



Alison Monahan: Welcome back to the Law School Toolbox Podcast. Today, we're talking about some common problems that we see a lot in the analysis section of your legal essays, whether that's 1Ls or really all the way to the bar exam, and conveniently we have some suggestions for solving these problems. Your Law School Toolbox hosts are Alison Monahan, that's me, and Lee Burgess. We're here to demystify the law school and early legal career experience so that you will be the best law student and lawyer you can be. Together, we're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career related website, [CareerDicta](#). I also run [The Girl's Guide to Law School](#).

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Lee Burgess: Welcome back. Today we're talking about common problems we see in the analysis section of legal essays from 1Ls to the bar exam, and we've got some helpful suggestions for solving them. The first problem that we see come up over and over again is students not systematically discussing all the necessary elements of the law. So Alison, what really is this problem?

Alison Monahan: Well, this is a good one. It's definitely one we see a lot. I see this with a lot of rising 2Ls who have not done as well as they might like on their grades and they come to me and they say, "I studied all the time. All I did was study. I worked so hard, I knew everything, and then I got my grades back and I did terribly and I don't know what's going on." This issue typically derives from some type of problem in actually learning the law. So yes, if I asked someone to talk to me about the law of negligence, they might be able to do that, or talk to me about equal protection. They could talk about policy, they could tell me all this stuff, so and so said this, and there was this dissent, they said this, but they're not really getting to the point.

Oftentimes you see essentially a brain dump of everything you know about a legal topic, but they never really lay out the elements of the law in a usable format. So not surprisingly then the analysis is really muddled and it tends to miss some more subtle points. So I was thinking of a way to ... an analogy I could use to explain this.

Imagine that you and I are at your house in San Francisco and I ask you, "Lee, how do I get to the Ferry Building?" You start to explain to me that the street grid of San Francisco has a couple of different grids and they're separated by Market Street and south of Market you have really big blocks and they go in a certain direction. Then on the north side, which is older, you have smaller blocks, and they're at a diagonal, and I'm sitting there thinking, "Okay, this is



fascinating. But how do I get to the Ferry Building?" What I'm asking you for is directions and what you're giving me are not directions.

Lee Burgess: I think that's a really good analogy and I think one of the things that can be frustrating, especially for people in their first year of law school, is that your law school professors, it might sound like they're more explaining the grid rather than how to get to the Ferry Building.

Alison Monahan: Yeah. They're going all into the history of the street grid and the people who built it, and how they did it this way.

Lee Burgess: What happened in the earthquake, lots of different things.

Alison Monahan: Exactly. You're taking notes and you're frantically writing all the stuff down and you're researching it, but-

Lee Burgess: Yeah, but that's not necessarily what is required when it comes to the exam because in order to do legal analysis, you need to know what the applicable law is and the applicable law is much more condensed. It's going to say, "Drive down this street, turn left here, turn right here, keep driving. You'll find a parking lot." That's the clarity that those legal rules need and I think that it can be very confusing in class because it seems like you're supposed to be regurgitating almost this treatise that your professor has presented, but most professors don't want that.

Alison Monahan: Right, because that's not actually really how you solve legal problems. That might be interesting for policy or background or if you want to make a more sophisticated argument, you can't make that sophisticated argument unless you have the basic elements where you're like, "Okay. These are the questions I need to ask. These are the pieces I need to work through. This is the order I need to work through them in," and the solution to this really are having attack plans. So Lee, [what's an attack plan?](#)

Lee Burgess: So for any legal rule you're studying, you want to be able to write down the elements in an order if necessary to do the full analysis. So when you are studying, you should have an attack plan for, "If this legal issue comes up, I will discuss these four things," and attack plans can be very narrow. It can be one kind of legal rule. I was just talking to a student this morning about attack plans. We were talking about attack plans for contracts question where it's an open ended prompt where it's like, "Was there an enforceable contract? Discuss."

