal Methods problems are appellate cases that change previously enunciated legal rules, the brief's rule section should have two parts: the "old rule" being reviewed by the appellate court and the "new rule," which is the appellate court's revision of the old rule.[18] Such a separation better guides the students for doctrinal discussions, and at the same time instructs them on the courts' common-law role as law-makers.[19] As part of the process of learning brief categories, a simple case can be done as an oral or written exercise.[20]

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portunity to show students that reported cases look different from the abbreviated cases they see in case books. The Methods professor also has an opportunity to introduce the headnotes, syllabus, footnotes, concurring opinions, and dissents, and discuss their proper use in legal writing and analysis.

[16] Almost all legal writing texts contain a chapter or component on briefing cases. *See, e.g.,* VEDA R. CHARROW, ET AL., CLEAR AND EFFECTIVE LEGAL WRITING 42-52 (2d ed. 1995); DERNBACH, *supra* note 8, at 18-33; RICHARD K. NEUMAN, JR., LEGAL REASONING AND LEGAL WRITING 37-46 (2d ed. 1994); CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 89-108 (2d ed. 1994); LAUREL C. OATES, ET AL., THE LEGAL WRITING HANDBOOK 81-85 (1993); HELENE S. SHAPO, WRITING AND ANALYSIS IN THE LAW (2d ed. 1991); DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH 37-57 (2d ed. (1993). Of course, students should know why case briefing is an important part of preparation for classes utilizing case books and Socratic method. *See* Phillip E. Areeda, 1970 Lecture at Puget Sound, *reprinted in* 109 HARV. L. REV. 911 (1996).

[17] A comprehensive listing might include the following: case name, description of the parties, procedural posture, standard of review, issue(s), disposition (technical holding), facts, parties' arguments, rule(s), and rationale. *Compare,* DERNBACH, *supra* note 8 (listing the components as facts, issue, rule, holding, and rationale); ALAN L. DWORSKY, THE LITTLE BOOK ON LEGAL WRITING (2d ed. 1992) (listing facts, issue, holding, and rationale).

[18] *See* LINDA H. EDWARDS, LEGAL WRITING - PROCESS, ANALYSIS, AND ORGANIZATION 39-41 (1996) (employing a similar separation, explaining that "inherited rule" means the "rule of law the opinion inherits from prior authorities" and "processed rule" means "the complete rule as it appears when the opinion concludes").

[19] Students may find, after this discussion or several doctrinal classes, that including more categories than their doctrinal professors requested will aid them during class discussions, especially the "old rule" and "new rule" categories.

[20] Legal Methods texts often print a simplified case for this purpose. *See, e.g.,* DERNBACH, *supra* note 16, at 31.

2. The Second Step—Instruction on Rule Structures

Methods professors also should provide students with a thorough explanation of the various structures of rules. In Legal Methods, students often are required to hand in a brief of a case as an ungraded written assignment. Because this is typically done early in the students' first semester, a case containing a simple rule is often used for this assignment.

For the purpose of our "progression" model, students should continue refining the skill of rule extraction by receiving instruction on the types of rule structures in a straightforward way.[21] Students need to be taught and shown illustrations of these structures, including: 1) rules that have elements that must be satisfied,[22] the traditional "and" rule structure; 2) rules that have exceptions, the traditional "unless" structure; 3) rules that consist of categories, only one of which must be satisfied, the traditional "or" rule structure;[23] 4) rules that consist of factors to be considered; 5) balancing tests; and 6) rules that employ factors and an explicit context in which to balance or weigh those factors.[24]

3. The Third Step—Integrating the First Two Steps by Briefing a Complex Case

After these different rule structures are introduced, the next Legal Methods written assignment would be to assign the students to brief a case with a more complex rule, such as one

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[21] Systematic instruction on rule structures enhances a student's ability to recognize a complex rule that an opinion does not clearly label and divide into logical parts. Courses such as torts, contracts, and property often start with extremely old cases, with archaic legal jargon and writing style. It is hard enough for some first-year students to find rules in these cases and see how rules change over time, much less deduce the rule structure as well.

[22] Reviewing elements rules from different subject areas shows students that legal rules have similar constructions. Statutes containing elements can also be included. The next step is to show students some statutory rules and common-law rules and have the students break these rules into elements.

