Designing Problems to Enhance Student Learning

By Elizabeth E. Berenguer

One of the most challenging aspects of teaching legal writing is problem design. From year to year, legal writing professors must decide whether to re-use a problem, create a problem from scratch, or borrow a problem from somewhere else. It is not uncommon to see an email come across the listserv asking, “does anyone have a fun fact pattern involving a contract dispute?” or “is anyone willing to share a fun problem involving discrimination?” (or contracts, or torts, or some other specific area of the law). The legal writing community is a generous community, so these requests are frequently answered by many who graciously share their work with others. It strikes me, though, that these requests may not be asking the best question. Sure, it is important that students engage with the problem, and fun facts often increase engagement. But fun facts can be written about virtually any type of legal issue. In this Article, I argue that asking a more refined question focused on rule structure and desired outcomes, not just fun facts, leads to better learning outcomes for students.

This issue of “fun fact patterns” has been eating at me for some time, which is why I decided to write this Article. I began noticing the issue during my second year of teaching when my students did not seem to be mastering concepts as well as my students had mastered them the first year I taught. This struck me as odd. I was using the same textbook and my teaching skills were improving through mentoring and the growth I achieved through attending conferences and plugging into the national legal writing community. There was no marked difference in the students, either—I was teaching at the same institution, the median LSAT and UGPA for that class was higher than the prior year, the class size was the same, and that cohort did not differ dramatically from the prior year’s cohort in any other way. Even the gender and racial composition of the two classes remained virtually the same. It did not make sense that the students I taught my second year were not writing as articulately as students I taught my first year. So, I began to study this question and eventually isolated the problem.

1 Elizabeth E. Berenguer is an associate professor of law at Stetson University College of Law. This Article would not have been possible without the valuable insights and feedback of Professor Anne Mullins, Associate Dean for Assessment & Professional Engagement, Professor Linda Anderson, both of Stetson University College of Law and Professor Amanda Fisher, University of Arkansas School of Law. Many thanks are also owed to Professors Lucille Jewel and Teri A. McMurtry-Chubb for their enduring support, Dr. Kirsten Davis for her collegiality and advice, and Professor Christine Cerniglia for her encouragement and enthusiasm.


3 Recycling problems can increase issues such as plagiarism and cheating because current students may find it easier to get their hands on work submitted in prior years and either submit it as their own or modify it to become their own work. Either way, using a new problem helps to maintain a more level playing field in the classroom and eliminates opportunities to cheat or plagiarize.
What I came to realize is that in my first year of teaching, we initially used problems with simple rule structures and throughout the year progressed to problems with more complex rule structures. In the second year, however, the first problems used fairly complicated rule structures, and throughout the year there was no variation in rule structure. The complexity of the rule structures in the second year interfered with the students’ ability to master analysis, synthesis, organization, and all the other disciplinary skills we try to teach in the first year. Essentially, we made the fatal mistake of creating problems that did not help students develop certain critical skills because we did not take into consideration what we were trying to teach.⁴ We also committed the fatal mistake of assigning problems that were too difficult.⁵

This makes sense, if you think about it. The only major change from year to year in a legal writing course is the problem, or problems, we assign to the students. Most of us find a textbook we like and stick with it. We also tend to approach class lectures in similar ways. The problem, though, operates like a separate text for the course, and, for most professors, it consistently changes from year to year for a variety of reasons, including, but not limited to, reducing the temptation for students to plagiarize or otherwise cheat on assignments.⁶ I am not implying here that we never make other changes—I always tweak my notes and sometimes even rearrange the order of presentation—but from a conceptual standpoint, I generally teach the same disciplinary substance to my students, and in roughly the same order, and I know many of my colleagues do the same. The main difference from year to year is the problem.

By focusing primarily on the “fun fact pattern,” professors tacitly view the problem as a mere summative assessment tool to measure whether students have learned certain skills like rule synthesis, organization, rule explanation, and rule application, not as the integrated learning experience⁷ that it is.⁸ This integrated learning experience is formative because does not simply reveal to the professor what a student has learned, it is the method by which student learning occurs. The “fun facts” approach is superficial and reminiscent of those “[f]irst-year programs [that] have traditionally followed a product-oriented approach to teaching . . . with an emphasis on the student’s finished written product” as opposed to the process approach.⁹

To create a problem that is truly an integrated learning experience, providing both a sound formative and summative assessment of student learning,¹⁰ it is necessary to consider the ultimate

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⁴ Bannai, et.al., 38 U. DAYTON L. REV. at 198.
⁵ Bannai, et.al. 38 U. DAYTON L. REV. at 199.
⁶ If a professor recycles a problem from year to year, it can become easy for a high-scoring submission from a prior year to get into the hands of the current class.
⁷ Thank you to Professor Anne Mullins for coining the phrase “integrated learning experience” after reading an early draft of this article and offering helpful critique.
⁸ Linda L. Berger, Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context, 49 J. LEGAL EDUC. 155, 156 (1999) (“what writers do is how they come to know.”) “When our students write memos and briefs, they are doing more than just telling us what they know. They are also learning how to think like lawyers.” Laurel Currie Oates, Beyond Communication: Writing as a Means of Learning, 6 J. LEGAL WRITING INST. 1, 1 (2000); Christine M. Venter, Analyze This: Using Taxonomies to Scaffold Students’ Legal Thinking and Writing Skills Legal Writing, 57 MERCER L. REV. 621, 626 (2005).
¹⁰ I acknowledge that the advent of AI may fundamentally change the way we think about formative and summative assessment. That analysis is beyond the scope of this article. This article relies on the traditional view that legal
goal(s) of the assignment, which must be rooted in the goals of legal education, generally. The general goals of legal education, to a large degree, are to introduce students to the discourse community and teach them to utilize the language and systems of the community. This is often referred to as teaching students to “think like lawyers.”

The ABA Sourcebook on Legal Writing identifies the following skills that should be taught in a typical first year writing course:

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<td>Oral Argument</td>
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<td>Circuit Splits (Reconciliation)</td>
<td>Persuasive Writing</td>
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writing problems and the resultant student work product can provide for sound formative and summative assessment when thoughtfully constructed.


The first-year courses train students how to find and make meaning out of the law. To teach students to think like lawyers, law school creates a discipline whereby students are trained to draw lines between “the material and the immaterial”\(^\text{14}\) according to a particular way of knowing and being that is rooted in traditional Greek rhetoric.\(^\text{15}\) The law expects arguments to take a particular form, the syllogism, which Aristotle considered to be “the structure that produces new


knowledge.” 

Syllogistic reasoning depends upon “bivalence, transitivity, and disembodied rational thought.” Throughout this training, not only must students learn to identify meaning

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16 Berenguer, Jewel, McMurtry-Chubb, CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE, AND EQUITY, 12 (Bristol University Press 2023).

17 “Bivalence is the concept that any one thing must belong inside a single category. In Aristotle’s view, it is not possible for the same thing to belong both and not belong in the same category. A fact must be either true or false. It is not possible for Socrates to be both a man and a god, to be both mortal and immortal. One can trace a host of thinking patterns to the concept of bivalence. First, in modern thought, the bivalence principle is responsible for mutual exclusivity and strict either/or dichotomies. Second, in the law, bivalence is responsible for a winner takes all type of thinking—for instance, one is either guilty or not guilty. Western norms of competition, which are intensely embedded in the common law’s adversarial system, deeply entrench these either/or thought patterns. And third, bivalence emphasizes a oneness of thinking, a monistic style of thinking, that has been reinforced by Judeo-Christian monotheism, where causal agents are identified as single things that necessarily exclude all other things. Here, bivalence helps define linear thought, for instance, that there is usually only one primary reason or cause for any given event.” Berenguer, Jewel, McMurtry-Chubb, CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE, AND EQUITY, 12-13 (Bristol University Press 2023).

18 “[T]ransitivity is the rule that mandates that if two things are identical to a third, then they must be identical to each other. Implicit in this concept is that if two things both fit inside a single categorical box, then they must be identical to each other. All men are the same in that they are all mortal. Transitivity fuels stereotypes, the idea that everyone situated in the same category has exactly the same attributes. This type of thinking tends to gloss over and even ignore complexity.” Berenguer, Jewel, McMurtry-Chubb, CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE, AND EQUITY, 12-13 (Bristol University Press 2023).

19 While it initially might seem that disembodied rational thought is a laudable goal that can ensure neutral decision-making, it is simply not possible for humans to make decisions without being influenced by their life experiences. E.g. Elizabeth Esther Berenguer, The Color of Fear: A Cognitive-Rhetorical Analysis of How Florida’s Subjective Fear Standard in Stand Your Ground Cases Ratifies Racism, 76 Md. L. Rev. 726, 728-29 (2017) citing Michael R. Smith, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 259 (2002); see also Linda L. Berger, The Lady, or the Tiger? A Field Guide to Metaphor and Narrative, 50 WASHBURN L.J. 275, 280-82 (2011); Kenneth D. Chestek, The Plot Thickens: The Appellate Brief as Story, 14 J. LEGAL WRITING INST. 127, 136 (2008); Jennifer Sheppard, Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda, 46 WILLAMETTE L. REV. 255, 259 (2009); see generally Barbara A. Spellman & Simone Schnall, Embodied Rationality, 35 QUEEN'S L.J. 117 (2009) citing Daniel Kahneman, Paul Slovic & Amos Tversky, eds., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Cambridge: Cambridge University Press, 1982) and others. Instead, what happens is that the dominant experience (wealthy white landowners, who were all men until fairly recently, in the case of the United States) comes to be viewed as neutral and disembodied. Arguments that do not align with the values of the dominant class are viewed as unpersuasive because they lack pathos (which is the appeal to values). Arguments that do not follow the syllogistic form are viewed as unpersuasive because they lack logos (which is the appeal to logic), at least in the form expected by the audience. Finally, arguments that do not conform to the conventions of traditional legal rhetoric are viewed as unpersuasive because they lack ethos (which is the appeal to credibility) because the writer is presumed ignorant of the conventions of the discourse community. Berenguer, Jewel, McMurtry-Chubb, CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE, AND EQUITY, 9-65 (Bristol University Press 2023)

20 Berenguer, Jewel, McMurtry-Chubb, CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE, AND EQUITY, 12 (Bristol University Press 2023).
within the law as it exists, but students also learn that becoming a lawyer imbues them with the power to create legal meanings that affect the material and social reality of others.²¹

The first year ultimately “trains the student away from empathy, moral outrage, and social justice concerns and . . . refocuses the student toward the rule of law absolutism and toward instrumental relativism.”²² Inevitably, “professors ask students to enter into a binary system of verbal combat where each legal argument is matched by a nearly equal and opposite counter-argument.”²³ Often, students are assigned to argue a specific side, having no say in the assignment, which is typically made “without reference to personal morality.”²⁴ Moreover, students typically are asked to “make the opposing argument as well. Thus, law students learn to switch allegiances easily.”²⁵ In this way, law school trains “lawyers . . . to believe or, at least, speak and write as if the law is so loaded with unquestioned authority or is so fair, neutral, and objective in its application that the lawyer needs no personal, moral relationship to the dispute or to the arguments that positional necessity might ‘require’ them to advance.”²⁶ In other words, becoming a lawyer “means more than learning to think, read, and talk about the law. It means casting off one's moral compass, shutting down one's empathetic response, and putting grander concerns about social and political justice aside in favor of satisfying the surface requirements of formal rationality.”²⁷

Law school thus obscures privilege and power in the real world behind a façade of “false certainty of law, . . . facial neutrality, and . . . linear logic.”²⁸ “This ‘invisibilization’ of power, privilege, and cultural advantage (and the correlative invisibilization of subordination, oppression, and stigmatization) is the hidden curriculum of professional training, a training that simultaneously reproduces and camouflages the dominant social order.”²⁹

Legal writing professors participate in this professional training by guiding students both implicitly and explicitly as they enter the discourse community and “not only cooperate with . . . language in"doctrine"ation . . . , [but] teach it explicitly both with . . . doctrinal research and writing assignments and with [a] self-reflective use of process and socio-cultural approaches to legal

²² Berenguer, Jewel, McMurtry-Chubb, CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE, AND EQUITY, 9 (Bristol University Press 2023).
²⁴ Baker, 34 J. MARSHALL L. REV. at 135
²⁵ Baker, 34 J. MARSHALL L. REV. at 135
²⁶ Baker, 34 J. MARSHALL L. REV. at 135
²⁷ Baker, 34 J. MARSHALL L. REV. at 135. The American Bar Association has made efforts to address this issue through the adoption of the new Standard 303(c). Interpretation 303-5 provides that “[t]he development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice[,] . . . developing a professional identity requires reflection and growth over time.” Interpretation 303-6 further emphasizes “the importance of cross-cultural competency to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law.”
²⁸ Baker, 34 J. MARSHALL L. REV. at 136
²⁹ Baker, 34 J. MARSHALL L. REV. at 136
writing.”

One process-based example is teaching rule-based reasoning where we ask students to abstract the complexities and humanity of the dispute to the extent that they effectively reject morality and empathy in favor of “categorical certitudes and legal edifices that create a false aura of inevitability.”

From a socio-cultural standpoint, we arbitrarily assign students roles and ask them to change roles, without regard for their personal morality or life experience. In doing so, we “reinforce[] the alleged ‘objectivity’ and authority of law” because we demand that students “speak and write as if the law is so loaded with unquestioned authority or is so fair, neutral, and objective in its application that the lawyer needs no personal relationship to the dispute or to the arguments.”

It cannot go without saying that legal writing professors have a tremendous opportunity to resist and improve how law school is taught and practiced by changing the way we think about creating the problems in our classroom. This resistance teaching would align with recommendations in the MacCrate Report, the Carnegie Report, and more recent changes to the American Bar

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30 Baker, 34 J. MARSHALL L. REV. at 140. “[T]his phenomenon . . . reinforces the alleged "objectivity" and authority of law, [and promotes] the amorality of arbitrary assignments to such roles and the consequences of being asked repeatedly to change roles.” 134. See also, e.g., Kathryn M. Stanchi, Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices, 103 DICK. L. REV. 7, 12 (1998); Jamie R. Abrams, Book Review: THE LEGAL SCHOLAR’S GUIDEBOOK, 69 Am. J. Legal Ed. 836 (2020).

31 Baker, 34 J. MARSHALL L. REV. at 133.
32 Baker, 34 J. MARSHALL L. REV. at 135
33 Baker, 34 J. MARSHALL L. REV. at 134.
34 Baker, 34 J. MARSHALL L. REV. at 135.
35 The point “is not whether we participate in the doctrinal acculturation of our students or serve valid pedagogical aims by revealing it, but whether we are willing to criticize its misconceptions and self-deception, reform or transcend its flaws, and transform its application.” Baker, 34 J. MARSHALL L. REV. at 147. To do that, one must acknowledge the existence of doctrinal acculturation. Many legal scholars are currently engaged with the work of dismantling doctrinal acculturation. E.g., Berenguer, Jewel, McMurtry-Chubb, CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE, AND EQUITY (Bristol University Press 2023); Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power, 23 HARV. LATINX L. REV. 205, 220 (2020); Teri A. McMurtry-Chubb, The Practical Implication of Unexamined Assumptions: Disrupting Flawed Legal Arguments to Advance the Cause of Justice, 58 WASHBURN L.J. 531 (2019); Teri A. McMurtry-Chubb, Still Writing at the Master’s Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy, 21 SCHOLAR 255 (2019); Teri A. McMurtry-Chubb, On Writing Wrongs: Legal Writing Professors of Color and the Curious Case of 405(c), 66 J. LEGAL EDUC. 575 (2017); Lucille A. Jewel, Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy, 56 BUFF. L. REV. 1155 (2008); Lucille A. Jewel, Oil and Water: How Legal Education’s Doctrine and Skills Divide Reproduce Toxic Hierarchies, 31 COLUM. J. GENDER & L. 111 (2015); Kathryn M. Stanchi, Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices, 103 DICK. L. REV. 7 (1998); Kenneth Chestek, Dimensions of Being and the Limits of Logic: The Myth of Empirical Reasoning, 19 JALWD: Legal Communication & Rhetoric 23 (2022): but see Eun Hee, Tiffany Jeffers, Susan McMahon, The Unending Conversation: Gut Renovations and No-Demo Renos, 6 Stetson L. REV. 1 (2023).
37 William M. Sullivan et al., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, Carnegie Foundation for the Advancement of Teaching (2007))
Association Standards\textsuperscript{38} governing law schools.\textsuperscript{39} But teaching as resistance is the subject of another article. For purposes of this Article, it is important simply to understand the role that problems play in actual teaching, not just measuring, legal knowledge and practice.

