[96/97] SIX

Demystifying Exams

You get the job done or you don't.

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1. Don't Count on an Exam Review Session

At the end of the semester, many professors have exam review sessions. These sessions are important because they can give you some clues into the professor's mindset in terms of grading (e.g., “Make sure to discuss policy arguments,” or, “I will not read anything over x number of words.”). They can also flag for you some bigger picture issues that the professor wants to bring to your attention. For instance, my exams are always tightly timed. This is deliberate. I'm not saying it's the best approach to drafting exams. I am saying it's my approach. This has consequences on your end. First, it means that you need to know the law cold, which I've already told you. Second, it means you need to be vigilant about time on the exam. You cannot go five minutes over here and ten minutes over there. If you do that, you will not get through the exam. I always warn students in the exam review session to force themselves to move on if they are at the time limit laid out on the exam. These sorts of things are invaluable nuggets that you will get from an exam review session.

But wait a sec . . . isn't the title of this section “Don't Count on an Exam Review Session?” I'm confused. Fair enough. Exam review sessions are important for the reasons I described above. But do not count on them to signal which areas of law will be tested or to re-teach the law.

[97/98] I had a conversation with a student last semester who based his studying on his perception of the amount of focus I put on something in class. Really bad idea. Like I've said before, everything is fair game. Do not try to read the tea leaves. If anything, what you cover in an exam review session (e.g., through a hypothetical or sample exam) probably won't be on the real exam. But that would be reading the tea leaves, which I've told you not to do.

I think students regard exam review sessions as a condensed and digestible summary of the entire course. This makes no sense. I just spent 40 or 50 hours teaching you all the material you need to know. Do you think I can somehow capture all that material again in a one-hour review session? It's foolish for students to believe that a review session will provide a detailed and meaningful substantive recap of the material. And frankly, it's maybe a little unwise for professors to even have these sessions.[1]

2. Common Misconceptions About Exams

Law school exams are all pretty similar. They usually involve “fact patterns,” and you are expected to apply the law you have learned to the facts. It's really not that hard, if you know the law. Many misconceptions prevail around law school exams. Here are the big ones.

A. Issue Spotting

First up, issue spotting. I kind of hate the term “issue spotting” because it suggests that it is *a thing*. I know I'm alone in the wilderness on this one, but I believe issue spotting is not really an independent skill. Instead, it's

a function of knowing the law. In other words, if you understand the law as well as you should, you *will see* what legal issues are relevant. In this respect, it is a backward-looking relationship, not a forward-looking one. People make it seem like there's some magical "issue spotting" step in the exam process. There's not. Issue spotting is just what comes of knowing and understanding the law.

For example, let's assume that I've learned everything there is to know about Contracts. When I read the fact pattern, things will jump out at me. When I see an acceptance by mail, I will think "mailbox rule." When I see someone say, "I'll have my lawyer draft that up," I will think "formal contract contemplated." [98/99] When I see someone paying $5 for a car, I will think "consideration." What I'm saying is that issue spotting comes from knowing the law. Accordingly, your focus should be on that, not on some esoteric notion of "issue spotting." I have trouble convincing students of this, so here are a couple of messages I got from 1Ls after their first semester Contracts exams that back me up:

> I personally felt that time was okay, I did not feel too rushed. Also, just as you said, the more you know the information, the better you will be able to spot issues. I felt that I was able to spot most of the issues and hopefully articulated and argued them well.

> First off, I am happy that one more exam is out of the way! The exam is what I expected, it was tough but fair. There were no surprises in my opinion. Like you said, after studying, the issues seemed to jump out at me.

Quick summary of this section: Issue spotting is not a thing.

B. The "Right" Answer

Second up. Getting the "right" answer. There is usually not a right answer on a law school exam. We professors made this exam up out of thin air. It's not a real case. These are not real people. There is no real answer. Your job is not to get the right answer, but to address the legal issues presented in a logical and comprehensive way. There is certainly an element of judgment involved. But we are far more interested in the back and forth of your argument than your legal conclusion. Unless, of course, your legal conclusion is a stupid one that does not flow from the analysis you just did. For instance, if you just spent forever arguing that Max is unlikely to have a restitution claim and then conclude that "there's a good chance" he'll succeed in restitution, that's a problem.

C. Organization

Third, organization. Students have this crazy idea that if they just "organized" their answer better, their grade would have gone from a C to an A. No. Organization is not what distinguishes good from bad answers. Unfortunately, some academic support materials overemphasize "organization" as an independent value and get students to focus on the wrong thing.

Here's an email that my husband, who is an adjunct professor of law, received recently from a student in his Evidence class:

> [99/100] As the final exam approaches, I find myself concerned about the essay portion of the final. My primary concern is how formal the essay is supposed to be. Are we required to include headers, subheadings, and an introduction?

This email is like a gut-punch for professors. Your "primary" concern is whether to use headers, subheadings, and an introduction? This does not bode well.

Certainly, it would be ideal if all your exam answers were clearly organized. But organization does not make or break an exam. Professors understand that exams are stressful and done under significant time constraints. If you forget to discuss the most relevant issue until the end because you somehow missed it initially, you will likely still get full credit for it. Do not cling to the "organization" myth.

D. IRAC

Fourth, IRAC (Issue, Rule, Application, Conclusion). When I was in school, it was called IRAC. Now, it's morphed into different things at different schools.[2] Whatever your school calls it, it's the same thing. It is the skill that you're taught in your legal writing class that informs your approach to legal problems. You are told to apply IRAC on your exams. And you should. But not in an overly formal and mechanistic way. I've seen some students literally write out:

Issue: The issue here is [insert].