[23] Two illustrations of legal rules that fit this structure are the four categories of ex post facto laws from Calder v. Bull, 3 U.S. 386, 390 (1798) (reduced to three categories by Beazell v. Ohio, 269 U.S. 167 (1925) and Collins v. Youngblood, 497 U.S. 37, 42 and n.3 (1990)), and the three ways to prove a common-law marriage from In re McGrath's Estate, 179 A. 599 (Pa. 1935).

[24] For example, review of a denial of substitution of counsel, under the Sixth Amendment right to counsel, employs a factors and balancing test. *See infra* text accompanying notes 57-58. Another test that balances some factors against other factors is the RESTATEMENT (SECOND) OF CONTRACTS § 178, which sets forth factors to consider when examining whether a contract is unenforceable on public policy grounds.

with several elements or categories, perhaps with at least one of those categories containing several elements. Once the professor explains case briefing and rule structures generally, a student is better able to find one of these structures in a case and structure an analysis around it.[25]

B. The Second Skill—Applying Rules to Facts

Once students understand the correct rule from the case, a hypothetical is given to them that can be completely analyzed using this case. The analysis is performed as an in-class discussion. The professor, as an illustration of legal analysis and writing, can end this discussion with a verbal summary—a "talk through"—of exactly how a discussion section based on this hypothetical and case should be written, including beginning conclusion or thesis, description of the law (Rule) section, application of the law to the facts of the hypothetical, supported by relevant analogies and distinctions, and ending conclusion.[26]

C. The Third Skill—Writing a Legal Analysis

At this point, the students are assigned to write the discussion section of a memorandum based on the hypothetical problem used in the prior steps and the in-class discussion. By following this progression, a student's first attempt at writing a discussion section based on a known analysis becomes more of a writing exercise[27] than an analytical exercise,[28] in which any er-

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[25] See OATES, *supra* note 16, at 170-73 (providing various memorandum organizational plans based around rule structures). This case briefing assignment should involve the type of case that is particularly problematic for students: an opinion that discusses various parts of a rule in various places within the opinion and never pulls these parts together in any comprehensive restatement of the entire rule. Asking students to perform this task is an essential first step toward the skill of restating a properly structured rule without using excessive quotes from a case.

[26] The "talk-through" reinforces previous lessons learned regarding drafting a discussion. These lessons may include: writing a beginning conclusion that incorporates the terms of the legal rule, expressing the rule in understandable form with a proper mix of quote and paraphrase, applying the rule to the facts of a hypothetical case, and supporting the application with appropriate analogy or distinction using the known case. The writing of the discussion section after this oral discussion of the components and content reinforces prior lessons, but allows the students to focus on writing rather than analysis at this point.

[27] At this point in the semester, students should already have instruction in the elementary aspects of legal writing, including what a conclusion is and how to write one that incorporates the terms of the applicable legal rule, how to "match" the facts of the hypothetical with the relevant parts of a rule, how to make analogies and distinctions to the facts of other cases to conclude that the same or different holding should apply, and

rors can be corrected by the professor or self-corrected by the student before proceeding to the next process.[29]

D. The Fourth Skill—Independently Integrating the Prior Skills of Rule Recognition, Legal Analysis, and Writing

At this time, the students should progress to an ungraded assignment where they can individually utilize the skills learned to date by briefing a case, extracting the proper rule, and applying the rule to a hypothetical in a written discussion. This assignment should be based on a new hypothetical with an additional case in the same subject area as the last one. However, the case should contain a slightly different rule structure than the last case. Because the case deals with the same subject as the first case, the students will be forced to see how rules change over time or change to meet different circumstances.[30] This written assignment requires the students independently to brief the case, to work through a legal analysis of the hypothetical problem, and to express that analysis in a written discussion section.

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whatever legal writing style your program teaches, such as IRAC or C-RAC. *See* Millich, *supra* note 7, at 34 (citing Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471, 519-22 (1988)). Of course, this article's theory and model advocate that all first-year students should be taught the skills of legal analysis and writing in a process that isolates the skill being taught, builds upon skills previously taught, and does so in a progression that aids the students' overall comprehension of the process.

[28] Because the applicable legal rule drives the entire legal analysis and, therefore, the rest of the memorandum, the parts of memos that are written last should be taught last. Therefore, the questions presented, brief answers, statement of facts, and conclusion sections may be taught later in the semester.