Of course, it is necessary for students to graduate law school fluent in legal communication because “a discourse community will invariably recognize and accept certain forms of discourse to be legitimate while rejecting other forms. To make legal decisions, give legal advice, and participate in legal dialogue, new community members need to know what kinds of evidence and argument currently count.”\textsuperscript{40} The challenge of problem design is creating a problem that is suitable not only for assessment, but also for pedagogy; it is, after all, an integrated learning experience. As legal writing professors guide students into the law discourse community, it is imperative that we not only equip students to speak and think like the discourse community,\textsuperscript{41} but we must simultaneously train students to critique the norms and empower them to deconstruct the illusions of neutrality.\textsuperscript{42} In practice, lawyers must know how to “speak within the discipline and about the discipline in order to perform appropriate tasks, to signal membership, and to challenge conventional approaches with more transformative ones.”\textsuperscript{43}

Their training must therefore begin with identifying a rule structure that students are capable of analyzing based on their knowledge and experience to that point in law school. In other words, we as professors must be thinking about scaffolding writing experiences from less complicated to more complicated and designing problems that focus on the particular skills we are teaching and the outcomes we desire to produce at any given moment.\textsuperscript{44} Professors must be careful to create problems that are, to quote Goldilocks, “just right”: not too complicated (to avoid cognitive overload\textsuperscript{45}) and not too simple (to avoid cognitive underload\textsuperscript{46}). There is a lot more to it than just choosing “fun fact patterns” for our students.

Because rule structure drives so much of how the problem is resolved and how the written product is organized, that should be at the forefront of the professor’s mind from the very beginning.\textsuperscript{47} It

\textsuperscript{38} American Bar Association Standard 303(c) and Interpretations 303-5 and 303-6.
\textsuperscript{39} See generally, Elizabeth Berenguer, Lucy Jewel, and Teri A. McMurty-Chubb, CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE, AND EQUITY (Bristol University Press 2023).
\textsuperscript{40} Baker, 34 J. MARSHALL L. REV. at 141.
\textsuperscript{41} Baker, 34 J. MARSHALL L. REV. at 143 (students “must learn the language of the realm in order to meaningfully participate in the activities and discussions that instantiate their socialization”).
\textsuperscript{43} Baker, 34 J. MARSHALL L. REV. at 142-43.
\textsuperscript{44} Gail Anne Kintzer, Maureen Straub Kordesh & C. Ann Sheehan, Rule Based Legal Writing Problems: A Pedagogical Approach Presentation, 3 LEGAL WRITING: J. LEGAL WRITING INST. 143 (1997); Venter, 57 MERCER L. REV. 621.
\textsuperscript{45} See Venter, 57 MERCER L. REV. at 632, see also, Linda Berger, Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context, 49 J. LEGAL EDUC. at 163.
\textsuperscript{47} While Bannai et al., acknowledge that rule structure is an important consideration in problem design, their article does not explicitly emphasize that rule structure is the number one decision that drives problem design and that
is axiomatic that the rule structure of our problems impact student learning; solving the problem itself and expressing the solution in writing and orally is the learning. 48 Certainly, a student is not going to learn how to do legal writing by exclusively reading samples and listening to lectures, 49 and mere exposure to the legal writing discipline will not necessarily cause students to become fluent in the discourse. 50 They must wrestle with the concepts in a hands-on way through analyzing the issues in the problem, researching the law, synthesizing the law to coherently examine the issues, and actually writing about it.

Part of the problem with knowing how to design effective legal writing problems is that our methods for designing problems has not evolved consistently alongside legal writing pedagogy. Early on, “writing was thought of as separate from analysis and the focus was on practical knowledge development: teaching students how to produce legal memoranda, briefs, etc.” 51 This content development is known as the “traditional product approach.” 52 The traditional product approach is conducive to a more superficial focus on content such as organizational paradigms, citations, grammar, and style as opposed to actual analytical thought. 53 Now, the field of legal writing has developed a discourse community with a robust discipline that recognizes the analysis occurs through the process of writing, and learning how to engage in rigorous analysis of complex legal questions is more than just a skill. 54 This is known as the process approach, 55 and it focuses less on content generation and more on the how and why of legal writing. 56 Students who learn through the process approach are able to translate their skills in a variety of ways to meet the demands of practice. 57

primarily focusing on rule structure can prevent the Top Ten Mistakes from occurring. 38 U. DAYTON L. REV. at 201. Similarly, while the Kintzer article recognizes that certain rule structures are easier for students than others, it does not explain how varying rule structures is essential to comprehensive student learning, nor does it tie specific rule structures to specific outcomes. 3 LEGAL WRITING: J. LEGAL WRITING INST. 143.

48 “[W]riting and assimilating knowledge are linked; ‘writing is a way of knowing and learning’ in the discipline.” Teri A. McMurtry-Chubb, Toward a Disciplinary Pedagogy, 1 SAINT MARY’S L. REV. 169, 171 (2014) quoting Michael Carter, Ways of Knowing, Doing, and Writing in the Disciplines, 58 C. COMPOSITION AND COMM. 385, 385 (2007); “It is through the complex recursive process of analyzing and writing that students construct meaning, and become prepared to ‘enter the discourse community of lawyers and to practice law.’” Leonore F. Carpenter & Bonny Tavares, Learning by Accident, Learning by Design: Thinking about the Production of Substantive Knowledge in the LRW Classroom, 88 UMKC L. REV. 39, 52 (2019).

49 Although samples and lecture explanations can be helpful in introducing students to the common discourse of lawyers, students must still engage with the drafting process itself to acquire the knowledge and skills essential to lawyering. Judith B. Tracy, “I See and I Remember; I Do and Understand”: Teaching Fundamental Structure in Legal Writing through the Use of Samples, 21 Touro L. Rev. 297 (2005); see also Bannai et al., 38 U. DAYTON L. REV. at 200.

50 Venter, 57 MERCER L. REV. at 625.
51 Carpenter and Tavares, 88 UMKC L. REV. at 50; see also Durako et al., 58 U. PITT. L. REV. at 719-722.
52 Durako et al., 58 U. PITT. L. REV. at 720.
53 Venter, 57 MERCER L. REV. at 625.
54 Durako et al., 58 U. PITT. L. REV. at 719-722. It is true that some within the legal writing community do not yet perceive the field as a disciplinary discourse community and remained adhered to the traditional product approach because they “remain under-informed about the process approach and how to implement it in the classroom.” 58 U. PITT. L. REV. at 720.
55 Durako et al., 58 U. PITT. L. REV. at 720.
56 Durako et al., 58 U. PITT. L. REV. at 722
57 Durako et al., 58 U. PITT. L. REV. at 722
With this Article, I hope to emphasize that as a professional community we should be thinking beyond whether we have simply come up with a “fun fact” pattern that we can live with the rest of the semester. Obviously, I am not the first one in our field to make this claim. Bannai, et.al., have advised that we should “(1) teach, and allow students to practice, specific skills; (2) be neither too difficult nor too easy; (3) involve subjects that are interesting, familiar, and realistic; (4) be well researched; and (5) be sensitive in its treatment of issues and individuals.”

Kintzer et al., have also written that rule structure should be considered when designing problems, but in describing their experience with build-up pedagogy, they recount using “a common-law problem, a statutory problem, and a constitutional law problem,” in that order. They do not explain the process of problem design itself or emphasize how rule structure drives that process.

This Article takes the general suggestion of considering rule structure to teach specific skills further by making the claim that rule is the foremost consideration for ensuring students learn specific skills and can translate those skills to different rhetorical contexts. I also want to address the lack of information available on how to go about designing problems—many articles identify what makes a good problem, but few guide novice professors on how to design one. While there have been articles written on many aspects of legal writing pedagogy, I have yet to find one that explains the process of problem design or identifies the types of rule structures that pair best with the various skills we must teach over the course of the first year.

This Article relies on best practices and modern pedagogical theory to assert that the problems used in legal writing courses should be intentionally designed around specific rule structures and developed to accomplish discrete learning outcomes and pedagogical goals. Section II briefly discusses the challenges we face when designing problems. Section III explains why problem design matters. Section IV provides a framework and process for effective problem design. Section V concludes by reiterating the pedagogical benefits of intentional problem design and the benefit to students overall.

II. Challenges with Designing Problems.

A significant challenge to problem design is that few resources explain how to do it, and those that do exist have historically viewed the law “as a fungible aspect that varied based on skills-based

58 Bannai et al., 38 U. DAYTON L. REV. at 200.
59 Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 151
60 Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 152.
61 Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 152-162
62 See generally, Bannai et al., 38 U. DAYTON L. REV. 193; Carpenter and Tavares, 88 UMKC L. REV. 39; Grace Tonner & Diana Pratt, Selecting and Designing Effective Legal Writing Problems Presentation, 3 LEGAL WRITING: J. LEGAL WRITING INST. 163 (1997). The Bannai et.al., articles does lay out a process for problem design, but it again provides abstract characteristics that professors should keep in mind without guiding them on why these are important, how they influence decisions, and what ultimately influences the final design of the problem. 38 U. DAYTON L. REV. 193. Kintzer et al., share their experiences with very specific problems using certain legal doctrines, but they do not explain how they created the problems themselves. 3 LEGAL WRITING: J. LEGAL WRITING INST. 143.
pedagogical goals.”

Most advise professors to choose a substantive area of law that first year students can comprehend without consideration of the rule structures relevant to solving the particular issue presented in the problem. Even the articles that advise professors to choose rules based on the rules’ organizational approach do not spend time explaining the various rule structures or identifying the structures that are best suited to teaching discrete skills. Indeed, there is even disagreement about what disciplinary writing should be. Consider the questions posed in David Russell’s comprehensive history of writing, Writing in the Academic Disciplines: A Curricular History:

Is writing a set of discrete mechanical skills or a function of maturing thought? Should students be able to generalize instruction in writing to a variety of situations, or do students need help in discerning the requirements imposed by different contexts? Should writing be regarded as transparent (an intrinsic skill), or should writing be highlighted as a powerful means of learning? Is writing something that the chosen few learn to do without being taught, or should writing instruction provide mobility within a democratic society?

Many articles that tackle problem design simultaneously address other issues, such as curriculum, course design, and the legal writing discipline as a whole. The 1997 essay by Grace Tonner and Diana Pratt, Selecting and Designing Effective Legal Writing Problems, provides a good example of how attempts to provide concrete guidance on problem design ultimately function more as a guide to course sequencing rather than problem design. I have chosen to use this particular essay as the prototypical example of this type of scholarship because its purpose (as explicitly stated in the title) is to aid the reader in “Selecting and Designing Effective Legal Writing Problems.” To be fair, they wrote this article in 1997 when the field of legal writing was still figuring out what it


64 Carpenter and Tavares, 88 UMKC L. REV. at 54. Kintzer et al., explicitly say that rule structure should be considered, but in their Section IV, they discuss the problems themselves in terms of style (common-law statutory, or constitutional) and the complexity of doctrine (nuisance law/common enemy doctrine, Fair Housing Act, Fourth Amendment, and so forth). They do not associate the success or failure of the problem with the underlying rule structure itself. 3 LEGAL WRITING: J. LEGAL WRITING INST. 143.

65 Bannai, et al., 38 U. DAYTON L. REV. at 202. None of the 10 steps the authors identify as the process for putting together an assignment advise professors to consider how the rule structure would advance the goals of the assignment. Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. 143. This article focuses on the complexity of skill first, such as reading cases, then identifying rule structures, and then integrating those steps by briefing a complex case. 147-48. Although it advises that “[v]arying rule structures gives students an opportunity to stretch written and analytical abilities,” it does not explain how or why this statement is true, and it does not advocate a specific order for introduction of rule structures, and it also does not connect specific rule structures to specific outcomes.


67 Durako et al., 58 U. PITT. L. REV. 719

68 Tonner and Pratt, 3 LEGAL WRITING: J. LEGAL WRITING INST. 163; The Durako et al., article, From Product to Process: Evolution of a Legal Writing Program, is another good example, but for purposes of this article, one example suffices to establish the point that scholarship on problem design has tended to focus more on curricular choices and course development rather than the process and mechanics of designing pedagogically sound problems.

69 Tonner and Pratt, 3 LEGAL WRITING: J. LEGAL WRITING INST. 163.
meant to be a discipline, and this article met many needs for its audience at that time. In the interim, however, little has been written to further develop the ideas they propounded, and the needs of the legal writing community have evolved as the discipline has evolved.

One exception is the Kintzer et al., article entitled Rule Based Legal Writing Problems: A Pedagogical Approach. The Kintzer et al., article does say that rule structure should be considered when designing problems and that assignments should progress from simple to complex, but it does not define what it means by “simple” and “complex.” It also mixes the ideas of rule structure, common law and statutory law, and state and federal law, failing to identify a central driving force and neglecting to guide the reader in how to prioritize these considerations. Instead of focusing on how rule structure influenced the complexity of the problem, they describe their own problems and reveal what worked well and what did not. Additionally, the rationale for what worked and what did not was tied more to underlying doctrine than rule structure.

In this Article, I focus exclusively on rule structure as the central driving concern in problem design because changes in state and federal law or common law and statutory law, from a problem design perspective, do not drive the pedagogical outcomes. For example, a student can learn rule synthesis from any set of cases, regardless if they are federal or state. It is true that the difficulty level of research or complexity of procedural posture could be influenced by whether the problem is positioned at the state level or federal level, or even whether a statute is involved, but these concerns are secondary to the complexities created by rule structure. Rule structure drives organization and the way that students begin to think about the problem, and for this reason it must be the first and primary inquiry. The other potential complexities should be addressed after the rule structure is selected and the problem begins unfolding.

Returning to the course sequencing set of articles, the Tonner and Pratt essay tends to focus on the various documents that can be created (such as a predictive memo or appellate brief), rather than on how problem design facilitates student learning. It thus takes a traditional product approach and responds to these questions by treating legal writing as a mere skill, not a disciplinary learning tool. The essay does not mention substantive law until the end, almost as an after-thought.

The Tonner and Pratt essay begins by explaining that the “general considerations in problem design” are identifying the “research, analysis, organization, predictive writing, and persuasion” skills the professors desires to teach, but it does not tie these goals to the substantive design of the problem. It then goes on to identify particular skills and explain the pros and cons of working

70 Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 143.
71 Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 143.
72 Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 152.
73 Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 152.
74 Tonner and Pratt, 3 LEGAL WRITING: J. LEGAL WRITING INST. at 163-172.
75 Tonner and Pratt, 3 LEGAL WRITING: J. LEGAL WRITING INST. at 172-73. Taking a slightly different approach, the Durako et al., article documents the process by which faculty at Villanova Law School shifted from the traditional product approach to the process approach, highlights innovations in assessment methods, and reports the impact of the changes on student learning, but the article does not explain how the problems underlying the assignments were designed, or even whether the problem design choices changed when the course shifted from the traditional product approach to the process approach. 58 U. PIT. L. REV. 719
76 Tonner and Pratt, 3 LEGAL WRITING: J. LEGAL WRITING INST. at 163-64.
with a single fact pattern or different fact patterns throughout the semester.\textsuperscript{78} It seems to prioritize document production over skill mastery (the traditional product approach over the process approach), particularly in the section on “Designing Expository Problems” where it informs that a first year legal writing course uses “three different types of expository assignments . . . a briefing exercise and analysis memo, a closed universe memorandum, and an open research memorandum.”\textsuperscript{79} Even if this prioritization was unintentional, it has the effect of failing to examine the unquestioned assumption that producing legal documents inevitably leads to skills mastery. It also implies that we are teaching students to draft documents as opposed to teaching them how to answer complex legal questions and using legal documents as a tool to coherently express the solutions to those complex legal questions.

