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Getting it Right by Writing it Wrong: Embracing Faulty Reasoning as a Teaching Tool

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In the early days of legal writing, we use exercises that have clear "right" answers. The rules are very simple and their meaning, even without looking at the cases, is usually clear. So, the "right" answer is often obvious. Indeed, it is intuitive.[1] Though these exercises give students a sense of accomplishment and allow them to track achievement and understand success and failure, in some ways, they reinforce a common problem in first-year law students: their inability to see beyond the surface of a legal rule.

To ensure the "right" answer, students must distill not only a general rule, but derive its meaning from the facts, holdings, and reasoning of precedent cases. They must use what's explicit as well as what's implicit in the cases. They must make reasonable inferences from the facts, and not disregard common sense or ignore practical implications and everyday realities. In other words, they must approach the assignment as a skilled practitioner.[2] Therefore, after the most preliminary assignments, when the meaning of the general rule is not easily discernable and the "right" answer is counterintuitive, students usually get the answer "wrong" because they neglect all but the most obvious analysis.

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* This article is based on our presentation at the Ninth Annual Rocky Mountain Legal Writing Conference in Tempe, Arizona in 2009 by the same title. We also co-presented on the same topic at the First Annual Empire State Legal Writing Conference at Hofstra University Maurice A. Deane School of Law in May 2010. The title of that presentation was *The Psychology of the Wrong Answer: Tapping into the Power of the "Aha!" Moment.*

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1. For example, the first legal writing problem we assign asks the students to analyze whether a tree house, which had a mattress and other bedding, but was used as a hangout by a 10-year-old boy and his friends, is a "dwelling" within the meaning of the New York second-degree burglary statute. We assign three short edited cases that clearly state that a structure is considered a dwelling only when it is usually occupied by a person lodging there at night, such as a permanent residence or fully operational home. People v. Quattlebaum, 698 N.E.2d 421, 422 (1998); People v. Santospago, 603 N.Y.S.2d 551, 552 (N.Y. App. Div. 1993); People v. Ryan, 644 N.Y.S.2d 118, 118 (N.Y. Sup. Ct. 1996). The leading case further states that the mere presence of a bed in which someone could sleep is insufficient to convert an otherwise non-residential building into a dwelling. *Quattlebaum*, 698 N.E.2d at 423. Given that the rule is explicit, and the application is so straightforward, reaching the correct answer is instinctive and almost effortless.

2. Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School Into Practice*, 29 STETSON L. REV. 1193, 1215 (2000).

THE CHALLENGE

With this background, the immediate challenge for legal writing professors is to teach new legal writers to read critically and engage in deep and thoughtful analysis of legal problems.[3] To do so, they must be trained to explore the meaning of general rules, appreciate the significance of relevant facts, recognize the role of judicial reasoning, and reach counterintuitive conclusions.[4]

Though legal writing professors might have individual styles when giving feedback on students' written legal analysis, for the most part, they all involve some degree of explaining why the students got it wrong.[5] In fact, we often ask students to re-work an assignment with the right answer in mind. In that case, students are forced to accept the right answer, even if unconvinced.[6] Not surprisingly, some students resist this approach. Telling students that they are wrong can lead to defensiveness, closed-mindedness, and resistance, among other things. These behavioral complications impede a positive learning environment, especially in the legal analysis and writing classroom.

THE RESPONSE

Given the downside of the traditional approach, we searched for a way to minimize the pain of being wrong and maximize the value of being right. Thus, we decided to experiment with letting the students hold on to the wrong answer when they re-work an assignment, allowing them to discover the right one on their own. The hope was that this flash of insight would become a real "a-ha!" moment, one which would allow the students not only to appreciate having been mistaken at first, but also to revel in the accomplishment of getting it right.

To that end, our approach focuses on the process over the conclusion and is specifically designed so that students can have that eureka moment. By letting students focus more on engaging in quality analysis rather than proving they are "right" in their initial conclusion, they retain the lessons taught and hone their critical reading and analytical skills.

Accordingly, we created an exercise that required the students to distill not only a general rule, but derive its meaning from the facts, holdings, and reasoning of precedent cases. It is an exercise that students, unless they go

3. Miriam E. Felsenburg & Laura P. Graham, *Beginning Legal Writers in Their Own Words: Why the First Weeks of Legal Writing Are So Tough and What We Can Do About It*, 16 LEGAL WRITING 223, 226 (2010).

4. *Id.* at 281 (showing that other legal writing professors work towards these goals).

5. Rowe, *supra* note 2, at 1210.

6. *Id.*

beyond the most glaring analysis, will get wrong. In actuality, many students get it wrong. But instead of reviewing the exercise with a focus on showing why they were wrong (and forcing them to accept our conclusion), we have them re-work the assignment holding onto the wrong answer until they are ready to let it go.

THE METHOD

We do this experiment early in the fall semester using a standard closed-universe problem that asks the students to predict the likelihood of success of their clients' claim.[7] The opinions are short and edited, but the fact pattern is quite detailed. The students must synthesize a rule from the cases and then write their analysis to an explicit question using a traditional CRAC format. The exercise itself involves the materially misleading element of a New York statutory consumer fraud claim.

