

Cite as: Charles R. Splawn, *Teaching Legal Analysis: A Tale from the Front*, 27 *PERSPS.* 70 (2019).

# Teaching Legal Analysis: A Tale from the Front

By Charles R. Splawn

*Charles Splawn is the Assistant Director of Academic and Bar Support at Elon University School of Law.*

## I. Introduction

Legal analysis is the foundational skill of lawyering, and it is at least part of what captivated us as law students. But because legal analysis is as much art as science, explaining it—now as teachers—can be a somewhat elusive process. Inspired by a colleague's simple but effective presentation at a conference I attended four years ago,<sup>1</sup> and armed with a great textbook,<sup>2</sup> I have embarked on a teaching journey that has been remarkably fulfilling—for my students and for me.

While the specific approach I have developed is not earth-shattering, it nonetheless offers some solid techniques and addresses some of the difficulties in cultivating singular focus and intense scrutiny in our millennial law students. I hope that sharing my teaching experience will be helpful to those charged with the task of teaching legal analysis. I note also that the principles explored herein could fruitfully be applied in other contexts. For instance, an abbreviated series of legal analysis exercises deployed in a pre-1L program could provide a wonderful foundation for more effective 1L learning. Similarly, the course content I describe below could be parceled out in academic support workshops or one-on-one meetings, giving the academic support professional a tried and true, turn-key platform to develop students' analytical skills.

<sup>1</sup> John F. Murphy, Assoc. Professor of Law at Tex. A&M Sch. of Law, Developing a Targeted Class to Improve Academic Performance, Presentation at Third Annual Southwestern Consortium of Academic Support Professionals Workshop (Mar. 6, 2015).

<sup>2</sup> Cassandra L. Hill & Katherine T. Vukadin, *LEGAL ANALYSIS: 100 EXERCISES FOR MASTERY* (2d ed., Carolina Academic Press 2017).

This Article will explore four key aspects of the course I have entitled “Mastering Legal Analysis.”<sup>3</sup> The first key aspect is the necessity of introducing (or at least re-introducing) students to the classification of information and the examination of inferences, both of which are essentially ways of figuring out the relationship between the concepts that lurk behind our terminology. Second is the deliberate and thorough deconstruction of the process of legal analysis itself—breaking an often-inscrutable monolith into discrete, manageable tasks. Third is a summary of the overarching strategy and specific techniques by which my students are challenged to move through a wonderfully practice-oriented textbook. Finally, I describe how student engagement in this cumulative process culminates in a longish office memorandum that serves both as proof of the skills they've acquired and a template for the union of thinking and communication that will help them in law school, on the bar exam, and in the practice of law.

## II. Teaching Classification and Inferences

First, regarding classification, I often encounter in students a laziness about, or even a reluctance toward, categorizing information precisely. Perhaps it stems from a distaste for restrictive definitions or a sense of moral ambiguity, but many students tend to shy away from any process that imposes rigid classifications.<sup>4</sup> The value in adopting such tendencies in a social or psychological sense is debatable. But the inability or unwillingness to separate information into appropriate categories based on similarity and

<sup>3</sup> Developed by the author and taught to second- and third-year students at the Elon University School of Law since 2016.

<sup>4</sup> Offering a sobering sociological study of Generation X that reveals significant, yet casually adopted, moral laxity, see Christian Smith et al., *LOST IN TRANSITION: THE DARK SIDE OF EMERGING ADULTHOOD* (2011).

“I note also that the principles explored herein could fruitfully be applied in other contexts.”

“Without exposing and testing the inferences in an assertion or a fact pattern, students are doomed to an incomplete analysis on account of incomplete information.”

dissimilarity is poison to legal analysis. Indeed, the heart of legal analysis requires students to analogize and distinguish. They simply cannot think like, and of course *be*, lawyers without it.

