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Teaching Legal Analysis Using the “Unified Field Theory” A Systematic Method for Instructing Students in the Fundamental Skill

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Explanation

The “unified field theory of legal analysis” method draws on learning theory as well as the experience of professors, especially those who teach element-driven courses (e.g. criminal law and torts). It emphasizes rules, and elements that comprise those rules, as the fundamental organizing principal of how to do legal analysis. This applies to what is done in class, where step-by-step articulation of elements, and application of facts to those elements, is emphasized rather than cases and court opinions as such. The goal is to connect what goes on in class on a day-to-day basis with what is expected of the students on a final exam: a good answer to a fact pattern-based, issue-spotting essay question.

As I explain to my students, there is no special examsmanship trick to writing exam answers. Answering a fact pattern-based exam is about doing sound legal analysis and presenting that analysis to the professor in writing. Legal analysis, as presented in 1L exams, involves applying new facts to existing rules. This is what must be done on law school exams, what must be done on the bar exam, and what a lawyer will have to do in practice. One goal of the method is to link those activities more clearly to what is done on a day to day basis in class.

This latter point is very important. I make clear from the very first class the connection between what we are doing and what is expected on the final exam. Transparency is important. Here is how I explain this to my students from a recent syllabus.

Different professors will describe the basic process in different ways. Here is my take on it: One useful way to think about legal problem solving and exam answer writing is to recognize that virtually every sentence should either be "this is something that needs to be demonstrated" or "this is how it is or is not demonstrated". The something that needs to be demonstrated can be anything the legal system considers to be relevant - a rule or one element of a rule, an exception or counter-argument to a rule or element, or a factor that might trigger a policy argument and push a court to decide in one direction or the other. The "how it is demonstrated" will usually be a fact or facts presented by the professor or a case in class, in an exam fact pattern, or by a client.

I also make clear that this is what lawyers do in real life. A client presents facts to the lawyer. The lawyer must figure out which legal theory or theory might work, wade through the facts to find the relevant ones, and then apply those facts to what the legal system considers relevant (whether rules or policies), to see whether the elements of a given legal theory or cause of action are met. I used to think it was unnecessary to “sell” students on doing legal analysis, but I have found that making explicit the connection to the practice of law (as well as to success in the course and bar) is beneficial. So, I do make clear why we are doing legal analysis in the way that we are doing this: for the final exam, for the bar exam, and for practice.

Every rule is broken down into elements and sub-elements. Sometimes we develop those elements and sub-elements in class before we read cases or do problems, and I write them on the board (PowerPoint can be used, but writing on a whiteboard works better when you are asking students to develop a list of rules in class). Other times the students develop the elements on their own as they work through the cases, and then we fine-tune them in class as we move forward. Every time a student analyzes a fact pattern or a case, I ask the student to go through the list of elements in the same order each time (a component of “guided repetition”, to move the material from their working memory to long-term memory). For the sake of saving time we might skip over one or more elements in discussing a case or working through a problem; if so, we explicitly state that we are doing so. In effect, we have developed a rubric and are using it for the first case that demonstrates a particular legal rule, and for subsequent cases.

Often rules, whether presented by the court, or derived from the restatement, are presented to students by *combining* several elements or sub-elements into one long sentence. The unified field theory has the student do the exact opposite – disaggregating a rule into its component steps. For example, the first two elements of negligence (as stated in most opinions and casebooks) are “duty” and “breach”. But what about the standard of care? There are special rules (or special rules argued for and rejected) for minors engaging in a dangerous, adult activity or for those with superior knowledge. Addressing the standard of care is a separate analytical step from ascertaining whether a duty is owed (normally yes, but arguably not if the defendant argues nonfeasance-no duty to act at all). Therefore, the unified field theory tells us that we should articulate duty as one step, standard of care *if* a duty is owed as another step, and breach (determining if the standard of care was not met) as a separate step, regardless of whether the casebook or restatement does or does not list these three analytical steps as separate “elements”.