Next, the Tonner and Pratt essay prioritizes jurisdiction by informing that persuasive writing can be taught “with a problem set at either the trial or the appellate level” and that “[t]he choice depends on the dictates of your program.”\textsuperscript{80} Again, this section implies that the most important priority is teaching document production rather than utilizing document production as a tool to facilitate the solving of complex legal issues. Notably, the essay does not mention rule structure as a guide to problem design at all and advises professors to seek topics from, \textit{inter alia}, “first year courses[,] . . . [t]reatises[,] . . . [o]n a more popular level, . . . the news media.”\textsuperscript{81} In other words, look for something fun and familiar to students. This advice is consistent with the common practice “[i]n typical first-year Legal Writing courses, [where] four or more major assignments will be given, each of which requires students to analyze one or several legal questions [which] often are chosen specifically to avoid duplicating issues covered in other first-year courses, partly in order to expose students to an area of law they are not already studying and may not have a chance to study before they graduate.”\textsuperscript{82}

While, of course, the subject chosen for a legal writing problem is inevitably bound to produce in students deep knowledge about that subject, producing that deep knowledge is not the primary goal. Rather, it is merely “incidental declarative knowledge”\textsuperscript{83}, a tool, if you will, to facilitate the deliberate knowledge of how to engage in legal analysis to solve complex legal problems. Furthermore, when the central focus of problem design is identifying a fun fact pattern or choosing a memo or a brief, we accept the false binary that legal writing is merely a skills course unsupported by a substantive discipline.\textsuperscript{84} As such, the incidental declarative knowledge cannot be the driving motivator in the design of the problem. Instead, the driving motivator in problem design must be the deliberate declarative knowledge of legal analysis as expressed orally and in writing.\textsuperscript{85}

\textsuperscript{78} Tonner and Pratt, 3 LEGAL WRITING: J. LEGAL WRITING INST. at 164-65.
\textsuperscript{79} Tonner and Pratt, 3 LEGAL WRITING: J. LEGAL WRITING INST. at 166. The memo has traditionally been considered an “objective” document, and many legal writing programs bifurcate objective or predictive writing from persuasive writing. \textit{See} Tracy, 21 TOURO L. REV. at 304-05.
\textsuperscript{80} Tonner and Pratt, 3 LEGAL WRITING: J. LEGAL WRITING INST. at 169.
\textsuperscript{81} Tonner and Pratt, 3 LEGAL WRITING: J. LEGAL WRITING INST. at 172-73.
\textsuperscript{82} Edwards, 1 SAVANNAH L. REV. at 4-5.
\textsuperscript{83} Carpenter and Tavares, 88 UMKC L. REV. 39.
\textsuperscript{84} Carpenter and Tavares, 88 UMKC L. REV. at 42-44.
\textsuperscript{85} Carpenter and Tavares refer to the deliberate declarative knowledge of legal analysis as “practical knowledge” in an effort to better characterize the oversimplified false dichotomy implied by the terms: “skills” and “doctrinal.” 88 UMKC L. REV. 39. A thorough examination of the “practical knowledge” label is beyond the scope of this Article,
As Durako et al., emphasize, the problems used in legal writing courses are substantive. The critical skills they identify include teaching students that (1) the recursive writing process involves the overlapping and intertwining of pre-writing, writing, and revision; (2) legal “writing is rhetoric based, focusing on audience, purpose, and constraints”; and (3) the final product must simultaneously “communicate[] the writer’s message [while meeting] the reader’s needs.” With these skills in mind, it becomes obvious that there is no magic in the product, and the process should be the salient pedagogical concern. For example, complaints, orders, motions, memos, white papers, and myriad other documents can be used to teach rhetorical strategies.

Furthermore, rhetorical strategies should be taught throughout all phases of the legal writing curriculum, not just in the “persuasive” semester.

Many legal writing programs distinguish between objective or predictive writing and persuasive writing, often teaching them in different semesters. In the predictive semester, assignments tend to focus on the internal office memorandum, a document some argue is practically obsolete although it may endure as a sound pedagogical tool. Regardless of that debate, however, the fact is that “all memos are written in a context that is not objective and in which external forces affect
audience and information delivery.”93 More importantly, regardless of the predictive/persuasive distinction, to teach the recursive writing process, rhetorical strategies, and effective communication, professors must give considerable thought to the substantive problem they design, not just the document they ultimately want the students to produce.

In fact, the document produced is merely incidental to the assignment itself. For example, a formal advice letter requires the same kind of analysis that a predictive memorandum requires—a succinct explanation of the law in the context of the facts of the case, a prediction of how the law is likely to apply, and a recommendation for how to proceed. A motion with an incorporated memorandum of law requires the same kind of analysis as an appellate brief (without all the extra details like tables of contents, tables of authorities, summaries of argument, standard of review, and so on)—statement of the facts, argument with explanation of the legal standard, application of the law to the facts of the case, and a conclusion with a specific request for relief. The fact is, if students know how to identify rule structure and build an analysis around that, they can adapt those skills to create any document they need to draft once they are in practice. As writing professors, our goal is not to teach students how to draft discrete documents; the point is that we teach them the conventions of written legal analysis so that they can draft any document demanded of their practice.

None of this is to say that selection of a specific document, such as a memo or appellate brief, or a general topic, such as tort or contract law, is irrelevant. The point is that those considerations should not be the central driving factor in problem design. An approach that focuses on a specific document or a general topic and “fun facts” is superficial and will inevitably lead to inconsistent results from year to year because “they all ignore the core question of what students are learning”94 and how the problem advances those learning goals.

The substantive law is not as important as rule structure because it does not influence the analytical, rhetorical, and organizational choices available to the student—the structure of the legal standard is what drives those choices. Building a problem around structure, therefore ensures that the student is engaged in deliberately acquiring knowledge of legal writing. Learning legal writing is crucial because it “is necessary for deep learning . . . and [it] is how new members of the discipline become literate in that discourse community.”95

Of course, when gaining entry into a discourse community, there is always “a tension between conformity and inclusion.”96 Legal writing pedagogy especially “contributes to the muting of outsider voices in the law because it teaches law as a language, and thereby both reflects and perpetuates the biases in legal language and reasoning.”97 That risk is especially high when problems are not carefully designed to accomplish specific pedagogical goals, and professors must be ever vigilant to protect against the manifestation of unintended and subconscious bias in their problems. Moreover, and as explained in more detail below, designing problems around rule

93 Berenguer, Jewel, and McMurtry-Chubb, CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE, AND EQUITY at 224.
94 Carpenter and Tavares, 88 UMKC L. REV. at 54.
95 McMurtry-Chubb, Toward a Disciplinary Pedagogy, 1 SAVANNAH L. REV. at 74.
96 Abrams, 69 Am. J. Legal Ed. at 836.
structure can be an effective tool for addressing outsider voices and introducing critical and comparative rhetorical tools to give voice to those outsider perspectives that otherwise do not situate well within traditional legal rhetoric.

Boiled down, the Tonner and Pratt essay only begins to scratch the surface on what professors must consider when designing problems, and it goes no further than to say, “consider these things.” It does not advise how to weigh each consideration or why each consideration is important. It does not explain how the skills we teach in legal writing are connected to the documents we ask our students to produce. The Kintzer et al. article does essentially the same thing as the Tonner and Pratt essay. For a new professor designing a problem for the first time, Tonner and Pratt imply that the primary considerations are merely selecting the type of document (a memo or a brief), the jurisdiction (trial or appellate court), and the type of problem generally (procedural or substance, and a fun fact pattern). Kintzer et al. advise professors to consider the rule, but they do not explain why it is important or how to weigh that consideration.

Newer law professors typically find themselves relying on others who are kind enough to share their problems. Then, once they find a few problems they like, they tend to continue relying on the same problems. Of course, this is not the universal approach. I know that there are those of us who draft new problems fairly regularly, even yearly or semester to semester. But, I frequently hear like, they tend to continue relying on the same problems. Of course, this is not the universal approach. I know that there are those of us who draft new problems fairly regularly, even yearly or semester to semester. But, I frequently hear new and experienced professors lament on the difficulty and challenges of designing good problems. Furthermore, it just seems odd that there is no manual or guide that explains how to design a problem when you start teaching legal writing, especially given the wide range and variety of legal writing texts. Problem design is fundamental, and we should be intentionally training legal writing professors how to do it.

Admittedly, writing a problem from scratch is risky. They are hard to vet from the student perspective, so it can be difficult to predict how challenging the assignment will be for students. For this reason, professors often like to adopt problems that have been used successfully in the past. By re-using a problem, chances are the problem will work well again. Updating the research tends to be fairly easy, and, assuming the law has not changed drastically, the problem can

98 Tonner and Pratt, 3 LEGAL WRITING: J. LEGAL WRITING INST. 163.
99 Tonner and Pratt, 3 LEGAL WRITING: J. LEGAL WRITING INST. 163.
100 Tonner and Pratt, 3 LEGAL WRITING: J. LEGAL WRITING INST. 163.
probably be updated without too much work. In fact, a research or teaching assistant could probably handle updating the law and problem with little supervision or time investment from the lead professor. I should be clear, too, that recycling a problem is not inherently wrong. I am more concerned with how we choose an existing problem than with whether the problem has been used before. In other words, is the professor seeking a particular rule structure, or is the professor merely interested in a “fun fact pattern.” If it is the latter, the pedagogical results are bound to be haphazard, even unpredictable, because the professor has not considered how the problem can be used to reinforce the discrete skills that the professor is trying to teach.

There are, of course, other challenges, too. Creating a problem from scratch is risky and time-consuming. If the area of law involves a pending question on appeal, the case may be resolved before the students complete their semester of study. Additionally, students may find easy access to documents filed in pending cases, raising the temptation to intentionally plagiarize, or at least raising the risk of unintentional plagiarism. Coming up with a new problem can also feel overwhelming. The creative juices may not be flowing, or it may seem like every interesting fact pattern has already been taken. Another risk includes failing to anticipate problems in the problem itself. Sometimes in creating a brand-new problem, the designer may miss a critical area of the law or fail to consider how a nuanced fact may change the entire analysis.

Given these concerns, it can seem like the easiest way to develop a new problem is to simply find one that is tried and true. Numerous resources exist where professors can find fact patterns. Two commonly used sources are the NYU Law Moot Court Casebook and the Legal Writing Institute’s Teaching Bank.

New York University publishes the NYU Law Moot Court Casebook annually in December, and it is available both in print and online. One limitation is that only law schools, firms, bar associations, and libraries are permitted to subscribe to the casebook, meaning that individual professors may not request copies. Most libraries and institutions will work with their legal writing professors to obtain a copy of the book, however, if requested.

The Moot Court Casebook problems are developed by NYU Law students working under faculty supervision “as well as by students and faculty from across the country.” They tend to be well-vetted and include a robust set of resources such as a detailed record comprised of multiple documents “and a bench memo that surveys all relevant case law and includes analysis of the strengths and weaknesses of each sides’ case.”

Even if a professor does not choose to adopt a problem in its entirety from this source, it can be helpful for identifying current circuit splits. Circuit splits provide a strong base for building
advanced problems because there is no clear-cut answer, and students cannot argue what the governing law is; rather, they must argue what the law ought to be.

While the database has over “100 problems on a wide variety of legal topics,” more than 100 law schools subscribe to it.\footnote{https://www.nyumootcourt.org/casebook/} This means that students could easily find samples online, increasing the risk of plagiarism and cheating. It also means that artificial intelligence, like ChatGPT, Bard, Bing, ChatSonic, or Jasper AI, may have better access to these fact patterns, increasing the likelihood of accurate prediction\footnote{Generative AI, like ChatGPT, “uses a neural network trained on a large dataset of text . . . to learn patterns in language and generate new text that is similar to the training data [and] generates a response by predicting the next word in the sequence based on the patterns it has learned from the training data.” Lea Bishop, \textit{Can ChatGPT Think Like a Lawyer? A Socratic Dialogue} (January 26, 2023). Available at SSRN: https://ssrn.com/abstract=4338995.} should a student attempt to use artificial intelligence to draft the document.\footnote{Whether the use of artificial intelligence in this way constitutes cheating or plagiarism is a matter of significant debate in academia. See, e.g., Brent A. Anders, \textit{Is Using ChatGPT Cheating, Plagiarism, both, neither, or forward thinking?} PATTERNS, 4 (March 10, 2023) (available: https://www.cell.com/patterns/pdf/S2666-3899(23)00025-9.pdf) (last visited June 29, 2023).} It must be noted, as well, that using AI presents a tremendous risk of biased responses given that the training data is replete with bias, and just because artificial intelligence might predict an “accurate” response, it is not likely that it will generate a creative response or one that is capable of advancing social justice or change given that it is programmed to make predictions on pre-existing patterns; it does not think in a way that challenges those patterns.\footnote{E.g. Algorithmic Justice League (https://www.ajl.org/); \textit{Artificial Intelligence “Godfathers” Call for Regulation as Rights Groups Warn AI Encodes Oppression}, Democracy Now (June 1, 2023) (Available at: https://www.democracynow.org/2023/6/1/ai_bengio_petty_tegmark); \textit{How AI is Enabling Racism & Sexism: Algorithmic Justice League’s Joy Buolamwini on Meeting with Biden}, Democracy Now (June 22, 2023) (Available at: https://www.democracynow.org/2023/6/22/joy_buolamwini_on_ai_risks) (last visited June 29, 2023); Leonardo Nicoletti, Dina Bass, \textit{Humans are Biased. Generative AI is Even Worse: Stable Diffusion’s Text-to-Image Model Amplifies Stereotypes about Race and Gender – Here’s Why that Matters}, Bloomberg Technology & Equality (2023) (Available at: https://www.bloomberg.com/graphics/2023-generative-ai-bias/) (last visited June 29, 2023)}

The other major resource, the Legal Writing Institute’s Teaching Bank, is an online resource for “[c]urrent professional teachers of legal writing.”\footnote{https://www.lwionline.org/resources} It houses a “collection of assignments, teaching rubrics, and other instruction-related materials”\footnote{https://www.lwionline.org/resources} that other legal writing professors have submitted for sharing. In order to access the Teaching Bank, “[y]ou must be a member” of the Legal Writing Institute. Similar to the issues with using the NYU Law Mootcourt Casebook, because most legal writing professors are members of the Legal Writing Institute, the problems posted in the Teaching Bank may have been used numerous times across the nation. Students could easily find samples online or successfully use artificial intelligence because there is a larger database of information for the generative AI to draw from when predicting responses.

Another drawback to both of these sources is that they tend to be indexed according area of law, not rule structure. Especially for novice professors, this can present a challenge in terms of determining the complexity of the problem and discerning the pedagogical goals that can be accomplished by using the problem. This Article advocates selecting problems based on rule...
structure, and that advice is difficult to follow with either of these databases. In both, finding a problem based on rule structure is akin to finding a needle in a haystack.

Despite the challenges inherent in problem design, there is also a certain amount of joy that can be derived from creating the problem. Identifying the issues can be an outlet for the professor’s pent-up intellectual curiosity about a pressing legal question. Writing the facts can be a creative outlet for the professor, too. Engaging teaching assistants to help with the problem is also a fulfilling relationship-building exercise.

By way of example, I will share my experience in developing the problem I used in Fall 2022. I had the luxury of hiring two teaching assistants, and they worked well together. I knew the body of law I wanted to use (assault in the state of Florida), and I provided a set of cases around which I wanted to build the problem. I chose this body of law because it involved an elements test, a fairly simple rule structure for students in their first semester. Early on, we discussed potential options for developing the fact pattern based on the major issues that appear in the caselaw, and then I set them off to let their creative juices flow. They were able to find actual security camera footage of a scene that fit perfectly with the body of law, and we were able to use that visual evidence as part of the problem packet. That touch of reality helped the students in my class connect with the fact pattern because they were able to put faces with names, and the issues began to seem less abstract. Having an image of the actual people involved also helped the students move beyond intensely focusing on grades to caring about actual problem solving. More importantly, the rule structure helped them meet certain pedagogical goals such as, inter alia, organization, rule synthesis, rule explanation, and rule application.

When I started creating my own problems in 2011, I confronted all the challenges identified in this Section, and initially I felt intimidated by the process. My impostor tried to take over and tell me that I was not capable, but once I began to identify the process that is explained in Section IV of this Article, I discovered elation and joy throughout the problem-design process. For many years now, problem-design has not been a chore or source of angst. In fact, it has become something that I look forward to doing with great anticipation. My hope in writing this Article is to empower professors to embrace the challenges, discovering at the same time the joy inherent in developing their own problems while ensuring that the problems are pedagogically sound and engineered to meet their goals.

III. Why Does Problem Design Matter?

Problems are the principal pedagogical tool of the legal writing professor because the problem is the primary way legal writing professors teach students how lawyers think and what lawyers do.117

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115 Sasha Ledney graduated from Stetson University College of Law in May 2023. Nicolle Little is currently a rising 3L at Stetson University College of Law with an anticipated graduation date of May 2024.

116 The statute as written actually involves a disjunctive structure embedded in an overall conjunctive test: “An “assault” is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.” (emphasis added to highlight disjunction) Fla. Stat. 784.011. In building the problem, I wrote the facts in a way that only one branch of the disjunction was available for analysis, thereby focusing the problem on the conjunctive form.