An Explanation of the Facts

The clients, Susan and Patrick Renault, are the quintessential power-couple. Originally from the Midwest, they are a professional and affluent couple living in Manhattan in a Park Avenue white-glove co-op. They are parents to a three-year-old boy, named Dylan, and are very eager to enroll him at the Learning Center, a prestigious Manhattan nursery school which feeds the prestigious Manhattan private schools. The Learning Center favors students who are proficient in math, foreign language, and art history. From the facts, the students learn additional details, such as how Patrick is a managing director at a highly respected investment bank and Susan is a part-time PR executive and former concert pianist, now devoting more time at home raising Dylan. The students also learn that Susan had spent time with the children in Dylan's playgroup when she tried to teach piano to him and his friends. She was unsuccessful, as the children lacked the necessary focus and merely wanted to bang on the keys.

The Renaults had heard through word of mouth about a new tutoring service, which prepares students for interviews at the Learning Center. Motivated for their son to gain admittance, they reached out to the young owners, Margot DuBois and Daniella Matera—former *au pairs* who emigrated to the United States two years earlier from France and

7. Professor Pepper no longer teaches first-year legal writing students, but Professor Montana currently does and continues to use this exercise every fall semester without fail. This article describes our collective experiences teaching this exercise as an ungraded assignment for about ten years now. Over time, we have updated the facts as well as modified the cases and added new ones, both to adjust it to the evolving needs of students, and to ensure its relevancy. However, the core problem and assignment design have been unchanged. The method we describe in this article incorporates the changes we have made over the years, which have invariably improved the success of the exercise.

Switzerland—and invited them to give a presentation to the parents of the co-op's playgroup.

The presentation was well attended and DuBois and Matera, neither of whom were fluent in English, explained to the parents their background and experience. Though the Renaults did not ask any questions, other parents did, and DuBois and Matera responded to the questions honestly. In particular, DuBois volunteered that she had worked with gifted 10 and 11-year-olds for over a year. Matera informed the group that she had the equivalent of a B.A. in elementary education from the University of Bologna in Italy and had published an article about a famous Caravaggio painting. Other than the teaching required for graduation, however, she had no teaching background.

DuBois and Matera assured the parents that their experience as *au pairs* to children of all ages qualified them to train children for admission into the Learning Center. They further explained to the parents that over the course of twelve weeks, they could provide enough individual instruction in art appreciation, elementary mathematics, and either basic French or Italian for each child to pass the Learning Center's interview. Specifically, lessons would be scheduled once a week for four hours per session (at mutually convenient times) in the co-op's playroom. The amount of instruction would be evenly divided among the three subject areas. The fee for the program was $10,000.00 per student.

At the end of the presentation, the parents of ten children, including the Renaults, each entered into an individual agreement with DuBois and Matera for their service. Over the course of a twelve-week period, Dylan met with DuBois for four hours each week and received the instruction promised according to the agreement.

Shortly after the course ended, Dylan went for his interview at the Learning Center. He performed dreadfully. When a member of the admissions committee asked Dylan (in French) how old he was, Dylan answered (in French) that he had ten toes. When he was asked to pick out an abstract painting from the works of Monet, Matisse and Picasso, he selected the Matisse (not the Picasso). When he was told to add several fractions and reduce to the lowest common denominator, he broke into tears.

Ultimately, the Learning Center notified the Renaults that Dylan had not been accepted into the nursery school program. Susan contacted some of the other parents who also had used DuBois and Matera's service. None of the children who studied with DuBois and Matera made it into the Learning Center's nursery school program.

Understandably, the Renaults are upset and believe they were defrauded. They claim that DuBois and Matera deceived them in representing the service they would provide. They want to know whether they have a claim of consumer fraud against DuBois and Matera.

Thus, the specific question presented to the students is whether DuBois and Matera's representations to the Renaults were "materially misleading" under New York consumer fraud law.[8]

An Explanation of the Law

For the law, we assign two cases which conclude there was materially misleading conduct and three cases which conclude there was not.[9] All but one of the cases provided present a very straightforward general rule.[10] They present it in the same words; it is explicit and thus impossible to miss.[11] A materially misleading representation or omission is one that is "likely to mislead a reasonable consumer acting reasonably under the circumstances."[12]

The Classroom Experiment

After they have submitted a written analysis, in which 90% of them conclude the conduct was materially misleading under New York consumer fraud law, we spend a class "rewriting" the analysis.[13]

We begin by soliciting their conclusion. Our students answer (almost in unison), "yes!" That is, yes, the representations were materially misleading: the Renaults have been wronged and should be compensated.

To some extent, their answer is expected. Early in the first semester, students have not yet become proficient at separating emotional reaction from logical reaction. They know that the Renaults have not gotten the "benefit of

8. This is a statutory claim. Section 349 of New York General Business Law states that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" are unlawful. N.Y. Gen. Bus. Law § 349 (McKinney 2002). We give the students this statute. After reading the assigned cases, they quickly discover that to prevail on a consumer fraud claim under this statute a plaintiff must prove: (1) the conduct was consumer-oriented; (2) the conduct was materially misleading; and (3) the conduct resulted in injury to the plaintiff. Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 745 (1995). In an earlier assignment, the students first analyze whether DuBois and Matera's conduct was consumer-oriented using a subset of the same cases assigned for this exercise on the materially misleading element.

9. Stutman v. Chemical Bank, 731 N.E.2d 608, 611-12 (2000); Gaidon v. Guardian Life Ins. Co. of Am., 725 N.E.2d 598, 607 (1999); *Oswego*, 647 N.E.2d at 745; Gomez-Jimenez v. New York Law Sch., 956 N.Y.S.2d 54, 59 (N.Y. App. Div. 2012); Teller v. Hayes, Ltd., 630 N.Y.S.2d 769, 774 (N.Y. App. Div. 1995). The cases are edited for clarity, but we intentionally leave in discussions on the other two elements of the claim to force students to read critically for only that information pertinent to the materially misleading element.