Rule: The rule here is [insert].

Application: The way this applies is [insert].

Conclusion: In conclusion, [insert] should win.

What started as a helpful guidepost for writing an exam answer has turned into a strait jacket that completely stymies legal analysis. When professors say "use IRAC," they don't mean to use it in a literal sense. They mean to use it as an approach. They mean that what they are looking for in an answer is your ability to flag the relevant legal issue, explain the guiding legal principles, and then apply those principles to the facts — all while identifying nuances and areas where the answer is not so clear-cut. Legal thinking should follow this process [100/101] organically. Like issue spotting, IRAC is not a *thing* to aim for on an exam. It captures the very essence of what the exam is designed to test.

Students are hearing more and more (from who, I don't know) that the key to exams is IRAC. I've been getting so many questions on IRAC lately. One student set up a meeting with me to specifically ask whether I "wanted IRAC" on the exam. What does this even mean? I answered "yes and no." I mean, I want you to talk about the rule and apply it. But I don't want some IRAC template answer. She seemed confused.

I asked her about the assignments she had been doing for my class all semester (we had done eight).[3] I asked whether she used IRAC for the assignments. She said no. I asked her whether she talked about the issue presented in the assignment, the legal rule, and whether she did an analysis. She said yes. So, she *did do* IRAC. She did it naturally and without being told to do it. It was like a lightbulb went off. She finally appreciated that IRAC is just how one approaches legal problems — and, frankly, is what you would do if you had never even heard the term before. There is a section later in the book where I talk about several terms I want to abolish from our lexicon (spoiler alert: one of them is "financial aid"). Here's another term I want to abolish: IRAC. *I know, heresy!* The problem is that the term has caused more confusion than necessary. And the overfocus on IRAC as a master template for all things legal has not served students well. Okay, let me get off my soapbox.

* * *

You should know that these are not just my idiosyncratic views on "misconceptions." Other professors have flagged many of the same issues. For instance, Professor Keating talks about ten myths of law school grading. His Myth #3 is "My Grades Would Be Higher, If Only I Could Learn 'Exam Technique.'" This essentially encapsulates much of what I am saying above. Here is how he describes it:

> This very prevalent student myth is probably heard most frequently early in the second semester of law school, after the students have received their very first set of law school grades. This belief is not entirely myth; there are, indeed, some students whose initial exam grades in law school are artificially low [101/102] because of some problem in exam-taking technique rather than because of deficiencies in their substantive knowledge. Furthermore, students as a group probably become more adept at taking exams as they take more of them. However, how many students can legitimately expect that their exam technique will significantly improve over time relative to their peers, whose exam techniques are also presumably improving with experience?

> I am convinced that such "technique-deficient" students are the exception rather than the rule. When students come to me after receiving their exam grade to ask how they can write a better exam, I first re-read their exam closely to see if I can discern any problems of style or approach. Typically, however, my response to the student after re-reading the exam is the same: Know the subject matter better and be able to apply the law to the facts of the exam. This, of course, is not the answer that students want to hear. Instead, they want to be told some secret about exam "technique" that somehow they have been missing. After all, these students are positive that they knew the material much better than some classmates who somehow (presumably because they knew the secret) got better scores on the final exam. It is the prevalence of this myth that keeps alive a whole industry of nationwide "exam technique" seminars that offer the dubious guarantee that if the student's grades do not increase, the student can take the course again "for free"!
>
> This myth is perhaps the most understandable of all the student grading myths, because it is so directly a function of the student's need to "sleep through the night" (Myth No. 2). As human beings, we all have a need to explain away our failure to perform at the level where we thought we should be.[4]

Why did I include this lengthy excerpt? (Other than I promised the publisher over 300 pages.) Basically, so I could show you that this is not just a "me" opinion.

3. Law Students All Make the Same Mistakes

I've been grading exams for 15 years. I've literally graded thousands of exams across more than half a dozen subjects: Commercial Law (Canada), Civil [102/103] Procedure (Canada), Conflict of Laws (Canada), Contracts I (U.S.), Contracts II (U.S.), Sales (U.S.), and Conflict of Laws (U.S.). My observations below are based on a pretty large sample set.

Here are the biggest mistakes I see students make on exams.

A. Issue Spotting

I know, I just said it's not a thing. It's not. But I needed a title. Students often miss "live" issues on the exam — i.e., issues that they were supposed to discuss. There are two reasons for this. First, the obvious one. They didn't know the law well enough to see the legal issue presented. I keep on harping on this, but if you know the law, you will see the issue.

The second one is a little different. Students often have blinders on and see the legal issue as only one thing, instead of recognizing that there are sometimes different ways to skin a cat.[5] For instance, oftentimes a Contracts exam will test consideration in conjunction with promissory estoppel (don't worry about what either of those things mean). Students will either see it just as a "consideration" problem or just as a "promissory estoppel" problem, but not both. Students who do this will leave half the points for the question on the table. It's not that they didn't know the law, it's just that they get so caught up in chasing down an answer that they forget there might be another issue involved. It's almost as if they are like, "Got it, done," which prevents them from seeing the problem in a more holistic way.

B. Getting Bogged Down in Non-Issues

Non-issues are the biggest exam time suck. Many students get bogged down in non-issues because they approach exams with the wrong mindset. They think that writing an exam involves going through a checklist of every single topic they learned that semester. Some professors tell students that this is actually how they should approach the exam. Maybe it is for that class, but not for most exams. And most importantly, not for the practice of law. I do not need a student to tell me what is readily apparent from the facts.