Another example is “intent” to commit a battery. Under the intent element, we need to consider first, whether there was a volitional act. Then we need to consider what the defendant’s purpose was. Was it to make contact (single intent test), or to make a harmful or offensive contact (dual intent)? Then, separate and distinct from those two steps, we need to consider how we can prove whatever intent must be demonstrated. Do we have direct evidence of the defendant’s purpose, or are we inferring the purpose because the outcome was substantially certain to occur if the defendant did what they did, or are we merely inferring it from the surrounding circumstances? This inquiry suggests that, rather than combining all these things into one long statement about intent, we need to list, under the element intent, sub-elements of “volitional act,” “single intent test,” “dual intent test,” and “method of proof” (under which substantial certainty will be one type). Again, the goal is to identify every distinct step of analysis, articulate it, and look for facts that might

satisfy that element or sub-element, each time we confront facts that suggest that this legal theory (here, battery) might apply.

When I call on students to present a case in class, I don't ask them to present the facts (as they would be inclined to do if following the usual practice and the most common case brief templates they would see in their Legal Writing class). Instead, I ask for the legal theory or theories that might apply, and for the student to state the rule for each theory. In stating the rule, the student is asked to go step-by-step - to break down each rule into its component elements. In other words, the student first states what must be demonstrated (based on what the legal system considers to be relevant). The student then looks at the facts of the case the court had before it, and explains whether what needs to be demonstrated *is* demonstrated - do the facts satisfy each of the elements required?

Benefits

This method reinforces the importance of knowing what the legal system considers relevant, whether it be a hard and fast rule, a set of factors, or even a policy argument (so-called "black letter policy" arguments). Once the student knows what she, or the court, is looking for, it becomes clear which facts are relevant. This makes clear to students exactly how facts relate to rules in doing legal analysis. As I explain this to students in the book *Starting Off right in Contracts*:

This same approach applies to a fact pattern presented to you by your professor, whether on an exam or in class. But instead of asking questions to an actual, live client, you are in effect "questioning" the fact pattern. The rules tell you what you need to "find out" from that fact pattern to satisfy a particular definition or element. When one of the authors was home from law school on vacation looking in the kitchen for something to eat, his mother would ask him, "What are you looking for?" He would answer, "I don't know." And she would respond, "Then how will you know when you've found it?" Wise words. You can't begin to analyze the facts in a legal problem until you know what you are looking for. The existing rules (broken down into definitions or elements wherever possible) will tell you what you are looking for.

This also drives home the point that one fact might be relevant to two separate elements (something that is often critical to writing good exam answers). I tell new professors that strategy precedes techniques, and techniques precede implementation. This method (of asking a student to state a case rules-first) is a *technique*, designed to implement a larger *strategy* of instructing first year students in the fundamental skill of doing legal analysis and demystifying it.

Learning theory tells us that to be able to do higher-order thinking, information must be transferred to long-term memory to free up working memory. An advantage of stating elements the same way and in the same order every time is that it achieves this objective without relying on rote memorization. Repetition leads to the desired result of shifting the needed information (the "rules") to long-term memory.

The unified field theory is also based on observation of how someone starts out when learning a musical instrument or a sport. At first, a person does things very mechanically - whether it's

placing their fingers on the piano keys or practicing a basketball move. Eventually, what began as artificial and mechanical becomes automatic. At that point, the person learning the new skill can begin to reflect on what they are doing, and further learning comes more readily.

Some students will pick up on how to do legal analysis very quickly; they see it and intuitively understand how it is done. One of the things I am trying to accomplish by breaking legal analysis down into its component parts and by beginning with a very mechanical application is to allow the weaker student to be able to replicate, through a disciplined approach, what the stronger student can do more intuitively.

This method has another beneficial effect. Using the step-by-step method in class demonstrates to first-year students how to begin to organize an outline (by legal theories, rules, and elements, not by cases). The list of elements, sub-elements, and commonly-encountered grey areas that we have listed on the board is, in effect, the beginning of an outline. The student thus sees what a good outline looks like as we develop a rubric in class. Class discussion models a proper outline structure, and a proper outline structure models a proper exam answer. We come full circle - a good answer to a fact pattern-based exam question consists of a rigorous step-by-step application of new facts to existing rules. That answer can be reverse engineered to show us what a good outline should look like. The unified field theory goes one step further, by reverse engineering a good outline to show us what we want to take away from class discussion.