10. *See Stutman*, 731 N.E.2d at 611-12; *Gaidon*, 725 N.E.2d at 604; *Oswego*, 647 N.E.2d at 744; *Gomez-Jimenez*, 956 N.Y.S.2d at 58; *Teller*, 630 N.Y.S.2d at 773. To make it simpler, we assign equal weight to the cases, despite their true precedential authority.

11. *Stutman*, 731 N.E.2d at 611-12; *Gaidon*, 725 N.E.2d at 604; *Oswego*, 647 N.E.2d at 744; *Gomez-Jimenez*, 956 N.Y.S.2d at 58.

12. *Stutman*, 731 N.E.2d at 611-12; *Gaidon*, 725 N.E.2d at 604; *Oswego*, 647 N.E.2d at 744; *Gomez-Jimenez*, 956 N.Y.S.2d at 58.

13. Although we provide written feedback on each student's submission, we do not return the papers until after the class.

the bargain," which is something to be redressed. So, they approach the assignment with the mindset that, of course, what DuBois and Matera did was materially misleading. The Renaults relied on their representations and it did not yield the promised result. They should, indeed must, be compensated for this injury.

Even after lifting the general rule from the cases—the conduct must be likely to mislead a *reasonable consumer* acting *reasonably* under the circumstances—most students maintain the view that DuBois and Matera's claim was materially misleading.[14] They reach this conclusion for two reasons. First, they continue to focus on the unfulfilled promise. Second, they concentrate on only the first half of the rule—the part that discusses the nature of the representation or omission. They fail to examine the second half of the rule, which evaluates the behavior of the consumer in the particular circumstances the consumer faced. To understand what this part of the rule means, they must develop it using the facts and reasoning in the cases. We do this with the students while accepting their conclusion that the representation was materially misleading. Thus, we walk through each of the assigned cases, first discussing what happened, then exploring the court's decision and reasoning for it. We create a chart of this information, with a goal of extracting rules from the cases that can be applied to determining the result of future like-problems.

A Deep Reading of the Cases

In the first case, the leading New York case on consumer fraud, *Oswego*[15], the New York Court of Appeals determined that an administrator of two major pension funds acted reasonably by accepting a bank manager's representation that the pension funds were opening interest-bearing accounts, when the accounts opened were, in fact, non-interest bearing.[16] The bank manager had not provided the administrator with the bank's account rules, which disclosed necessary information, but were in the bank's exclusive possession.[17] Without access to the rules, the administrator had no way of

14. *Stutman*, 731 N.E.2d at 611-12; *Gaidon*, 725 N.E.2d at 604; *Oswego*, 647 N.E.2d at 744; *Gomez-Jimenez*, 956 N.Y.S.2d at 58.

15. As mentioned earlier, we edit the decisions. For *Oswego*, we modified the facts and, as a result, changed the disposition of the case. In the original decision, the court denied the bank's motion for summary judgment because the parties disputed whether the bank provided the pension funds with the relevant bank rules. *See generally Oswego*, 647 N.E.2d at 744. In our edited version, there is no dispute that the bank failed to provide these rules to the pension funds.

16. *See generally id.* at 743-45.

17. Most students do not read the court's reasoning closely and therefore omit the key fact that the bank *alone* had the relevant information. *Id.* at 743. The court explains how "the statute surely does not require businesses to ascertain consumers' individual needs and guarantee that each consumer has all relevant information specific to its situation." *Id.* at 745. "The scenario is quite different, however, where the business *alone* possesses material information that is relevant to the consumer and fails to provide this

knowing the representation was false.[18] Thus, the bank's conduct was materially misleading.[19]

We get a consensus from the class that this is what happened in the case. After we pull out all the relevant circumstances, we blow them up into a broader rule, one that we would be able to apply to a new set of circumstances. In other words, we craft a rule that will be a tool for solving a future problem. In the end, we decide on the following rule from *Oswego*:

> When a seller has exclusive possession of information needed to understand the transaction, but fails to disclose it, the consumer acts reasonably in believing the representations the seller makes. Under those circumstances, the false representations are likely to mislead that consumer.[20]

The second case, *Gaidon*, involves an ordinary couple who had been the target of a slick marketing presentation, full of charts and calculations, which predicted a rosy future that they would have to pay premiums for only eight years for their life insurance coverage.[21] The court held it was reasonable for the policyholders to accept the insurance company's unrealistic projections about "vanishing premiums."[22] The company's salesman falsely promised that over the course of eight years, the company's dividend would increase sufficiently to cover all remaining monthly premiums—thus, they would vanish.[23] The sales presentation centered on a series of complex calculations, which were too difficult for the policyholders of average understanding to break down.[24] Of course, the eight years pass, and the premiums are in no

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information." *Id.* (emphasis added). Without this key fact, the students believe that materially misleading conduct occurs simply when a seller has relevant information but does not disclose it. With this misguided understanding, they typically develop a rule that is way too broad.

18. *See generally Oswego*, 647 N.E.2d at 745.

19. *See generally id.*

20. *See generally id.* at 744-45.

21. *Gaidon*, 725 N.E.2d at 600.

22. *Id.* at 602, 604.

23. *Id.* at 601, 605.