117 Venter, 57 MERCER L. REV. at 626-27. “An essential component of an LR&W curriculum is teaching students how to prepare legal documents which reflect the conventions of the practicing professional.” Linda Berger, A
As introduced in Section II, the problem is not merely a summative instrument used to measure whether students have grasped a concept; rather, the problem is the formative instrument students use to grasp particular concepts because, through writing, students learn the conventions of the discourse community.\textsuperscript{118}

Within the legal discourse community,

writing is constructed along [the following] disciplinary lines: (1) What are the possible sources for arguments?; (2) How do we categorize the information in those sources for the purpose of locating arguments?; (3) How does an author compose arguments appropriate to a particular discipline and its modes of written communication?; (4) By which system or method does an author organize arguments for effective written communication?; and (5) Once the arguments are ordered, how do we communicate them to a desired audience? The answers to these questions, which are ultimately the expression of how disciplinary knowledge is formed, are communicated in the various genres that a discipline employs.\textsuperscript{119}

The documents students produce in a legal writing classroom represent a small fraction of the various genres\textsuperscript{120} within the legal discipline, and, as a collective, the written discourse common to practitioners represents an entire genre system.\textsuperscript{121} In a traditional product approach, students are introduced to the different genres separately without context as to how the documents work together as a system.\textsuperscript{122} The traditional product approach is conducive to the “fun fact” pattern style of problem creation because it allows professors to focus “on content like CREAC and Bluebook citations” to the exclusion, or at least reduction, of legal analysis and thinking.\textsuperscript{123}

Deliberately designing problems around rule structure causes a natural shift toward the process approach whereby the problem becomes a powerful tool in “help[ing] legal educators link what lawyers know to what lawyers do.”\textsuperscript{124} It more explicitly teaches students the conventions of the discourse community, including, but not limited to, the cognitive thought processes essential to lawyering.\textsuperscript{125} The process approach becomes something more meaningful than just “look[ing] behind the product [to] develop an understanding of how and why [it] came into being.”\textsuperscript{126} It adds a layer of insight into the genre system as a whole, how and why that particular product fits into a

\textit{Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer}, 6 J. Legal Writing 57, 61 (2000), Upon graduating, students must be able to “construct[] . . . thought rather than [just] construct[] . . . a document.” See also, Tracy, 21 Touro L. Rev. at 299.

\textsuperscript{118} See Teri A. McMurtry-Chubb, Toward a Disciplinary Pedagogy, 1 Savannah L. Rev. at 72; Durako et al., 58 U. Pitt. L. Rev. at 722; Linda Berger, Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context, 49 J. Legal Educ. 155, 156 (1999) (“[W]hat writers do is how they come to know.”).

\textsuperscript{119} Teri A. McMurtry-Chubb, Toward a Disciplinary Pedagogy, 1 Savannah L. Rev. at 88.

\textsuperscript{120} For a comprehensive list of genres, see Teri A. McMurtry-Chubb, Toward a Disciplinary Pedagogy, 1 Savannah L. Rev. at 91-92.

\textsuperscript{121} Teri A. McMurtry-Chubb, Toward a Disciplinary Pedagogy, 1 Savannah L. Rev. at 89.

\textsuperscript{122} Teri A. McMurtry-Chubb, Toward a Disciplinary Pedagogy, 1 Savannah L. Rev. at 89; Durako et al., 58 U. Pitt. L. Rev. at 722; Venter, 57 Mercer L. Rev. at 626.

\textsuperscript{123} Christine M. Venter, Analyze This: Using Taxonomies to “Scaffold” Students’ Legal Thinking and Writing Skills, 57 Mercer L. Rev. 621 (2005).

\textsuperscript{124} Teri A. McMurtry-Chubb, Toward a Disciplinary Pedagogy, 1 Savannah L. Rev. at 89.

\textsuperscript{125} See Venter, 57 Mercer L. Rev. at 625.

\textsuperscript{126} Durako et al., 58 U. Pitt. L. Rev. at 722
larger litigation scheme, and how and why to choose a particular genre in any given rhetorical scenario. As a result, students are better prepared to translate what they learn in law school to the demands of actual practice.127

When problems are designed around rule structure, the learning can be scaffolded in a way that “enable[s] [students] to structure and process their thoughts effectively.”128 “Scaffolding” is “an instruction device that provides individual students with intellectual support so they can function at the cutting edge of their cognitive development.”129 Through scaffolding, students can begin to take responsibility for their own learning because information processing becomes a more manageable task.

In the context of problem design, scaffolding simply means beginning with simple rule structures before introducing more complex ones. Simple rule structures, like declarative rules and elements tests, are more conducive to learning early in students’ law school careers because they are easier to manage and understand. They also create knowledge upon which students can connect new understanding about legal discourse.130 As students gain fluency in the discourse, they are better able to navigate problems designed around more complex rule structures because they can relate the new material to the prior material.131 This structured approach allows students to learn incrementally so that they can “internalize the fundamentals which will enable them to successfully approach legal problem solving and expression.”132

When problems are designed around rule structures, as opposed to “fun facts” centered on document production, students could be asked to produce a variety of documents and still achieve whatever outcomes the professor desires for that particular phase of the course. For example, using the same rule structure and basic problem, a student might be asked to draft an advice letter to the client, or a motion, or a memo, or a complaint, or a brief, and so on. Regardless of the document, “Legal Writing students [remain] significantly more accountable for their reading of the cases, [their choice of] the most important cases, [their justification of] those choices, and [their written] analysis of the law . . . distilled from the cases.”133 In every written document, students engage with any number of critical thinking skills essential to lawyering such as, inter alia, research, rule synthesis, organization, reasoning styles, statutory interpretation, and application of a rule to the facts of the hypothetical problem.134 Thus, there is no magic in the document itself because the

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127 Teri A. McMurtry-Chubb, Toward a Disciplinary Pedagogy, 1 SAVANNAH L. REV. at 89. Laurel Currie Oates, 6 J. LEGAL WRITING INST. at 18 (Lawyering “involves the creation of entirely new knowledge structures or the restructuring of old ones.”)
128 Venter, 57 MERCER L. REV. at 634. See also Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 144.
130 “What a reader understands and retains from the text and context depends upon the reader’s prior knowledge of similar texts and contexts.” Venter, 57 MERCER L. REV. at 632, citing Janet Emig, The Web of Meaning: Essays on Writing, Teaching, Learning and Thinking (Dixie Goswami & Maureen Butler eds., Boynton/Cook 1983).
131 See Venter, at 57 MERCER L. REV. 632.
132 Tracy, 21 TOURO L. REV. at 299.
133 Edwards, 1 SAVANNAH L. REV. at 5.
acquisition of knowledge and skills occurs through the reading and writing required to produce the document, not because of the nature of the document produced.\textsuperscript{135}

Additionally, exposing students to multiple genres is an effective way to teach students how to engage in the legal discourse community; indeed, “expertise in thinking like a lawyer can come only through exposure to the multiple facets of practice.”\textsuperscript{136} The point here is not that students “memorize” how to draft a certain number of discrete legal documents; rather, students gain fluency in adapting the skills they are learning to different audiences and genres so that they develop professional judgment for how to do the same once they enter practice. Thus, the particular document does not necessarily matter, but the variety of genres does.

By building problems around rule structures, professors can assign students to create a variety of interrelated documents using a single fact pattern, thereby simulating multiple facets of practice.\textsuperscript{137} For example, for a single problem, a professor might assign students to draft an advice letter to the client, a motion, a response to that motion (assuming the professor is comfortable with the students switching sides, which has the added benefit of forcing students to confront counterarguments in a direct way), a memorandum of law or trial brief, a proposed order, and maybe even an appellate brief.\textsuperscript{138}

Problem design must be deliberate because it is naive to assume that students will automatically develop analytical skills just because they write; while writing and thinking are interrelated, writing does not necessarily lead to the development of thorough thought processes absent explicit instruction on thinking.\textsuperscript{139} Because assignments are formative, not just summative, professors must be much more intentional about the outcomes associated with any problem they choose to use. If the problem involves concepts that are too advanced or that have not yet been introduced, the students will not be able to produce quality work due to cognitive overload—they will not have the ability to recognize patterns in the law and they will rely on more basic skills that they have mastered, like reading for information instead of higher order processing through reading.\textsuperscript{140} In fact, it would be impossible for a student to make connections to new information because they lack any foundational receptors with which to adhere the connection.\textsuperscript{141} Students will not only feel frustrated, but their learning will be stymied because they are being asked to learn too many things

\textsuperscript{135} It should be noted that this knowledge acquisition is not necessarily automatic, but it can become more predictable if learning is scaffolded and problems are designed around manageable rule structures. See Venter, 57 Mercer L. Rev. at 626.

\textsuperscript{136} Venter, 57 Mercer L. Rev. at 627. “Students must be socialized into the discourse and practices of law through as much exposure as possible to the process of the law.”

\textsuperscript{137} Venter, 57 Mercer L. Rev. at 627. “[S]tudents must understand that they need to select an appropriate mode of response from those available, which is dependent on the context, audience, relations, limits, constraints, and values of the parties to whom the lawyer is beholden.”

\textsuperscript{138} In Spring 2023, using a single fact pattern, I assigned my students to produce all of these documents. They received feedback on each assignment which they then used to evolve their writing to meet the needs of the new genre assigned. The problem and arguments remained the same, but students used the feedback and multiple exposures to dig deep into the research, thinking, and writing to produce thorough legal analysis which they then adapted to a variety of genres.

\textsuperscript{139} Venter, 57 Mercer L. Rev. at 626.

\textsuperscript{140} Venter, 57 Mercer L. Rev. at 632, see also, Linda Berger, Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context, 49 J. Legal Educ. at 163.

\textsuperscript{141} See Venter, 57 Mercer L. Rev. at 632, citing Ruth Ann McKinney, Reading Like a Lawyer 53 (Carolina Press 2005).
at once. On the other hand, if the problem is well-designed around rule structure and appropriately suited to the student’s knowledge level, the student will begin making the connections through the writing process because the writing “becomes an integral part of thought.”

If the only thought in the professor’s mind is whether the facts are interesting, the professor is inherently failing to consider the pedagogical purposes of the assignment. Sheer luck is the only way the professor will ever meet the learning needs of the students under this approach. That is why professors cannot haphazardly seek whatever fact pattern seems interesting. By focusing on problem design, professors necessarily take into consideration “how information is retained, stored, and linked, as well as how connections are formed.”

Legal writing professors have a duty to teach their students how to think and write well for the practice of law. By intentionally creating problems that reinforce concepts already introduced to the students, professors provide students with the opportunity to master those concepts in a simulated setting ensuring that they experience less confusion. When problems are intentionally designed, students should more readily learn how to adapt their basic skills in increasingly sophisticated ways. They should also gain confidence in mastering the basics and feel more comfortable translating those basics into contexts that require more complex analyses. In short, problems deliberately crafted around rule structure lead to better learning, which better prepares students for practice by teaching them fluency in the discourse and enabling to translate and transfer their knowledge and skills to a variety of rhetorical contexts.

IV. Basics of Problem Design

The field of Mind, Brain, and Education informs that “[s]kills grow in three cycles, moving from single elements to complex systems for first actions, then representations, and then abstractions.” Learning in law school, much like in every other learning environment, is similarly “slow and hard,” and requires coordinating the learning of necessary skills with the ever-changing developmental process. Formative assessments must be balanced to sufficiently challenge students without overloading them with material that is too advanced. Thus, if we are

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142 Venter, 57 MERCER L. REV. at 633.
143 “Embarking on a project to teach thinking ‘without adopting a systematic approach to the task’ would be foolhardy.” Venter, 57 MERCER L. REV. at 634, quoting Laurel Currie Oates, Beyond Communication: Writing as a Means of Learning, 6 J. LEGAL WRITING INST. 1, 3. Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 144 “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.”
144 Venter, 57 MERCER L. REV. at 633.
145 Venter, 57 MERCER L. REV. at 621-23.
serious about teaching skills, we must design problems that begin with simple elements and then 
progress to more complex systems, which can be accomplished by designing problems around rule 
structure and then tailoring the other components (such as facts and the type of document 
produced) to meet any other pedagogical goals of the assignment. By designing problems in this 
way, instruction can be scaffolded, beginning with the most foundational concepts, and then 
progressing based on students’ increasing knowledge throughout the semester.

This section will first explain the process by which a problem is developed around rule structure, 
it will then explain the benefits to adopting the rule-focused approach to problem design, and it 
will conclude by highlighting how focusing first on rule structure facilitates flexibility as well as 
the incorporation of other pedagogical goals into the assignment.

The six rule structures, in order of least complex to most complex, are: simple declarative, 
conjunctive, factors, balancing, defeasible, and disjunctive. These rule structures may also be 
combined. For example, a balancing test may demand consideration of factors on either side of the 
balance, or a conjunctive test may incorporate disjunctive components.

After years of working with rule structure, I settled on this order given the increasing cognitive 
demands of each rule structure and observing how challenging students have found the various 
rule structures. The simple declarative rule is perhaps the most obviously simple structure. It 
inhertently deals with one thing, usually a prohibition, and it does not depend on the interpretation 
of other parts of the rule to give it meaning. The conjunctive test is comprised of more than one 
simple declarative rule joined by “and.” The conjunctive test is more complex than the simple 
declarative rule because it has more pieces, but it is still a fairly simple structure in that it 
esentially creates a positive checklist whereby proof of each element satisfies the test. The factors 
test is more complex than the simple declarative rule even though it, too, is comprised of more 
than one simple declarative rule because it requires the writer to exercise judgment in determining 
which factors are salient and require analysis for any given problem. It requires the writer to 
exercise more professional judgment. The balancing test likewise requires the writer to exercise 
more professional judgment while at the same time addressing competing interests. The added 
layer of addressing competing interests makes this rule structure more complex. The defeasible 
rule is more challenging for writers because it involves an exception, which demands defining not 
only what belongs, but also what does not.149 Finally, the disjunctive test is the most complicated 
because it requires students to analyze two or more separate branches of a rule, taking into account 
not only competing interests but also contingencies and competing rules.150

At Section III(A)(2) of their Rule Based Legal Writing Problems article, Kintzer et al., identify 
these rule structures, with the exception of simple declarative rules, but they do not necessarily 
classify the rules from simplest to most complex in the same way I have, and they also do not

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149 Identifying and justifying what does not belong is an added layer of complexity when compared to other rule 
structures which require basic identification of what does belong. Instead of just classifying the characteristics of 
belonging, the writer must classify what it means to belong as well as define what it means to not belong. It 
challenges bivalence because something that does not belong does not necessarily fit the exception.

150 It should be noted that the disjunctive test ceases to be the most complicated rule structure if only one side of the 
disjunction is involved in the problem. Returning the example of the Florida assault statute, a problem can easily be 
written so that the disjunctive part of the statute is eliminated from the analysis.
examine whether rule structure should be introduced in any particular order.\textsuperscript{151} In fact, at Section III(A)(3), they advise assigning “students [as an early assignment] to brief a case with a more complex rule, such as one with several elements or categories, perhaps with at least one of those categories containing several elements.”\textsuperscript{152} They make this recommendation without explaining why assigning a complex rule early in the semester would be a best practice.

It should be noted that later in the Article, they do state that legal writing problems should “follow a progression from easy to complex, and use a variety of rule structures to both teach and test the students.”\textsuperscript{153} And, although they initially marry the complexity of rule structure to the inherent complexity of the problem early in the article, later on, the issue of complexity is muddied by considerations of procedure, doctrine, and federalism.\textsuperscript{154}

Kintzer et al., ultimately view the complexity hierarchy of rule structure differently from this Article, suggesting that elements and disjunctive (called “simple category” in their article) rule structures are the simplest structures, and they do not address simple declarative rules at all or explain how the more complex rule structures can all be reduced to simpler forms.\textsuperscript{155} As mentioned above and explained in subsection (D) below, disjunctive rules are more complex from an organizational standpoint than even factors tests, unless the rule can be reduced down so that students are dealing with only a single branch, effectively making the test a simple declarative rule instead of a disjunctive options test.

This Article recommends that professors begin with the simplest rule structures and then progress to more complex structures because, as explained in Section III above, if students are required to analyze more complex rules before they learn how to analyze more basic rules, they will not have the necessary cognitive receptors upon which to create sophisticated thought patterns. For this reason, starting simple is essential.

A. Start Simple: Declarative Rules.

Simple declarative rules are basic rule structures that work well for introducing students to the concept of rule-based reasoning, perhaps the most foundational mode of legal reasoning.\textsuperscript{156} The simple declarative rule is the building block of every other rule structure that exists. A conjunctive test, for example, is essentially two or more simple declarative rules joined together by “and.” Each factor in a factors test is its own simple declarative rule joined by “or,” any combination of which could satisfy the test. Either side of a balancing or defeasible test can likewise be reduced to a simple declarative rule. Teaching students how to analyze and understand simple declarative rules is thus essential to preparing them to analyze more complex rule structures.

