

PROPERTY



# PROPERTY

*Hypotheticals, Self-Assessment Rubrics,  
and Tools for Success*

**Jill M. Fraley**



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For my students, past, present, and future.

And for Halie, always.



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## About the Author

**Jill M. Fraley** is a Professor of Law at Washington and Lee University School of Law, where she has been teaching for 10 years. She practiced as a litigator, before first teaching in 2004. She was the Tutor in Law at Yale Law School for two years before moving to Washington and Lee University School of Law. Professor Fraley holds a B.A. from Yale University, a J.D. from Duke University School of Law, and an LL.M. and J.S.D. from Yale Law School.

Professor Fraley is a native of Appalachia, specifically a farm in eastern Kentucky, and is passionate about issues of equality, access to education, poverty, homelessness, environmental protection, and just property laws. She is a professional photographer and passionate about the work of NGOs. She spends as much time as she can outdoors, in the mountains, traveling, gardening, quilting, and writing.





# Introduction

Hard work in law school does not necessarily translate to good grades. It is frustrating, but true. One of the main reasons is that law school deviates from the method you have used to learn your whole life: practice, evaluation, feedback, repeat. Then you get to law school and there is a single exam at the end of the semester or maybe also a midterm but without grades or individual feedback. Students feel anxious, depressed, frustrated, and as though the system is random or unfair.

Worse, that single exam is probably a hypothetical, which is different from the kinds of exams you have taken all your life. Answering a hypothetical requires you to apply rules in a robust and thorough manner. It is not as easy as it sounds, and law school classes rarely provide an explicit methodology for writing an application. Legal writing courses often teach analysis, but the best strategies for writing a brief are not exactly the same strategies for getting the most points on an exam. I test this out regularly by asking second semester 1Ls to tell me how to go about applying a rule — without using the word “apply.” They can never do it. They do not have a methodology; they just think they know how to apply a rule intuitively. Exam results suggest otherwise.

Checking your own work on a hypothetical meant to be ambiguous is also not easy. Think about it this way: You know that you understand how to multiply, because if you multiply three by two, you get six. The calculator agrees. What did your agreement with the calculator tell you? Not just that you got the right answer, but that you know how to multiply. In other words, we normally check our understanding of processes by checking the accuracy of our conclusions. Hypotheticals are usually balanced, or nearly so, meaning that there is no one correct conclusion. You can't use the answer to check your process.

It is also difficult to practice hypotheticals. You are likely to have trouble finding samples of hypotheticals, particularly samples paired with some type of scoring device or sample answer. Oddly enough, even when students have

samples, they sometimes focus entirely on study rather than practice. This is not a good plan. Answering a hypothetical is a skill, not knowledge. You would not give a piano concert after trying to play once or reading a book about playing. You would give the concert after regular practice, correction, and progress reports from a teacher. Except law school does not usually provide practice, detailed corrections, or progress reports.

After the first semester, students are often still in the dark. Exams are often not returned to students or have limited comments. In many courses, if you want your exam back, you must ask the professor to “review it” with you, which feels like challenging your grade even when it is not and is approached with similar levels of apprehension and dread by both parties. If students score well enough to avoid crying on the bedroom floor, they rarely request such meetings, even though some feedback might help take them up a grade the next time around. When a student does take this opportunity, exam reviews often fail for lack of genuine feedback. Students often receive a simple numerical total and a series of checkmarks across pages of their answer with no indicators of what was missing.

I do not like this situation. I do not like that students can work hard but fail to do well in law school. I do not like that grades seem random because students do not understand what they did well or poorly. What I want is a world where hard work actually works, where you get the grade that you deserve. I’ve done that in my own classroom, and this book is my plan for world domination, so to speak.

The purpose of this book is to give you back some control. This book works as a review for property law, a workbook as you learn property law, a course in academic success, or a review for the bar on common law real property.

You can learn how to write a robust application of the rules. More importantly, you can practice this skill. Then you can grade yourself accurately and see how your score compares to other law students. You can diagnose problems with your answers, learn strategies to fix those problems, and keep practicing to improve your scores.

## **The Secret of This Book: Rubrics**

The real secret of this book is the scoring rubrics. You can find hypothetical prompts or fact patterns in a variety of places. You could write them as a study group. But they’re not useful. You need a scoring rubric to make those hypotheticals actually useful. Why? Because you need specific, individualized, and detailed feedback on your performance to improve. A scoring rubric provides that.