24. The students get easily distracted by the court's explanation as to how the insurance company made the vanishing premiums the "centerpiece" of their sales presentations with the "very goal" of trying to "convince" consumers the premiums would vanish as promised. *Id.* at 604-05 ("Defendants made vanishing dates the centerpiece of their sales presentations." "The very goal of the marketing scheme was to convince prospective purchasers that the vanishing date would in fact conform to the individualized projections."). This explanation is exactly what they think DuBois and Matera did. They made passing the interview the focal point of their presentation to the parents with the clear intention of convincing parents to elect their services. Yet, this reading of the case is incomplete. Logically, it cannot be right either, as it would make all marketing presentations subject a materially misleading charge. The rule cannot be that broad. When the students are pointed to the court's reasoning about the sophistication of the consumers, it becomes clearer that the court had to be concerned about the complexity of the agreement too. *Id.* ("Consumers vary in their level of sophistication and their ability to perceive the connection

danger of vanishing.[25] There, too, the court held that the conduct was materially misleading.[26]

The students agree that this is what happened and again we develop it into a meaningful rule that will be useful to a new set of facts. We decide on the following:

> When promises are presented in a highly complicated or complex way that is too difficult for an ordinary consumer to understand, the consumer acts reasonably in believing unrealistic or overly optimistic projections. Under those circumstances, the false representations are likely to mislead the consumer.[27]

Then we get to *Gomez-Jimenez*, the first of the cases in which the conduct was not materially misleading.[28] In that case, the court held that a group of law students who sued New York Law School (NYLS) for reporting inflated employment and salary statistics concerning its recent graduates were not acting reasonably under the circumstances in relying on those statistics to decide on their legal education.[29] Even though the law school did not break down the numbers, publicly available sources, like NALP and US News Rankings, could have helped the students figure out the data.[30] Those sources, together with the well-established realities of legal employment, clearly revealed the inflated nature of the law school's representation.[31] Therefore, the court concluded that the law students, a sophisticated subset of education consumers, were not acting like reasonable consumers acting reasonably under the circumstances.[32]

The students, having just completed the law school admission cycle themselves, seem to relate to the facts of this case. They easily see the rule.[33]

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between a fluctuation in dividend/interest rates and a vanishing date, or to make the necessary arithmetic adjustments.").

25. *Gaidon*, 725 N.E.2d at 601.

26. *Id.* at 604.

27. *See generally id.* at 603-04.

28. Gomez-Jimenez v. New York Law Sch., 943 N.Y.S.2d 834, 856 (N.Y. Sup. Ct. 2012).

29. *Id.* at 846-47.

30. *Id.* at 839.

31. *Id.* at 843-44.

32. *Id.* at 843.

33. This case is the easiest for the students to understand, in part because they can relate to the experience as law school consumers themselves and also because the court's language is quite explicit:

> In researching law school options, it also should have come as no surprise to these law school consumers that the most lucrative law jobs often are associated with having attended a high ranking law school. Indeed, plaintiffs also characterize in their complaint NYLS's "lackluster ranking and reputation" and even quote one NYLS professor as acknowledging that "[a]t a law school like [NYLS], which is toward the bottom of the pecking order, it's long been difficult for [NYLS] students to find high-paying jobs." These statements constitute further

Because the law students had recourse to information, and common sense militated against blindly believing the numbers, they did not act reasonably in relying exclusively on the law school statistics.[34] They instead should have educated themselves about the likelihood of obtaining legal employment after graduating from the school.[35] Accordingly, as a class, we agree on the following rule:

> When a consumer, especially a sophisticated one, has available to him or her a number of public sources of information to review and evaluate before making a decision, that consumer does not act reasonably when he or she blindly relies on an inflated or unrealistic representation without any research or consideration of the well-established realities surrounding that decision.[36]

Next, we discuss *Teller*, another case in which the conduct was not materially misleading, and one that builds nicely on the idea that a consumer bears some burden to investigate.[37] In that case, a wealthy homeowner ran across a contractor working on someone's house.[38] It so happens she was walking her dog at the time, which leaves a big impression on the students.[39] She had a long drawn out conversation with him, they came to terms about the cost of renovations to her home, and she hired him.[40] The costs went over

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> documentary evidence that a reasonable consumer who is seriously considering NYLS is more likely to appreciate the nexus between higher law school rankings and commensurate employment and earning expectations. It is also difficult for the court to conceive that somehow lost on these plaintiffs is the fact that a goodly number of law school graduates toil (perhaps part-time) in drudgery or have less than hugely successful careers. NYLS applicants, as reasonable consumers of a legal education, ***would have to be wearing blinders not to be aware of these well-established facts of life in the world of legal employment***. *Gomez-Jimenez*, 943 N.Y.S.2d at 845 (emphasis added) (internal citations omitted).
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> In sum, reasonable consumers would have considered and compared the NYLS statements on employment and compensation along with other decision factors[,] such as other sources of data cited in the complaint, career preference cited in the complaint, i.e. obtaining a law degree for purposes other than practice of law, available financial resources, and economic circumstances in the law business cited in the complaint, all of which would have had to play an important part in reasonable consumers' investigation when deciding whether to commit to attend NYLS and to complete their legal education there. *Id.* at 846-47

We remind students that they must retain what they learned from earlier cases and not disregard it when reading the others. This case helps students further understand why the pension funds and insurance policy holders were acting like reasonable consumers under the circumstances in *Oswego* and *Gaidon*, respectively.