Often, simple declarative rules are written as prohibitions like “no littering” or “no smoking.” These are the kinds of rules that new law students can understand fairly easily based upon their prior life experiences. In using a simple declarative test, the professor would generally have no

\begin{itemize}
  \item \textsuperscript{151} Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 148
  \item \textsuperscript{152} Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 148-49
  \item \textsuperscript{153} Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 151
  \item \textsuperscript{154} Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 151
  \item \textsuperscript{155} Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 151
  \item \textsuperscript{156} Baker, 34 J. MARSHALL L. REV. at 133.
\end{itemize}
concerns about students being too overwhelmed by learning complex legal standards while at the same time learning the nuances of written and oral advocacy. The risk of cognitive underload tends to arise only if students are required to continue working on it after they have become proficient or if the fact pattern is so overly simplified that students struggle to buy in. So although simple declarative rules, upon first examination, may seem overly simple even for novice legal writers, they actually present the perfect level of difficulty to challenge students to begin engaging with legal analysis while building confidence in their learning of foundational concepts.

A simple-declarative-rule problem also reinforces to students the importance of incorporating rule-based reasoning into their analysis and not relying exclusively on analogical or counteranalogical reasoning. I have found that students who rely heavily on analogical and counteranalogical reasoning, to the exclusion of other modes of reasoning, tend to case brief instead of synthesize a coherent rule of law. They are also less able to explain why a certain argument is correct given the rhetorical circumstance. If they start with a simple declarative rule and rule-based reasoning, however, they are trained to think first about rule-based reasoning, and their use of precedent is more intimately tied to explaining the rule, not just regurgitating precedent facts for the purpose of comparisons that may or may not be salient.

The case-briefing phenomenon occurs as a result of cognitive overload when students are asked to synthesize too soon before they have learned how to identify and work with rules and rule structure. As novices, the process of rule synthesis can seem like a simple exercise to students that involves identifying mere similarities and differences between precedent and the hypothetical fact pattern. These concepts of analogy and counteranalogy are often familiar to students from their prior life experiences. Additionally, students feel comfortable writing about the facts because that part of the assignment feels more familiar and connected to their lived experiences. But even though they understand the what—similarities and differences—they do not grasp why the similarities and differences matter.

In a legal writing course, because students do not yet know how to effectively distinguish between the “material and immaterial,” they do not fully understand that every similarity is not necessarily legally significant or that every difference is not salient. Thus, they resort to case briefing, throwing every fact from precedent into the explanation, and then comparing every fact to the hypothetical fact pattern without regard for whether the fact is legally relevant or outcome-determinative. By beginning with a simple declarative rule and rule-based reasoning (using a problem that does not require synthesis from multiple sources), students learn the importance of identifying authority to support their arguments and how to make arguments without resorting to superficial factual comparisons between the hypothetical problem and precedent.

157 Kintzer et al., 3 LEGAL WRITING: J. LEGAL WRITING INST. at 154.
158 I have reached this conclusion based on years of experience working with students.
160 This is precisely the phenomenon that Venter explained would occur with cognitive overload. Venter, 57 MERCER L. REV. at 632, see also, Linda Berger, Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context, 49 J. LEGAL EDUC. at 163. Students essentially shut down and rely on the only processes they know. When they get to law school, students can identify similarities and differences. What they do not yet know is why they matter.
Rule-based reasoning requires students to think beyond mere observations so that when they begin learning analogical and counteranalogical reasoning, they have the foundation to understand that more than mere observational comparison is required. Learning how to work with the rule, therefore, is a critical step in teaching students how to distinguish between the material and immaterial.

Turning to how to design the problem, the first step is to identify the rule. Good sources for simple declarative rules include quasi legal sources, like employee manuals, honor codes, and school discipline policies, as well as actual legal sources like criminal laws and rules of procedure.

In my first semester legal writing course, I generally create a problem around plagiarism using my school’s honor code policy. The assignment has multiple goals, the most important of which are:

- Analysis of a simple declarative rule
- Rule-based reasoning
- Reading statutes *in pari materia*
- Statutory interpretation
- Teaching students the substantive rules prohibiting plagiarism
- Teaching students the consequences of plagiarism

Importantly, even though building substantive knowledge of plagiarism is one of the goals, it is not the goal that drives the problem design. While plagiarism is important, it is not the foundational concept that undergirds virtually every other concept in the course. The simple declarative rule, on the other hand, is foundational, and without mastering analysis of a simple rule, students will struggle to master the analysis of more complex rules. That is why starting simple is critical.

Depending on the overarching pedagogical goals, once the rule has been selected, the professor has significant freedom to craft the problem in a variety of ways. One consideration may be that the professor does not want to create an entire memo assignment early in the semester. The simple declarative rule can easily be used to create in-class exercises or shorter analytical assignments like an email memo. The professor also has freedom to craft any facts that fit the rule anchoring the problem.

In my first semester class, I use this simple declarative rule for a short memo revision assignment during the first couple of weeks. In the first class, I introduce students to the concept of rule structure, and I expose them to all types of rules. Over the first few weeks, students are required to label every rule in the honor code based on rule structure so that they become familiar with the entire Code and begin reading the various provisions *in pari materia*. Then, students are given a hypothetical fact pattern involving an instance of plagiarism. The rule governing the issue is a

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[^161]: I use an interactive polling tool to create a game for recognizing rule structure. The students have fun with this exercise, and they retain the material well because I ask them to explain why the correct answer is correct and why any incorrect answers are incorrect. In this class, they acquire knowledge and demonstrate comprehension.
simple declarative rule: using the words of another without attribution is prohibited. The fact pattern establishes that a hypothetical student quoted language in his memo from another source without designating the quoted material using quotation marks. This hypothetical student correctly identified the source from which he derived the quoted material.

For their memo, my students must analyze what “attribution” means within the context of the Code as a whole. I provide them with a list of common canons of statutory construction and teach them principles of statutory construction to guide their analysis. Additionally, the Code itself provides examples of conduct prohibited by this section:

This type of misconduct can take many forms. The most blatant forms include copying someone else’s work word for word or turning in a paper written by another with your name as the author. Other examples include rewriting someone else’s work with only minor changes, or summarizing another’s work or taking another person’s ideas without acknowledging the source through proper attribution and citation.¹⁶²

These specific prohibitions do not align seamlessly with the fact pattern, however, and “proper attribution” is not specifically defined anywhere. Another paragraph in this section of the Code provides:

An inference that you have inappropriately used the work of others will arise when significant sections of the paper match other sources and no attribution is given to those sources; when any portion of the paper borrows heavily from a particular source, including the Internet — whether verbatim or paraphrased — and the source is not acknowledged; and when you fail to follow conventions for indicating direct quotations (e.g., when a paraphrase is too close to the original or when an actual direct quotation is not indicated). Failure to identify direct quotations is a problem regardless of whether the source is actually cited. (emphasis added).¹⁶³

The Code further provides that:

Students sometimes make minor mistakes in completing academic assignments. While one missing citation in a paper may, in most instances, be considered a careless mistake rather than academic dishonesty, multiple instances of failing to provide proper attribution through quotation marks and/or citations will give rise to an inference that you have inappropriately used the work of others. (emphasis added).¹⁶⁴

The issue students must then wrestle with is whether the failure to use quotation marks one time is indeed plagiarism or whether it is simply a careless mistake. For this problem, there is no caselaw for the students to synthesize or consider. The permitted sources of “law” include the Honor Code, the list of canons of statutory construction that we have reviewed in class, and a dictionary.

¹⁶² Stetson University College of Law Honor Code
¹⁶³ Stetson University College of Law Honor Code
¹⁶⁴ Stetson University College of Law Honor Code
Initially, students are frustrated by being confined to these three sources. They struggle to understand how to explain a rule of law without being able to compare it to other, prior scenarios. When they stick with the process, however, they eventually realize how important it is to be able to explain every facet of the rule without resorting to factual comparisons with precedent. By requiring them to follow this process, they generally do not lapse into a series of case briefs in their subsequent assignments, and their legal analysis usually includes detailed rule and sub-rule statements that anchor the analysis.

To make this assignment manageable, rather than have them write a memo from scratch, the students are provided with a mediocre sample analysis that we review together in class. We typically engage in a highlighting exercise so that students become familiar with the organizational paradigm of a memo, and we discuss the areas where the rule explanation or application may be weak. Based on our conversations, students revise the sample discussion section to provide a more thorough analysis. They are not required to produce an entire memo. This method chunks the learning for the students in a manageable way.

As explained in Section III, legal writing is a discipline that requires instruction in both process and substance. For a memo, the skills that fall into process include organization, citation, fact selection, and components of the document such as the fact statement, issue presented, brief answer, and discussion section. Substantively, students must learn to articulate rules and sub-rules, explain those rules and sub-rules, employ legal reasoning, predict outcomes, and apply rules to facts. From a substantive standpoint, using a problem that involves no precedent allows students to focus on articulating rules and sub-rules and employing rule-based reasoning to predict an outcome based on the application of those rules and sub-rules to a specific fact pattern.

By providing students with a sample to revise early in the first semester, they can build fluency working with single elements, thereby preparing them to move into more complex systems. They are not distracted with simultaneously learning procedural skills while also learning the foundational substance, a process that is more abstract, and they gain fluency in the foundational substance without having to simultaneously manage the details of the procedural skills. On the whole, the brain learns best when it is presented with new information one piece at a time with the opportunity to repeat what is learned in new contexts as it acquires additional information.

Two other benefits of using a simple declarative rule problem are that students are forced to engage in rule-based reasoning and begin exercising the skill of multi-modal purposeful reading without the distraction of precedent. The ability to state a rule and analyze it independently of precedent is a critical foundational concept without which students will struggle to master explanatory

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165 For this exercise, I ask students to bring different colored highlighters and pens to class and then mark the sample memo with the thesis designated its own color, the rule statements in one color, the rule explanation in one color, the rule application in one color, and the conclusion in one color. Through this exercise, students begin to see that the term “rule” can refer to the overarching umbrella rule governing the entire problem as well as the sub-rules that support how the umbrella rule is applicable to the fact pattern.

166 Logan, Jessica & Castel, Alan & Haber, Sara & Viehman, Emily. Metacognition and the spacing effect: The role of repetition, feedback, and instruction on judgments of learning for massed and spaced rehearsal. Metacognition and Learning. (2012); Venter, 57 Mercer L. Rev. 621.

167 See Venter, 57 Mercer L. Rev. 621, and Berger, Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context, 49 J. Legal Educ. at 163-64, for more information on the challenges novices face in reading like a lawyer.

Electronic copy available at: https://ssrn.com/abstract=4513341
synthesis. Furthermore, when students rely on precedent before they understand rule construction, it becomes easy to slip into case briefing mode and permit precedent facts to substitute for actual rule statements. In that scenario, fact-to-fact comparison is substituted for meaningful legal analysis based upon legal principles. By focusing on a simple declarative rule problem that requires students to engage in rule-based reasoning, the professor builds “muscle memory” such that students develop the habit of articulating a standard and applying it before beginning to make fact-to-fact comparisons.

The multi-modal purposeful reading has a drawback, however, in that students will most certainly move beyond the simple declarative rule to analyze and interpret the rule in pari materia, and some of those other rules will not have the simple declarative structure. For example, definitions of terms are frequently disjunctive tests, so even something as basic as defining a term in the simple declarative rule may implicate a more complex rule structure.

This issue is not a reason to avoid designing problems around rule structure, however. First, this issue arises regardless of whether the problem is designed around the rule structure or fun facts; since it cannot be avoided, it must be confronted. Second, and more importantly, the sub-rules do not drive the overall analysis; they only apply to narrow aspects of the overall analysis. The overarching rule structure will drive overall organization and determine the styles of legal reasoning available to the writer, whereas the subrules will govern, at most, the rhetorical options available for a single section.

Moreover, rule structure drives the overarching organization of the analysis, so teaching students rule-based reasoning first permits the professor to focus on the simplest organizational paradigms. In my teaching, I refer to the acronym TREAC (Thesis, Rule, Explanation, Application, Conclusion), but there is no real magic in those letters. Some professors may refer to IRAC, CRuPAC, TREAT, CRAC, and some may not even refer to a particular paradigm at all. At their core, each of these acronyms guides students toward utilizing an organization that emphasizes the legal syllogism:

Major Premise (General Rule Statement): All men are mortal.

Minor Premise (Specific Fact Statement): Socrates is a man.

Conclusion (Application of General Rule to Specific Fact): Socrates is mortal.

The major premise generally represents the rule while the minor premise generally represents specific facts. The conclusion is the outcome of the application of the rule to those facts. Problems built around simple declarative rules help students gain fluency with the legal syllogism and basic organizational paradigms. Using a full-fledged simple declarative rule problem early in the

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168 Diane B. Kraft, CREAC in the Real World, 63 CLEV. ST. L. REV. 567, 567 (2015). It should be noted that some scholars argue these organizational paradigms are also analytical paradigms because they are “a kind of shorthand for the categorical syllogism.” Kristen K. Robbins-Tiscione, A Call to Combine Rhetorical Theory and Practice in the Writing Classroom, 50 WASHBURN L.J. 319, 328 (2011). For reasons far beyond the scope of this Article, I view these paradigms as primarily organizational due to the fact that students can master the organizational paradigm without coming close to mastering the substantive analysis. Like Venter wrote in Analyze This, the learning is not automatic. 57 MERCER L. REV. at 626.
semester introduces essential content such as issue statements, brief answers, fact statements, organizational paradigms, and conclusions as well as substance such as statutory interpretation, rule identification, rule explanation, and rule-based reasoning.

Finding simple declarative rules can sometimes be challenging because the law is complex, and statutes frequently establish more complicated rule structures. Even within the criminal code, for example, many criminal statutes involve elements tests, disjunctive tests, or even combinations of these. City and county ordinances tend to be simpler, and even quasi-legal rules, like those in honor codes or student handbooks tend to be written as simple declarative rules. Additionally, procedural rules often follow the simple declarative rule structure and have the added advantage of helping students gain an understanding of legal processes early in their legal career. The following list identifies some simple declarative rules around which a problem can be designed fairly easily:

STATUTES:

- “A ‘licensed human operator is not required to operate a fully autonomous vehicle.’”\(^{169}\)
- “A person that knowingly possesses a powdered alcohol product shall be fined not more than $500.00.”\(^{170}\)
- “The authority is entitled to reasonable attorney's fees incurred by the authority in enforcing its rules.”\(^{171}\)
- “A marriage license must not be issued when either applicant is under the age of sixteen.”\(^{172}\)

ORDINANCES:

- “Persons shall turn in to park personnel any articles which may be found.”\(^{173}\)
- “There shall be no smoking on the premises of a teen club.”\(^{174}\)
- “It is unlawful to exhibit captive cetaceans.”\(^{175}\)
- “Smoking shall be prohibited in all enclosed public places within the city.”\(^{176}\)

QUASI-LEGAL SOURCES:

\(^{171}\) TX SPEC DIST § 8813.107 (West)
\(^{173}\) Leon County, Florida, Code of Ordinances, Sec. 13-64.
\(^{174}\) New Orleans, Louisiana Code of Ordinances, Sec. 14-169
\(^{175}\) County of Maui, Hawaii, Code of Ordinances, Sec. 6.01.020.
\(^{176}\) Pittsburgh, Pennsylvania, Code of Ordinances, Sec. 617.04
• “Bikes MUST be walked once they are on school property.” John M. Sexton Elementary Student Handbook.177

• “Drinking contests are prohibited.” Keene State College Alcohol and Other Drugs Policy.178

• “A lawyer shall provide competent representation to a client.” Rule 1.1: Competence, ABA Model Rules of Professional Conduct.179

• “A physician shall support access to medical care for all people.” AMA Code of Medical Ethics, IX.180

Initially, it may seem boring to build an entire memo problem around a simple declarative rule. It may also seem like there is not enough time during the semester to focus an entire problem on rule-based reasoning. To be sure, rule-based reasoning can be taught in other ways. For example, if the semester memo problem involves a conjunctive test, the professor may choose to take one element and use that as a formative assessment tool for teaching rule-based reasoning. These minor assignments represent chunks of learning that are more manageable for students and teach them how to translate their newly learned skills in different settings. Furthermore, smaller assignments involving rule-based reasoning are easy to incorporate as in-class assignments, either individually or in groups because they do not necessarily require much time to complete.

To summarize, the use of a simple declarative rule problem early in the semester permits students to practice how to articulate rules and engage in rule-based reasoning, both of which are foundational and substantive. This method begins to train students on how to identify relevant details and then use those details to explain certain fact patterns. It reinforces the idea that legal analysis should be rooted in some authority, which is typically articulated as a rule in legal discourse.