[103/104] For instance, if the "call of the question"[6] involves breach of contract, I do not need to you start at ground zero and start talking to me about contract formation. *The offer was when Mary said, "I offer to buy*

your business for $500,000." And the acceptance was when Bob said, "I accept." So, you're telling me there's offer and acceptance. No duh? And the fact that I asked you about breach *of contract* should probably have signaled that there was a contract to breach. I don't need you to start at Adam and Eve. You do not get points for telling professors about non-issues. All you do is waste time and predispose a professor to thinking that you don't know how to distinguish between live and non-live issues.

Students tend to feel insecure about *not* mentioning everything under the sun. But wouldn't it be logical to start at whether there *is* a contract before moving on to breach? No. Look at it this way. In Contracts, you're probably going to cover at least the following topics (all of which have multiple subtopics):

- Mutual Assent
- Offer and Acceptance
- Consideration
- Certainty of Terms
- Promissory Estoppel
- Restitution
- The Statute of Frauds
- The Parol Evidence Rule
- Interpretation
- Implied Terms
- Excuses for Non-Performance (e.g., Misrepresentation, Duress, Unconscionability, Frustration, Impracticability, etc.)
- Modification
- Express Conditions
- Substantial Performance and Breach
- Anticipatory Repudiation
- Damages
- Rights of Third Parties

[104/105] Are you telling me that your plan is to go through this list *for every question* on your Contracts exam? It's completely nonsensical.

Let's assume your question is about damages. Here it is:

> Joe says to Ernie, "Would you like to buy my car for $15,000?" and Ernie says, "Yes." They sign a written contract to that effect, where they spell out all the details of the transaction. Joe breaches and sells the car to someone else for $17,000. Discuss the measure of damages Ernie is entitled to.

How stupid would it be to start the answer to the question like this:

> Here, there is an offer because Joe said, "Would you like to buy my car for $15,000?" and Ernie said, "Yes." Thus, you have offer and acceptance, and concomitantly, mutual assent.
>
> Then they drafted up a contract in writing so there was no statute of frauds problem. The statute of frauds requires a contract for the sale of goods of $500 or more to be in writing. Here, there is a sufficient writing, so we don't have a statute of frauds issue.
>
> And there clearly is consideration. The consideration on Joe's part is the promise to sell the car for $15,000 and the consideration on Ernie's part is to buy the car for $15,000.
>
> And we don't have a certainty of terms issue because the problem tells us that the writing spells out all the details of the transaction.
>
> There are no issues presented on the facts that deal with promissory estoppel or restitution. Also, we don't have an interpretation issue because the parties are not disputing any of the terms of the contract.

> Further, we don't have a parol evidence rule issue because no one is trying to introduce evidence to contradict or supplement the terms of a fully integrated agreement.

Can you see what I mean? This is all *stupid*. If the question is about breach of contract or damages, go to that issue right away. Otherwise, you'll waste all this time where you get zero points. As a professor, when I see this on an exam, I literally skip over it — i.e., I do not read it.

I recently graded a final exam where only 111 out of 934 words were relevant to what the question was asking (about 12%). The student got a very low score even though they wrote a novella. They got something like a 2 or 2.5 out of 10. The student barely engaged with what the question was asking, and instead [105/106] took me on a trip through Article 2 of the Uniform Commercial Code. Nice try, but no points for you.

Now, I'm going to give you a caveat. If one of your professors says that they want you to talk about non-issues, *then f**king have at it*.[7] It's stupid, but they are grading your exam.

C. Not Using Facts You Are Given

You should assume that every fact on the exam is there for a reason. The vast majority of professors do not throw random sh*t into exams just because. When there's a date, a number, a quote from a character in the exam, a strange factual nugget, all these things are usually important. Your job as a student is to figure out where the fact goes (i.e., what legal issue does it speak to).

So many students fail to use the facts they are given. Let me give you an example. In one of my practice exams, there's a mom who ostensibly enters into a contract with her daughter. After the daughter accepts the mom's offer, the mom says, "That kid sure is gullible. Always believing pie in the sky promises."[8] I did not just put that quote in there for fun. I did not put that in there to make the story interesting for you (cause, it's all about you, right?). These sorts of things need to raise alarm bells for you.

D. Not Explaining Enough

Students often appear to be racing through their answer to get to the end. There is barely any explanation of the law or application of the law to the facts. There is no elaboration. There are conclusory answers. These exams will always be in the C or lower range. The point of an exam is to prove to the professor that you know the law. It's your time to show off. More is more.

Last year, one of my Contracts students informed me that my favorite expression was, "But, why?" The entire class agreed wholeheartedly. I never noticed that I ask this question *all the time*. The class emphatically insisted that [106/107] I did. For example, a student might say, "The buyer's reliance on the seller's representation was reasonable." And I would respond, "But, why?"

On some level, I didn't like that this had become a bit of a (good-humored) joke with the class.[9] But on another level, I wore it as a badge of honor. There is nothing wrong with being the "But, why?" professor. Law is about the "But, why?" And, importantly, exams are about the "But, why?" Your most used word on an exam should be the word "because." It should be everywhere. The student who informed me that I was the "But, why?" professor got an A on the Contracts exam. Here's the email she sent me after I shared the good news with her:

> I hate that I gave you a complex about it, but I have to say that asking myself "but why?" a million times a day while studying is the only thing that helped me truly understand the statute of frauds. And the cover and write method is how I can recite it from memory!