34. *Id.* at 846, 851.
35. *Id.* at 846.
36. *Id.* at 846-47.
37. *Teller*, 630 N.Y.S.2d at 774.
38. *Id.* at 771.
39. *Id.*
40. *Id.*

by about $1,000,000, but the court took little sympathy on her.[41] The court found that as a sophisticated consumer, she bore some responsibility to educate herself about the details of the transaction and the likelihood that the promises were realistic.[42] Because she made no effort to investigate the accuracy of the contractor's representations about the cost of renovations, she did not act reasonably under the circumstances.[43] As a result, the contractor's conduct was not materially misleading.[44]

We describe the case this way to the students, and again, we take the holding and reasoning from the case and craft it into a more useful rule.[45] Here is the final rule:

> Consumers, especially sophisticated ones, have an obligation to educate themselves about the accuracy of representations when the information is not in the exclusive control of the seller. Making no effort to investigate whether the seller's promise is realistic is not reasonable. Under those circumstances, the representations are not likely to mislead the consumer.[46]

Finally, in the last case, *Stutman*, a couple sought to repay their mortgage loan early, but they needed to transfer collateral from another bank to do so.[47] The bank charged them a fee to arrange the transfer and the couple sued claiming that the bank had promised not to charge them a "prepayment fee."[48] The court held that the couple's assumption that the bank's promise not to charge a "prepayment fee" in the event that they repaid their mortgage early meant that the bank would not charge any additional fee in connection with repaying their loan was "inherently unrealistic".[49] Hence, the couple had not

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41. *Id.*

42. *Teller*, 630 N.Y.S.2d at 775. The *Teller* decision is not as well-organized as the other decisions. There are points in the decision where the court seems to blend its discussion of the consumer-oriented and materially misleading elements. *Id.* at 774. Therefore, it is tricky for students to tease out the correct reasoning. That is why we stress the importance of reading cases with the general rule in mind. Reading the decision with the precise purpose in mind—to learn why the homeowner was not acting like a reasonable consumer under the circumstances—makes it easier to find the relevant reasoning. *Id.* at 775. It almost jumps off the page in fact. The court emphasized: "[T]he plaintiff bears some burden to educate herself before signing a contract to pay several hundred thousand dollars. Given the size of this contract, the plaintiff should have taken at least some steps to safeguard her own rights." *Id.*

43. *Id.* at 775.

44. *Teller*, 630 N.Y.S.2d at 775.

45. *See* discussion *supra* The Challenge.

46. *Teller*, 630 N.Y.S.2d at 775.

47. *Stutman*, 731 N.E.2d at 610.

48. *Id.*

49. *Id.* at 613. We added this explicit rationale to the decision: Plaintiffs' expectations that no prepayment penalty meant no fees whatsoever if they repaid their mortgage early were ***inherently unrealistic***. But, even so, the students have a really hard time making sense of *Stutman*. Some students will ignore the case entirely, believing it was included in error. That is because its application is not obvious if students are focused on the first half of the rule—the representation or omission. *Id.* at 611-12.

acted reasonably under the circumstances in believing that the bank would perform, at no charge, a special service the borrowers needed to repay the loan early.[50] Accordingly, the bank's conduct was not materially misleading.[51]

Our discussion with the students focuses mostly on the common-sense aspect of the *Stutman* case, in part because the students marginalize the value of common sense at this point and also because applying common sense to the Renaults' situation is essential.[52] It was absurd for the couple to think that "no prepayment fee" meant "no fees whatsoever," especially when the bank performed a service for them.[53] Thus, the rule we distill from *Stutman* is as follows:

> When consumers expect a result that defies common sense, they do not act reasonably.[54] Under those circumstances, the seller's representation is not likely to mislead them.[55]

After we discuss and chart all the cases and settle on the correct rule from each of them, we move to synthesize them into one cohesive rule.[56] Here is the final synthesized rule[57]:

> A "materially misleading" representation or omission is one that is likely to mislead a reasonable consumer acting reasonably under the circumstances.[58]
>
> A consumer acts reasonably under the circumstances when he or she accepts false representations made by a seller who has concealed information necessary to an informed decision, to which the consumer has no independent access.[59] Moreover, a consumer acts reasonably when he or she accepts unrealistic representations that

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It is only when they shift their attention to the second half of the rule, which evaluates the behavior of the consumer, that they pick up the most relevant language underscoring just how ridiculous the borrowers' belief was. *Id.* at 613.

50. *Stutman*, 731 N.E.2d at 613.
51. *Id.*
52. *Id.*
53. *Id.* at 610, 613.
54. *Id.* at 613.
55. *Stutman*, 731 N.E.2d at 613.
56. *See* discussion *supra* A Deep Reading of the Cases.
57. We do not complete proper citations in these models; at this point in the semester we want the students to focus on the substantive, not technical, aspects of rule synthesis.
58. *Gaidon*, 725 N.E.2d at 604; *Oswego*, 647 N.E.2d at 745.
59. *Oswego*, 647 N.E.2d at 745.

> involve complicated calculations an ordinary consumer would not necessarily understand.[60]
>
> On the other hand, a consumer acts unreasonably when he or she can, but does not, investigate the details of a transaction or the accuracy of the representation.[61] Likewise, a consumer who expects an "inherently unrealistic" result does not act reasonably under the circumstances.[62]

Stepping Outside of the Cases

With this explanation, we have given the necessary meaning to the general rule. Yet, even though the students agree to the synthesized rule, for many, it is still unclear how we got there. To do a deep reading of the cases, we need to go outside of the problem. This is why, at this stage, we pose questions to the students that ask them to think of the parties as real people. For example, we might ask the students at which restaurant would the Gaidons (the ordinary couple who purchased life insurance policies) be most comfortable: Chuck E. Cheese's, Hooters, Olive Garden, or Daniel?[63] Or we show the following images of two living rooms and ask which living room the Gaidons would be more likely to have:

60. *Gaidon*, 725 N.E.2d at 612.
61. *Gomez-Jimenez*, 943 N.Y.S.2d at 846; *Teller*, 630 N.Y.S.2d at 775.
62. *Gomez-Jimenez*, 943 N.Y.S.2d at 851; *Stutman*, 731 N.E.2d at 613.
63. *About Daniel*, RESTAURANT DANIEL, https://www.danielnyc.com/about (last visited Mar. 3, 2020) (An exclusive and legendary fine dining restaurant in Manhattan).