B. Continue to Build: Conjunctive Tests.

After the simple declarative rule, the next easiest rule for students to understand is the conjunctive test. Essentially, a conjunctive test is a series of simple declarative rules strung together with “and.” If a student understands simple declarative rules and rule-based reasoning, those skills can easily be adapted and applied to conjunctive tests. When designing problems, professors should be cautious about whether any element has embedded a more complicated test. If a conjunctive test involves three elements, but one element requires students to consider multiple factors, the students may be confused because they have not yet learned how to analyze and organize around a factors test.

178 https://www.keene.edu/administration/policy/detail/handbook/alcohol/.
179 https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/.
As discussed in the immediately preceding section, this issue is not necessarily fatal—perhaps the factors are not terribly complicated, and the professor can dedicate time in class to guiding the students through organization of a factors analysis. Another option is for the professor to exclude the factors element from the analysis by instructing that the element is not at issue and that students should analyze the other elements. It is important to remember, as well, that the sub-rules do not drive the overall analysis; they only apply to narrow aspects of the overall analysis. The overarching rule structure will drive overall organization and determine the styles of legal reasoning available to the writer, whereas the subrules will govern, at most, the rhetorical options available for a single section. Ultimately, the professor should consider the pedagogical goals, such as the style of reasoning, the type of rule identification and synthesis, the style of organization, when deciding whether an elements test that has other embedded rule structures is manageable for the class.

 Conjunctive tests work well for building on the foundation students learned with the simple declarative rule. A conjunctive test will require students to again identify and explain governing rules and sub-rules, but the test is generally more complicated because there are more pieces to coordinate as a single, comprehensive rule. This single rule, however, can generally be treated as a checklist of simple declarative rules, meaning that the analysis will have a fairly predictable organizational structure including at least one paragraph of explanation per element. At this stage of their education, students should be able to chunk each piece of the elements test and address them one at a time.

 The chunking of the elements into separate declarative rules is familiar to students, which allows them to build on the foundation established with the simple declarative rule problem to learn the additional concepts of rule synthesis, analogical reasoning, and counteranalogical reasoning. Rule synthesis is the process of combining information from various legal sources, such as statutes, cases, rules, and policies, to articulate a generally applicable rule or subrule. The product of rule synthesis appears in the rule explanation section of the analysis. Analogical and counteranalogical reasoning is typically found in the application section of the legal analysis, and it draws comparisons and distinctions between precedent facts and the facts of the hypothetical case. Through analogical and counteranalogical reasoning, students are able to identify similarities and dissimilarities that should help them predict a likely outcome in a particular case.

 Even adding in rule synthesis, analogical reasoning, and counteranalogical reasoning, students must continue to include rule statements and rule-based reasoning. Rule synthesis, analogical reasoning, and counteranalogical reasoning build on the foundations of rule statements and rule-based reasoning to provide a richer understanding of how the rule operates.

 Consider for example an elements test defining homicide as “[t]he unlawful killing of a human being [w]hen perpetrated from a premeditated design to effect the death of the person killed.”\footnote{Fla. Stat. Ann. § 782.04 (West)}

 The elements can be separated as follows:

1. Unlawful killing
Once separated, each element can be explained thoroughly by synthesizing precedent that has interpreted each element. When crafting a conjunctive-test problem early in the first year of law school, the facts should not be overly complicated, and they should generally only call one element into question. This narrow focus allows students to continue building on the foundational skills in a way that does not create cognitive overload. Creating research assignments around this type of test is also fairly easy because the statute annotated is likely organized around the elements. Not only can the professor easily read the precedent related to each element and then decide which element will be most manageable in terms of synthesizing a coherent rule of law from precedent, but students will be able to identify a good starting point for the research on their project. In the homicide example, the professor could build a fact pattern that calls into question “premeditated design” using inspiration from precedent while providing facts that obviously meet the legal standard vis-à-vis the other elements.

The written analysis of a conjunctive rule should require students to carefully consider the purpose and function of each sentence. Each sentence of rule explanation should fulfill at least one of the following purposes: elucidation, elimination, affiliation, or accentuation.182 A sentence may even fulfill more than one purpose. Elucidation illuminates some aspect of the rule to explain its meaning, often by “providing an example of how the rule operated in a precedent case.”183 Elimination identifies something that the rule does not govern or proscribe to “eliminate possible misinterpretations of general rules.”184 Affiliation sets up analogical or counteranalogical reasoning by explaining how certain outcome-determinative facts are governed by the rule, with an eye toward creating a basis for comparisons and distinctions in the application section. It “make[s] the rule more meaningful to the reader by explaining it in familiar terms”185 that will readily connect with the hypothetical fact pattern. Accentuation “emphasizes the operative effect of a general rule” or sub-rule.186

Sophisticated legal analysis employs a variety of reasoning styles, which is a layer of difficulty added on to the foundation established through the simple declarative rule assignment. If students have gained fluency in the basics like identifying rules and sub-rules and then applying those rules through rule-based reasoning, they are ready to add on to these. By emphasizing the foundational concepts of rule identification and rule-based reasoning with a simple problem at the beginning of

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183 Smith, ADVANCED LEGAL WRITING, 41-42.
184 Smith, ADVANCED LEGAL WRITING, 43.
185 Smith, ADVANCED LEGAL WRITING, 45.
186 Smith, ADVANCED LEGAL WRITING, 46.
the semester, students learn that articulating the rule and utilizing rule-based reasoning are essential first steps to effective legal analysis, even when analyzing more complicated problems.

The other benefit to creating a problem around a conjunctive test early in the first year is that it tends to be easily organized within the traditional IRAC paradigm that first year law students generally must master to perform well in law school. The test itself functions as a type of checklist wherein each element can be fully explained before the entire test is applied to the fact pattern. It is not hard to hold the explanation for each element in short-term memory, and in fact it is generally helpful for the reader to have a comprehensive understanding of the legal test as a whole before it is applied to the hypothetical. Often, a single fact in a hypothetical will impact the analysis of more than one element. By maintaining a strict IRAC structure wherein each element is explained entirely before any application is conducted, the writer avoids unnecessary repetition of the facts as they apply to each element.

To summarize, the conjunctive test builds on the simple declarative rule test by adding on multiple simple declarative rules. This rule structure is also conducive to introducing rule synthesis, analogical reasoning, and counteranalogical reasoning. The layering of these new concepts upon the foundational concepts of rule identification and explanation and rule-based reasoning allows students to learn at an appropriate pace in terms of their cognitive development. The repetition of the foundation in a new but relatable context creates an opportunity for deeper learning and improved student outcomes.

C. Layering Learning: Introducing the Factors Test.

The factors test adds a layer of complication even though it may initially appear quite similar to the conjunctive test. It is true that the factors test is made up of several simple declarative rules, but the fact that they are joined together by “or” instead of “and” creates challenges for organizing the analysis in the form of a checklist. A checklist discourages holistic analysis of the factors, and the rule structure is more challenging to articulate as a coherent rule of law synthesized from a variety of cases that do not necessarily all involve each factor that may be applicable to the hypothetical problem they have been given. Students are required to exercise more judgment in terms of organization with the factors test than they must exercise with the conjunctive or simple declarative rule because they cannot necessarily address one factor at a time. Determining how to address each factor requires exercising the judgment that they learn by practicing with simpler rule structures, like the simple declarative rule and the conjunctive test. The key feature of the factors test is that the factors are interconnected, and the combination, not any individual factor, generally drives the outcome. So, instead of holding one piece of the test at a time, students must hold multiple pieces at once and manage the ever-shifting connection between the factors and their relation to the overarching legal standard.

Factors tests are frequently invisibly embedded in precedent, and they may even be embedded in other rule structures. For example, a balancing test might have factors on either side of the balance that must be weighed. In section (D) below, balancing tests are examined in more detail. When the factors test is embedded in another rule structure, the organizational decisions the student must make are even more complicated, and it is advisable to avoid using problems with combination tests involving factors until students have become proficient in working with simple declarative rules, conjunctive rules, and factors tests.
Synthesizing a factors test can also be complicated when the factors test is embedded in precedent, as opposed to explicitly created through a statute or rule. It is not uncommon for an opinion to articulate facts and then jump to the holding without expressly naming the factors, leaving students in a position where they must identify and label the factors that the courts have implicitly used to guide their analysis. This process requires students to engage in inductive reasoning to identify patterns in precedent and define categories that govern the legal analysis. Michael R. Smith explains that

[the types of legal issues that give rise to the inductive reaction of a factor test have two general characteristics. First, the law on an issue must set out some kind of flexible legal standard designed to control the outcome on the issue. Second, a number of cases must exist in which the courts of the jurisdiction endeavored to apply the flexible legal standard to the facts of specific cases.]

Deriving a factors test from precedent is an advanced form of inductive reasoning that requires students to possess a strong foundation in identifying and explaining rules and subrules, and it also requires students to manage a large body of precedent governing the issue. That is why teaching the factors test after students have analyzed a simple declarative rule and a conjunctive test is a better strategy for ensuring long-term proficiency in the various legal writing outcomes. It is challenging, if not impossible, for students to move beyond basic fact-to-fact comparisons with precedent and articulate a coherent analytical framework if they have not yet learned how to articulate and explain simpler analytical frameworks.

A factors test is useful not only for building on the concepts that students learned through analyzing the simple declarative and conjunctive rules, but it adds in more sophisticated facets of those concepts as well as new concepts. Identifying rules and subrules, for example, is likely going to be more complicated because courts do not always explicitly state the factors they are considering. Instead, they may identify important facts and then reach a conclusion. With conjunctive tests, courts tend to state the subrules more explicitly, so it is easier for students to identify the rules with the simpler tests. Consider the following excerpt from a sample appellate brief:

A trial court must engage in a factual determination in deciding whether a claimant has consciously elected Workers’ Compensation as an exclusive remedy while consciously rejecting all other remedies. Jones, 932 So. 2d at 1105 (concluding that “the point upon which a worker’s action with regard to a compensation claim constitutes an election of the Workers’ Compensation remedy to the exclusion of a civil action is not entirely clear”). Factors the court should consider include: (1) whether the plaintiff initiated a Workers’ Compensation claim or passively accepted benefits; (2) whether the parties entered into a mediated settlement agreement; (3) the specific language of any agreement; (4) whether the employer accepted the claimant’s injuries; and (5) the actual parties to the agreement. See

187 See generally, Smith, ADVANCED LEGAL WRITING.

188 This excerpt comes from a brief I wrote sometime between 2004 and 2008 that was filed by Thomas B. Luka on behalf of his client. Despite my best efforts to locate the original citation, I cannot locate it due to the fact that I do not recall the party names. I have used this sample for pedagogical purposes throughout my teaching career, which began in 2008. This brief is public record.
The first sentence of this paragraph articulates a conjunctive rule requiring proof of both consciously electing Worker’s Compensation and consciously rejecting all other remedies. The signal phrase “factual determination” alerts the reader that the sub-rules involved with this conjunctive test are factors. The brief then identifies five factors that courts should consider when determining whether the two-part conjunctive rule has been satisfied. The signal “see” that begins the citation sentence informs that none of the cases necessarily expressly identifies all five factors. In fact, none of the cases identifies a factors test at all. Rather, the cases analyze facts and then reach a holding; I, as the brief writer studied those facts to identify the categories and then synthesized them into the factors test.

The creation of a factors test is a powerful rhetorical strategy that lightens the cognitive load on the reader.\textsuperscript{189} The above example shows that articulating a factors test establishes an analytical framework to support the rest of the analysis. The express articulation of the factors test informs the reader of the structure of the analysis that will follow, so the reader does not bear the burden of a heavy cognitive load in understanding the law governing the issues in the case.

Factors tests also open up opportunities for students to learn variations on the organizational paradigm. Most legal writing curricula begin by teaching students a symmetrical organization scheme such as TREAC. This paradigm can be used with a factors test,\textsuperscript{190} but it requires the reader to hold a lot of information in short-term memory, which can make the ultimate analysis more difficult to follow. Consider the following example:\textsuperscript{191}

Whether two individuals hold themselves out to be a married couple is an intensely fact-sensitive question. In evaluating the evidence, courts generally consider the parties’ living arrangements, socially expected behaviors indicating the factum of marriage, joint property ownership, evidence of future plans, medical decision-making authority, and financial relationships. See, e.g., Brown, 198 Ga. App. at 568; Wilson, 236 Ga. App. at 497.

Whether the parties reside together is a threshold question in common law marriage cases. While failure of the parties to reside together is usually fatal to a claim of marriage, see Fireman’s Fund Ins. Co., 151 Ga. App. at 271 and Finch, 251 Ga. App. at 637, that is not to say cohabitation alone is insufficient to establish the existence of the marriage, Drawdy v. Hesters, 130 Ga. 161, 161 (1908). On the contrary, “the fact of cohabitation is equivocal, being consistent with a meretricious or marital relation.” (emphasis added.) Drawdy, 130 Ga. at 161. Evidence of cohabitation, without more, is insufficient as a matter of law to support a finding of common law marriage. See LeGrand, 259 Ga. App. at 68 (finding a landlord/tenant relationship, not a marriage, existed because decedent

\textsuperscript{189} Smith, ADVANCED LEGAL WRITING, 83-88.
\textsuperscript{190} Smith, ADVANCED LEGAL WRITING, 77-82.
\textsuperscript{191} This text is excerpted from an Application for Discretionary Appeal that I wrote in 2016 and that was filed by K. Paul Johnson at the Georgia Supreme Court in Michael M. Husain v. Jane A. Schonian. This brief is public record.
In addition to evidence of a shared residence, the proponent must be able to show other behaviors consistent with the factum marriage. For example, exchanging wedding rings would evidence a desire to solemnize the agreement to marry. \textit{Wright v. Goss}, 229 Ga. App. 393, 395 (1997). Similarly, evidence that the wife officially changed her last name to match her husband’s would tend to show the parties desired to hold themselves out as married. \textit{Cf. Wilson}, 236 Ga. App. at 498 (finding a lack of evidence where the purported wife never adopted the purported husband’s last name, even though in two previous marriages she had adopted the last name of her husbands). Even using his last name without undergoing an official name change would weigh in favor of finding a common law marriage existed. \textit{Franklin}, 253 Ga. App. at 148; \textit{cf. Smith}, 298 Ga. App. at 202 (finding no marriage existed where purported wife sporadically used purported husband’s last name but never officially changed her name).

The choice to have children and raise them together would tend to show an agreement to marry as would listing the purported husband as the child’s father on the birth certificate and giving the child the father’s last name. \textit{Bolden v. Southerland}, 127 Ga. App. 71, 71 (1972) (finding evidence of a marriage where the parties had a baby and sent out birth announcements as Mr. and Mrs.); \textit{cf. Smith}, 298 Ga. App. at 202 (finding no marriage existed where the mother did not list the father on the birth certificate).

Referring to each other as husband and wife is strong evidence that the parties held themselves out as married. \textit{Beals v. Beals}, 203 Ga. App. 81, 82 (1992); \textit{cf. Finch}, 251 Ga. App. at 637 (noting that the purported husband never introduced the purported wife as his wife); \textit{see also Baynes}, 219 Ga. App. at 849 (holding that “in all the fifteen years the two lived together, the deceased never told his daughter, his mother, his brother, or his best friend that he was married to appellant”).

Additional evidence tending to support the existence of the common law marriage involves property considerations. The joint purchase of a home tends to evidence a decision to live together as man and wife. \textit{Beals}, 303 Ga. App. at 82. Similarly, jointly signing a lease as husband wife show the parties’ intent to live together as husband and wife. \textit{See Smith}, 298 Ga. App. at 202 (reasoning that a jointly signed lease is one factor to consider). Large purchases of personal property, such as furniture, convey the same message. \textit{Ridley v. Grandison}, 260 Ga. 6, 6 (1990). In the same vein, entering into contracts together indicates an intent to marry. \textit{Ridley}, 260 Ga. at 6; \textit{Finch}, 251 Ga. App. at 637 (finding evidence that the parties never entered into a contract together showed a lack of intent to marry).

Courts may also consider the financial arrangements of the parties in determining whether they intended to enter into a common law marriage. Evidence that the

Evidence that the parties have filed joint tax returns and together claimed children on tax returns shows the marriage more than likely existed. *Ridley*, 260 Ga. at 6 (finding a marriage existed where the husband claimed wife’s children for tax purposes); *cf. Wilson*, 236 Ga. App. at 498 (finding the evidence weighed against a finding of marriage where the parties on numerous occasions swore under penalty of perjury that they were not married). In the same way, evidence that the parties had referred to each other as spouses on employment applications and other personnel documentation would support the existence of the marriage. *Cf. Baynes*, 219 Ga. App. at 849 (explaining that failure to list husband as such on public housing application supported a finding of non-marriage).