So how to get potentially reluctant students comfortable with hierarchies and the method of analogy and distinction by which those hierarchies are actualized? A game, of course<sup>5</sup>—and specifically what I call the “Categories Game.” In the first or second class, I introduce the basic assignment reproduced below, instructing students to create a system of categories that show the relationship between the items listed in each set. First, all of us work together through the “Ice Breaker” described below. Then I split the class into small groups and require them to tackle either the Group 1 or Group 2 exercise. After a few minutes, each group depicts its categorization schema on the whiteboard, and we discuss. Not only does this exercise typically produce “aha” moments with respect to categorization and hierarchy, but it also confirms the role of creativity that is inherent in many elegant legal arguments. For each of the three sets below, students are required to recognize that they need to create at least one umbrella category not already provided to them: for instance, some version of “participants” for the Ice Breaker and Group 2 sets and some version of “enforcement” in the Group 1 set in order to account for “tax lien.”

#### THE CATEGORIES GAME

Ice Breaker:

- Double-dribble, NCAA, LeBron James, NBA, lay-up, collective bargaining, basketball, referee, guard, Title IX, foul, slam dunk.

Group 1:

- IRS, capital gains, taxation, deduction, audit, tax lien, dependents, state, federal, income, charitable gift.

Group 2:

- Search warrant, district attorney, police officer, parole, embezzlement, aggravating factor, criminal justice, plea bargain, fourth amendment, fingerprint, judge.

A sample schema is provided<sup>6</sup> to illustrate how students might define the relationships in the Ice Breaker, wherein the students must not only recognize similarities and differences, but also develop the inferred hierarchical categories that explain and order them. The inferred categories are displayed in burgundy font in the samples. Obviously there are judgment calls to be made in creating and ordering categories, so variation among student schemas is to be expected.

A second, related prerequisite to legal analysis is the ability to recognize hidden or implicit inferences, to explain the basis for these inferences, and finally to evaluate them. Without exposing and testing the inferences in an assertion or a fact pattern, students are doomed to an incomplete analysis on account of incomplete information. Similar to my approach with classification, I find that a game-like exercise best demonstrates the art of decoding inferences. For that purpose I typically let students work in pairs or small groups to identify and evaluate simple (and often stereotypical) inferences such as these:

1. John will vote for a Republican because John is a gun shop owner.
2. Sally will vote for a Democrat because Sally is a Hollywood movie producer.

These simple assertions are ripe with multiple assumptions and are falsely absolute in ignoring the possibility of other voting factors. Unmasking and discussing the meaning (and accuracy) of the assumptions always leads to a lively class discussion.

### III. Elucidating the Legal Analysis Process

Perhaps a preliminary question is whether it is advisable for law teachers to decode law school learning at all. Certainly one camp of faculty would argue that the onus should be on students

<sup>5</sup> For thoughtful treatment of game- and group-based student learning, see Jennifer L. Rosato, *All I Ever Needed to Know About Teaching Law School I Learned Teaching Kindergarten: Introducing Gaming Techniques into the Law School Classroom*, 45 J. LEGAL EDUC. 568 (1995).

<sup>6</sup> For three sample options, please see Appendix C.

to figure out how to learn law largely on their own. After all, a lawyer's primary super power is precisely that: figuring things out for others (e.g., establishing a client's rights, obligations, and options, as well as the practical means to address them). In my experience, it is absolutely true that many of today's law students need to improve their resourcefulness and become more self-reliant. But it is also my experience that, for whatever reasons (hello, high schools and universities), too many law students falter at deep doctrinal learning unless we in the academy proactively instill in them the foundational thought processes of legal analysis.

So, from beginning to end, this course essentially analyzes "analysis." What better way to teach analysis, the process of breaking things into their component parts, than to break legal analysis into *its* component parts? Thus, I introduce students in sequence and somewhat in crescendo to this fairly standard model of legal analysis:

1. Deconstruction of rules (whether from cases, statutes, or regulations) into their separate elements or conditions;
2. Fact-matching, which I describe (and demonstrate) to students as determining the legal significance of the facts presented in a hypothetical by matching each specific fact to the rule element(s) or condition(s) to which the fact appears to relate—this is a separate, distinct precursor to *using* facts to prove elements or satisfy conditions (i.e., argument-building, immediately below);
3. Argument-building, which consists essentially of identifying which facts tend to prove or disprove each rule element or condition and, most importantly, explaining how and why each fact (and the inference(s) drawn therefrom!) supports a specific assertion;
4. Evaluation of arguments, which is assessing the strengths and weaknesses of each argument and counterargument, reaching and expressing sub-conclusions based on the arguments for and against each element or condition, and then adding up the sub-conclusions to determine the grand conclusion that resolves the question presented; and

5. Communication of reasoning and result.

Most of the writing assignments are in a memorandum format with which the students are already familiar, so the main goal is to inject into their writings the superior organization, clarity, and robust reasoning we achieve together in class, such that a think first/write second protocol becomes more and more second nature to students.