[29] This last written assignment allows the professor to identify which students have not been following the instruction so far or have not yet understood the amount of effort that is expected in the written assignments. Errors such as employing the wrong rule; inability to follow a discussion format such as C-RAC; or excessive grammatical, punctuation, and proofreading mistakes should denote to the professor the need for an immediate conference to alert the student to problems and help to get the student on track.

[30] This case may relate to the first case as follows: 1) further explains the rule, 2) changes the rule, 3) provides an exception to the rule, or 4) provides a different rule because the parties' situation is different. In fact, letting the students use both cases presents them with a choice which encourages them to see for themselves how the rule has changed. Some students may fail to see the change and incorrectly apply the rule, or part of the rule, from the prior case; some students may be unable to identify the correct rule from the second case. These types of mistakes identify students who need further instruction on how to read a case and find the correct rule.

E. The Progression Model Continued—Testing Skills with Graded Problems

After this step by step approach to learning the basic skills of legal analysis and performing these skills on ungraded problems, students should be ready for graded problems. These problems should be set in a known jurisdiction,[31] follow a progression from easy to complex, and utilize a variety of rule structures to both teach and test the students.[32]

Early assignments that use an elements rule structure or a simple category rule structure are often easiest for students. In addition, these structures are often the first they will encounter in their doctrinal courses. Later assignments can employ rule structures that students often find more difficult in written analysis, such as factor tests, especially those set within a specific balancing framework. Varying rule structures gives students an opportunity to stretch written and analytical abilities, whereas constant elements tests soon cease to teach new skills. Similarly, a Methods course that consistently assigns only common-law problems short-changes students in this world where statutory law is increasingly important.[33] Along the same line, problems should be based on both state and federal law. The last assignment in this progression from simple to complex is often a Methods course's oral advocacy problem. This oral advocacy problem should contain several issues and rule structures and should incorporate alternative arguments and policy arguments. Of course, the oral advocacy problem is often the most difficult for students because it must be a well-balanced problem.[34]

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[31] This model assumes that students need to learn how to use both mandatory authority and persuasive authority, which can only be done realistically in a known jurisdiction.

[32] A problem that is similar to problems in the past simply tests what a student has already learned. A problem that incorporates different rule structures or advances to statutory analysis rather than common-law, reaches into new territory and becomes both a testing and a learning vehicle.

[33] Most areas that were once ruled by common law have now become codified, such as civil procedure, evidence, criminal law, and property.

[34] As the most complex, the oral advocacy problem should not be a simple choice of rules problem. For example, a case of first impression set on a summary judgment posture often only requires that the students argue what rule the court should adopt and apply, and the facts are undisputed. This type of simple problem is easier than prior problems because students usually merely repeat policy arguments gleaned from existing persuasive opinions. Rather, such a summary judgment problem should also include the alternative issue of whether the plaintiff has sufficient evidence to create a genuine issue of fact that necessitates resolution by trial. This type of problem requires

IV. Problem Selection In Accordance With The Model

Legal Methods professors have the enviable and unenviable task of selecting new problems each semester for their students. The task is enviable because the professor has a wider range of topics from which to choose than a Torts or Contracts professor. It is unenviable because the Methods professor often feels that she or he must rewrite the curriculum each year, in a sense rewriting the casebook. Although the pedagogy suggested here reduces the range of problems available, though not the areas of law, it also reduces the amount of curriculum rewriting that must be done from semester to semester.

New Legal Methods professors often allow the chosen problems to "drive" the curriculum plan. The suggested pedagogy permits the professor's goals to set the framework. It is important to view a detailed problem plan for a whole semester to give insight into the effect that problem selection has on the curriculum.

A. First Illustration of Problems Consistent with the Model

This section will describe examples of the "build-up" pedagogy in using a common-law problem, a statutory problem, and a constitutional law problem. The constitutional law problem was not successful, but the other two worked well.

Common-law problems work well for initial build-up because each case usually analyzes one small component of the rule; hence, an early problem can focus on a small part of a rule. The professor can organize the fact pattern around that one small component, while anticipating that the next cases will bring greater rule complexity into the analysis. For example, a nuisance problem could focus on whether the conduct was intentional, that is, whether the defendant intended to do whatever ultimately caused the injury, even if he did not intend the injury. Nuisance is an elements test, and one element is whether the conduct was intentional.