Then you have to say, "Okay. Well, I need to use the structure of the law, which I have created an attack plan from, to guide me through this organization." So in that case it would be like you always start with what's the applicable law? Then, was there a contract? Was there formation? Was there an offer? Was there



acceptance? Was there consideration? That type of attack plan gives you a bit more of a roadmap of all the things that you can discuss in an appropriate order. So that's a bit more broad, but for a more narrow issue, let's say staying with our contracts example, if you want an attack plan for third party beneficiary, well you just need to have the elements that you need to discuss listed out and memorized in the order you need to discuss them.

Alison Monahan: Right, exactly. So you know for contracts, obviously, typically one of the first questions is going to be, "Well, are we dealing with the UCC or are we dealing with the common law?" That's kind of the first thing you need to understand because those legal systems are different. So if you don't ask that question, because it just doesn't occur to you, you could go down a very, very, very bad path.

Lee Burgess: Quickly.

Alison Monahan: Yeah. If you're supposed to be talking about the UCC and you're talking about the common law, well that's pretty much going to be a zero, and that's not good. So yeah, and I think sometimes you have those sort of attack plans and then sometimes you have more like, "Okay, you're in criminal law. There's a dead body." Well, chances are good, you're going to have a dead body on your test, I can pretty much guarantee it, and you want to have thought through in advance what do you need to consider.

So in this case you might not need to talk about everything. If you're looking at homicide and manslaughter and all these different things that could be applicable, but some of them clearly aren't, that's a different type of attack plan. So you still want to have that list that you can run through of the seven or eight different things that may apply to make sure you're not forgetting anything.

Lee Burgess: So, the wording of the attack plan or the ... the name attack plan can get a little frustrating for people because I think it can be applied in a lot of different ways, but I think as long as you always think about it as the roadmap for what I'm going to write down to do legal analysis, then I think you're in a pretty good spot.

Alison Monahan: Yeah, exactly. These are questions you want to have thought about before you get to the exam so that when you do identify an issue, you're not just dumping out the street grid equivalent. You're actually saying, "Okay. I recognize there's a dead body. These are the four things that I need to talk about. Now I'm going to talk about each one of them in order. Here are the elements of each one," and it's very systematic in a way.



Lee Burgess: Right, which is comforting in an exam situation. I think that's what a lot of students forget when they're studying for exams is if you memorize the law and the elements in an organized fashion, it's comforting to do the rest of the assignment, because you're like, "I know that law," and you list out your four elements, and then you apply them, and then you move on. It's very clean.

Alison Monahan: Yeah, exactly. This isn't really actually all that complicated in a lot of cases. One of the places I think this type of problem is especially likely to occur, just the total brain dump of everything you've ever thought about, is a class like con law, where you're talking a lot about policy, history, disagreements, gray areas. People can think, "My professor wants me just to discuss all these disagreements, and the development of this law, or for history. That's what I'm going to write down," but this is not a history course.

You still need to learn the law in a way that actually allows you to apply it to a real problem. Of course you want to include those gray areas in your analysis. So you might make a note to argue viewpoint X and viewpoint Y, where it's relevant. Maybe it's a closed question, maybe the law is not really settled, maybe your professor has a certain viewpoint, but these areas of potential disagreement which could depend on your politics, your point of view, on originalism, things like these, that doesn't eliminate the need for the legal elements. You've got to apply the rules step by step before you can talk about these gray areas. I think that's really what you need to remember.

Lee Burgess: Yes. You can spend part of your essay arguing that the rule of law is wrong, but you should wait til you tell somebody what the rule of law is and how it applies first. You know?

Alison Monahan: Yeah. Exactly. You got to do the first part before you can get into the more advanced stuff.

Lee Burgess: Yep. Exactly. Well, I think that's a big one and I hope this clears up for a lot of people the importance of needing to just memorize this language. I think one other thing that we should mention here is the importance of terms of art or-

Alison Monahan: Definitely.

Lee Burgess: ... buzzwords, because I think that when you're writing these attack plans and when you are putting them into memory, don't ignore terms of art and buzzwords because that's what professors are skimming to look for when they're doing your grading.