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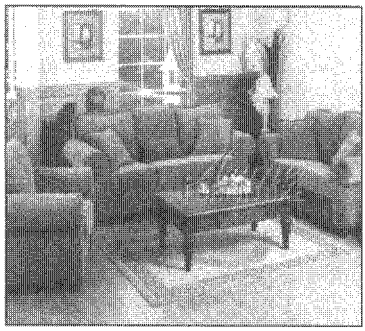

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The students correctly select Olive Garden and the more relaxed living room on the left. They do so (and quickly) because the answer to these questions is implicit from the cases.[66] In other words, the students would not have been able to answer them correctly without having read and understood the cases.[67] This teaches students that they need to make explicit in the rule what is implicit in the cases.[68] This type of break from the four corners of the cases also has the added benefit of converting the last few holdouts into believers of the new synthesized rule.[69]

Organizing the Cases

Stepping outside of the cases also helps us organize them. Students can now appreciate that consumer sophistication is an aspect of the rule, as is consumer expectation, investigation, and control of material information.[70] We further our understanding of the cases by organizing them around these four central concepts: (1) consumer sophistication/complexity of the representation; (2) consumer expectation in light of common sense; (3) consumer investigation; and (4) control of relevant information.[71] Therefore, together we chart the aspects of the cases that the courts focused on. Only

64. *The Contemporary Couch Design Studio*, HOUZZ, https://www.houzz.com/professionals/interior-designers-and-decorators/the-contemporary-couch-design-studio-pfvwus-pf~59063510 (last visited Mar. 2, 2020).

65. Caroline Patterson, *Chenille Living Room Furniture*, FOTER, https://foter.com/chinelle-living-room-furniture (last visited Mar. 2, 2020).

66. *See supra* Introduction.

67. *See supra* Introduction.

68. *See supra* Introduction.

69. *See supra* A Deep Reading of the Cases.

70. *See supra* A Deep Reading of the Cases.

71. *See supra* A Deep Reading of the Cases.

after completing this chart do we begin to focus on whether the facts of our case will satisfy the rule:

Case	**Consumer Sophistication** **Complexity of Presentation**	**Consumer Expectation in Light of Common Sense**	**Consumer Investigation**	**Control of Relevant Information**
Oswego[72]	Average; information concealed	N/A	None possible	Bank's sole possession
Gaidon[73]	Average; very complex	N/A	None possible	Company's sole possession
Gomez-Jimenez[74]	High; straightforward	Unrealistic	None undertaken; much available	Equal access
Teller[75]	High; straightforward	N/A	None undertaken	Equal access
Stutman[76]	Average; straightforward	Unrealistic	None undertaken	Equal access

Applying the Rule to the Renaults' Case

At this point, many of our students have more "a-ha!" moments. Before even examining our case, they quickly see that our clients share more elements in common with the parties in *Gomez-Jimenez*, *Teller*, and *Stutman* than the other two cases.[77] For those who are unconvinced, we pause for

72. *Oswego*, 647 N.E.2d at 745.
73. *Gaidon*, 725 N.E.2d at 612.
74. *Gomez-Jimenez*, 943 N.Y.S.2d at 846.
75. *Teller*, 630 N.Y.S.2d at 775.
76. *Stutman*, 731 N.E.2d at 613.
77. *Gomez- Jimenez*, 943 N.Y.S.2d at 838; *Stutman*, 731 N.E.2d at 610; *Teller*, 630 N.Y.S.2d at 771. *See also supra* An Explanation of the Facts.

another "outside" the problem illustration. This time the goal is to give the students a better view of who the Renaults are. So, we ask the same question from earlier, but now applied to the Renaults.[78] At which restaurant would the Renaults likely celebrate their anniversary: Chuck E. Cheese's, Hooters, Olive Garden, or Daniel?[79] And which car would Patrick Renault be more likely to drive?

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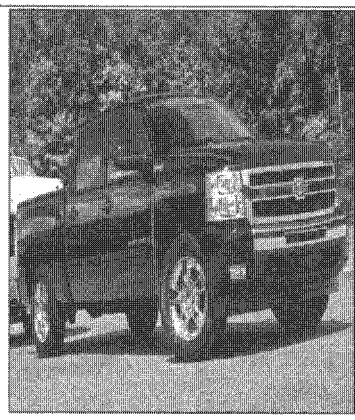

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From these illustrations, it becomes clear that the Renaults are sophisticated individuals, likely to dine at Daniel, not Olive Garden, and drive a BMW, not a Chevy Silverado.[82] This insight allows us to jump even deeper into our case. Therefore, the next step in the exercise is to chart[83] our case:

78. *See supra* Stepping Outside of the Cases.
79. *See supra* Stepping Outside of the Cases.
80. Marcus, *BMW M5*, BMWCOOP (Sept. 2, 2011), www.bmwcoop.com/2011/09/02/bmw-m5/.
81. Brad Berman, *Chevrolet Silverado Hybrid – Towing Boat*, HYBRIDCARS (Mar. 16, 2009), https://www.hybridcars.com/chevrolet-silverado-hybrid-towing-boat-html/.
82. *See supra* An Explanation of the Facts.
83. *See supra* An Explanation of the Facts.

