# Chapter One

## Six Exam Tasks, Six Grading Criteria

### SIX OBJECTIVES OF THIS BOOK

- **To show you clearly the differences between what you mostly do in class—analyze and decode appellate cases—and what you must do on essay exams: decode, spot and resolve issues raised by the fact pattern.**
- **To help you prepare for exams using skills-centered learning and performing, aimed at uncovering, practicing and refining the methods and techniques that are most efficient and effective for you.**
- **To help you develop skills in spotting issues and writing lawyerly arguments, and to avoid unlawyerly issue spotting and arguments by explaining and illustrating the characteristics of each.**
- **To help you avoid common mistakes and outright blunders by pinpointing what they are and how to avoid them.**
- **To show you how to practice, develop, and master the panoply of related basic exam skills that empower you to do your best on exams as well as in practice.**
- **From all of the above, to increase your confidence before the exams in your demonstrated capacity to do well.**

To enable you to pursue these objectives, I will use numerous illustrations, mostly from first-year subjects such as torts, criminal law, contracts, constitutional law, and civil procedure. Remember, however, to keep your eye on the ball: Our focus is on learning the skills that are a *sine qua non* for doing well on all exams that are not systematically taught in law schools. We are *not* engaged in any systematic doctrinal review (rules, principles, policies) of these first-year subjects.

#### *Assumption*

I assume that you are attending each class and studying diligently and smart on a day-to-day basis. This book is no substitute for such attendance and meticulous, intense studying and practice. An indifferent, episodic approach or studying a couple of hours a day will not do.

#### *A Caveat*

If there is any conflict between anything I write in this book and what your professor says, you *follow,* of course, your professor's guidance on that item for that course. Later, I will specify how you make any necessary adjustments in what I am presenting to dial into your professor's substantive, analytical and exam frequencies in each course.

## CONCRETELY, WHAT IS THE CHALLENGE IN ANSWERING LAW-SCHOOL EXAM PROBLEMS?

Prior schooling often emphasizes memorization of materials from a textbook and the teacher's lectures, and requires a sophisticated regurgitation on the exam, and sometimes in weaker programs not such a sophisticated regurgitation. Clearly, this level of teaching and learning is prevalent in elementary and high schools, and unhappily intrudes into college and beyond. In law school, by contrast, the exam priority is on skills in *issue spotting and then application of rules and principles to each given set of facts to resolve the issues spotted with advocacy arguments.*

In addition, law-school exams differ radically in format from what you have been doing since August. So far, you have mostly been studying and briefing appellate cases: facts, procedural history, issue, holding, reasoning, and judgment.

You have acquired a growing skill in after-the-fact dissection of appellate cases. In these "legal autopsies," you have analyzed how a judge has marshaled the relevant facts, articulated the issue, applied a rule or principle of law, and articulated reasons from the relevant repertoire of legal reasoning for her application of the rule or principle to the facts. Based on the logic of all of your schooling experience, you might expect that a law-school exam would be akin to an analysis of a collection of appellate cases. Though logic and experience are decisively in your favor, the expectation is **completely contradicted** by the reality of law exams. *Generally, there is only modest direct connection between your dissection of appellate cases in class and what you must do on the exams. Even worse and as noted, the elaborated, often discursive, reasoning typical of many appellate cases misleads you as to the direct, concise writing essential for law exams.*

*Generations of first-year law students have been confounded, bewildered and disappointed by the realization, after their initial first-year exams, of this stark contradiction between the required class performance and the radically different exam performance that produces the 'A' grades.*

## SIX EXAM TASKS

In typical exam problems, you are given a detailed fact pattern, often extending for a page or more, single-spaced, with your professor's question at the end. You must perform the following six tasks:

1. **You must extricate the key facts from the non-key facts embodied in the often dense fact pattern (also called relevant and non-relevant facts).**
2. **You must spot and specify the issues raised by the key facts in light of your professor's interrogatory at the end of the essay problem.**
3. **You must select the correct legal rules (or principles) to be applied to resolve the identified issues.**
4. **You must apply the rules by interweaving the key facts with the elements of the applicable rules or with the principles (or their tests or standards).**
5. **You must sometimes indicate the policy purpose(s) served by the application of the relevant rules.**

**6. You must do all of the above with concise, time-pressured, lawyerly writing, and sometimes argue two or three ways as required by the facts, the rule and your professor's expectations.**

## THE CENTRALITY OF SPOTTING THE ISSUES

Students sometimes ask me a question that may be on your mind: Which of these six tasks is the most critical? Most professors, I believe, agree that skill in spotting and specifying legal issues in a problem is the most important.

A moment's reflection on the above sequence of six skills verifies this proposition. Since steps three through six presuppose the issue-spotting step, it is obvious that these latter steps cannot be pursued without the issue having been identified and specified. To stress this conclusion is only to reflect the old maxim that if you miss the question, you miss the answer.