Back to your exam. Take the full amount of time and write as much as you possibly can. Explain the "but, why" for everything. A general rule of thumb is that you should never finish an exam early. Exams are never meant to be finished early.[10] If you see a student leaving an exam early, you should not feel anxious about your own performance — you should feel bad for them because they are walking out of there with a B, tops.

E. Getting the Law Flat-Out Wrong

This one pains me. There is no excuse for this. Unfortunately, a number of students just have the law wrong. There's no recovering from this. If your law is wrong, your analysis is wrong. You're lucky if the professor throws you a bone and gives you a few points. This is solely on you. You have the textbook; you have over 40 hours of classes; you have a gazillion study aids at [107/108] your disposal; you have a professor and sometimes teaching assistants who are willing to meet with you to help with areas of confusion. If, after all this, you still don't know what substantial performance is, there's not much I can do about that.

F. Rewriting the Facts

I have seen this happen every year for 15 years. I don't really get it. I wrote the exam. I know what it says. Don't re-tell me what *I said*. All the time you spend doing this is time completely wasted. If you ever find yourself doing this — Stop. Regroup. And write the answer, not the question.

4. Law School Exams: *Like It's Hard?*

I'm pretty sure you're thoroughly freaked out by now. But don't be. It's not that hard. I've got in mind the scene from *Legally Blonde* where Warner says to Elle, “You got into Harvard Law School?” and she responds breezily, “Like it's hard?!” Same thing with law school exams. I'm going to replicate a short assignment I've given my students to show you that it's not that bad. Exams are just this, but longer and with more facts.

Assignment

Al just graduated from law school and is having a party at his house on June 20th. Al contracts with Bill, who owns a window cleaning company, to clean all 30 windows of his house on June 19th. Al specifically tells Bill that he is throwing a party on June 20th and that he needs all 30 windows cleaned before then. Bill arrives at Al's house the afternoon of the 19th. After cleaning 16 windows, Bill realizes that he still has three other cleaning jobs to do that day for very important clients. Bill tells Al that he has finished cleaning the front windows, which are the ones most visible to guests, but that he could not clean the remaining 14 windows that day. He then leaves to go to the next job. Has Bill breached the contract with Al? If so, is this a material breach? A total or partial breach? Please discuss the rights and remedies of the parties.

* * *

Here are two student answers. Not a word in the answers was changed.

[108/109] Student #1

To begin, Bill most likely has committed a breach of this contract. Any non-performance of a promise, however small, is a breach and entitles the non-breaching party to damages. Bill's promise under the contract was to have **all 30** windows cleaned before June 20th. Anything short of cleaning all 30, including only cleaning 16, Bill has breached his promise and the contract. The only argument that he did not would be if he made some arrangement to come back the next day and clean the windows before the party that Al is having. This depends on if “before then” refers to before the date of June 20th or before the party. I am going to assume that “before then” means before the date of June 20th and since the windows aren't cleaned and Bill has left for the day he has breached the contract.

If this is a **material** breach, Al's duty to perform has not yet arisen and he is not yet required to pay Bill. He may still need to pay Bill something in the end depending on what type of material breach Bill has committed. A breach is **material** if the breaching party has not rendered “substantial performance.” What constitutes substantial performance is not determined according to any specific percentage or bright-line rules. What may not be substantial performance under one contract may constitute substantial performance in another. The decision will always be a fact-based inquiry according to a variety of factors. One thing to consider is that Bill

hasn't committed what most would consider substantial performance in a colloquial sense. 16/30 windows are roughly 53% of the windows cleaned. In more realistic cases that substantial performance is upheld the debate was around performance of 75-85%. It would be difficult as a threshold matter to convince a judge that 53% performance is "substantial" but as this is a fact-based inquiry the other factors warrant consideration.

The purpose of the contract with Bill was to have Al's windows cleaned in preparation for his party. Bill may have cleaned the windows "most visible" to the partygoers but has not completed Al's objective. Not only are almost half of Al's windows not cleaned, but the ones that weren't cleaned are also going to look *even worse* in comparison to the clean ones than if the others hadn't been cleaned in the first place. This objective would be difficult to satisfy in a suit for damages as well. Maybe Al could get another cleaner to come in the next morning to clean the windows for a higher price than Al could then recoup through damages, but it will take months for that case to clear the court system [109/110] and the cost of window washing is probably not enough to litigate over from Al's perspective. Bill's breach is also a willful breach that is borderline bad faith. He decided that his contract will Al was less important than not meeting his other obligations and decided to have Al pay that price. This is going to cut against Bill having completed substantial performance. Although the injury to Al is not huge as dirty windows are not the end of the world, Bill barely completed half of the performance required and walked away willfully. All in all, this is most likely a **material breach** meaning that Al does not yet have to pay Bill and may not have to pay him at all.

Once a material breach has been determined, it must be determined if the material breach was partial or total. If the breach was only a partial material breach, then Al cannot walk away. He must give Bill time to "cure" his partial breach. At this point, Al is entitled to damages for the breach of a contract as a "breach is a breach is a breach." However, whether or not Al's duty to perform has been discharged will depend on the distinction between total and partial breach.