Alison Monahan: Yeah, exactly. You don't need to make it harder for yourself. You don't need to try to describe a term of art in two paragraphs when you could just use the two words.



- Lee Burgess: Exactly. They want you to use the two words, because they're looking for the two words.
- Alison Monahan: Yeah, exactly. You want to write down mens rea. You don't need to talk about like intent and all these other things at that point. It's just like, just write mens rea. We all know what that means.
- Lee Burgess: Right, exactly. All right. What are some of the other problems that we see come out in student essays?
- Alison Monahan: Well, I think one of the big ones is just [missing issues](#).
- Lee Burgess: That's a big one.
- Alison Monahan: Yeah, I mean if you don't see a legal issue, you are not going to discuss it and you are not going to get points for it. So that's a pretty direct line to a decreased grade or a decreased score on an exam, right?
- Lee Burgess: Yeah.
- Alison Monahan: But let's be honest, in the heat of the moment, it's really easy to overlook [relevant facts that are designed to trigger a discussion of legal issues](#). You have to be incredibly careful. So for example, you might have a criminal law question and it's about somebody stealing property from a converted garage office where the incident in question happens at 8:00 PM in the summer. So Lee, listening to that sentence, what are two things that need to jump out at you?
- Lee Burgess: Well, the fact that it was a converted garage office sounds a little wonky, so I'd probably want to spend some time thinking about that. Then it was at 8:00 PM in the summer. Those are some pretty specific facts.
- Alison Monahan: Right, exactly. So you might be reading this and just thinking, "8:00 PM, whatever, it doesn't really matter," but, this is all designed really to trigger a discussion of the differences between the modern and traditional rules about burglary. So one of them, I don't remember the exact rules at this point, but one of them has to be in a dwelling at night.
- Lee Burgess: At night, yeah.
- Alison Monahan: At night. So these are the questions, "Is an office garage a dwelling? We might want to talk about that. 8:00 PM in the summertime. I wonder if it's dark at that point? Maybe they want me to discuss that."
- Lee Burgess: Right. Exactly. Like why would they have spent time adding that detail in? I think that's what you want to start thinking about when you're thinking about the



facts, is that somebody wrote these fact patterns and created these facts to trigger something for you. I was working on a bar question with a student today where it was a contracts question about formation and one of the parties had Alzheimer's, and it's like, "Why would they have chosen to give him Alzheimer's over cancer?"

Well, because Alzheimer's is going to affect mental capacity. Well, I bet that's something you need to talk about, and I think a lot of times students just overlook that part and they're like, "Well he's sick with Alzheimer's." It's like, "No, they chose Alzheimer's specifically."

Alison Monahan: Like, "Too bad for him."

Lee Burgess: Yeah.

Alison Monahan: But I think sometimes people maybe subconsciously kind of realize there's an issue, but then they sort of freak out about it and they don't really want to talk about it, so they just don't, because they're not quite sure how it might come out. If you're thinking, "8:00 PM in the summer, I don't know if that's dark or not. Okay. I'm going to skip that."

"Alzheimer's, I'm not sure if that would impact mental capacity. Well, I'll talk about that later," and then you never talk about it.

Lee Burgess: Right. That's a problem. If you don't talk about Alzheimer's in a question where one of the parties has Alzheimer's, they're probably not going to give you a great score, because they did that for a very specific reason.

Alison Monahan: Yeah. I've literally never seen a formation question where that was the case. So I think it was a pretty clever way to push the edges of the law here.

Lee Burgess: Yeah, exactly.

Alison Monahan: But, this makes a good point about our solution.

Lee Burgess: Yeah. So you got to try and understand why all these facts matter. So you need to know the law really well, and all the variations of it. So for instance, in our burglary example, Alison was mentioning the difference between the modern rule and the traditional rule. That's going to lead you down the road to raising all the legal issues to get all the points possible, so that's very important. But you really need to become an expert at [reading the facts](#) and practicing to get better and better at it. So if you miss an issue on a practice test, like let's say one of the examples we've given you, if you saw a fact pattern that was similar, you're less likely to miss it later on the real exam. Even if it's applied slightly



differently, you will at least have seen it and done legal analysis around that issue and it's going to be easier to do it again.