This logic would seem to pinpoint the first sequence, extricating the key facts, as most important since it is a presupposition of issue spotting. While there is a sense in which that is true, it is also true that the objective of extricating the key facts is to spot the issue. *Extricating key facts leads, often intuitively and immediately, to issue spotting.*

Thus, while extricating key facts can be analytically separated from issue spotting, the two usually go hand in hand in the actual decoding of exam problems. Indeed, while all six sequences can be analytically separated, they are best viewed holistically as intertwined parts of a whole, as parts of an integrated process.

To appreciate fully the centrality of issue spotting, it may help to see legal issue spotting as simply a reflection of the general truth, as underlined by the American philosopher, Suzanne Langer, in *Philosophy In A New Key*, that a question establishes a field, a framework, for analysis and for drawing conclusions. Scientists might agree too since scientific research and verification usually takes place within a framework established by a theory expressed in a more specific question in the form of a hypothesis.

Thus, the lawyerly emphasis on the quality of issue spotting conforms to philosophical and scientific tradition as well as jurisprudential requirements. If you articulate the right legal issue, you are on the right path leading you to the right rule and to apt interweaving. But if you have misstated the issue, you are on the wrong path leading you to the wrong rule and to incorrect interweaving. Indeed, as you gradually sharpen your issue-spotting skill, you can approach *each* new course, and its topics and subtopics, with an illuminating perspective: *what are the core issues in each topic and subtopic?*

Even if you should make some mistakes in applying the right rule and in interweaving on an exam, you will likely receive substantial credit if you have stated the issue well and applied the rule implicit in the issue. The reason, in short, is that a lawyerly statement of the issue is impressive.

Clearly, too, issue spotting is an everyday lawyerly skill in practice. Lawyers in very varied practices devote a great deal of their time to uncovering the key facts in cases and determining their legal significance, i.e., spotting and specifying the issues. You should emulate them as a law student by devoting substantial time to uncovering the key facts in exam essays and determining their legal significance, i.e., spotting and specifying the exam issues.

There are no good answers without good questions, not on exams, not in practice, and not in life. This skill of issue spotting is systematically decoded in Chapter Four.

## SIX CRITERIA FOR GRADING EXAMS

### *You are graded on how well you perform your six exam tasks by the corresponding six criteria*

You should not be surprised that the six criteria by which you are graded are simply a reframing of the six exam tasks you must perform. These six criteria follow:

*Six Grading Criteria*

1. **Your lawyerly skill in extricating the key facts from the non-key facts embodied in the exam problem.**
2. **Your lawyerly skill in spotting and specifying the issues raised by these key facts.**
3. **Your lawyerly skill in learning, recalling, and applying the applicable legal rules (or principles) to resolve the specified issues.**
4. **Your lawyerly skill in interweaving (meshing together) the key facts with the elements of the applicable rules or with the principles (or their tests or standards).**
5. **Your lawyerly skill in sometimes applying the appropriate policy purpose(s) to support your rule application.**
6. **Your performance of all these skills with concise legal argument within the allocated time, and sometimes arguing two or three ways as required by the facts, the rule and your professor's expectations.**

Notice that the six criteria are formulated as skills. This skill-focused formulation is, of course, intentional. It captures the holistic, skills-centered approach that is central to *dialing* into the exam wavelength.

### *Grade differences result mostly from differences in skills*

Many students are unaware of what professors know: The decisive difference between a mediocre, good and excellent exam paper, between a 'C-' and a 'B+' or 'A', is typically in the quality of the skills displayed. The reason for this fact is that *knowledge tends to be broadly shared among many first-year students since most study intensely. In contrast, however, the core exam skills specified above are distributed widely across the spectrum from poor to outstanding.* To be sure, arguments may also reveal differences in knowledge and, of course, these differences can be important too, especially at the extremes.

Nevertheless, after grading *thousands* of exam papers over three decades, *what leaps out at you as a grader are the radical differences displayed in legal skills.* Briefly, some answers are lawyerly. They are directly responsive to the interrogatory at the end of the essay. They are lucid, logical, well organized and fact- and issue-centered. They display cogent legal reasoning. Issue spotting of all major issues is followed by apt rule application and interweaving of key facts with the relevant rules. Policy is briefly but appropriately applied when required. The writing is concise without meandering or regurgitating irrelevant knowledge. In essence, these arguments embody or approach the writing formats detailed in Chapter Five and approximate the model and excellent student responses detailed in Chapter Seven. These exam papers make professors smile.

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In contrast, many other exam responses, in varying degrees of weakness, display unlawyerly qualities. They are sometimes not directly responsive to the interrogatory. They are confused, not well organized, not systematically developed, and not sufficiently fact- and issue-centered. Major issues are missed altogether, rule application is often faulty, and interweaving with key facts is weak or even missing. At worst, the paper is an unappetizing stew of relevant and irrelevant rules, principles, facts, and conclusions, mixed well with confusion, rambling, and often ending abruptly, sometimes with the words: "no more time." Illustrations of poor responses are also set forth in Chapter Seven.