As an aside, this model also helps to make clear to students that their preparation of an outline (or whatever tool they use to organize the material - I am using the term "outline" for simplicity's sake), is critical to success on the exam. The student has all semester to organize their thoughts into a functional outline (one that replicates and anticipates the discussion that would go on in a final exam question), and must understand that fitting class discussion and cases into the outline in the proper place is part of the job. Also, the student must understand that it makes far more sense to try to write an exam answer based on her outline (which has been crafted over many weeks, and reviewed many times) rather than to write an answer based on the facts the student has been presented with just now in the exam itself.

There are other advantages of this method that should be mentioned. First, it allows better "scripting" of class discussion. It is useful for a professor to arrange questions in a way that anticipates the flow of the discussion, and the order in which topics will be raised. By having the discussion go element by element, this is made easier. One kind of decision that a professor often must make is when to introduce policy arguments, procedural wrinkles, or quirks of a given court opinion. Being able to predict the flow of the discussion makes this easier.

Another advantage is that utilizing the unified field theory on a consistent basis builds formative assessment into your course. Although I incorporate several sample exam problems in my first-year courses, students are always asking me, "Where can I find a practice problem?" My answer is, "The next case in the casebook." If the next case involves the same legal theory, it invites the student to go through the elements and sub-elements, in exactly the same way we did in the previous case. In class, there is immediate feedback as to whether the rules - what needs to be demonstrated - have been stated correctly. Then the student called on must apply the facts of the new case to the rule, and again, class discussion gives that student (and every other student in class)

feedback as to whether the application of the facts to the rule has been done correctly or not. For example, the first case on misrepresentation in the contracts book I use (Blum and Bushaw) is *Sarvis v Vermont State College*, which has affirmative statements that are false, as well as some half-truths. The next cases, *Kaloti Enterprises, Inc. v. Kellogg Sales Company* and the infamous *Stambovsky v. Ackley* (the haunted house case), involve failure to disclose. Those two “next cases” allow the student to review the elements of misrepresentation (xxx), and then add to the understanding of misrepresentation (and adds a sub-element or additional sub-step in analysis) by showing that silence- a failure to disclose - is part of the rule defining the first element of misrepresentation (a “statement”).

An additional benefit of the approach with weaker students is making clear what is being discussed in class. Here is how, in *Starting Off Right in Contracts*, I explain to students the three major functions of class discussion:

Speaking of what happens in class (and how it relates to your reading) there is another piece of advice that may help you follow the class discussion better. It may also reduce your anxiety in the event that your professor uses random calling and zeroes in on you. In a classroom discussion (and when you are reading any case material), you should be aware of what the professor is trying to get you to learn. There are at least three major tasks that the professor may be trying to get a student in class to engage in:

1. Identifying the rule – pulling the “holding” out of the court's opinion and stating it clearly
2. Debating whether the rule the court has decided to follow is a good one – presenting policy arguments that support this rule or that argue for rejecting it (and might argue for an alternative rule)
3. Applying the facts of the case (or a new set of facts) to the rule – taking the rule as a given (even if it may not be a good rule, and even if it may not be crystal-clear), and seeing whether the facts satisfy the rule

While it may be evident to you and to your stronger students which of these three tasks is happening at a given time in a class discussion, it isn't always clear to less strong students. Discussion structured using the unified field theory signals more strongly which of these distinct tasks is on the table. One of the best bits of advice given to new professors is to “situate the material” at the beginning and/or end of class. But making clear the distinction between these tasks is also an aspect of situating the material.

This approach does not assume that law is static and it does not assume that facts are always self-evident. Some rules are clear and uncontested. Other rules are highly contested. Some facts (especially in a typical time-constrained law school exam) are straightforward. Other times, (whether in an upper level course using a case file, or in a clinic, or in practice) the facts themselves are not clear. The theory also does not assume that just because an element can be clearly stated, it is always easy to apply (for example, the reasonable person test of offensiveness in battery). But

always the student goes back to the basic approach of determining, first, what must be demonstrated, and then, whether it is or is not demonstrated in the situation before us.