Alison Monahan: Sure. I mean, if I ever in the future saw a contracts question and someone had Alzheimer's, you better believe I'm going to be like, "Yeah, that's what we talked about. I've seen this before." For me my favorite example is I took my first torts exam and someone had I think a tiger or lion as a pet and I forgot at that point that there are strict liability if you keep a wild animal as a pet. Of course the lion bit someone or whatever. I was horrified when I looked at the answer and realized I had missed this, but I will never again in my life forget that there are strict liability for wild animals in tort law.

Lee Burgess: Yeah. So that's why you [got to do this practice](#). The other thing that you can do and even include these in your outline if it makes sense, is you can think about how you'd raise these legal issues as you were learning them. So you can either think about hypos that were covered in class or maybe something that you read in let's say an examples and explanations book, or something you made up on your own. But once you learn the rules, you can kind of [play with hypos](#) to explore the gray areas and think about what kind of facts can trigger these certain legal issues. Then you're going to be more likely to identify those issues when they appear on the exam.

Alison Monahan: Yeah. I think this is largely a habit of mind to, is just to always be thinking of how would I test this? Or even just thinking of for example famous ones. There's a vehicle and a statute that says, "No vehicles in the park," so if you're not in law school, you might just think, "A vehicle, that's a car. Moving on, next," but as a law student, you need to be thinking about all these other options. "Is a tricycle that a child is riding a vehicle?"

Lee Burgess: Or a golf cart.

Alison Monahan: Well, it's transporting him, or a golf cart, or a horse. How about an ambulance? Some of these are obvious like a car. Okay. That probably is pretty clearly a vehicle, but there's a lot of other stuff out there that may or may not be and you can start thinking of arguments for and against, and what that's really making you do is try to understand, "Okay, well, what's my viewpoint on this statute? Is it literal? Do I look at the intent?" These are the things that lawyers look at. So I think making that a habit of mind as you're learning these legal issues, by thinking about like, "Well, how would I test the distinction between a modern rule and a traditional rule? How would I blur the lines between the UCC and the common law situation?" because those are the things your professor is likely thinking about too.



- Lee Burgess: Right. When they're writing fact patterns, [they're trying to create ambiguity through the facts](#), so they're doing the exact same exercise as you're doing when you're outlining and trying to come up with triggering facts.
- Alison Monahan: Yeah. I remember one of my professors, I think it was my civ pro one, when he did a con law class exam, he loved to have a statute that referred to a person and then make the facts be about an alien. Yeah, which really threw people, but again, after you've looked at three or four of his practices, you saw this recurring and you're like, "We need to think about the alien problem."
- Lee Burgess: That's awesome.
- Alison Monahan: So practice and look at your professor's old exams.
- Lee Burgess: Yeah. All right. The next issue that we see come up over and over again, not legal issue, issue as in problem issue, is ignoring counterarguments and analysis, and this is a big one.
- Alison Monahan: Yeah, for sure.
- Lee Burgess: Yeah. It is so easy to jump to conclusions about who should win and ignore counterarguments, because this could be based on sympathy for one side or your instant reading of the law. You could just read it and say, "Well, of course this is the outcome."
- Alison Monahan: And clearly so and so wins.
- Lee Burgess: Exactly.
- Alison Monahan: Oftentimes professors will make someone very sympathetic, you know, "The poor single mother," blah, blah blah, but then give her some unfavorable facts, and if you ignore those, you're going to have problems.
- Lee Burgess: Exactly. You're going to lose massive points if you do not raise these counterarguments and you might see comments on your exams that say you're being conclusory. This is oftentimes where we see this come up. So, you really have to actively put yourself in each party's shoes for each element, and so this is really the solution. You have to go through this intellectual exercise of standing in the shoes of both sides and seeing if the facts could be viewed different ways. Then you have to shift your viewpoint, because the thing about being a lawyer is oftentimes you may have to argue for the side that you don't really agree with. The skill of legal analysis and advocacy doesn't mean that you think you're always right or that you are even going to win. You are just doing the best advocacy for your side that you can.