This basic pattern is intentionally repeated, modeled, and practiced in every single class, as together we explore progressively more complex legal questions. The curricular perspective is described more fully in the next section, but I would like to share several specific insights from my classroom experiences in applying these fundamental analytical steps.

First, I make the point to my students that if fact-matching seems somewhat cold and impersonal, then you are certainly doing it correctly. The multitude of impressions or even emotions that a narrative can involve (we are built for stories, right?) are counterproductive to converting the facts of a story to the fodder of legal analysis. This is law and not literature, so fact-matching is essentially narrative deconstruction, somewhat akin to rule deconstruction (step 1, above).

Next, I suspect that the speed of accessing and processing information in the digital age is at least partly to blame for two common student difficulties. The first difficulty is an overzealous transition from fact-matching (step 2) to argument-building (step 3). The second difficulty is the near-instantaneous adoption of one argument to the virtual exclusion of consideration of the counterargument.

Those of you nodding your heads right now will probably agree that these two difficulties stem from two closely-related causes: failure to carefully consider all available information, and failure to work methodically through multiple possible outcomes. In a vicious feedback loop, a student not accustomed to focusing very intently, or for very long, on dense factual information may skip over the very facts that should lead her to discover a plausible (if not winning) counterargument to

“What better way to teach analysis, the process of breaking things into their component parts, than to break legal analysis into *its* component parts?”

“Say what you will about the ills of social media, but the connectedness it apparently generates can be useful in the classroom—and beyond.”

the conclusion that first leaped to her mind after a somewhat casual reading of the hypothetical. In fact, as I admit to my students, devilish law professors more often than not design questions precisely to expose the pitfalls of inadequate attention to detail and lazy attachment to first impressions. Likewise, bar examiners require careful reading, attention to details, and fine distinctions, especially on the MBE portion of the bar exam.

Lastly, regarding the evaluation of arguments (step 4), I have learned never to underestimate the tendency of some law students to forego expressly stating sub-conclusions, perhaps thinking that their law professors should be able to infer them. Why waste the time and effort, they may think? (But as noted above, exposing inferences is prerequisite to accurate and complete analysis.) I have somewhat successfully counter-argued that (1) their grades will most definitely suffer with such an approach, and (2) expressly stating sub-conclusions can reveal to students flaws in their reasoning while there is still time to fix those flaws.

#### IV. Course Strategy and Classroom Techniques: A Whole Lot of Doing

There is a macro and a micro aspect to the course. The overarching macro pattern, facilitated by the structure of the textbook, is to engage students in exercises of increasing legal and factual complexity. Students start with a few very basic rule-to-fact application exercises, where the “rule” is not even a real rule of law. This critical first step is to ensure students focus on the foundational, five-step analytical process described in the previous section. As the course progresses, the analytical process sequentially involves actual legal rules (provided in the question), then rules that must be extracted from a single case, next rules that must be synthesized from several cases, and finally rules composited from both statutory interpretation and case synthesis.

Within the macro view outlined above, students receive a heavy dose of practical application before, during, and after every class. These micro components consist essentially of the following: (1) pre-class exercises from the textbook that students

must be prepared to present in class; (2) working through at least one exercise together in class; and (3) post-class writing exercises that are graded.