The complication in the second assignment utilizing nuisance law involved the common enemy doctrine. This doctrine is a special exception to the nuisance doctrine, saved especially for neighbor-to-neighbor flooding. The common enemy doctrine allows flooding between neighbors for virtually any reason except

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an extensive factual record, complete with a complaint; answer; and various discovery documents, such as interrogatory answers, admissions, depositions, and affidavits.

malice. The exception to the common enemy doctrine is that the defendant may not "collect water and cast it in a body on to the land of his neighbor." Students will now have to work through a doctrine, then through the special circumstance of neighbor-to-neighbor flooding (generally no relief is available), then finally to the exception to the exception. This exercise requires one standard nuisance case, *Argyelan v. Haviland*,[35] and then two or three cases that allow the student to explore the question of whether the water was "cast in a body." It is an excellent common-law vehicle for teaching the basic skills of rule recognition, extraction, and application.

Statutory problems often make good rule-recognition problems, and they, too, lend themselves to gradual complication. These qualities make them good candidates for build-up problems. They often have the advantage of orderliness (if chosen well) over common-law cases. To a student, a short, well-written statute can look much less intimidating than a common-law opinion.

For example, a problem involving a claim of familial status discrimination would start with the Fair Housing Act. The statutory provision, of course, proscribes discrimination on the basis of family status. The one-case analysis used a case that clearly set out the test for determining whether there has been familial-status discrimination.

A Legal Methods professor can complicate a statutory problem by adding conflicting or refining opinions from sister courts, by adding superior authority, or by starting with a statute that is changed in a later assignment. The language preventing discrimination based on familial status was added in 1988: the problem could easily start with the earlier statute and a case involving a family, and then move on to the amended statute and a case like *United States v. Lepore*.[36]

Statutory problems, while apparently giving students "rules" that are comparatively easy to extract, are not easy problems. They do add a layer of complexity in that students must read statutes together with cases to determine what the statutes mean; statutes are more abstract than cases because they have no stories attached to them; and a simple, well-drafted statute can lull a student into a false sense of security that rule recognition and extraction are simpler skills than they

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[35] 435 N.E.2d 973 (Ind. 1982).

[36] 816 F. Supp. 1011 (M.D. Pa. 1991).

really are. Statutory problems do have the distinct advantage of balancing an otherwise lopsided curriculum that, in some schools, virtually ignores the legislative branch in the first year.

The third kind of problem that can be used in building up skills for analysis is the constitutional problem. Constitutional problems can be more fun to teach and to work on, but they pose serious problems in trying to teach basic skills. The constitutional problem described here was a Fourth Amendment protective search. The one-case analysis used a state court case, *Connecticut v. Trine*.[37] Connecticut adhered to a standard that is more protective of defendants' rights than is required by the Federal Constitution.

The difficulty in using a constitutional problem became apparent during the case-briefing portion of the class. The students do not really understand the relationship between the state and federal governments at this point in their education (if some do, it gives them an advantage that is not rightfully part of the evaluation of their competence in Legal Methods). The concept of a "more protective" standard is rather confusing, and constitutional cases include more historical background and comparison with other state and federal jurisdictions than do cases involving state statutory or common law. Thus, rule recognition and extraction become much more difficult for the student and the professor is required to spend precious time away from rule application.

The idea of the build-up for this case was to introduce a different standard, the *Minnesota v. Dickerson*[38] standard as adopted by the Illinois Appellate Court in *Illinois v. Henderson*,[39] where the "plain view" doctrine of *Terry v. Ohio*[40] was expanded to include the "plain feel" doctrine of *Dickerson*.

The weakness of such an exercise is, in retrospect, evident. Constitutional analysis requires much more policy analysis and much less application-type analysis. The problem was written to dictate the same outcome regardless of the test applied, but that did not help the students to master the fundamental skill of applying a rule to facts. The constitutional analysis presented some of the difficulty of the statutory problem described above because constitutional provisions are more abstract: if anything,

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[37] 657 A.2d 675 (Conn. App. Ct. 1995), *rev'd*, 673 A.2d 1098 (Conn. 1996).

[38] 508 U.S. 366 (1993).

[39] 640 N.E.2d 1334 (Ill. App. Ct. 1994).

[40] 392 U.S. 1 (1968).

their meaning is less evident than the meaning of a statute. Constitutional provisions also invite a level of philosophical exegesis absent even in statutory problems, and this makes them even more difficult for students to decipher.