There are arguments to be made that he is a total breach by Bill. Al communicated to Bill's company the reason for needing the window cleaning and set a specific date the cleaning needed to be done. Delaying finding a replacement to give Bill time to cure his breach would reasonably appear to hinder Al's ability to get a replacement. Realistically Al could treat this as a partial breach and call Bill and have him come back to the house and cure the breach by cleaning the rest of the windows. However, Bill had two other cleaning jobs to do and will not be available to cure the breach before Al's party. That means if Al tries to give Bill the rest of the day/evening to cure the breach, he very likely will be trying to find a replacement the morning of the party to come and rush clean the windows before the start of the party. (Most likely paying a premium for the rushed service.) The other factors mentioned above including extent of the performance (53%), the willful nature of Al's breach, and the difficulty in adequately compensating Al through damages all cut towards this being a **total breach of contract.**

I would argue that this is a **total material breach** by Bill. This means that Al's duty to perform (pay Bill) has been discharged and Bill is allowed to walk away from the contract and enter another contract with someone else to clean his windows. However, just because Al *can* walk away does not mean that he *should* walk away. Because the line between total/partial breach is so blurred in all cases, and especially in this one where it is a borderline total breach, the [110/111] safest thing to do is give the other party the time to cure the breach and then sue for damages once the date of performance has passed without a cure. As explained above, Al is not likely to get all his windows cleaned in time for his party. Even under a partial material breach, his duty to pay does not arise until the breach is cured. So while he has an argument to walk away from this contract *now* as it is a total breach, he is already entitled to damages, and repudiating the contract now, no matter how justified, is not going to gain Al anything. Al has the right to walk away as the total breach has discharged his duty of performance. He will put himself on the best **legal** grounds for an eventual suit for damages by waiting until after the party, withholding payment because the breach will most likely not be cured, and then sue for damages. The court will take into consideration in any eventual litigation that Al gave Bill time to cure the breach but did not do so.

Student #2

1.Whether Bill breached the contract.

The first issue here is whether Bill breached the contract with Al to clean 30 windows by June 20. Here, Bill breached the contract with Al. Al needed the windows cleaned by June 20, but on June 19 Bill told Al that he could not clean the remaining 14 windows that day and left. Assuming Bill did not come back and finish the job this is a breach because Bill did not complete his promise to clean 30 windows by June 20. A breach is a breach, no matter how minor. However, just because there was a breach, this is not fully determinative of the rights and remedies of the parties. If there is only a breach, but the breach was not material, Al would still be entitled to recover damages.

2.Whether Bill's breach was material.

To determine the extent of the remedies of the parties, the issue now becomes whether this was a material breach. To determine whether Al materially breached the contract, we must determine whether Bill substantially performed. If Bill substantially performed, then the breach is not material, and Al must still perform his end of the bargain, subject to an offset for damages. However, if Bill did not substantially perform then he materially breached, and Al may not have to render counter performance, depending on whether it is a total or partial breach. There is no bright line rule for when a party has substantially performed, however the court will look to a number of factors [111/112] to determine whether a party substantially performed. These factors include the purpose of contract, whether the breach was willful or inadvertent, the extent of performance rendered, the extent of benefits receive by the injured party, type of contract involved, whether the injured party be adequately compensated in damages, what is the cost of remedying the defect, the harm to the breaching party, whether timing was important, and whether the aesthetic look of something important.

Factors that weigh in favor of this not being substantial performance and therefore a material breach include the following. The purpose of the contract was for all of Al's windows to be washed prior to his party so his house would look nice for his guests. That purpose is now not fully met because of Bill's breach. Regarding whether the breach was willful, Al could argue the breach was willful, no matter what, Bill would not be able to wash at least one customer's windows that day, and he chose to not wash Al's windows instead of someone else's. Bill can try to argue that it was not willful because he was overbooked that day and he at least needed to show up to all of the jobs, so he had no choice but to leave. Al has the stronger argument because Bill could have finished the job but chose not to. Regarding the extent of performance, Bill cleaned over 50% of the windows, 16 out of 30, and Bill also washed the most important ones, those in front of the house. While there is not bright line rule for how much performance is substantial performance, performing just above 50% of the performance does not weigh in Bill's favor. Regarding the cost to remedy the defect, here it is unclear as to what this would be or if Al could even find someone to wash the remaining windows on such a short notice. Regarding timing, here timing was very important, Al needed the windows washed by the next day, that was one of the main purposes of the contract. Regarding the aesthetic look, here this was very important, Al wanted his house to look nice before his party. Regarding whether the injured party could be adequately compensated in damages, here to the extent this could be done, Al could have the cost of the windows that were not cleaned offset from what would be paid to Bill, but it would be hard to put a number on any harm done beyond that, so Al may not be able to adequately compensated in damages for the harm.

The following two factors weigh in favor of Bill substantially performing and therefore not materially breaching the contract. Regarding the extent of the benefits received by the injured party, Al, here Al received the most important part of the service, that being the cleaning of the windows that are most [112/113] visible to his guests. Regarding the harm to the breaching party, Al is harmed in that all of his windows will not be washed before his guests arrive and his house will not look as nice, which is not particularly severe.

In looking at the totality of the factors, they weigh heavily in favor of Bill not substantially performing such that he materially breached the contract.

3.Whether the breach was total or partial.

The question now turns to whether this was a total or partial breach. If this is not a total breach, meaning it is partial, then Al's duty to perform is not discharged, it is simply suspended and he does not need to perform at this point in time. If it is a partial breach Al must give Bill time to cure the breach. However, if it is a total

breach then Al's obligation to perform is discharged and he does not have to perform at all. To determine whether a material breach is total, the court looks to the factors noted above for substantial performance, but also considers whether the injured party is hindered in making substitute arrangements due to the breach, as well as the importance that timing played in making the contract.

Here, Al needs the rest of his windows washed before the start of his party the next day. It is unclear as to what the market for window washer are, but it is highly unlikely he can find someone to wash his remaining windows in this short amount of time. Timing was also a very important issue in the contract, time was of the essence as Al needed his windows washed the next day. This all weighs heavily in favor of this being a total material breach.

