

“ Explanatory synthesis ... improves the substance of legal writing by combining precedents and revealing the factors and policies that determine the outcome of these precedents. ”

Communicating Explanatory Synthesis

By Michael D. Murray

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The TREAT paradigm¹ and the doctrine of explanatory synthesis² are both organizational methodologies and substantive theories designed to improve the substance of legal writing. The TREAT paradigm doctrine holds that the presentation of legal discourse in a carefully constructed order not only promotes clarity and satisfies audience expectations but also maximizes the communicative potential and persuasiveness of the substance of the material. Explanatory synthesis (the “E” of TREAT) improves the substance of legal writing by combining precedents and revealing the factors and policies that determine the outcome of these precedents. Explanatory synthesis follows the path of inductive reasoning through exploration of the species of situations where a given legal rule has been applied to produce a concrete outcome (i.e., the cases), and derives the genera of principles of interpretation and application of the rule that can be presented in legal writing.

Explanatory synthesis is the most difficult concept I have to communicate to first-year, first-semester law students. This is how I do it:

¹ See Michael D. Murray and Christy H. DeSanctis, *Legal Research and Writing*, chapters 6 and 7 (2005). “The [TREAT] format is derived from the rule-based reasoning syllogism and it instructs you to introduce your Thesis on the issue in the form of a heading, provide the Rule or rules that address the issue, Explain each rule and instruct the reader about how the rules are to be interpreted and applied, Apply the rules to your client’s situation, and restate your Thesis as a conclusion.” p. 95.

² See *id.*, chapter 6.

Step One: The Reading

The assigned textbook³ provides the background and explains the theory and process of explanatory synthesis. Many examples of synthesized and unsynthesized material are provided.

Step Two: The Theory

In class, I go over the following chart to explain the theory behind explanatory synthesis.

Goals of the Explanation Section

The goal is to explain how the rule is to be interpreted and applied based on how the authorities have applied it in actual concrete factual settings, and on how commentators have interpreted the rule.

- You are going beyond what the courts have already said about the rule in interpretive rules found in cases.
- You are presenting principles of interpretation that are supported by a careful reading of the cases.
- You are doing the work of analyzing and synthesizing the cases so the reader doesn’t have to.

Case-by-case presentations make the reader do most of the work and they are wasteful of space and time (the reader’s attention span).

- Avoid them even though they are easy to write, and sometimes fun to write.
- Avoid them even though courts use them.
- The only time to resort to a case-by-case presentation is when you have one or two cases that are so close to the facts that you want to cover them in great detail; or if you want to distinguish one or two troublesome cases in enough detail to make your point.

³ *Id.*

Step Three: The Process

In explanatory synthesis, students are taking the relevant cases and discerning the factors, policies, or facts that make a difference in the outcome of the cases. Students are using inductive reasoning to find the genera (as many as are relevant to the analysis) of which individual cases are the species. From there, each genus is described and supported by citations to the cases that include parentheticals to explain why and how each species case supports the genus. The communication of the results of this process of inductive reasoning is much more helpful to the reader than a simple walking tour of the individual facts and circumstances of two or three cases. In most instances, students are going beyond the “interpretive rules” that are written in the cases themselves.⁴

In class, I next go over the following chart that summarizes the process of explanatory synthesis:

The Process of Explanatory Synthesis

Read cases and look for common facts and common outcomes.

- Group cases by facts.
- Divide groups of cases by outcome.

Review the groups to find the factors or public policies that make the difference in the outcome.

- Reconcile cases that have different outcomes; what policy or theme or factor determined the outcome in these cases.
- Reconcile cases that have the same outcome on different facts; what common policy or theme or factors brought about the same outcome on different facts.

Write principles of interpretation that explain your findings.

- Phrase your principles of interpretation in language that mimics interpretive rules.
- Often you can use interpretive rules as principles that tie together multiple authorities; there is no requirement that you always have to come up with brand new principles.

Cite the cases that support your principles of interpretation with parentheticals that provide facts or other information about each case.

- Parentheticals should contain enough information to illustrate how the individual case supports the general principle you have laid out.
- Use shorthands and abbreviated phrases to save space.