Once the students have mastered basic rule recognition, extraction, and application, the professor may branch out into various complexities in other graded assignments. Again, the watchword is careful planning. The professor may have chosen to begin the semester with a controlled problem involving a common-law elements test, and then move to an exception complication of the test. He might then complete the build-up with a category test within the exception. The next problem should move to the next level of complexity, for example, a statutory elements test in which one of the elements has an "or" test, and another of which has a balancing test.

For example, one problem asked whether a defendant was subject to federal court jurisdiction under the Major Crimes Act. The problem required the students to find 18 U.S.C § 1153 and to determine the elements of federal jurisdiction: whether the defendant was an Indian; whether the crime was committed in Indian Country; whether the federal government had ceded jurisdiction to the state; and whether the crime was one of the enumerated offenses. The major rule, the statute, is an elements test. Whether the crime was committed in Indian Country is an elements test. Whether the crime was committed by an Indian is a factor test. Whether the crime committed was an enumerated offense ultimately requires the student to consider possible permutations that move off into state substantive criminal law.

The problem works well if the students have had the gradual build-up that teaches them to look for different kinds of tests. They then have the confidence to try various approaches to rule extraction when they encounter the cases that indicate that the question of whether a defendant is an Indian is governed by a rule whose structure is different from the rule about what constitutes Indian country.

B. Second illustration of problems consistent with the model

A first common-law case briefing assignment involved the validity of a pre-nuptial agreement in Pennsylvania from *In re Estate of Gelb*.[41] The *Gelb* rule used the traditional category

[41] 228 A.2d 367 (Pa. 1967).

test, requiring either a reasonable provision for the contesting spouse or, in its absence, a full and fair disclosure of the defending spouse's financial worth.[42] The determination of the reasonable provision category involved the court's consideration of five factors. Because the *Gelb* court found neither full and fair disclosure nor a reasonable provision for the contesting spouse, these five factors were left to a footnote in the majority opinion. The dissenting judge, however, applied the five factors and found that a reasonable provision had been made for the contesting spouse.[43]

The professor had to be sure, during the in-class discussion of this case, that the students found the correct rule. Then students needed to recognize that the rule involved a category test, with the first category having five factors and the second category having two elements.

Next, the students analyzed a hypothetical set of facts that questioned only whether full and fair disclosure of the defending spouse's assets had been made. Students were told not to address the reasonableness of any provision for the contesting spouse. The hypothetical's facts were structured so that full and fair disclosure of assets had been made at the time of the agreement. Thus, with this first analysis, students only had to find and articulate that full and fair disclosure had been made, despite monetary inflation in the intervening time between the signing of the agreement and the time it was contested.

The application of the rule to the hypothetical was extensively discussed during class.[44] After this class discussion, each student submitted the written discussion section of an office memorandum and received extensive feedback from the professor.

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[42] *Id.* at 370. To find the rule on the prenuptial agreement issue, the students first had to understand that several evidentiary questions were not relevant for their purposes and thus had to avoid confusion by the Court's discussion of parol evidence and the Dead Man's Statute. The case also provided an opportunity to reinforce the students' understanding of the standard of appellate review: the Pennsylvania Supreme Court reviewed the case after it had already been heard by an auditing judge then followed by an en banc review by the Orphan's Court of Philadelphia.

[43] The five factors were: a) the financial worth of the husband; b) the financial status of the wife; (c) the age of the parties and the number of children each has; (d) the intelligence of the parties; and (e) whether or not the wife aided in the accumulation of the wealth. This case also provided an opportunity to discuss the place in American jurisprudence of dissenting opinions. *See id.* at 372-73.

[44] *See supra* text accompanying notes 26-29.

At this time, the students were ready for a more complex rule application assignment. For this assignment, the students were given "recently discovered" affidavits that put into question the full and fair disclosure as well as two of the factors of the reasonableness provision for the contesting spouse: the contesting spouse conceived the idea for her husband's patented invention that made him a million dollars and she only had an eighth grade education. Again, the students' written discussions of this new problem gave them a chance to rewrite and correct any problems with their first discussion's full and fair disclosure analysis and also to apply two factors of the reasonableness test.