Courts also consider future plans when determining whether a common law marriage exists. A plan to marry in the future is typically insufficient to evidence a present contract of marriage unless the parties show the planned ceremony is intended solely to solemnize an existing marriage contract. *Holmes*, 232 Ga. App. at 434 (finding a common law marriage did not exist when the purported husband “asked [her] to move in with him and maybe . . . the marriage would come later”); *Fireman’s Fund Ins. Co.*, 151 Ga. App. at 272; *but see Bolden*, 127 Ga. App. at 71 (reasoning that the parties planned to obtain a license for the purpose of proving they were already married); *Georgia Osteopathic Hosp., Inc. v. O’Neal*, 198 Ga. App. 770, 778 (1991) (holding that when the parties “talked some about getting married . . . ‘[b]ut . . . never did it . . .’ [it] does not necessarily negate the existence of a common-law marriage relationship, for a couple may enter into such a relationship yet nevertheless discuss and plan a marriage ceremony for the purpose of formalizing the arrangement”).

In this matter, Ms. Schonian has provided woefully little proof that she and Mr. Husain held themselves out as a married couple prior to January 1, 1997. In fact, the only evidence she provides indicates that they lived together beginning in 1994 and purchased a home together before 1997. While these two factors would weigh in favor of a finding of marriage, the weight of the other evidence coupled with the glaring lack of evidence as to some factors demands a finding that they did not hold themselves out as married.

As a general matter, Ms. Schonian and Mr. Husain did not hold themselves out as being married. Aside from her self-serving and controverted statement that Mr. Husain once referred to her as his wife, not a single witness testified that either
party ever referred to the other as a spouse. Additionally, at no point prior to January 1, 1997, did the parties exchange wedding rings or utilize any other outward symbol of marriage.

Ms. Schonian did not adopt Mr. Husain’s name. Like the purported wife in Wilson, Ms. Schonian had a history of changing her last name to match her husband’s. Yet, she chose to keep her prior husband’s name during the first five years of her relationship with Mr. Husain. What is more, when she decided to officially change her name, she reverted to her maiden name instead of taking Mr. Husain’s name. Just like the pattern of behavior in Wilson evidenced that the parties were not married, Ms. Schonian’s pattern of behavior speaks volumes about her belief as to whether they were married and weighs against a finding of marriage.

As to their finances, the evidence tends to show that the parties did not combine their financial lives. Though she testified otherwise, Ms. Schonian was unable to produce a single financial document evidencing the commingling of their financial lives. On the contrary, all the documents in evidence tend to show that the parties swore under oath, on multiple occasions, that they were not married.

Unlike the husband in Riley, Mr. Husain, to his detriment, did not file a joint tax return or claim any of Ms. Schonian’s children on his taxes. While it is true that filing separate tax returns is not necessarily devastating to a claim of marriage, it does weigh against a finding of marriage. When considered together with all the other relevant factors, this case appears most similar to Wilson where the court held that separately filed taxes tend to prove that the parties were not married.

Similarly, Ms. Schonian was unable to demonstrate that the parties had referred to each other as husband and wife on employment documents. Prior to 1997, Ms. Schonian obtained retirement accounts through her employment, yet she neither named Mr. Husain as the beneficiary to said accounts, nor did she have Mr. Husain sign an ERISA spousal waiver of rights.

Taken as a whole, the evidence in this case indicates that the Parties merely decided to meretriciously cohabitated and did not merge their lives into a marital union. Prior to January 1, 1997, they did not think of each other as spouses, they did not tell others that they were married, and they did not commingle their financial and personal lives in such a way as to create a common law marriage. Ms. Schonian, therefore, failed to establish by a preponderance of the evidence that they held themselves out as married prior to January 1, 1997.

As organized, this factors test is written like a checklist. In the above excerpt, the first nine paragraphs are dedicated to rule explanation. The first paragraph is an introduction that identifies the governing factors as: the parties’ living arrangements, socially expected behaviors indicating the factum of marriage, joint property ownership, evidence of future plans, medical decision-making authority, and financial relationships. Thereafter, the factors are explained in the subsequent eight paragraphs, creating a vast amount of information that the reader must hold in short-term memory before applying the test to the underlying facts.
After the explanation, the last six paragraphs apply the rule utilizing primarily rule-based reasoning. Approaching the application factor by factor, the writer emphasizes that all but two factors weigh against a finding of marriage. This application also includes a few analogical and counteranalogical comparisons, but they are not particularly factually specific and are a bit difficult for the reader to track because there has been so much intervening information between the introduction of the precedent and its application to the underlying facts. This sort of bulk, however, can be persuasive in convincing a decisionmaker that the factors weigh more heavily in favor of one particular party or the other.

This analysis causes the legal standard to seem more abstract and detached, leading the decisionmaker to approach the decision from a more clinical, less personalized perspective. This organizational paradigm communicates to the reader that the issue is one of adding up all the factors, and the sheer number of factors in favor of one party will govern the outcome. The downside, however, is that there is little room to understand the quality of the evidence vis-à-vis a given factor, and it is hard for the reader to holistically comprehend the entirety of each factual scenario leading to a finding of marriage or non-marriage. This structure can, therefore, be misleading, as most factors tests are not decided solely on the number of factors in favor of one party or the other; the quality of the evidence as well as the particular combination of factors in any given case is outcome-determinative.

As demonstrated in the above example, the symmetrical paradigm is not necessarily the most sophisticated organizational option when it comes to legal reasoning, especially with more complicated rule structures at issue. In fact, from a historical perspective, many persuasive briefs that have been filed in the real world have not employed a symmetrical paradigm. Rather, they relied on an integrated paradigm wherein the rule explanation and application are much more intertwined, supplying information to the reader in a format that allows simplified processing of sophisticated and complex information through the creation of mental images or narratives.

If the professor’s goal is to introduce students to variations on the traditional TREAC paradigm, such as an integrated paradigm, a factors-test problem is a useful tool. The integrated paradigm is more adept at painting a complete picture for the reader as opposed to handing the reader a few bottles of paint and asking the reader to imagine a landscape. While organizing the analysis like a checklist has the benefit of creating the illusion of bulk of evidence in favor of one party or the other, it fails to cohesively explain the factors in a holistic way that emphasizes not only the number of factors, but also their relationship to each other and the quality of evidence necessary to tip the scale in favor of one party or the other. If the symmetrical paradigm is like a grocery list, then the integrated paradigm is a fully prepared meal.

Returning to the Worker’s Compensation rule explanation paragraph excerpted above, consider the following integrated paradigm:

For example, in Hernandez the parties entered into a “Stipulation in Support of Joint Petition for Order Approving a Lump-Sum Settlement under F.S. 440.20(11)(a)(1994).” Hernandez, 766 So. 2d at 1252. Despite the agreement, the employer continued to contest the compensability of the claim, and the stipulation so stated. Id. Because of this language in the stipulation indicating that the employer did not accept responsibility for the claimant’s injuries, the Third District found that the Workers’ Compensation matter had not been resolved on its merits, despite the
stipulated settlement, so as a matter of law “there could be no election of remedies.” Id. at 1253. Likewise, the Defendant/Appellee in this case did not accept responsibility for Mr. O’Rourke’s injuries, nor did it admit his injury was even compensable. (R 33) At paragraph (g), page 3, of the mediated settlement agreement, the language provides “[t]he Claimant acknowledges that this Agreement is not an admission of guilt or wrongdoing by the E/C and acknowledges that the E/C does not believe or admit that they have done anything wrong.” (R 33)

This paragraph demonstrates an integrated style of reasoning wherein the writer explains how the factors articulated in the preceding paragraph governed the outcome in Hernandez and then goes on to immediately compare the underlying facts of the case with those in Hernandez. The legally salient facts at issue in Hernandez tied to the following cluster of factors: (3) the specific language of the agreement; and (4) whether the employer accepted the claimant’s injuries. Those facts were analogous to the underlying facts where the employer included explicit language in the agreement that it was not admitting any guilt or wrongdoing.

The next paragraph highlights facts from the Vasquez case related to a different cluster of factors: (2) whether the parties entered into a mediated settlement agreement; (3) the specific language of any agreement; (4) whether the employer accepted the claimant’s injuries; and (5) the actual parties to the agreement. The explanation is immediately followed by two paragraphs of application to the underlying facts:

Similarly, in Vasquez, the Second District held that there had been no conscious election of remedies or waiver of rights because the Workers’ Compensation matter had not been resolved on its merits. 962 So. 2d at 414. The written agreement specifically stated that Mr. Vasquez was not making an election of remedies and the only parties to the agreement were the insurance carrier and Mr. Vasquez. Id. The employer “did not agree to the settlement, and … was [not] a party to the agreement.” Id. at 415. Additionally, “the settlement agreement itself provided that it settled only potential Workers’ Compensation claims, not other potential causes of action.” Id. at 414. The settlement agreement specifically provided that the insurer did not accept that the claim was even compensable and continued to contest that Mr. Vasquez was entitled to the benefits at all. Id. at 414-15. Based on these facts, the Third District concluded that the Workers’ Compensation matter had not been resolved on the merits, and therefore Mr. Vasquez was entitled to pursue a civil suit against his employer. Id. at 415.

Just like Mr. Vasquez, Mr. O’Rourke did not make a conscious election of remedies or resolve the Workers’ Compensation claim on the merits. In his settlement agreement, Mr. O’Rourke deleted the sentence “[t]he parties stipulate and the Claimant agrees that this Agreement constitutes an election of remedies with respect to the Employer herein.” (R 32-33) The deletion of this sentence evidences Mr. O’Rourke’s intent not to elect Workers’ Compensation benefits as his exclusive remedy, and the Defendant/Appellee accepted this amendment to the mediated settlement agreement. Mr. O’Rourke’s actions are similar to those of the claimant in Vasquez who included language that the settlement agreement did not represent an election of remedies. The Vasquez case is distinguishable only insofar as the employer there did not enter into the agreement; however, this
distinction actually serves to explain why Mr. O’Rourke was permitted to delete the language regarding election of remedies but did not add in language specifically reserving his right to pursue a tort action. It is highly unlikely the employer would have accepted such language as part of the agreement because it could be perceived as an admission of tort liability. (T 16:2 – 17:25)

In the first paragraph of the agreement, page 1, Mr. O’Rourke also added in language to the effect that he “voluntarily relinquishe[d] all Workers’ Compensation claims and rights the Claimant may have had against the E/C.” (R 31) (emphasis added). This specific language is similar to that language included in the Vasquez settlement where the court held that the claimant had not given up his right to pursue other remedies beyond the Workers’ Compensation claim. Just like in the Vasquez case, the language in Mr. O’Rourke’s mediated settlement agreement evidences his intent to reserve his right to pursue a tort remedy against his employer for the injuries he suffered.

As is evident from both the symmetrical and integrated samples above, the decisions students must make about organizational structure and synthesizing a cohesive rule of law are much more sophisticated than that necessary for explaining and applying a simple declarative rule or a conjunctive test. The symmetrical model has the advantage of creating bulk and neutralizing emotional facts when each factor is explained one at a time and then applied like a checklist in the application section. The benefit of the integrated model is that it captures the essential interconnectivity of the factors test and provides a multi-faceted framework for deciding the issue.

If novice legal writers are required to analyze a factors test before they have gained proficiency in the basics taught through simpler tests, they will not have the foundation necessary to support this type of sophisticated reasoning. They will likely not know how to create an analytical framework by articulating a cogent rule of law because they will not have had experience identifying and explaining explicit rules. Inducing a rule that is not articulated explicitly in precedent is nearly impossible without first learning how to identify and explain clearly articulated rules in precedent. Additionally, students will not have a clear understanding of how articulating the rule is essential to crafting a strong analytical framework; they may not even comprehend what an analytical framework is, much less appreciate how necessary the framework is to supporting the legal argument.

With a factors test, students can also build on the rule-based, analogical, and counteranalogical reasoning that they have already learned by adding on policy-based reasoning. Factors tests typically implicate policies because factors tests are designed to be flexible, not rigid like a conjunctive test. Policies guide the analysis to set the boundaries for how flexible the standard should be in a given circumstance.

Looking again to the Worker’s Comp brief quoted above, it identifies and explains the policy behind the overarching rule in the paragraphs preceding the articulation of the factors test:

The policy and intent of the statute is “to provide a quick and efficient delivery of disability and medical benefits to an injured worker and is based on a mutual renunciation of common-law rights and defenses by employers and employees.”
Judge Wells cautioned that “the intentional tort exception must not be allowed to become a shield for employers to block intentional tort suits or a sword for employees already compensated for their accidental injuries.” Id. (internal quotes omitted). Thus, in those instances where a claimant has received some compensation, pursuing the tort claim will not result in double recovery for the injury; rather, “insurance carriers are authorized to file a notice of payment of benefits which operates as a lien on any subsequent judgment to the extent that the judgment includes damages of the same type as benefits paid under the Workers’ Compensation plan (e.g., medical benefits and wage compensation).”

This policy is subtly infused throughout the rest of the argument to justify the factors that courts must consider when determining whether a claimant has consciously elected Worker’s Compensation as the exclusive remedy while simultaneously consciously rejecting all other remedies. The following language, for example, harkens back to Judge Wells’ admonition that “the intentional tort exception must not be allowed to become a shield for employers to block intentional tort suits”:

In his settlement agreement, Mr. O’Rourke deleted the sentence “[t]he parties stipulate and the Claimant agrees that this Agreement constitutes an election of remedies with respect to the Employer herein.” (R 32-33) The deletion of this sentence evidences Mr. O’Rourke’s intent not to elect Workers’ Compensation benefits as his exclusive remedy, and the Defendant/Appellee accepted this amendment to the mediated settlement agreement. Mr. O’Rourke’s actions are similar to those of the claimant in Vasquez who included language that the settlement agreement did not represent an election of remedies. The Vasquez case is distinguishable only insofar as the employer there did not enter into the agreement; however, this distinction actually serves to explain why Mr. O’Rourke was permitted to delete the language regarding election of remedies but did not add in language specifically reserving his right to pursue a tort action. It is highly unlikely the employer would have accepted such language as part of the agreement because it could be perceived as an admission of tort liability. (T 16:2 – 17:25).

By explaining why Mr. O’Rourke did not add in language specifically reserving his right to pursue a tort action, the writer subtly highlights the unequal bargaining power between an injured employee and the employer. It also shows that by avoiding an admission of tort liability in the language of the contract, the employer could potentially weaponize the intentional tort exception doctrine to deprive employees of their rights to otherwise pursue a tort remedy in compensation for any intentional tort suffered during the course of employment. These subtle arguments align with the policy behind the tort exception doctrine explained in the paragraphs preceding this application section.

Factors tests tend to work well in the persuasive semester because the factually intensive analysis makes it easy to create balanced problems with good arguments on both sides. Even in the real world, it is hard for lawyers to predict how a court will rule on a case where a factors test is involved. There are just too many moving parts for anyone to be able to make a substantially
certain prediction as to the outcome. Additionally, students should have gained proficiency in the basics like rule identification, rule synthesis, rule illustration, rule-based reasoning, analogical reasoning, and counter-analogical reasoning.

To summarize, the factors test typically demands a more sophisticated process of inductive reasoning to derive the rule than that required of simple declarative rules and conjunctive tests. It also requires more intensive analogical and counter-analogical reasoning in the application section. Factors tests tend to be good for introducing policy-based reasoning because policies generally guide how to consider the factors all together. Factors tests build on the foundational skills students acquire with the simple declarative rules and conjunctive tests, but they are not suitable for introducing foundational skills because they involve a high level of complexity. Going back to the neuroscience of learning, the brain generally learns better when it progresses from simple to more complex concepts with the more complex concepts introduced in a scaffolding method, building on the foundational, simpler concepts.

D. Developing Proficiency: Dealing with Disjunctive Tests

Disjunctive tests are one of the most complicated tests if both sides of the alternative are involved in the fact pattern. If only one alternative is involved in the fact pattern, it is possible to write a problem as a simple declarative rule or as a conjunctive test for any of the purposes previously identified in this Article. Consider for example a problem designed around the Florida statute for assault, which defines the offense as “an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.” The only part that is disjunctive is “by word or act.” This statute could easily be used for a conjunctive test problem by simply creating a fact pattern that involves either a word or an act, but not both. On the other hand, if the goal is to create a more advanced problem and build on the conjunctive test concepts, the professor could have the students grapple with whether certain words and acts are, either separately or together, an intentional, unlawful threat, thereby creating a disjunctive test problem.