4.Rights and remedies of the parties.

Because Bill did not substantially perform and this breach was a total breach, Al may simply walk away from the contract, although he does not have to. He does not have to render his counter performance of paying Bill.

* * *

Hopefully I didn't make you more nervous about law school by providing you with these answers. What I was aiming to show you is that exam answers involve weaving law and facts together. Both of these students write clearly and in plain English. And while you may not have exactly understood the concepts tested (total/partial breach, substantial performance), you probably got a good flavor for what they were saying.

[113/114] Like I said, an exam is just this, but only longer and with more details thrown in. If you think you would be able to do the above problem (after being taught the material), then you will be able to tackle a law school exam.

5. Watch the Clock Like a Hawk

Students run out of time on exams all the time. *How the f**k does that happen?* Because they aren't paying attention to the time. They are approaching the exam as a leisurely stroll in the park when, in reality, it's a 100-meter sprint. It is bad to run out of time on an exam. A professor can't give you points for something you did not write. No matter how well you did on the first four (of six) questions, your grade is going to be capped at a B- . . . if you're lucky. It'll actually probably be lower than that.

Think of it this way. There is a ceiling on how well you can perform on a given question. A professor is not going to give you a 12/10 on an answer. If writing three good pages would have gotten you a 10/10, writing six pages is just a waste of time. Students often don't know where to stop in their answer. Let me give you an example based on an exam I just graded. The exam had six questions. The student wrote 14 pages. He or she devoted six full pages to Question 1. Almost half the page count for one question! How does that make any sense?

What I would suggest is this. Professors often give suggested time allocations. Follow them almost to the minute if you can. If you go over time on one question, you must make it up on another question. If a professor does not provide time allocations, then they should designate how much a question is worth (e.g., 20% of the grade; 35% of the grade). If you can find out this information ahead of time, then do the math and translate for yourself how many minutes this is. If you don't know how much each question is worth until the day of the exam, then do some quick math before you start. Bring a calculator if you have to (180 minutes x 20% = 36 minutes). If your professor does not tell you how much the question is worth, then they probably shouldn't be teaching. Harsh, but true. It is unfair to students not to tell them what the value of each question is.[11]

One very practical suggestion for you. Bring a watch to the exam that easily allows you to calculate time.[12] If you have an analog watch (one with hands), set [114/115] the hands to 12:00 and then start the watch when the proctor says “go.” Having your watch set to 12:00 more readily enables you to keep track of time.

For the actual exam, you need to be working as fast as you can. This is why it is important to have everything memorized, answers pre-planned, and everything ready to go. You do not have time to read the fact pattern three

times. Read it once, carefully, the first time. Use a pencil to underline or circle things and take marginal notes. You do not have time to do detailed outlines on your scrap paper. You do not have time to write out acronyms for everything you've studied or a checklist of all the issues that might present themselves on an exam. I have seen students have more ink on their scrap paper than on their actual exam. That does not bode well for the grade.

6. Don't Make Dumb Mistakes

Do not make dumb mistakes on exams. By dumb mistakes, I don't mean getting something of substance wrong.[13] Let me give you a couple of examples of dumb mistakes.

On my first year Civil Procedure exam, things were going swimmingly. I had pre-written my answers for the open book exam, I spotted all the issues, I was writing as fast as my hand would let me. I just finished writing an answer on standing but I felt like it had not flowed well. *Hmmmm*. I went back and read the question again. I then noticed that the question was not about standing, but about *intervention*, which is a whole different thing. I felt the blood leave my head. Time for massive panic. My first instinct was to go back and substitute the word "intervention" for "standing." I did that for about half the answer. Remember, I'm doing this with liquid paper and a pen because we didn't take exams on computers when I went to law school. I realized this wasn't going to work because, well, they were different legal tests. I crossed out the whole answer and started over again. I did the best I could but ended up wasting about 20-30 minutes out of a three-hour exam because of this stupid mistake.[14]

[115/116] Here's another dumb mistake that students make (a lot). When students read through the question, they usually underline, highlight, circle and make marginal notes. This is all good; it's stuff they should be doing. But then when they go to write their answer, they fail to look back at what they wrote. I had one student, Xavier, who was disappointed in his grade, a B-. After talking about the exam, he said, "I guess I just didn't see these issues." I pulled out the exam question sheet and showed Xavier where he had indeed flagged the issues. But for some reason, he hadn't written about them on the exam.

You can't make these kinds of mistakes. I am aware that there's a lot of adrenaline pumping through your veins but forgetting to write about issues that you actively spotted[15] is just careless.

7. Stuff the Burrito

I'm sure you're confused by title of this section. Bear with me. One of the things I see all the time is students writing short, measly answers to exam questions. Like I've said, it's almost like students are trying to write the least amount possible to be done with it and move onto other, more interesting, things.

I was driving to school one day thinking about this. I knew I wanted to have a conversation with my students about this issue, which I had been seeing in their quizzes. But I also knew that simply saying "write more" would not resonate. So, I came up with an analogy: the burrito.

What students were giving me was a sad burrito. It was a gluten-free burrito that had a few vegetables and brown rice tossed into it. Nobody wants to eat that burrito. Instead, what you should be aiming for is a big-a** Chipotle burrito. One that that is stuffed to the gills with *carne asada*, white rice, salsa, sour cream, cheese, and guacamole. One that is so big you can barely fit it in your mouth. A new expression was born: *Stuff the burrito*.