Also, I remind students, as they are analyzing a specific situation (whether a judicial opinion or a fact pattern), that they need to follow the same approach every time to optimize their analysis. For example, one fact might be relevant to two different legal theories. Or more than one element might be at issue, even if the opinion only focused on one, and even if the student thinks the dispute over a given element is obvious or dispositive. I clearly explain these “advantages” of the methodical approach we are using.

The Unified Field Theory Applied to Class Discussion

Here is a case that is included in several casebooks, including the one I teach from. I sometimes cover the case as part of the regular course material. Other times I use the case, or a shortened version of the facts, as an early practice exam problem. Following the case are my teaching notes and comments about how I cover the case, or answer the sample exam question, using the unified field theory:

LEICHTMAN v. WLW JACOR COMMUNICATIONS, INC. 92 Ohio App. 3d 232, 634 N.E.2d 697 (1994) PER CURIAM. ...

Leichtman claims to be “a nationally known” antismoking advocate. Leichtman alleges that, on the date of the Great American Smokeout, he was invited to appear on the WLW Bill Cunningham radio talk show to discuss the harmful effects of smoking and breathing secondary smoke. He also alleges that, while he was in the studio, Furman, another WLW talk-show host, lit a cigar and repeatedly blew smoke in Leichtman's face “for the purpose of causing physical discomfort, humiliation and distress.” ...

Leichtman contends that Furman's intentional act constituted a battery. . . In determining if a person is liable for a battery, the Supreme Court has adopted the rule that “[c]ontact which is offensive to a reasonable sense of personal dignity is offensive contact.” It has defined “offensive” to mean “disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultfulness.” Furthermore, tobacco smoke, as “particulate matter,” has the physical properties capable of making contact. As alleged in Leichtman's complaint, when Furman intentionally blew cigar smoke in Leichtman's face, under Ohio common law, he committed a battery.

No matter how trivial the incident, a battery is actionable, even if damages are only one dollar. The rationale is explained by Roscoe Pound in his essay “Liability”: “[I]n civilized society men must be able to assume that others will do them no intentional injury—that others will commit no intentioned aggressions upon them.” Pound, *An Introduction to the Philosophy of Law* (1922) 169. Other jurisdictions also have concluded that a person can commit a battery by intentionally directing tobacco smoke at another. We do not, however, adopt or lend credence to the theory of a “smoker's battery,” which imposes liability if there is substantial certainty that exhaled smoke will predictably contact a nonsmoker. Concerning Cunningham, at common law, one who is present and encourages or incites commission of a battery by

words can be equally liable as a principal. Leichtman's complaint states, "At Defendant Cunningham's urging, Defendant Furman repeatedly blew cigar smoke in Plaintiff's face."

With regard to WLW, an employer is not legally responsible for the intentional torts of its employees that do not facilitate or promote its business. Arguably, trivial cases are responsible for an avalanche of lawsuits in the courts. They delay cases that are important to individuals and corporations and that involve important social issues. The result is justice denied to litigants and their counsel who must wait for their day in court. However, absent circumstances that warrant sanctions for frivolous appeals . . . , we refuse to limit one's right to sue. Section 16, Article I, Ohio 2 Constitution states, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." . . .

We . . . reverse that portion of the trial court's order that dismissed the battery claim in the second count of the complaint. This cause is remanded for further proceedings consistent with law on that claim only.

[edited version of case taken from <https://law.lclark.edu/live/files/12018-leichtman>]

This is the version I created to use as a practice exam question:

Leichtman claims to be "a nationally known" anti-smoking advocate. Leichtman alleges that, on the date of the Great American Smokeout, he was invited to appear on the WLW Bill Cunningham radio talk show to discuss the harmful effects of smoking and breathing secondary smoke. He also alleges that while he was in the studio, Furman, another WLW talk-show host, lit a cigar and repeatedly blew smoke in Leichtman's face "for the purpose of causing physical discomfort, humiliation, and distress."