As to the pre-class work, the students obviously have to complete it or things go awry quickly in class. Including pre-class work in their participation grade component certainly helps, as does periodically collecting their written pre-class summaries. More interesting, though, I have found that the thought of presenting one’s work to one’s classmates is an effective motivator. In fact, nearly all of my students enjoy communicating and sharing with each other. Say what you will about the ills of social media, but the connectedness it apparently generates can be useful in the classroom—and beyond.<sup>7</sup> In sharing the pre-class work, I rotate a variety of presentation methods from class to class, including solo oral or board-written summaries of a student’s analysis, small group peer review, and break-out groups assigned to develop and advocate for competing positions. A particularly effective device, which incorporates peer connectedness, is an in-class exercise I call “Rule Deconstruction Face-Off,” in which several student volunteers go to the whiteboard and simultaneously deconstruct the rule we will be analyzing.<sup>8</sup> After discussing each student’s elemental expression of the narrative rule, two helpful things usually happen. First, as a group we achieve a better composite rule statement, drawing from the strengths of each student’s individual contributions. Second, the natural and acceptable variations in expression of the rule illustrate what the students will try to achieve in

<sup>7</sup> See, e.g., Janet Weinstein et al., *Teaching Teamwork to Law Students*, 63 J. LEGAL EDUC. 36 (2013) (arguing that the legal profession’s shift to a more collaborative working environment necessitates more attention to development of teamwork skills in law schools).

<sup>8</sup> This game occurs early in the semester and involves three or four volunteer students separately deconstructing a narrative rule statement from one of their textbook exercises at the (fortunately) massive whiteboard in my classroom. Once finished, we all examine and discuss each student’s elemental expression of the narrative rule. Inevitably a more correct composite becomes apparent from considering the separate deconstructions, but the exercise is also useful in showing natural and acceptable variations among the students’ schema. I believe this game is helpful in setting the stage for what comes later in the course: the delicate and complex balancing between legal correctness on the one hand and logical creativity in argument on the other.

law practice—i.e., the delicate balance between legal correctness and legal creativity in argument.

The second half of each class is typically devoted to a hypothetical they have read before class but not yet analyzed—if there are cases involved, they must brief the cases before class. Nearer the beginning of the course, I take the lead in modelling the analysis for their assigned in-class exercise.<sup>9</sup>

Using the whiteboard from left to right, I solicit the students' help in building a chart that starts with rule deconstruction, then, for each rule element or factor, progresses to fact-matching, argument and counterargument development, evaluation, and finally, conclusions. This is a very interactive process, in which I am constantly requiring their input, making corrections, and helping them see how an analysis-empowered mind thinks (and communicates) “like a lawyer.” Once we move on to multiple case rule synthesis and analogical reasoning, I introduce a modified analysis chart in class and encourage students to use it as a blueprint for their out-of-class writing exercises. Sample charts for a Negligent Infliction of Emotional Distress multiple-authority exercise are presented in Appendix A (blank template) and Appendix B (completed in class).

As the course progresses, the students take on more of the in-class analytical work, and I might have several students step into my role as facilitator at the whiteboard. I should note here that I do not use PowerPoint or any other pre-packaged presentation tools in class. Consistent with the primary goal of this course, *doing* legal analysis, we spend the entire class thinking, analyzing, and evaluating together. I have found that the process of building an analysis together from scratch is very engaging and effective, even if it sometimes exposes a flaw in *my* reasoning

process. After all, honesty and humility are not bad traits for lawyers (and teachers) to cultivate.<sup>10</sup>

Finally, as part of their summative assessment, I require students to perform a self-assessment of several of their graded post-class exercises—doubling down on feedback, so to speak. I do not require a particular format, but I encourage them to make the connection between the analysis charts we create in class and the discussion or argument sections of a typical legal writing document, such as a memorandum or brief. The point I hope to drive home is that legal writing is first and foremost the written record of the logical, ordered, and thorough thinking process that should precede it.

#### V. Putting it All Together

The capstone project for Mastering Legal Analysis, which I typically weight about 50 percent of the final grade, is an eight- to ten-page memorandum that follows the format from their 1L Legal Writing course. This writing project is released three to four weeks before the last class and requires students to utilize virtually all of the skills they have developed to date. The final memorandum revisits their 1L legal writing training in the context of our course's amplified exposure to legal analysis, specifically requiring statutory interpretation involving seven or eight cases, complex rule synthesis, and thorough analysis of a fact-rich hypothetical. I have used an Americans with Disabilities Act problem to good effect several times. That was my law review write-on topic, and I figure that shared pain can be a good bonding experience.

#### VI. Conclusion

Students have consistently given this course high praise in evaluations, and many have shared with me the same two insights. First, they recognize

“ . . . legal writing is first and foremost the written record of the logical, ordered, and thorough thinking process that should precede it.”