Alison Monahan: Right, and sometimes you'll hear this talked about like, "Is there a colorable claim?" Or when you're working, you might hear somebody you're working for say, "Okay, could we make this argument with a straight face?" Meaning it's probably not a great argument, but it's not totally unreasonable. The question is like, "Is there really no reasonable argument you could possibly come up with in favor of your client's position?" In some cases that may be true. If the light was red and everyone agrees the light was red and you should've stopped, okay, fine, don't argue that point. But, most of the time you're going to have some type of argument that you could make on both sides. So literally envisioning yourself even like switching sides or switching clothing and becoming the different lawyer I think can help here.

Also as you're learning the law, again, you can make this habit of really thinking about the gray areas and thinking about, "Okay, what's an argument I can make on one side. Now what's the argument I would make on the other side? Now what would that person counter?" Eventually you'll get to the end of that chain, but you could even consider putting these arguments and counterarguments into a chart or something so that when the issue arises, you at least know what to think about and you can quickly say, "Okay. This may not apply, but they could make this argument." So the more, I guess the more thinking you've done in advance, typically the better you're going to be instead of just having to do this on the fly on an exam, never having thought through it very carefully. That's probably not going to get very well.

Lee Burgess: Yes, I think that's true. I think the one thing people have to watch out for is you don't want to be doing an incorrect application of the law to raise counterarguments. Sometimes I've seen students say, "Well, if it's so important for me to argue counterarguments, I'll just make some up," and then say-

Alison Monahan: Right, I'll either make up the facts or make up the law.

Lee Burgess: Right, and that is problematic because you don't want to confuse the professor or the bar grader that you don't know what you're talking about. So that is kind of what I would recommend that you think about, is remember that the counterarguments still have to be arguments related to the correct application of the law. You're just looking for ambiguity in the facts, or the law, to be able to give yourself wiggle room to raise counterarguments.

Alison Monahan: Right.? I mean, for example, if the question states that the light was red, it probably is not a valid counterargument to say, "Well, if the light had been green or if the parties didn't agree that the light was red," it's like, "Well, they do agree it's red. Moving on." You can't just create things. Don't fight the hypo as they say. You want to raise reasonable arguments based on the law and based on what's actually in the hypo and not make stuff up. "Well, if we were



applying the UCC," it was like, "Well we're not." So, what does this have to do with anything? You're wasting time here.

Lee Burgess: Yep. If the professor had wanted you to raise issues of the UCC, they would have changed the facts to do that.

Alison Monahan: Right, that's the whole point, that if they lead you down a certain path and that path is not UCC, why would you waste time talking about the UCC? But people do because they think, "I know a lot about the UCC, I want to make sure my professor knows I understand it, so I'm going to write it down."

Lee Burgess: Yep. Exactly.

Alison Monahan: Then they're shocked when they don't get any points for that.

Lee Burgess: Yeah. All right. So it's pretty simple when you think about it, but it is such an easy way that people leave points on the table.

Alison Monahan: For sure.

Lee Burgess: Yeah. All right. What's our next habit or pattern that we see in students' work?

Alison Monahan: Well, this is an interesting one. So a lot of times people think that ... you're always told, "Draw a conclusion." So people think that they're drawing a conclusion on each of the relevant elements of the law, but they're not really. If you're not drawing your conclusion, you're not showing your legal judgment and you're losing points. So for example, sometimes students see the issues, they even understand the law pretty well, but they don't actually reach the point of drawing a well reasoned conclusion. You need to do this really for every disputed element. So for example, somebody might say, oftentimes repeatedly in the same paragraph, "Plaintiff will argue X, plaintiff will argue Y, plaintiff will argue Z," and then they move on. But that's not sufficient because even if this is an easy question, if it's a minor issue, what you need to say is, "Plaintiff will argue X." Okay, fair point. Then you continue. "However, this is likely a losing argument because of Y," and then you give your reason.