Leichtman contends that Furman's act constituted a battery. Is he correct?

My teaching notes for the battery claim are below. I recognize that different professors teach "intent" differently, so keep in mind the larger point here: reciting the elements and sub-elements in the same order each time, stopping to see whether the facts in front of us satisfy that element or sub-element, then moving on to the next step of our analysis.

(Comments in parentheses are parenthetical notes to myself in my teaching notes.)

[Comments in brackets are asides to you, the reader, making observations about the process as you go through the notes.]

Teaching Notes

Intent

Volitional act? yes

D blows the smoke

Single Intent?

Rule: intent to make contact

Blows smoke in the P's direction

Can we prove it by direct evidence?

Maybe D would admit it

Can we infer his purpose was to have the smoke be in direct contact with P?

Probably, given the context

Can we use substantial certainty?

Given the close quarters, it might be virtually certain the smoke would come into contact with P

Dual Intent?

Rule: intent to make contact with the subjective purpose to harm or offend

As to offending:

Direct evidence?

No unless D admits it

Inference?

Probably

Context – anti-smoking guest, and D knows that (it's why the P is there)

Counter-argument?

D could argue it's just a joke or a gag

No purpose to offend just to make a point

Substantial certainty?

maybe

The subjective purpose can be to offend *or* to harm

Hard to prove D had that as his purpose

Contact?

Depends on what counts as a “contact” for battery purposes

External/definitional standard (not articulated by the Court or restatement)

Black letter rule says that the “extension” of a person can count

e.g. throwing something at P

but that doesn’t answer the question here

[but notice, it does remind students that this sub-element must be noted before getting to the issue of the particles themselves, since this is not a case of the D touching the P]

Should these small particles count?

Pollution doesn’t count for trespass

Traditional test for trespass was whether particles were visible to eye

Which this would meet, even if some forms of pollution might not

Why wouldn’t it count?

Policy argument

Bad outcome - covers too much

There is a “right” to smoke

(this is contestable, and might change over time; it may have already done so)

All smokers would be liable (this is mentioned in case)

Especially in a single intent jurisdiction

Substantial certainty will satisfy intent almost all the time

We won’t have that problem in dual intent jurisdiction for the common situation of a smoker with others nearby, since it will be difficult to prove the purpose of harm or offense

(this is a nice illustration of how a court can be lenient in its test of one element, if cases the Court is worried about can be dealt with by using another element to negate the claim)

[usually we deal with policy at the end of the analysis “what arguments might push the court to decide in one direction or the other?” Here, where the issue of whether to consider smoke as a “contact” is not clearly addressed by the restatement or any clear rule, and where the policy argument has been raised by the court’s opinion so explicitly, I allow the discussion of policy to take place at the time we discuss the element.]

Harmful or offensive?

Must establish one or the other

Argue in the alternative; try to establish both

Harmful

Rule:

Restatement 2d, Sec. 15 “any physical impairment of the condition of another’s body, or physical pain or illness”

Unclear what the exact definition means in this context

(a reminder that the restatement doesn’t always give us a full statement of the elements and sub-elements we want to identify)

This isn’t like a touching that is enough to cause temporary discomfort or change

It may be more than rearranging the molecules on the P’s skin by a light touching
but rearranging the molecules isn’t enough

it’s less than pushing hard on someone’s arm, which, even if it doesn’t cause pain, might cause at least a temporary discoloration or slight bruise

Can *long term* physical impairment count?

Probably

Second hand smoke is harmful

But can that harm be proven from one encounter?

Is there enough short-term harm to count?

Tissue in the lungs is probably temporarily altered (is there a doctor in the classroom?)

But if we can’t see that, is that enough?

[on exams, students often call the test for “harm” an objective test. The test for “offensive” is an objective test (reasonable person). This is a definitional test, *not* an objective test]

Does “discomfort” (which was alleged by the P) count?

[this can lead to a discussion of what an attorney should include in the pleadings, which presumably are based on the elements of the legal theory]

Offensive

Rule: reasonable person in the circumstances

Restatement 2d (19): offensive to a reasonable sense of personal dignity

arguably this is offensive under that standard

Can we count the fact that P is “anti-smoking advocate”?