When you draft the Application section, apply the principles of interpretation to your own facts; as a general rule, do not apply individual cases to your facts.

- Applying principles to facts will make your analysis more convincing; you have spelled out the connections to be made between the authorities and then followed through and showed how the principles learned from a study of the authorities determines the outcome of the case at hand.
- The exception to this rule is when you have one or two fabulous cases that are worthy of individual attention in the Explanation section; these should be discussed individually in the Application section, whether as support or to distinguish them.

“In explanatory synthesis, students are taking the relevant cases and discerning the factors, policies, or facts that make a difference in the outcome. ...”

⁴ Interpretive rules are principles of law regarding the proper interpretation or application of a legal rule that are found in primary and secondary legal authorities. *See id.*, chapters 5 and 6. In contrast to the specific principles of interpretation and application that students are to derive through inductive reasoning from the cases (the records of specific situations where the legal rule was applied to produce a concrete outcome), interpretive rules simply are found and noted in the text of the legal authorities. The TREAT format contemplates that interpretive rules will be communicated in the rule section, not the explanation section. *Id.*, chapter 6.

Step Four: The In-Class Illustration

In class, I use the following illustration:

Unsynthesized Case-by-Case Approach

Humpty Dumpty ignored the conditions at hand and undertook an ill-advised course of conduct when he sat on a wall. His size and shape were not conducive to stable placement on a wall. Soon after, he had a great fall.

“I would estimate that it takes 60–70 minutes to get through the theory, the process, and the in-class illustration.”

Nothing could be done to remedy the situation.

In similar fashion, the *Foolish Milkmaid* did not concentrate on her task at hand when carrying a pitcher of milk on her head. She let her mind wander to all the things she would do with the money she would obtain when she sold the milk. One idea was to buy a ball gown and go dancing. When she twirled around in her reverie, she spilled the milk all over the ground. Nothing could be done to remedy the situation.

The *Foolish Dog* who had a splendid meaty bone was also prone to distraction from the task at hand. When he saw his reflection in the river, he mistook it for another dog with another fine bone, and he jumped at the reflection. In the process, he lost the splendid meaty bone he had and wound up with nothing.

The *Three Little Pigs* demonstrate the effects, pro and con, of ignoring the facts and circumstances of the task at hand. The first two pigs ignored the facts and circumstances and built dwelling structures that were not able to withstand common wolf invasion. The third pig, having properly assessed the situation and the task at hand, built a solid wolf-proof structure, and he was able to save his own skin and that of his brothers.

Lastly, the *Tortoise and the Hare* show how important it is to assess and follow through on a task, rather than to get distracted and to lose focus. The hare had tremendous advantages of speed, and by all accounts could have lapped the tortoise in any footrace, but the hare allowed his mind to wander and he stopped in the middle of the race for a nap. This allowed the tortoise, who stayed focused on the task at hand, to finish first in the race.

Synthesized Approach

Staying focused on the task at hand is critical to success. *Compare Humpty Dumpty* (failure to focus on requirements of task caused injury), and *Foolish Milkmaid* (same), and *Foolish Dog* (same), with *Three Little Pigs* (party who focused on the requirements of the task at hand succeeded, while parties who did not focus failed), and *Tortoise and Hare* (same).

Irreparable harm can come to a person who does not focus on a task. See *Humpty Dumpty* (government officials were powerless to repair damage); *Foolish Milkmaid* (spilt milk could not be recovered); *Foolish Dog* (bone dropped in river could not be recovered). Simply staying focused can change the odds greatly in favor of the party who applies the focus. See *Three Little Pigs* (one little pig's focused effort thwarted wolf who had routed two other little pigs); *Tortoise and Hare* (incredibly slow reptile was able to win footrace against vastly quicker mammal).

Step Five: Problems and Exercises

Steps one to four above generally take more than one class meeting to communicate. I would estimate that it takes 60–70 minutes to get through the theory, the process, and the in-class illustration. For the remainder of the time period of the second session on TREAT and explanatory synthesis I go over short exercises from the assigned problems and exercises book.⁵

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⁵ Michael D. Murray & Christy H. DeSanctis, *Legal Research and Writing Problems and Exercises*, chapter 6 (2005).