Renaults' Sophistication	**Dylan's Abilities**	**DuBois & Matera's Capabilities**	**Promises re Instruction**	**Information re Interview** (who controlled it)
Educated Finance-savvy Successful Rich Unfamiliar with NY Preschool market Susan attempted to teach piano lesson to playgroup, but stopped because children wanted to bang on keys	3 years old Collapsed under pressure English-speaking Probably an average learner	Tutored other kids Foreigners Former nannies Not fluent in English Experience with gifted children (for 1 year) or elementary education (equivalent) and art background (but no teaching other than what was needed to graduate)	48 hours of instruction (16 hours per subject) Difficult subjects Simple calculation to break down terms	Information was not in sole possession of DuBois & Matera Renaults did not take extra steps to find out how interview would be conducted Renaults did not fully investigate DuBois & Matera (asked no questions, though other parents did)

These categories are subsets of the four categories used to organize the cases.[84] They are tailored to capture all the facts of our problem, while still using the factors the courts focus on.[85] By charting the specific pieces of information given about the Renaults' sophistication level—including their own education and business savvy, knowledge of their child, investigation into the Learning Center interview method—Dylan's learning ability, DuBois and Matera's teaching capabilities, the details of what exactly was being offered, and who controlled the relevant information, we get a complete

84. *See supra* Organizing the Cases.
85. *See supra* Applying the Rule to the Renaults' Case.

picture of what happened.[86] Once we have that, we can easily apply the rule about whether the Renaults acted reasonably under the circumstances.[87]

At this point, nearly every student grasps that all the hallmarks of acting unreasonably under the circumstances are present, while almost none of the characteristics of acting reasonably exist.[88] But those who don't see it yet do at the next step when we apply the rule and reason by analogy to the facts of the precedent cases.[89]

Writing It Wrong

This is where we purposefully *write it wrong.* We start with an application of the rule that concludes that the Renaults acted reasonably. For example:

> Because the Renaults acted reasonably in believing, without investigating, the promise that a total of 48 hours of instruction in mathematics, art, and foreign language would be sufficient for their typical toddler to pass the competitive Learning Center interview, DuBois and Matera's representation was "materially misleading" under New York consumer fraud law.[90]

Of course, at this stage, there has been a turnaround and virtually no students agree with this application. But we do not stop the exercise there. We give the students about ten minutes to write up analogies between the Renaults' circumstances and those in *Oswego* and *Gaidon*, the analogous cases to the wrong conclusion. After about two minutes, however, we notice a lot of looking around the room. Occasionally, someone even remarks: "there's nothing to say!"

Working off the charted cases and the Renaults' case, we let them prove that point to themselves. Starting with the critical fact from *Oswego*, sole possession of the relevant information, we try to compare it to the Renaults' case.[91] We plumb the depths of what we know about the circumstances—incorporating as many of the facts as possible.[92] Here is the best analogy we can write:

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86. *See supra* Applying the Rule to the Renaults' Case.
87. *See supra* A Deep Reading of the Cases.
88. *See supra* An Explanation of the Facts.
89. *See supra* The Challenge.
90. *See supra* An Explanation of the Facts.
91. *Oswego*, 647 N.E.2d at 745.
92. *See supra* The Response.

> As did the bank in *Oswego*, DuBois and Matera had exclusive possession of information which they concealed from the Renaults.[93] The Renaults had no way to access any details about what the tutors would teach, how a typical three-year-old would respond to the instruction, what the interview would involve, or the specifics of the interview questions—all of which were critical to an informed decision.[94]

Moving to the critical fact from *Gaidon*, the complexity of the transaction, we push the students to emphasize exactly how similar the situation here is:

> Here, as in *Gaidon*, the details of the transaction were too complicated for people like the Renaults to deconstruct and understand.[95] This was far more than simply calculating the number of hours that their child would receive instruction.[96] They were incapable of knowing how their child processed information.[97] They had no experience with his learning processes.[98] They had never taught him anything before—they were not teachers, after all.[99]

These comparisons are not easy to make and many of the statements are unsupportable or plainly ridiculous. The students begin to feel uneasy about writing disingenuous comparisons. But, in the end, the students are enlightened—they internalize the importance of applying a rule appropriately and engaging in a credible and meaningful reasoning by analogy.

When we move to the "dissimilar" cases and try to distinguish them, any last holdovers give in. The critical fact in *Gomez-Jimenez,* blindly accepting the representation without checking it against publicly available and easily accessible sources, is so clearly present in the Renaults' case.[100] Further, the reasoning from *Teller*, that a consumer bears some burden to educate herself on the details on the transaction, squarely applies to the Renaults.[101] Finally, the most compelling part of *Stutman*, an inherently unrealistic expectation that a bank would provide an extra service to mortgage borrowers at no charge, is easily compared to the inherently unrealistic expectation that so

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93. *Oswego*, 647 N.E.2d at 745; *see also supra* An Explanation of the Facts.
94. *See supra* An Explanation of the Facts.
95. *Gaidon*, 725 N.E.2d at 612; *see also supra* An Explanation of the Facts.
96. *See supra* An Explanation of the Facts.
97. *See supra* An Explanation of the Facts.
98. *See supra* An Explanation of the Facts.
99. *See supra* An Explanation of the Facts.
100. *Gomez-Jimenez*, 943 N.Y.S.2d at 844; *see also supra* An Explanation of the Facts.
101. *Teller*, 630 N.Y.S.2d at 775; *see also supra* An Explanation of the Facts.