Like with factors tests, problems involving disjunctive tests require students to exercise sophisticated judgment in terms of adopting an organizational structure. Each alternative necessarily involves some other rule structure, whether it be simple declarative, conjunctive, or factors. It is even possible to have one rule structure on one side with a different rule structure on the other. With a disjunctive test, addressing each alternative in turn is often the best way to organize the analysis. This organizational paradigm allows students to deal with one alternative at a time, which they are used to doing since they have already worked with other rule structures. The use of subheadings can help students stay organized and focused. Within each subheading students could choose to fully explain and apply each alternative, or students may choose to explain each alternative as a separation heading and then include a final heading applying the alternatives in a single section.

The disjunctive test structure can also be used to teach students how to deal with unsettled rules of law. This is so because when the law is unsettled there is often a choice between two or more legal

tests that can be applied to a given issue. The two competing rules, in other words, create the disjunctive structure. This rule structure often challenges students’ ability to synthesize a coherent rule of law because courts are not always explicit about creating splits. Typically, students must discover the split by reconciling a number of cases. Consider the following example:

<table>
<thead>
<tr>
<th>This first paragraph sets forth the basic rule and a roadmap. As written, the rule includes a disjunctive clause that identifies two examples of equitable issues, but the basic rule structure is a simple declarative rule: equitable issues cannot be raised for the first time on appeal. Articulating a rule in the simple declarative form conveys simplicity and implies that the legal analysis will not be challenging for the court.</th>
<th>Equitable issues, such as computation of child support or attorney’s fees awards, cannot be raised for the first time on appeal. McCarthy v. Ashment-McCarthy, 295 Ga. 231, 233 (2014); Branhman v. Branhman, 290 Ga. 349, 350-51 (2012) (holding wife waived right to appeal attorney’s fees award when she failed to raise the issue with the trial court prior to appeal); see also, Holloway v. Holloway, 288 Ga. 147 (2010) (permitting appeal where motion for new trial raising child support issues had been filed prior to appeal); Brogdon v. Brogdon, 290 Ga. 618 (2012) (permitting appeal where motion for reconsideration raising child support issues had been filed prior to appeal); Demmons v. Wilson-Demmons, 293 Ga. 349 (2013) (permitting appeal where motion to amend or make additional findings of the final order and motion for partial new trial raising child support issues had been filed prior to appeal). In this case, Appellant did not file a Motion for New Trial, and his Consolidated Motion for Reconsideration did not raise either of the issues raised in this Appeal. He has therefore waived this Court’s review of these issues, and the judgment below should be affirmed.</th>
</tr>
</thead>
<tbody>
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<td>The second paragraph identifies how one preserves an equitable issue for appellate review, and the third paragraph delves into policy reasons justifying the overarching rule. The end of the third paragraph, however, begins to imply that the there may be another rule, or at least another interpretation, out there. The reader is alerted to the phenomenon by the A motion for new trial is the proper method for raising an issue regarding “the trial court’s failure to comply with the child support guidelines in O.C.G.A. § 19-6-15.” Kuriatnyk v. Kuriatnyk, 286 Ga. 589, 591 (2010). In McCarthy, after entry of the Final Judgment and Decree, the pro-se husband filed a motion to set aside the decree as well as a motion for new trial that “contained no grounds at all.” 295 Ga. at 232. He later amended his motion to set aside claiming “the parties never reached a valid agreement and that [w]ife had defrauded the trial court by misrepresenting her finances.” Id. Because “[n]either motion argue[d] that the trial court failed to follow the requirements of O.C.G.A. § 19-6-15,” the issue was not preserved for appeal. Id. (affirming trial court’s ruling). Furthermore, the Georgia Supreme Court expressly disapproved of interpreting Georgia law to mean “that the issue of a trial court’s compliance with O.C.G.A. § 19-6-15 is never subject to waiver.” Id., at 233 n.1 (disapproving Turner v. Turner, 285 Ga. 866 (2009); Walls v. Walls, 291 Ga. 757 (2012); Eldridge v. Eldridge, 291 Ga. 762 (2012)). On the contrary, compliance with O.C.G.A. § 19-6-15</td>
<td></td>
</tr>
</tbody>
</table>

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193 This text is excerpted from a brief I wrote in 2019 and that was filed by K. Paul Johnson at the Georgia Court of Appeals in Winchell v. Winchell, A19A1531. This brief is public record.
The fourth paragraph identifies the rule articulated in Ford as an aberration that cannot be reconciled with precedent. In this example, the disjunctive structure of the overarching rule appears in the middle of the analysis. From a persuasive standpoint, this choice is wise because the point is to persuade the appellate court that the longstanding rule is correct and that Ford was an incorrect departure from precedent.

The majority opinion in Ford, which permitted an attorney’s fee issue to be raised for the first time on appeal, cannot be reconciled with longstanding Georgia precedent, including Supreme Court precedent, preventing parties from raising issues for the first time on appeal absent special circumstances. Ford, No. A18A1688 (Rickman, J., dissenting) (citing Pfeiffer v. Ga. Dept. of Transp., 275 Ga. 827, 829 (2002); Shelley v. Town of Tyrone, 302 Ga. 297, 308 (2017); Extremity Healthcare, 339 Ga. App. at 258). In fact, it expressly contradicts the Georgia Supreme Court’s holding in Branham, in violation of the Georgia Constitution. Ga. Const. § V, para. III and § VI, para. VI. The Georgia Court of Appeals does not have the power to overturn longstanding precedent of the Georgia Supreme Court. Ga. Const. § V, para. III and § VI, para. VI. Moreover, this opinion is only non-binding physical precedent. Ga. R. App. P. 33.2(a). For these reasons, this Court should not be persuaded that issues of attorney’s fees can be raised for the first time on appeal.

Additionally, this Court should not be persuaded by the majority opinion in Ford for a substantive reason: the appeal did not involve a special circumstance. The only issues that can be raised for the first time on appeal are those involving special circumstances like “a jurisdictional challenge, a claim of sovereign immunity, a serious issue of public policy, a change in the law, or an error that works manifest injustice.” Pfeiffer, 275 Ga. at 829. Sufficiency of evidence issues are not special circumstances; nay, virtually every appeal on a substantive legal issue boils down to a question of whether the trial court correctly applied the law to the evidence presented.

Not only is the majority’s reasoning flawed, as pointed out by the dissent, but the majority’s rationale that any challenge to the sufficiency of the evidence can be raised for the first time on appeal opens a venerable floodgate of litigation because it would permit any fact-based issue to be raised for the first time on appeal. Id. at 829 (holding that “fairness to the trial court and to the parties demands
that legal issues be asserted in the trial court . . . [because i]f the rule were otherwise, a party . . . need not raise any legal issue, spend the next year thinking up and researching additional issues for the appellate court to address, and require the opposing party to address those issues within the narrow time frame of appellate practice rules”). Simply put, “it is basic that evidence cannot be contested for the first time on appeal.” Moody v. Dykes, 269 Ga. 217, 220 (1998).

The majority’s reasoning in Ford lands far afield from well-established precedent on preservation of appellate issues. The most prudent course of action would be to overrule Ford, pursuant to Georgia Rule of Appellate Procedure 33.3 or, in the alternative, to disregard the majority’s opinion as an anomaly and follow the well-established precedent that, “absent special circumstances, an appellate court need not consider arguments raised for the first time on appeal.” Pfeiffer, 275 Ga. at 829.

The application section unapologetically applies the long-standing rule over the Ford departure through rule-based reasoning in the first and second paragraphs. Notably, it does not engage any further with Ford because it has already resolved the issue that Ford should not apply. In this particular example, it would have undermined the argument to attempt to apply Ford because the whole point of the argument was proving Ford was decided incorrectly.

Applying well-settled Georgia law to these facts, Dr. Winchell indubitably did not preserve his right to appeal. He did not file a Motion for New Trial at all. (R. at 1055-1166; August 2, 2018, T. 11-12.) Ms. Moore, on January 16, 2018, filed a Motion for Reconsideration raising child custody issues. (R. at 1055-57.) Shortly thereafter, counsel for Dr. Winchell served a Motion for New Trial on Ms. Moore, but he never actually filed the Motion with the trial court. (R. at 10551166.) Although Ms. Moore filed a Response to the Motion for New Trial on February 15, 2018, the Motion itself was never pending before the trial court. (R. at 1097-99; August 2, 2018, T. 11-12.) Thereafter, on February 20, 2018, Dr. Winchell filed a Consolidated Motion for Reconsideration and Response to Plaintiff’s Motion for Reconsideration. (R. at 1100-02.)

This Motion for Reconsideration, however, did not address either of the issues raised in this Appeal; it only raised issues regarding physical custody. First, Dr. Winchell objected to Ms. Moore receiving four weeks of vacation with the Parties’ child during the summer. (R. at 1100.) Second, he requested the court adopt a specific definition for “summer vacation period.” (R. at 1101.) Third, he asked the court to reconsider the regular visitation. Schedule. (R. at 1101.) Fourth, he requested the court modify Spring Break visitation to permit the parents visitation in alternate years. (R. at 1102.)

Just like in McCarthy, Dr. Winchell did not raise with the trial court the issues he now wishes this Court to address. The law is well-settled that issues of child support and attorney’s fee awards cannot be raised for the first time on appeal. E.g. McCarthy, 295 Ga. at 233; Branham, 290 Ga. at 350; Pfeiffer, 275 Ga. at 829; Shelley, 302 Ga. at 308; Extremity Healthcare, 339 Ga. App. at 258. Dr. Winchell
“must stand or fall upon the position taken in the trial court.” See Pfeiffer, 275 Ga. at 829 (quoting Bell v. Sellers, 248 Ga. 424, 426 (1981), quoting Federal Ins. Co. v. Oakwood Steel Co., 126 Ga. App. 479 (1972)). He has waived his right to appeal both of these issues, and the trial court’s orders on child support and attorney’s fees should therefore be affirmed.

For unsettled issues, students will often need to explain both standards in a way that persuades the court that one test is clearly controlling or superior to the other. In the example above, the writer begins by establishing the longstanding legal standard with regard to preservation of issues for appeal. Toward the end of the third paragraph, it identifies where the law begins to split. It then deconstructs the one deviant opinion and urges the court to view the aberrant case as just that, an aberration, returning to the longstanding rule governing preservation of appellate issues post-trial. The less favorable standard is sandwiched between strong explanations of the preferred, and more deeply rooted, legal standard.

The analysis of this particular unsettled rule of law was not especially complicated, so the linear approach of setting out one standard first, then the less favorable standard, and then returning to why the first standard is preferable made sense from an organizational standpoint. Had the test been more complicated or involved more pieces on either side of the split, then the use of subheadings to distinguish between the tests may have been helpful in setting up the comparison.

To summarize, the disjunctive test continues to develop the complexity of concepts introduced by the simpler tests. This test is especially good for introducing unsettled rules of law because the fact that a rule is unsettled builds in inherent alternatives.

E. Building Up Fluency: Balancing Tests and Defeasible Rules.

Balancing tests build on concepts introduced through simpler tests by providing an opportunity to continue working on the same skills with an added layer of organizational complexity. Factors tests are frequently embedded on either side of a balancing test, so all of the concepts related to factors tests apply to balancing tests, as well. One major difference, however, is that students will typically not be able to organize the analysis in the form of a checklist because balancing tests require a side-by-side examination rather than a linear or sequential series of conclusions. There is simply too much information to address it linearly because the reader would not be able to retain so much detail delivered in a clinical, abstract way. Think back to the common law marriage brief excerpt in the previous section of this Article. The limits of the reader’s attention were already being tested by the nine paragraphs. Imagine if those nine paragraphs doubled to address the other side of a balancing test. That format is simply not conducive to conveying complex information in a way that is understandable and helpful to the factfinder. That is why the balancing test is more complex than the all of the rules set out before this Section.

Like factors tests, the balancing test often involves a holistic analysis of factors, but often different sets of factors apply to each side of the balance. In other words, there are likely at least two factors tests embedded in any given balancing test. Synthesizing and organizing two factors tests at the same time while explaining their relationship to each other requires students to exercise even more
judgment than they had to exercise with the factors test. With the balancing test, the factors on each side of the balance are not only interconnected within each cluster, but they also together have a relationship with the cluster on the other side of the balance. All of these relationships drive the outcome. Now, instead of holding one cluster of factors at a time, students must hold multiple clusters at once, all while continuing to manage the ever-shifting relations amongst the components.

Balancing tests are often derived from caselaw, though a balancing test may be set up in a statute or constitutional provision. Balancing tests often involve constitutional questions and implicate competing policies or special interests. Especially when derived from caselaw, the structure of the balancing test can be malleable in terms of setting up the analytical framework for the argument. For example, balancing tests can frequently be worded as a defeasible rule in order to convey a different sense of judicial power associated with the test. In the example below, Rule 1 is structured as a balancing test while Rule 2 is structured as a defeasible rule.

1. The state’s right to forcibly medicate the defendant to restore her competency to stand trial must be weighed against the individual’s right to privacy, which encompasses the right to refuse medical treatment.

2. The 4th amendment right to privacy protects an individual from being forcibly medicated to restore competency to stand trial unless the state has an important interest in prosecuting a serious crime.

Both rules are accurate, but the former presents the parties as standing on equal footing while the latter conveys a broad protection for the individual and creates a narrow exception for state action. The very structure of the rule subtly persuades the decisionmaker about how much power the court has to forcibly medicate the defendant for the purpose of restoring her competency to stand trial. Balancing tests are effective tools for teaching students more advanced persuasive and rhetorical strategies, and they can be especially useful for writing as resistance pedagogies because they allow students more freedom in how they define the issues, describe the parties, and organize the analysis.

To summarize, balancing and defeasible tests can be interchangeable rule structures that provide students the opportunity to practice shifting rule structures for persuasive appeal. These rule structures build on those concepts already introduced with simpler tests, essentially scaffolding the complexity in a way that the brain can process for long-term learning.

F. A Summary

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194 I drafted these rule statements as examples for a class exercise related to a problem I created using the Sell Test established in Sell v. United States, 539 U.S. 166 (2003). The Sell test involves four elements, and the first element is sometimes articulated as a defeasible test and other times articulated as a balancing test in precedent. I was initially inspired to create this problem after reading the opinion in Warren v. State, 297 Ga. 810 (2015).
The following table summarizes the connection between rule structure and pedagogical goals, and it also includes suggestions for where a professor might identify examples of rule structures around which to build problems:

<table>
<thead>
<tr>
<th>Rule Structure</th>
<th>Substantive Purpose</th>
<th>Complexity</th>
<th>Source</th>
</tr>
</thead>
</table>
| Simple Declarative  | • Identifying Rules
• Explaining Rules
• Rule-Based Reasoning
• Symmetrical Organization | Simple         | Statutes
Ordinances
Rules
Handbooks (HOA, Student Codes, and other Quasi-Legal Sources) |
| Rule               |                                                                                     |                |                                                                      |
| Conjunctive Rule    | • All Concepts for Simple Declarative Rules
• Synthesizing Rules from Precedent
• Analogical Reasoning
• Counteranalogical Reasoning
• Symmetrical Organization | Somewhat Complex | Criminal Law
Torts
Civil Procedure
Child Support |
| Factors Rule        | • All Concepts for Conjunctive and Simple Declarative Rules
• More Sophisticated Synthesis
• Create Factors Test
• Policy-Based Reasoning
• More Sophisticated Organization | Moderately Complex | Divorce
Alimony
Child Custody |
| Disjunctive Rule    | • All Concepts for Factors, Conjunctive, and Simple Declarative Rules
• More Sophisticated Synthesis
• Unsettled Rules of Law
• More Sophisticated Organization | Complex         | Ethics Rules
Statutes using the word “or” |
| Balancing and       | • All Concepts for Disjunctive, Factors,                                             | Extremely Complex | Constitutional Law
Defeasible          |                                                                                     |                | Criminal Procedure |
|                     |                                                                                     |                |                                                                      |
V. Conclusion

Centering the pedagogical goals and student learning experience requires professors to think intentionally about problem design. Learning theory and cognitive science unequivocally inform that students learn best when new information is relatable to prior experiences. As such, it only makes sense to begin simple and then scaffold the learning experience to the more complex.

What this Article adds to the literature is a particularized focus on rule structure as the source of inquiry into complexity. To some extent there is a relationship between the complexity of rule structure and doctrinal complexity, as reflected on the table in Section IV(F), but from the pedagogical perspective, the rule, not the doctrine, is the salient feature. The rule is what drives the learning of legal writing content, whereas the doctrine provides at most incidental learning.

When designing problems, best practices demand that professors first consider the pedagogical goals, then select the corresponding rule structure, and then seek a manageable rule and body of legal authority around which to build the problem.