### *Improvement possibilities — So what do I do?*

If you are graded by your professor's six criteria on how well you perform your six exam tasks, then the principle directing what you must do is clear. Your studying, reviewing, outlining, study group focus, and especially your practice with hypotheticals and in arguing old exam problems, must be carried out with these six tasks and six criteria in mind. *The details for implementing this direction comprise the rest of the book.*

To reduce your learning to an exam focus is unnecessary and foolish, but to overlook it, denigrate it, or in classic college fashion, to reserve it to the last week or two before the exam may be folly for which you could suffer. For my fellow liberal-arts devotees, the time-pressured surface character of law-school exams is, of course, a lamentable reduction of the rich history, economics, culture, religion, and political struggle from which law has emerged over the centuries and from which arise vibrant perspectives for analysis and critical appraisal. Yes, of course, I strongly agree. But keep in mind that you need *not* sacrifice any of your hard-earned liberal-arts perspectives and critical reading and writing skills. You just need to add a new frequency for exam decoding, for singing this particular song, for dancing this dance. That's all.

Chapter Two concentrates on aiding you to get on the right frequency for learning law for exams (and practice). From my long experience in law teaching, it is abundantly clear to me that weaknesses in exam performance are often rooted in deficiencies in learning efficiently and effectively, in failing to dial into the exam frequency. In contrast, strengths in applied legal argument spelling out the specified core skills flow from well-cultivated learning and performance skills first acquired in high school and college, school skills that often translate into good legal skills in law school. Thus, the priority on strengthening legal learning skills that is embodied in Chapter Two is justified by an analysis born of much experience.

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## ON LOOKING BACK

1. In beginning to think about and practice the core skills of issue-spotting and argument making, you should be aware that both **vary greatly** depending on the type of exam problem you confront. There are many such types. They are illustrated especially in Chapters Six and Seven.

2. The significant substantive revision in this chapter is the addition of principles to the specifications of rules for the reason detailed previously (p. xxii).

Understanding, especially *deep understanding* is the engine that drives exam and other skills. That is a theme animating the focus on all the specifics throughout the book and should be stressed here in Chapter One. There are *no skills without such understanding.*

The separate listing of the above skills could mislead. Atomism doesn't work. The skills all flow together in a configuration and depend on each other. Holism does work and is stressed throughout the book.

In a useful shorthand, the six exam tasks and related grading criteria can be summarized as two: 1) spotting the issues and 2) resolving them in a series of concise, well-crafted, advocacy arguments. Both



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skills are repeatedly illustrated in the strong exam arguments detailed throughout the book, especially in Chapter Seven.

3. It might be illuminating to know why I try mostly to avoid the word "answer" in describing responses to exam problems. The reason is that I fear that word will be understood as a collegiate answer that tends to regurgitate all one knows about what is asked. That is definitely not what you must do. *The word "argument" better captures what you must do: write a series of legal arguments to resolve the spotted issues.* I suggest therefore that you abandon use of the word "answer" as in "What is the right answer?" for the far more helpful word "argument" as in "What is the best argument?" Notice the added emphasis on "*best* argument" and always seek the best argument and be able to demonstrate why it is superior.

4. Lastly, if you are beginning your legal journey—and even if you have already started—my hope is that this book may help you to be clear about what you are doing and not doing. If you can achieve clarity, you can work *smart* and avoid the prevalent anxiety, even freneticism, of many first-year law students. Thus, your time and energy will be channeled to meet your professors' priorities as detailed in their course outlines, classroom presentations, and old exams. You will not waste time, for example, in studying law review articles (with the exception of your professor's article). You will study hornbooks and primers in a highly disciplined way, concentrating **only** on those sections that correspond to and aid you in decoding and mastering your professors' course coverage in scope and depth. And you will avoid study groups that are relentlessly off base.

Indeed, it's more than possible that you might even enjoy parts of law school by seeking the deeper understanding and potential for insight and service embedded in your courses. To illustrate, in studying the First Amendment, you absorb part of the infrastructure of freedom that we all enjoy and tend to take for granted—freedom of speech, press, assembly, association, petition, and religion — and the implicit right to pursue happiness as we define it and not as government and advertisers urge. What would our lives—and America—be without these freedoms that we exercise every day. As you prepare to practice and participate in legal culture, you develop a special understanding about how this infrastructure of freedom and opportunity is rooted not simply in Constitutional law, but also in all realms of law.

To illustrate, imagine the meaning later for you, your client and his family, in securing the freedom of an innocent person on death row or serving a long prison term, because of DNA evidence you uncovered (as has happened some hundreds of times in the nation). Or imagine the meaning for you and the families of victims in prosecuting and convicting an elusive serial killer because of DNA evidence, which has happened in New York and has occurred in many other places. Imagine the meaning for you and a young couple in aiding them in the purchase of their first home or business. Of course, learning law also offers a negative potential too. At heart, law and law practice are a moral quest and you choose your path.

If culture is the main channel for human liberation, as the philosopher, Ernst Cassirer said, the principles and black-letter rules you study exemplify a fascinating and poignant evolution of history, politics, economics and culture as well as opportunities for liberation. If you learn to work smart, you can excel on the exams, deepen yourself as a person, prepare to serve others, and continue to enjoy your life. Freneticism is not destiny in law school or in life. It is a *choice*.





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