The class was now ready to write a closed memorandum for their first course grade. For this assignment, the students stayed in the same jurisdiction, Pennsylvania, and the hypothetical's facts were largely the same: the two factors of the reasonableness analysis remained in question, and the full and fair disclosure analysis was made more complex with the addition of evidence that there had been material misrepresentation of the defending spouse's assets at the time of the signing of the agreement.

For this first graded closed memorandum the only authority available was the case of *Simeone v. Simeone*.[45] The *Simeone* case changed the Pennsylvania rules on the validity of prenuptial agreements. The *Simeone* court, in reexamining and clarifying the law of these agreements, determined that courts should not be evaluating the reasonableness of a prenuptial agreement; the court retained only the full and fair disclosure requirement.[46] The use of the *Simeone* case, along with the same fact pattern from the previous problem that was analyzed under *In re Estate of Gelb*, clearly changed the result of their analysis. Students had to recognize that the entire reasonableness analysis was no longer part of the discussion. The only question remaining was whether there was material misrepresentation of the defending spouse's assets, a new wrinkle on their first full and fair disclosure analysis. This problem also demonstrated

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[45] 581 A.2d 162 (Pa. 1990).

[46] The court pointed out that prenuptial agreements are contracts and must be evaluated under the general principles of contract law, a point not made in *Gelb*. While still requiring full and fair disclosure of the financial positions of the parties, rebuttable only by proving fraud or misrepresentation with clear and convincing evidence, the court's decision reflected the changes in the status of women during the twenty years before 1990. The court noted that paternalistic presumptions and protection were no longer valid. *Id.* at 165-67.

how rules can change over time. This assignment provided the professor an opportunity for early intervention with any student who had not recognized that an analysis of the reasonableness of the defending spouse's provision for the other spouse was no longer part of the law.

This last problem made a good first graded assignment because it built upon a prior progression that gave the students experience in recognizing rules and applying those rules to the facts. The graded problem exposed them to a case in a familiar legal area, with at least one of the rules the same, but with an opportunity for a completely fresh analysis.

The next assignment involved statutory interpretation and application of Title VII. This problem tested the students' recognition and application of an elements rule structure, but the analysis was complicated by the Title VII proof models set in a summary judgment posture. The problem asked whether specified actions by a male supervisor toward a male subordinate constituted sexual harassment. First, students needed to determine whether the plaintiff had a cause of action when the harassment was from a member of the same sex. This determination involved recognizing that the statutory language had no requirement that the action be between members of the opposite sex. If students found the harassment actionable or possibly actionable, they next needed to find and apply the five elements of a hostile work environment sexual harassment claim.[47]

This proved to be an excellent research problem, as well as a complicated writing problem for the last graded assignment of the year. Virtually all United States Court of Appeals have extensive case law on hostile environment sexual harassment. Nevertheless, the professor had the opportunity of setting the problem in a circuit that had not yet addressed the question of same-sex harassment.[48]

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[47] Those five elements are: 1) that the plaintiff was a member of a protected group; 2) that he or she was subjected to unwelcome sexual harassment; 3) that this harassment was based upon sex; 4) that the harassment affected a term, condition, or privilege of employment; and 5) that the company knew or should have known of the harassment but failed to take remedial action. These elements can be found in many recent Title VII cases. *See, e.g.,* Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Jensen v. Eveleth Taconite, Co., 824 F. Supp. 847 (D. Minn. 1993).

[48] This problem involved two basic issues for the students to analyze. The first addressed whether Title VII applied to same-sex harassment, an issue of law. The second, an alternative issue assuming that Title VII did apply, addressed whether the plaintiff had enough evidence to withstand the defendant's motion for summary judgment, an issue of fact. The professor provided an extensive discovery record and the students had

C. Third illustration of problems consistent with the model

Common-law marriage in Pennsylvania worked well as the basis for a series of ungraded exercises that follow the skills building sequence described in Part III. After instruction on briefing cases and an introduction to rule structures, students were assigned to brief *In re McGrath's Estate*.[49] The clearly written and numbered trial court's four ways of proving common-law marriage (a category test) was altered by the appellate court into three categories, but these categories were unnumbered and difficult to recognize and extract from the opinion.