So, that's not really that much longer. It's not that much more complicated, but it's going to get you infinitely more points. Because really the goal on the exam is to show your legal judgment, and the reality is, when you're actually working as a lawyer, clients are going to ask for this all the time. They want your informed analysis. "Well, what do you think the judge is likely to do?" You need to have an answer to that.

Lee Burgess: Right. I think that's one of the things where you kind of walk this line on essays where you don't want to pretend like you're in the real world just because



you're in this manufactured reality. However, they still want you to commit to something like you were in the real world and show that you understand how the law functions and whether or not it's going to be good or bad for whatever side you're representing.

Alison Monahan: Yeah, I mean if you just say, "Well, plaintiff is going to argue this and plaintiff is going to argue that," your professor's response is likely to be, "So what?"

Lee Burgess: Right. Who wins?

Alison Monahan: "What happens? Who's going to win?" We want to have an analysis of the outcome, not just be like, "Okay, great. Well, he could make that argument," and then what happens?

Lee Burgess: Right. The thing is, when you practice law, that's all your clients really care about, is what you think is actually going to happen.

Alison Monahan: Right, and they might want to know kind of why so they can do their own risk analysis about whether you're right. Basically they want to know what you think is going to happen.

Lee Burgess: Yep. That's what they're paying you for typically.

Alison Monahan: Yeah. They don't really actually care that much about what the other side's likely to argue. They want to be like, "Okay, well, is the other side likely to win on this argument? Is it going to cost money? How much money? What are we talking about?" The key to a good exam answer really is that you've got to rapidly identify major and minor issues, and I brought this up earlier to dispose of the minor ones quickly, but completely, and then to really dig into the major ones and discuss the counterarguments in detail, and you've got to explain your judgment about who has the best side of the argument.

Of course you always draw your overall conclusion too, who's going to win, but you know that's not the whole, it's not the whole answer. Another point here is that you can't just stop your analysis if it's a really close call. So for example you might say something like, "Plaintiff is likely to win on this point and it would be dispositive," meaning they would win the whole case. "However, if she doesn't," and then you do the rest of your analysis because unless you are absolutely 100% sure that this is truly dispositive and there is no way that this party can lose on it, you're taking a huge risk if you don't do the rest of the analysis.

Lee Burgess: Yeah, I think that's very true.



- Alison Monahan: You might think it's a slam dunk issue and your professor's like, "Actually it's pretty 50/50 and it could've gone either way and you just missed a quarter of the points on the exam because you didn't discuss it."
- Lee Burgess: Yeah. Going back to your example, I've seen this a lot in constitutional law, especially around things like equal protection, someone will ... if the question is like, "Is there a impermissible classification?" Then you kind of go through and you're like, "Well, this case would definitely be argued as being the classification of race." But then if there's another argument, that maybe it isn't-
- Alison Monahan: Right. Maybe there's like a disability claim or some sort of gender thing.
- Lee Burgess: That was going to change the level of scrutiny, you typically need to just say, "Okay, well, if it's raised this is what's going to happen. But if this other thing that's rational basis and this is what's going to happen," it doesn't take that much time to do that additional little paragraph of analysis. But if you're wrong, you have at least covered your bases and have given the professor kind of that you understand options.
- Alison Monahan: Yeah, and I think this is one of the harder things to get good at too, because sometimes people have a lot of trouble differentiating these major issues where there are different paths you could go down and it might be a close call from a minor issue. So if it's just a slam dunk and you start to do all of this like, "But this, but this, but this," and your professor is like, "This is an easy question. You don't need to spend a page on this. This is supposed to be two sentences," that means you're not talking about something else that would be getting you more points.
- I think the solution here is A, you've got to force yourself to actually draw a conclusion on every element, and to memorize different formulas for doing so. So typically this is going to involve some type of because words: since, therefore, hence, because. The more you use those, probably the better you're going to do. Then in terms of the major and minor issues, I think a lot of it's just practice.
- Lee Burgess: I did see something happen though on a student essay recently because we harbor or we hound students a lot to [use the because language](#), where they just said like ... it was basically like, "This element is met because this element is met," like using very similar language. They laid out a bunch of facts and they're like, "So, like clearly this element is met because this element was met." So you do have to make sure that because the linking language isn't linking-
- Alison Monahan: To a reason.