Stuffing the burrito is what you should be aiming to do on the exam. Write as much as you can. Then write more. Longer answers are almost always better.[16]

[116/117] 8. Learn from Your Exams (But Don't Expect Your Professors to "Go Over" Them with You)

Students are encouraged by academic support professionals and in books like this to seek out their professors to "go over" their exams.[17] I have concerns about this push to have students "go over" exams because I think there is confusion as to what this process should look like.

I think it is a very valuable exercise for a student to look over his or her exam, along with a sample answer or a rubric. Students should spend a while trying to figure out where they went wrong and why. I have often facilitated this process by distributing exams, walking through a sample answer, and then letting students sit with their exams. The point is for the *student themself* to do the learning.

Instead, I think what students have in mind when they want professors to "go over" an exam is a very different thing. I think they want the professor to flag for the student every misstatement of law, every *non-sequitur*, every area where they did not elaborate enough, etc. In short, they want the professor to *tell them* where they went wrong. This top-down "learning" is not my jam, as you'll see in the chapter on self-regulated learning.

The professor cannot be expected to sit down with 100 students and "go over" every exam individually. I have done this in the past, and it is a dreadful process. I would spend the better part of a month meeting with students, just to have the same conversation over and over. It was exhausting. And more importantly, I don't think any student took away anything valuable from the conversations.

In my experience, these meetings invariably involve the following questions, "Where did I go wrong?" and "How can I do better?" Students ask these questions as though there were a three-sentence answer. There is not. If you did not get the grade you expected on the exam, the exam was not the problem. It is what happened *way before* the exam that was the problem. The note taking, the outlining, the studying, the practice exams, etc. I can't know where in the process things broke down — it is on you as the student to figure it out.

[117/118] I often find myself saying, as gently as possible, "Well, the fact that you got a C+ shows me that you weren't super-solid on the law." The student will swear up and down that they knew the law inside out. Then I point out that they wrote, "The revocation was effective as soon as it was put in the mailbox (mailbox rule)" and that this is incorrect. Though they feel like they knew the law down pat, they didn't.

Students do not like hearing "You just didn't know the law well enough." That seems like too vague an answer — and a problem that is hard to fix. Instead, they want to hear something like, "Well, you could have used more headings." They want something easy and readily fixable. Incidentally, whether you use headings has no bearing on whether you're going to get a good grade.

We live in an age where if we have a problem, we want a quick solution. We are all guilty of that. But succeeding in law school is simply not a quick fix thing. Succeeding in law school requires sustained and purposeful effort throughout the semester.

Back to "going over" an exam. There is truly limited utility to going over an exam as a means of improving your exam performance. What I mean by this is that, in almost all cases, students don't have an "exam" problem. They have a "something way prior to the exam" problem. If you use the exam review as a diagnostic, as a way to figure out what you didn't know and why, then it is a very helpful process.

For instance, take the erroneous application of the mailbox rule. How did that happen? Were you not paying attention in class? Did you have it down in your notes correctly, but you somehow committed it to memory differently? Was there just a big gap in your notes? The point is to figure out where in your study process things went awry. You are never going to get a question about the mailbox rule again (until maybe the bar exam). So simply revisiting the rule after the professor tells you that you got it wrong is not particularly helpful.

9. The Proof Is in the Pudding: Karen's Story

I just finished up grading for the semester. I reached out to some of my students who received top grades to let them know the good news.[18] After I told [118/119] Karen that she received an A in Contracts, she sent me an email expressing how happy she was with the news. She also said, "This semester I used all of your studying

tips and they made the world of a difference in how I studied and learned the material for this final and all my other exams." *Tell me more . . . .*

I asked Karen if we could speak on the phone (yes, I'm obnoxious like that). So, Karen, tell me *how helpful* my guidance was to you. Be specific. I need the ego boost. Karen relayed specifics about her approach to law school her 1L year and how it gradually changed, in large part, based on my advice.

I asked Karen whether she would be willing to share her story with you all — and she said she'd be happy to! I mean, she probably didn't have much of a choice since what's she going to say, "No, Prof. Monestier, I have better things to do than help you with your book." But, still, I appreciate the completely non-coerced narrative that she has provided.

Here is Karen's story:

> I want to start off by saying to take all of Professor Monestier's advice. I can tell you from experience that doing everything she says will give you the grades that you want in law school. I had Professor Monestier for Contracts I, and throughout the semester she gave us the advice that she is giving to all of you throughout this book. I thought her methods sounded like an incredible way to learn the material and study. But I thought that I didn't have the time to start studying over a month before the exam and knew that I needed flash cards to memorize all the material that she wanted us to know for the exam.
>
> Throughout the semester, I read every case and spent *a lot* of time briefing them before class. I was normally too scared to say the wrong thing, so I didn't ever volunteer to speak in class. Also, I didn't start studying a month before the exam (like she told us) and instead memorized the material in a few days using flash cards. I felt confident for the exam because I had memorized every single thing we had learned that semester. However, while I was taking the Contracts I exam, I felt like I was scrambling. I didn't have enough time to finish, and I wasn't applying the correct doctrine to each question. My grade reflected how I felt during the exam. And I was extremely frustrated because I felt like I understood the material throughout the semester and had memorized everything we [119/120] learned. Contracts is a course I really enjoyed and felt like I was always on top of the material. So, I made it my personal mission to get an A in Contracts II.
>
> During Contracts II, I did things differently. I still read all the cases before class. However, I stopped spending all of my time briefing the cases and only took quick notes on the case to jog my memory during class. During class, I actively participated by raising my hand as much as I could. I would also think of an answer in my head to every single question Professor Monestier asked. I left every class feeling like I really understood the material we had just learned.
>
> Importantly, I also wrote down everything Professor Monestier said and took those notes, organized them, and put them into my outline. I didn't leave anything out of my outline, and it ended up being close to 100 pages long. But it was one stop shopping because, once it was complete, I only used my outline to study for the exam. Yes, you heard me, I said goodbye to my flash cards!
>
> I started studying for the exam about a month ahead of time (I was much busier during this semester, so that goes to show that you always have time to use this method to study). I started by focusing on one topic and would read it over a few times and then cover it up and try to speak everything I just read. I then would check to see how much I remembered. I did this over and over again and would add other topics in once I felt confident that I completely understood a topic. I kept building up until I could basically speak my entire outline without looking at it.
>
> To be clear, I wasn't just memorizing the material, I was working with the material. I knew the elements of a specific doctrine because I understood the purpose of the doctrine and had worked through all of the examples we covered in class. Because of this, when I went to apply the doctrine, knowing the elements came naturally.