After briefing the case, class discussion clarified the three categories of proof,[50] and the outcome of the *McGrath* petitioner's case under those three categories. Once the case was fully understood, students were given a hypothetical in which only one category of proof applied (cohabitation and reputation as husband and wife, which raised a presumption of a common-law marriage). The application of the proper category of proof to the hypothetical facts was completely discussed in class.[51] At this point, the students completed a written discussion section of an office memorandum based on the hypothetical, the *McGrath* case, and class discussion. This assignment was purely a writing exercise because a complete oral analysis, using the C-RAC writing model, was given to them in the class discussion.

Next, the students received another case, *In re Garges*,[52] and a hypothetical, and submitted a written discussion section

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the opportunity for oral argument on the summary judgment motion. *See infra,* note 34.

[49] 179 A. 599 (Pa. 1935).

[50] Before class discussion, many students, being unable or unwilling to follow the train of thought in the opinion, put down the trial court's four categories of proof as the "rule" from the case. Correcting this early failure to follow the court's discussion of the trial court's four categories as they related to the petitioner's case gave the students an invaluable lesson in how to read a case thoroughly, "word by word." This case also demonstrated the necessity of using a variation of the "old rule" and "new rule" brief categories. *See* text *supra* at note 18.

[51] This discussion included an oral "talk-through" of a written analysis, including a beginning conclusion or thesis, a clear and concise paraphrase of the rule from *McGrath*, and a discussion of how to support the conclusion that the petitioner in the hypothetical could prove the two elements of the applicable category (cohabitation and reputation). The class discussed analogies that could be made to the *McGrath* petitioner's proof of cohabitation to support the conclusion that the petitioner in the hypothetical could prove cohabitation. Based on the *McGrath* petitioner's failure to prove reputation, distinctions were discussed. One of the facts in the hypothetical was ambiguous, which led to a discussion of how to handle an ambiguity by explaining the two possible inferences and analyzing which was the stronger by using other facts in the hypothetical.

[52] 378 A.2d 307 (Pa. 1977).

based solely on their own efforts. The *Garges* case rejected the cohabitation and reputation presumption of marriage rule in situations where one party was incapable of contracting marriage due to an already existing marriage. The court stated that despite cohabitation and reputation, the parties would be presumed to be unmarried unless unequivocal evidence of a post-divorce agreement to enter into the legal relationship of marriage at the present time could be shown.[53] The hypothetical problem contained several facts that needed to be analyzed to see if the agreement element of this rule was satisfied.[54]

An in-class follow-up provided positive feedback to those students who understood the common law marriage rules correctly. As a group exercise, the students were given a hypothetical involving three children's petition for social security benefits based on their deceased father's earnings. The hypothetical contained the fact that the hearing officer, the Secretary of Health, Education, and Welfare, and the federal district court all concluded that the petitioners were not entitled to benefits because their parents had not formed a common-law marriage. No rationale for this conclusion was given to the students, however. The students were asked to evaluate the conclusion that the petitioners were not entitled to benefits because they were not the legitimate children of the wage earner.[55] The students properly rejected the conclusion, after applying the rules of common-law marriage from the two cases they studied.[56]

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[53] Getting the right rule from this case was problematic for some students still unable to follow the court's expressions and use footnotes to help them. These students could potentially get the rule wrong in several ways, along a continuum from using the rule from *McGrath* by misunderstanding the change in presumptions where a prior marriage existed; giving an incomplete description of the *Garges* rule by leaving out the element of an oral agreement; to thinking that cohabitation and reputation continued as elements, along with the agreement, instead of merely being evidence which could corroborate the existence of what may be the requisite agreement. The place at which a student erred provided an estimate of ability or effort at that point in the semester (third week) and enabled the professor to conference and address the specific skill(s) with which a student had difficulty. Clearly, however, at this point almost no students were having any difficulty following a general C-RAC format, even where they applied the wrong rule.

[54] In the hypothetical, no agreement could be proved. Giving students an early hypothetical where their client does not have a case helps to illustrate the objective nature of an office memorandum.

[55] This hypothetical adapted the facts of Mellon v. Richardson, 466 F.2d 524 (3d Cir. 1972).