You might think a sample answer would work just as well. It does not. During my first year of teaching, two of my students were very close friends. They were close enough to each other to have shared their grades and their answers to a practice hypothetical I had given as a midterm. One had an “A-” grade and the other a “B-” grade. Here is why they came to see me together: Neither one of them could tell the difference between the two answers. The one who had the higher grade said, “I did well. You would think I would know! But I do not understand why my answer was right, so I do not know if I can do it again or not.” That was when I decided that I had to share scoring rubrics with my class, even though I had given a sample answer.

A sample answer is someone else’s work. It is not detailed feedback on your work. It is the feedback that matters, along with continued practice to improve.

The rubrics in this book allow you to grade yourself and to provide yourself with that detailed and individualized feedback. Write in this book. Do the work of practice, grading, and more practice. Get a study partner or small group. Then it is easier because you can grade for each other using the rubrics.

This system works. Students in the bottom 10 percent of the class have used these materials to be in the top 10 percent the next semester. Your job is to put in the work of practicing. This book makes it as convenient and exam-realistic as possible.

## Why Would I Give Away Secrets?

You already know the first answer to that question: I want the world where your hard work matters, and you get the grade that fits with that work. I want a fair system where study and practice count. I want you to have a system of techniques for writing an application, so you do not wing it.

There is another answer to the question, though. As someone who came into the academy as an outsider, I am very conscious of how failures in transparency create an unequal playing field for students. I did not come from a professional family. I came from a small farming community in the Appalachian Mountains.

But I was lucky enough to get an excellent education. I have a bachelor’s degree from Yale University, a J.D. from Duke Law School, followed by an LL.M. and J.S.D. at Yale Law School. These multiple law degrees put me on rather unusual ground. Most professors hold only a J.D. A growing number hold a Ph.D. in another field such as history, philosophy, or sociology. Only the tiniest percentage holds multiple degrees earned within the legal academy. What that

means, in terms of this book, is that I have spent more than twice as long as most professors navigating legal education *as a student*.

Going from Appalachia to Yale in 1995 was like moving to another country at 18 without your parents, without any friends, and without knowing there could be culture shock without leaving your own country.

Insider knowledge presents itself more readily in upper-class families, where a student is able to consult family members and friends who have been to law school. Students from blue-collar or impoverished families just do not have the same opportunities. Success in law school is unevenly available to those with more social capital and those who come from professional families, creating unintentional, but nonetheless significant, barriers for others.

Additionally, failures in transparency likely generate much of the stress and distress that law school is known to create for students — stresses that are already known to fall disproportionately, in terms of gender, and likely across other differences such as race and socioeconomic status. And that bothers me. America long ago fell short of the ideal of a classless society — and I do not want law school, my intellectual home, to perpetuate social stratifications. Put another way, the secrets are already available to those who have or forge the right relationships. I am making them available widely.

## How the Rest of This Book Works

Part 1 of this book is a primer on hypotheticals. Read it first. It tells you how to go about answering a hypothetical, with a particular focus on the techniques you need to write a thorough application of the rules. Most importantly, the primer teaches you how to answer a hypothetical in the way that should get you the most points.

Part 2 contains the practice chapters. Each begins with a brief discussion of rules on a particular topic. Without a clear set of rules, it is impossible to issue spot or to develop a robust and structured application. Thus, each chapter begins with a brief set of relevant rules. (Note, you may learn different or additional ones in class.) Next, each chapter organizes those rules into a short outline. The outline provides a structure that you can use (and memorize if it fits the rules taught in your class) so that you can organize an application into a nested IRAC structure.

Then the chapter presents a sample hypothetical question. The question will require the rules given to you at the beginning of the chapter (and no others). As you get to later chapters with multiple issues, the hypothetical may draw

on rules from earlier chapters as well. Once you have learned the rules, do the hypothetical. The earlier chapters, which present property rules, tell you the issue for each hypothetical, so there is no issue spotting. This is intentional to allow you to focus on the depth and breadth of your application. Later chapters require issue spotting, and Part 3 has some issue spotting practice.

It is best to do the hypothetical immediately after reading it. Reading it first gives the brain an opportunity to do background thinking in a way that is unrealistic to exam situations.

When you complete the hypothetical, use the rubric to score yourself. (There are directions in the primer, and they are simple.) Finally, you can compare your answer to the sample answer. This allows you to see how well you followed the model structure and to also see how an ideal answer addressed problems that you might have skipped. Throughout the book the samples grow in complexity to those that are closer and closer to exam length hypotheticals. Timing yourself is ideal, even if you do not set a limit, but rather just monitor your time to make sure that you are improving.

Finally, Part 3 of this book focuses on diagnosing errors and giving you strategies to fix your errors. You can refer to that chapter repeatedly as you do the practice hypotheticals.