<sup>9</sup> For a thorough treatment of using classroom modeling (and other techniques) to segment complex tasks and reduce cognitive load, especially for relatively novice law students, see Terrill Pollman, *The Sincerest Form of Flattery: Examples and Model-Based Learning in the Classroom*, 64 J. LEGAL EDUC. 298 (2014).

<sup>10</sup> For a very insightful discussion of the value—and challenges—of being honest, and even vulnerable, in the classroom, see Melissa J. Marlow, *Does Kingsfield Live?: Teaching with Authenticity in Today's Law Schools*, 65 J. LEGAL EDUC. 229 (2015).

“... the foundational skills they hone in Mastering Legal Analysis translate directly to a better understanding of what they need to do to write better exams (or papers) in other courses.”

that the foundational skills they hone in Mastering Legal Analysis translate directly to a better understanding of what they need to do to write better exams (or papers) in other courses. Second, they make the excellent—and related—argument that this course might be even more beneficial to them if positioned in their 1L year instead of at the beginning of their 2L year. Similarly, what

I have learned most from this experience are the foundational primacy of legal analysis, the potential opportunities for better nurturing this skill in connection with doctrinal courses, and lastly the value of transparency in teaching, learning by doing, and meeting law students where they are (culturally and socially, as well as academically).

**APPENDIX A**  
CASE ANALYSIS CHART

<b>THE LAW</b>			
<b>RULE ELEMENTS</b>	<b>Case #1 Supplemental Definition</b>	<b>Case #2 Supplemental Definition</b>	<b>Case #3 Supplemental Definition</b>
1.			
2.			
3.			
4.			
5.			
<b>APPLICATION OF THE LAW (ELEMENTS OR FACTORS) TO THE FACTS = HOLDING</b>			
<b>Case #1</b>	<b>Case #2</b>	<b>Case #3</b>	<b>Your Case/Hypothetical</b>
1.			
2.			
3.			
4.			
5.			

APPENDIX B

CASE ANALYSIS CHART

EX 19

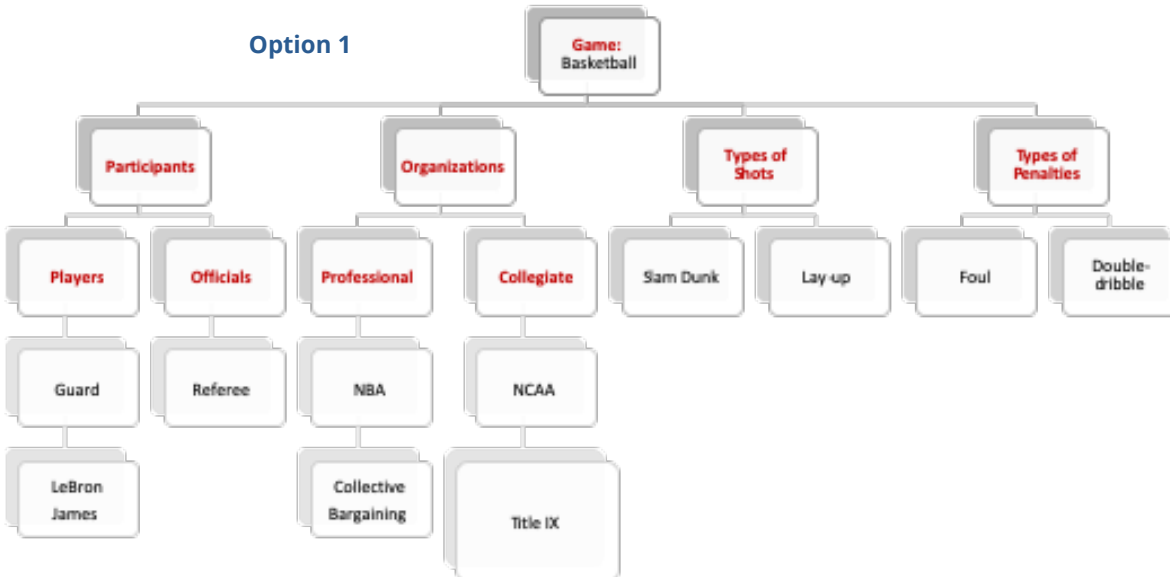
THE LAW			
RULE/ELEMENTS (Thing)	Case #1 (Thing) Expanded/Applied Definition(s)	Case #2 (Scher) Expanded/Applied Definition(s)	Case #3 (Wilks) Expanded/Applied Definition(s)
1. close clshp	↔	same	same
2. "present" at the injury-producing event	↔	Actually <u>not</u> contemporaneously witnessed the injury + the event; contemporaneously "perception" (not just visual)	visual perception not required; P must be at scene and "sensorially" aware of both event + injury
3. "then-aware" the event is causing injury	↔	↙ not just a with probability of injury	N/A
4. P suffers serious E.D. as a result	↔ N/A	N/A	N/A
5.			
APPLICATION OF LAW (ELEMENTS) TO FACTS = HOLDING			
Case #1 (Thing)	Case #2 (Scher)	Case #3 (Wilks)	Your Case/Hypothetical
1. mother/child	spouses	mother/child	Father/child
2. P not present until after auto accident	P in L.A.; husband (not present) in Las Vegas	P present at scene of home explosion	P away from home but watching/listening on PL via baby monitor
3. not aware until after the accident	AWARE VIA NEWSCAST of possibly injurious hotel fire, but not of actual injury	No visual perception of injury, but heard explosion + knew its quite certain injurious result	couldn't see (dark) but child + did hear crib collapse + son's cries as it happened
4. N/A	N/A	N/A	N/A
5.			