- Lee Burgess: ... to a reason, like an argument or an explanation of why something has happened, because when I called it out for the student, she was like, "You're right. That's bad," but I think it could be-
- Alison Monahan: The sky is blue because the sky is blue.
- Lee Burgess: Right, because it's blue.
- Alison Monahan: It's like, "The sky is blue because of the diffusion of particles," blah, blah, blah.
- Lee Burgess: Right, exactly. Yeah.
- Alison Monahan: The sky is blue because the word we use for the color of the sky is blue. Okay, that's not really saying anything.
- Lee Burgess: Yeah. So you do have to make sure that these linking words and these words to drive you down the road of having quality legal analysis are helpful, but they're not absolute. They don't solve all analysis problems.
- Alison Monahan: No, you still have to actually give a reason.
- Lee Burgess: Yeah, exactly.
- Alison Monahan: All right, and then I think the final point before we wrap up, [terrible organization](#).
- Lee Burgess: Yes.
- Alison Monahan: You see this so often and I think we see this a lot with bar students who when they are forced to actually look at the essays that the bar graders have generously returned to them after they fail, a lot of the times they're really shocked, right?
- Lee Burgess: Yeah. I think that that's true. It's very easy to be shocked because I think a lot of times people don't even appreciate how important organization is. One, you have to appreciate how fast your professor or your bar grader or whoever's reading these essays is trying to read, and if your organization is not thoughtful and easy to follow, they get frustrated. It shouldn't be surprising that frustrated graders don't give great grades.
- Alison Monahan: No, I think that a happy grader, you can imagine just reading, checking things off, check, check, check, check, check. They get to the bottom, they add up all the checks and they're like, "You did great." If this stuff is buried in a total stream of consciousness, two page long paragraph, or maybe some of these points are in there, they're probably not going to be as eager to give you those



points. That's just the reality of it. If it's hard to give you points or if it's hard to follow your reasoning, you're probably going to get a lower score. If you make it easy with a well laid out argument and headers, headers, always headers-

Lee Burgess: Always headers.

Alison Monahan: ... you're probably going to do better. So, I think to get to this point, some of it is about, as we discussed earlier, really knowing these elements and writing them down. But also it's about how you do your pre-writing outline. So when you're reading your essay, you're reading the hypo and do you just start typing?

Lee Burgess: No.

Alison Monahan: A lot of people do, not generally recommended, but you wouldn't have some sort of process for making a [pre-writing outline](#). We really strongly urge you to do it on paper for various reasons, to structure your essay because once you have that, you can move through it logically and you can really show the reader what you're talking about. The only thing about this is you've got to make sure you get everything from your pre-writing outline into your answer. I was talking to someone recently about why he had done poorly on one of his tests and he said, "Well, it was really frustrating because I had my pre-writing outline that I turned in with my answer and when I went to talk to the professor, it turned out that there were four issues and I'd identified all four of them on my outline, but only talked about three of them in the essay." The professor's like, "Well, had you talked about the fourth one, you would have done pretty well, but you didn't, so you lost a quarter of the points and did really poorly."

His explanation was something about like, "You've gone one direction to do the writing," and then the other direction when he was actually writing the essay, I don't really remember the details, but point being, you've got to practice doing this and have a format that you're typically going to use and some sort of check to make sure you're getting everything. So for me, I would often take a highlighter and as I talked about an issue that I'd identified in my outline, I would mark it off. If I got to the end and I saw that there were things that weren't marked off, well probably I need to put those in.

Lee Burgess: Yes.

Alison Monahan: So, people also go through the facts oftentimes and mark those off in the hypo. So you can see, "Okay, there's something I haven't talked about. What do I need? What is this raising? What is the EPM fact raising? Do I need to say something about that?" Because you probably do.