[this allows discussion of what goes into the reasonable person standard – how “objective” is it, and what characteristics can be taken into account? Gender, race, etc.?]

Alt argument:

maybe falls within the *Cohen* case rule (an additional way or demonstrating offensiveness)

[another case in the book, where the D was on notice that P would find the touching offensive, even if a “reasonable person” would not. The *Cohen* opinion does not explicitly state this rule, but in class we try to articulate why the *Cohen* court held as they did. And having articulated that sub-element, we need to incorporate it into our analysis and therefore into our outline]

Depending on what the rule of *Cohen* was

Stronger or weaker argument than *Cohen*?

D here infers P’s objection

In *Cohen* the P apparently stated it directly

P’s objection here based on general beliefs

In *Cohen* it was based on religious belief

Should that make a difference?

P’s objection here may be more widely held than the one in *Cohen*

Arguably not as “idiosyncratic” as the religious belief in *Cohen*

Cohen was medical situation; this is not

Does that matter?

In both cases, the objection by P could be respected without too much difficulty

But that would not be true of *all* second-hand smoking situations

What is the reason for the *Cohen* rule?

Fairness to D/putting D on notice

[here, we can review the *Cohen* rule and its rationale, which is also a review of one rationale for the objective test of offensiveness]

Would it be fair to D here to hold that he was on notice?

We might well conclude he was on notice

But did D appreciate the legal significance of his action?

Perhaps in the medical context in *Cohen* it is more likely D understands, or should understand, the legal significance

Some observations in teaching this case using the unified field theory of legal analysis:

Notice what the court doesn't tell us - most importantly, the elements of battery. A student who simply reads and presents the facts and issues of this case as the opinion sets them out does not learn what is necessary for a plaintiff to prove a battery. At most, they have added one or two nuances (e.g. that smoke can count as a contact) to their understanding of the elements.

Instead of asking the student to go through the opinion as written, my first question would be something like, "What legal theory or theories is the Plaintiff arguing?" Depending on when we address this case (or a version of it that I use as a practice exam problem), a student might go through the mental exercise of thinking about what torts are possible here - a possible battery, assault, intentional infliction of emotional distress, and possibly a cause of action for negligence. Maybe even an interference with a chattel, if the plaintiff was wearing glasses.

Usually I will tell the class to set aside the other possible claims for now, and to focus on the battery claim. My next question would be, "What does the plaintiff have to demonstrate to prevail on that theory?"

In my class, battery has three elements:

Intent

Contact

[which is] harmful or offensive

Your mileage may vary. You may use "causation" as an element, or state the elements in other ways. Fine. The point is that the student must understand the rule of battery not as one run-together sentence, but as a discreet set of elements, each of which must be met.

Where do they get those elements? Not from the opinion itself. This is an important point, and one I make to my class early in the semester. Judges don't write their opinions to help first year law students learn the material. In this case, the court focused on a few aspects of the case, leaving much unstated. We need to articulate every step of the analysis, by stating each element and then seeing if the facts satisfy them. We will have learned those elements from a previous case, from the restatement (which is sometimes useful in this regard and sometimes not), or from a previous class discussion (where we identified and refined our statement of the elements).

Students would then be asked to go through each element, one at a time, and see if the facts here satisfy the element. "Step-by-step" is something I often say to my class.

Summary

To summarize, the unified field theory:

Ties the classroom discussion to the outline, to the final exam, to the bar exam, and to practice

Breaks down every legal analysis problem into distinct component steps

Utilizes guided repetition, not memorization, to move information to long term memory to free up working memory

Is premised on the idea that, in learning a skill, a person first does it mechanically until it can be done automatically and with reflection

Treats every case and fact pattern as an opportunity to model a functional outline, which models a good answer to a fact pattern based final exam question

Emphasizes the fundamental aspect of legal analysis - applying new facts (whether clear or not) to what the legal system considers relevant (whether clearly-settled rules or contested rules or policy)