\* not physically present, but "contemporaneous" + "sensorial" awareness

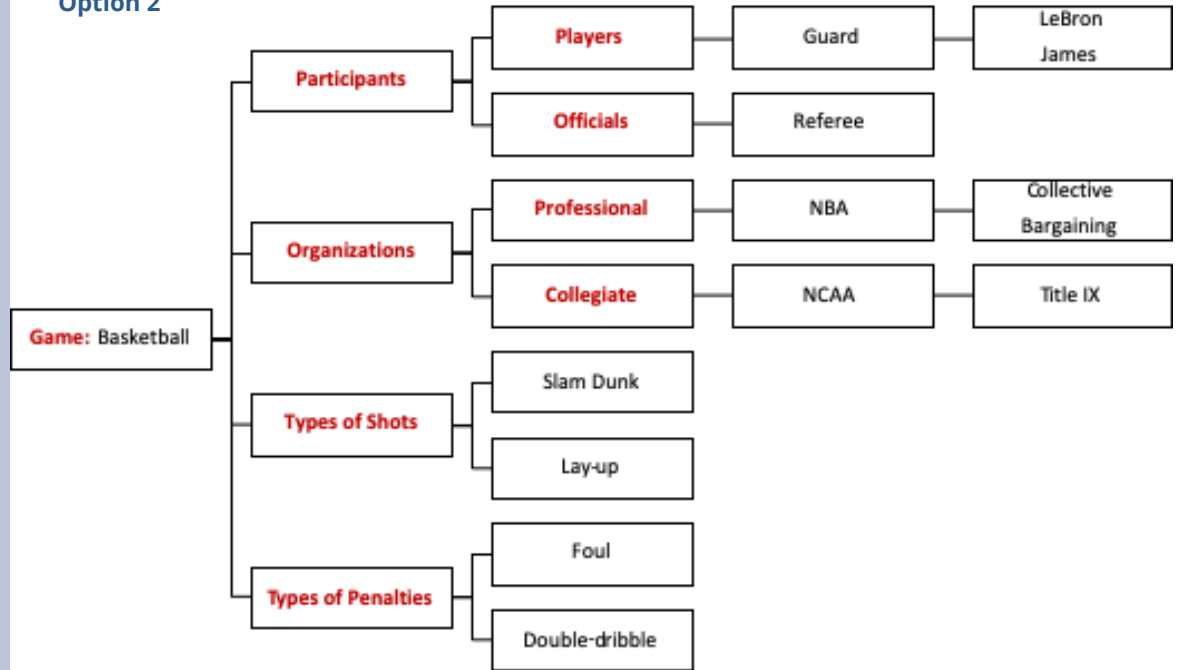
APPENDIX C

The Categories Game, Ice Breaker Diagram Samples

Option 1



## Option 2



## Option 3