Lee Burgess: Yeah. I think that's very true. I've also seen easy mistakes people can make by not using headers to break up the essay correctly. So professors or bar graders



think that they've missed one of the prompts or calls of the question because it's buried in there. That is just something you never want to do because you are again-

Alison Monahan: That you're not going to-

Lee Burgess: ... they're asking them to go hunting for information and they don't have time.

Alison Monahan: Yeah, that can happen a lot if you have multiple defendants that you're supposed to talk about or something, and for some reason you list out the first two as a header and then the third one you get busy, you get rushed and you forget. Then they think you didn't talk about Bob.

Lee Burgess: Yeah, I can see ... I think it happens with multiple defendants, see it a lot on evidence questions where you might have a lot of different pieces of evidence. That's another area where you might have like six things you need to analyze, when you bet ... if there's a list in the call of the question, you better list out all six things in a header.

Alison Monahan: And community property also.

Lee Burgess: Mm-hmm (affirmative). Yeah.

Alison Monahan: One by one. You might have 10 pieces of property and for whatever reason you just stopped listing them out one by one and when you get to like number seven ...

Lee Burgess: Yeah. It sounds like why would you ever make this mistake, but it's very easy to do under especially the time conditions of writing an exam answer. So what you need to do is practice to create habits that will prevent this from happening. Either checking things off in your outline, checking things off on the call of the question, whatever you need to do to give yourself some safeguards so you don't make these simple mistakes that can just cost you easy points.

Alison Monahan: Yeah, because you're going to be under pressure and no one's operating at their best at that point. So you've got to kind of scaffold yourself in to try and make as few mistakes as you can, knowing that you're probably not going to be operating at 100% capacity. That's just the reality of it.

Lee Burgess: Yep. Exactly.

Alison Monahan: All right. Well let's do a quick recap of how people can avoid a lot of these common essay mistakes. So number one, and I think probably honestly the most important, is really to learn the law as elements that you can easily apply. So, if you don't do that, basically you're not going to be able to do any of these other



things, because you're going to want to use those elements typically as headers in your essay, which is going to create a good structure. Then once you've got the structure, you can look at all the facts, every single one, thinking carefully about what element they should be used for, and then that's going to help you identify the major and minor issues and quickly, but completely, dispose of the minor issues, being sure you draw a conclusion. Then you're going to go through carefully your major issues and really make sure you're raising counterarguments and things like that.

I think the key is you've got to make sure you get all of this stuff into your actual essay. So you got to do your pre-writing outline to give you a structure, but you've also got to get it into the essay. So if that's something you struggle with, definitely got to think of ways to make sure that you're getting down in your essay every single issue that you've identified.

All right, well, with that, unfortunately we are out of time. Good luck on your essays. If you enjoyed this episode of the [Law School Toolbox Podcast](#), please take a second to leave a review and rating on your favorite listening app because we would really appreciate it. Be sure to [subscribe](#) so you don't miss anything. If you have any questions or comments, don't hesitate to reach out to Lee or Alison at [lee@lawschooltoolbox.com](mailto:lee@lawschooltoolbox.com), or [alison@lawschooltoolbox.com](mailto:alison@lawschooltoolbox.com). Or you can always contact us via our website [contact form](#) at [lawschooltoolbox.com](http://lawschooltoolbox.com). Thanks for listening and we'll talk soon.

#### **RESOURCES:**

- [Wondering What an Attack Plan is?](#)
- [Podcast Episode 139: How to Issue Spot an Exam Question \(w/Live Example\)](#)
- [Tips for Using Facts on Final Exams](#)
- [The Value of Issue Spotting and Strategies to Improve Your Skills](#)
- [It's Almost Finals! Are You Getting the Most out of Your Study Time?](#)
- [Where Can You Find Sample Law School Essay Exams?](#)
- [How to Write a Law School Exam: Deal with the Ambiguity](#)
- [The Single Most Important Word in a Law School Exam Answer](#)
- [How to Organize Your Exam Answers](#)
- [From Bare Bones to Meaty Analysis: How to Skeleton Outline Your Essay](#)