[56] At the end of the discussion, the professor told them that in the real case on which the hypothetical was based, the Third Circuit had arrived at the same conclusion as the class, and had reversed the prior decisions. This exercise provided the students

A good factor and balancing test application involved the Sixth Amendment qualified right to substitution of counsel. In this test, the right of a trial court to control its docket is balanced against the Sixth Amendment right of the defendant to substitute counsel, as determined by three factors.[57] Because this was a fairly easy factor/balancing test, the problem made a good first graded assignment.[58]

The next assignment on the continuum of difficulty involved whether a defendant could present to the jury a necessity defense to federal prison escape,[59] and was a graded open research memo. This defense has six elements, which were relatively easy to resolve based on the facts of the hypothetical, but the problem involved a difficult synthesis of the six elements from both prison escape cases and general necessity cases in the United States Sixth Circuit.[60] In addition, no case exactly on point existed.[61] Students had to make creative but close analogies to satisfy some of the defense's elements.

A complicated problem for a trial court or appellate brief involving summary judgment is routine for a semester's oral advo-

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with much needed positive feedback that they, unlike the lower tribunals mentioned, were able to correctly apply the rules to the facts.

[57] These factors are the "timeliness of the motion; adequacy of the court's inquiry into the defendant's complaint; and whether the attorney/client conflict was so great that it had resulted in total lack of communication preventing an adequate defense." United States v. Corporan-Cuevas, 35 F.3d 953, 956 (4th Cir. 1994) (quoting United States v. Gallop, 838 F.2d 105, 108 (4th Cir.1988)).

[58] In addition, the problem afforded an opportunity to discuss standards of review because the issue assigned was whether the client could obtain a reversal on appeal due to the trial court's denial of her motion for substitution of counsel. The facts of the problem were adapted from United States v. Mullen, 32 F.3d 891 (4th Cir. 1994).

[59] 18 U.S.C. § 751(a) (1988) required that the government prove that 1) she had been in the custody of the Attorney General, 2) as a result of a conviction, and 3) that she escaped from that custody. *See* United States v. Bailey, 444 U.S. 394, 407 (1980).

[60] In United States v. Singleton, 902 F.2d 471, 472 (6th Cir. 1990), the Sixth Circuit held that duress and necessity defenses have five elements, and referred to both defenses collectively as justification defenses. Specifically in prison escape cases, the Supreme Court has required that a defendant present evidence on at least two elements, *see* United States v. Bailey, 444 U.S. 394, 410, 413 (1980), both of which are included in some form in the Sixth Circuit's non-prison escape justification cases. *See* Singleton, 902 F.2d at 472. In addition to the universal five elements of duress or necessity, however, the only Sixth Circuit case addressing the defense in the prison escape context contained a sixth element, that the defendant use no force or violence in the escape. *See* United States v. McCue, 643 F.2d 394, 396 (6th Cir. 1981). Besides synthesizing the elements of the defense, the students had to discuss the difference between a necessity defense and a duress defense in the context of prison escape.

[61] The students' client, a female prisoner, escaped from a federal prison in order to prevent her Egyptian husband from taking their daughter to Egypt where she would be circumcised, also known as female genital mutilation.

cacy problem. Title VII problems work well in this regard, as long as students are provided with a record.[62] In the hypothetical used for a Title VII case,[63] the plaintiff, a member of a racial minority, was fired from his job as the assistant manager of a restaurant. After he was fired, another employee asked the restaurant manager where the plaintiff was, and the manager stated "I finally got rid of that nigger." However, the employer claimed that the employee was fired because he sexually harassed two female employees, one of whom was the manager's girlfriend, and because he had "stolen" food from the restaurant when he charged food under a company policy that had been supposedly eliminated the day before.

The complicated proof model of Title VII, as well as the summary judgment posture, made this a difficult organizational problem for the students. In addition to struggling with the summary judgment standards, the employer's two articulated non-discriminatory reasons for firing the plaintiff required the students to go over the record with a fine-tooth comb to justify their positions.

V. CONCLUSION

Legal Methods faculty occupy the most enviable position of all faculty in the sense that they are empowered to control the curriculum in a way that other faculty are not. There is much untapped potential in problem selection. It can be a source of great teaching opportunity if it is thoughtfully planned and systematically presented.

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[62] Ideally, this record should contain a complaint, an answer, interrogatories, employer's records and documents, deposition transcripts, and affidavits. Students grasp civil procedure generally, and summary judgment particularly, when they have to support or oppose a defendant's motion for summary judgment and look closely at the record for sufficient or insufficient evidence. *See supra* note 34.

[63] The facts of this hypothetical were adapted from Carter v. Smithfield's of Morehead, Inc., 1995 U.S. App LEXIS 19681 (4th Cir. July 26, 1995).