few hours of tutoring by tutors not fluent in English would be sufficient for an average child to grasp challenging subjects in a four-hour block.[102]

Nonetheless, we force the students to see if they can write the distinguishing case comparisons to support the "wrong" answer.[103] By this point, students really struggle to develop the factual support. Therefore, we oftentimes need to give the students prompts to guide the writing. A sample case comparison to the "distinguishable cases" when writing it wrong reads as follows:

> Unlike in *Gomez-Jimenez*, where the law students were sophisticated consumers who had countless publicly available sources to evaluate and review, the Renaults, though affluent, were not sophisticated consumers.[104] They were not natives of New York and were completely unfamiliar with the preschool market there.[105] Further, there were no sources available for them to check the accuracy of DuBois and Matera's assurances, particularly because the tutoring service was a new business.[106]
>
> Moreover, in contrast to *Teller*, where the homeowner neglected her responsibility to investigate the representations of the contractor, the Renaults did try to learn more about DuBois and Matera, the particulars of the interview process, what exactly DuBois and Matera would teach, and how their child would absorb the information.[107] Indeed, they invited DuBois and Matera to give a presentation and attentively listened to their responses to all questions.[108]
>
> Nor did the Renaults' expectations defy common sense.[109] Unlike the *Stutman* borrowers' absurd expectation that the bank would provide them with an additional service free of charge, the Renaults' belief that sixteen hours per subject would be sufficient for an average three-year-old to learn math, art and a foreign language was reasonable.[110] Similarly realistic was their assumption that three-

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102. *Stutman*, 731 N.E.2d at 613; *see also supra* An Explanation of the Facts.

103. This part of the exercise is helpful in showing students the best "wrong" answer. Invariably, there are students who want to know whether they can excel even if they get the "wrong" answer. This sample illustrates how the best "wrong" answer might distill an accurate rule but ultimately misapply it by either omitting relevant facts or not apportioning the correct weight to those facts.

104. *Gomez-Jimenez*, 943 N.Y.S.2d at 843; *see also supra* An Explanation of the Facts.

105. *See supra* An Explanation of the Facts.

106. *See supra* An Explanation of the Facts.

107. *Teller*, 630 N.Y.S.2d at 775; *see also supra* An Explanation of the Facts

108. *See supra* An Explanation of the Facts.

109. *See supra* An Explanation of the Facts.

110. *Stutman*, 731 N.E.2d at 613; *see also supra* An Explanation of the Facts.

> year-olds are able to concentrate for four hours at a time, and can retain what they have learned in a single weekly lesson.[111]
>
> In fact, elementary math, art appreciation, and French are not unusually difficult subjects.[112] Nor is it necessary for those who instruct toddlers to speak fluently the language those toddlers understand.[113] Math is a universal language and one of the subjects that DuBois teaches is her native tongue.[114] Moreover, it was not unrealistic to believe that former nannies, one of whom had worked with gifted preteens, and the other who had published an article on an Italian painting, would have the experience necessary to provide instruction to their three-year-old.[115]
>
> Finally, unlike the borrowers in *Stutman*, the Renaults were well within reason in expecting that knowledge of these subjects is enough to get through the interview.[116] As long as a child understands the material, no emotional component or stress could complicate the interview process for a place in a competitive program.[117]

"Distinguishing" from *Stutman* is a compelling way to conclude the case comparisons because there are so many aspects of the Renaults' beliefs that were unrealistic, including, for example, the fact that the tutors did not speak the language Dylan spoke fluently, the fact that they had worked only with gifted preteens, and the fact that the Renaults did not consider the emotional state of a typical three-year-old in getting through a tough interview.[118]

It rarely takes the entire lesson for students to get the point. Nevertheless, we finish the lesson allowing the students a heavy hand. We want them to see just how obvious the "right" answer is. In fact, many of them enjoy writing the rest of the analysis "wrong"—tongue in cheek, as if they had seen it all along. It is a true sense of accomplishment when students realize the "right" answer on their own. It is a rare epiphany in the classroom.

CONCLUSION

The process of writing it wrong to get it right is one of the most transformative learning experiences for our law students in the first year of

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111. *See supra* An Explanation of the Facts.
112. *See supra* An Explanation of the Facts.
113. *See supra* An Explanation of the Facts.
114. *See supra* An Explanation of the Facts.
115. *See supra* An Explanation of the Facts.
116. *Stutman*, 731 N.E.2d at 613; *see also supra* An Explanation of the Facts.
117. *See supra* An Explanation of the Facts.
118. *See supra* An Explanation of the Facts.

legal analysis and writing.[119] In one exercise, they learn to engage in a thoughtful and deep analysis of a legal problem, moving beyond a superficial understanding of a general rule.[120] They appreciate the significance of relevant facts and learn to consider all the pertinent facts, without over-relying on some to the exclusion of others, appropriately balancing their weight according to the demands of the rule.[121] They recognize the role of judicial reasoning and its significance in defining the boundaries of the rule.[122] Finally, they embrace reaching counterintuitive conclusions and using their practical experience and common sense as a guide.[123]

But, most important of all, they remember and internalize the countless lessons learned because they fully experienced them through the writing of the wrong answer.[124] They, in turn, effectively and proudly apply them on their future assignments. They do not want to get it "wrong" again and, even if they are uncertain about an answer, they take comfort in knowing that they can write it "wrong" to eventually get it "right."

119. *See supra* The Response.
120. *See supra* The Response.
121. *See supra* Applying the Rule to the Renaults' Case.
122. *See supra* The Challenge.
123. *See supra* Stepping Outside of the Cases.
124. *See supra* Writing it Wrong.