> When I took the Contracts II exam, I *finally* realized that law school exams are not about issue spotting. Because if you have worked to learn the material well, you won't have to issue spot because it is clear what doctrine you should apply to the question. Throughout the exam, I felt calm and confident. I knew the doctrine that applied in every situation and was no longer scrambling for a list of seven elements that I memorized in my head.
>
> All of this hard work paid off because I got the A! And more importantly, I feel like I will know Contracts II forever because I didn't just quickly memorize it in [120/121] a few days; I worked with the material for months. I used Professor Monestier's advice in all of my classes and saw the same results.
>
> My advice to you is to not be like me and wait until your 2L year. Do everything she says because it will change your law school experience and will give you the results you want!

Thank you, Karen, for the ringing endorsement of my study methods. Your check is in the mail. Karen is not a one-off. Here are a few other messages I received from students about my study methods (these ones were completely unsolicited):

> **Oliver:** When I first got to law school, I was middle of the pack, trying to figure it out. But your studying approach has significantly changed my performance not just in Contracts but every other class. Hopefully people can start realizing that this approach works. It was a pleasure learning from you these past two semesters.
>
> **Christopher:** When our paths crossed last spring, I was a mediocre law student coming off a mediocre fall semester. Your approach to law school, which I call 'The Monestier Method' changed everything for me. I graded into the Honors Program and was selected for Law Review after a strong spring. You gave me the framework and confidence to do that. I am forever indebted to you for instilling . . . in me [what I needed] to become a successful law student. I really think you have a gift for teaching and inspiring your students.
>
> **Anastasia:** I want to thank you for everything you have taught me, not just in contracts, but to become a better student and lawyer after I graduate. No other professor has had such a positive impact like you have had on me. I have seen my grades rise, and my thought process expand since following your learning approach and I truly thank you.
>
> **Carlos:** In all seriousness, I truly can't study any other way because of how effective your process was for me. It does work, and anybody who thinks it doesn't is just crazy!

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1. I am excluding professors who use these sessions to go over a sample exam and/or to provide general guidance to students.
2. *See* https://writingdejure.web.unc.edu/resources/legal-methodology/.
3. I think I mentioned I'm hardcore.
4. Daniel L. Keating, *Ten Myths About Law School Grading*, 76 WASH. U. L. Q. 171, 174-75 (1998).
5. For those who are offended by this common expression, I hear that I should substitute "There are many ways to eat a kiwi." Pretend I wrote that instead. Though, seriously, that's the best we can come up with?
6. What you're supposed to be talking about.
7. My 1L Contracts class tells me that one of their professors wants them to go through a checklist of issues and talk about them even if they are not applicable. I have trouble believing that's what he said. But I'm not about to get involved in that.
8. I didn't draft the exam. I don't use the expression "pie in the sky," but that's neither here nor there.
9. The "But, why?" appeared in one of my students' exam answers this year. The student wrote, "Courts frown on this much like Professor Coombs frowns when people call TB12 the best QB ever, or when students frown when Professor Monestier says, 'but, why?'" Most professors advise not to use humor on an exam. That's probably good advice. But, for me, a funny sentence here and there gives me a reprieve from the endless hours of drudgery that is grading.
10. Unless you have one of those new age-y professors who believes in giving you all the time in the world. *We wouldn't want to stress you out with time limits!* Cause that'll really help you on the bar exam.

11. I've seen it happen though. You have my full support in going to the Dean to complain about this.

12. All exam software has built-in timers as well.

13. Though it is a dumb mistake if the professor repeated something a million times or put it up in black and white on the chalkboard or Power Point and you copied it down wrong.

14. I know you're all wondering, *How did you do on the exam?* I ultimately did fine on the exam; I got an A. And, irony of ironies, I ended up teaching Civil Procedure my first two years in academia. But I never really forgave myself for such an egregious error. *Why didn't you read more carefully? How did you not notice that the facts weren't working with the standing test? Why would you waste even more time trying to liquid paper over the wrong answer?*

15. I know, not a thing.

16. Unless you are dealing with a professor who imposes word limits. Which is just mean on an exam, and possibly lazy on their part. Yes, I know, there are pedagogical reasons why professors have word limits. But I still think they shouldn't.

17. I read one academic support article that encouraged students to ask their professors to *read through* the exam with students to model careful reading and flag all the issues. *Honestly, I can't even . . . .*

18. This is one of the best parts of my job. I love delivering good news. I have had fun with it in recent years with students I know can take a joke. For instance, I got Ryan on the phone and told him that I had something serious to talk to him about. I told him to remember that grades weren't everything and that one bad grade doesn't define you. I did this whole build-up and then told him he got the CALI in the class. Sort of mean, I know. But fun for me.