

PROCEEDINGS

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PROCEEDINGS

VOLUME 3

ISSUE 1

The essays in this issue are based on presentations the authors made at regional legal writing conferences that took place in 2022. The Rocky Mountain Legal Writing Conference was held in March 2022 at the Arizona State University Sandra Day O'Connor College of Law. The Western States Legal Writing Conference took place in October 2022 at the University of Oregon School of Law.

This issue marks the departure of Barbi Goosens, who served as Managing Editor of Proceedings from its founding and whose creativity and dedication contributed greatly to its success.

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RETHINKING GRADING IN LEGAL WRITING EDUCATION

EUGENE KIM¹

Grading is widely accepted as a fundamental requirement of the teaching and learning process in law school and in higher education more generally. It is assumed that grading is necessary for motivating students; assessing their learning; and ensuring a meritocratic system in which everyone is evaluated objectively.

But what if none of those assumptions is actually true?

A significant body of research suggests that grading students hurts motivation for learning, diminishes interest in the subject being studied, and obfuscates meaningful feedback. The research additionally suggests that, far from providing fair assessment for all students, grading actually undermines the equity we seek. So why do we do it?

Here, I briefly address three primary justifications for grading: (1) it is necessary for motivating students; (2) it provides meaningful feedback to aid student learning; and (3) it is necessary to sort and rank students according to their levels of competency. I then conclude by challenging the notion that legal writing professors should be engaged in grading at all.

Motivation

Generally speaking, motivation is either intrinsic or extrinsic. Intrinsic motivation “refers to doing something because it is inherently interesting or enjoyable,” whereas extrinsic motivation

¹ Eugene Kim is a Professor at the University of San Francisco School of Law. This essay memorializes his presentation at the Western Regional Legal Writing Conference held in October 2022 at the University of Oregon School of Law.

“refers to doing something because it leads to a separable outcome.”² In the teaching and learning context, grades (and the privileges a good grade affords) are separable from any inherent value of the subject matter being learned. Grades are therefore extrinsic motivators.

Though it is often assumed that grades enhance academic motivation, research shows that grades and other extrinsic rewards actually have a substantial undermining effect on academic motivation.³

The first way that extrinsic motivation undermines academic motivation is by *affecting the types of challenges and tasks that students seek out*. Like many other teachers, I encourage my students to challenge themselves—to explore novel approaches and try new techniques, even before they feel confident in their ability to do so. I encourage this because I know that whether the students succeed or fail in their attempts, they will gain valuable experience in how (and how not) to handle new challenges.

But grading creates a barrier to this learning experience. Research shows that, while intrinsically motivated students prefer tasks that are moderately challenging,⁴ extrinsically motivated students tend to avoid challenging activities and courses⁵ and instead prefer easier tasks.⁶ These preferences are actually quite reasonable. After all, if the goal is to obtain an extrinsic reward like money, a grade, or recognition, then the rational approach is to find the lowest-risk path to that reward. Forget about learning through

² Richard M. Ryan & Edward L. Deci, *Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions*, 25 *Contemp. Educ. Psych.* 54, 55 (2000).

³ Edward L. Deci et al., *Extrinsic Rewards and Intrinsic Motivation in Education: Reconsidered Once Again*, 71 *Rev. Educ. Rsch.* 1, 15 (2001).

⁴ Mark R. Lepper, *Motivational Considerations in the Study of Instruction*, 5 *Cognition & Instruction* 289, 298 (1988).

⁵ Kelsey Chamberlin et al., *The Impact of Grades on Student Motivation*, *Active Learning Higher Educ.* (OnlineFirst), Dec. 25, 2018, at 1, 11.

⁶ Lepper, *supra* note 4, at 298.

mistakes and challenges; extrinsic motivation encourages students to avoid failure by avoiding challenges in the first place.

The second way that extrinsic motivation undermines academic motivation is by *affecting the way that students approach the tasks they engage in*. “[S]tudents who were offered a tangible reward for their successful solution of a classic concept-formation problem displayed less efficient, less logical, and less effective techniques for seeking information about the nature of the underlying concept.”⁷ This research suggests that extrinsically motivated students presented with complex intellectual tasks tend to put in the minimum amount of effort required to get the greatest reward. In contrast, intrinsically motivated students use more effortful but deeper, more effective, more efficient, and more logical strategies than their extrinsically motivated counterparts.⁸

Here again, the students’ behavior makes sense: if the goal is simply to obtain an extrinsic reward, taking the easiest path to that reward is rational. But novices often don’t know what the minimum amount of required effort actually is. So, in their attempt to find the easiest path to their desired reward, they are just as likely to choose a wholly inadequate one and fail to reach their goal entirely. In other words, extrinsically motivated students will choose what they perceive to be the easiest path to “solving” a problem—even if that approach actually hurts their chances for success.

Sadly, this effect persists even when the extrinsic motivation is removed. “[W]hen [extrinsically motivated] students were later confronted with a similar task under new conditions—in a setting in which guessing was forbidden and no further extrinsic rewards of

⁷ *Id.* at 299 (citing John Condry & James Chambers, *Intrinsic Motivation and the Process of Learning*, in *The Hidden Costs of Reward* (Mark R. Lepper & David Greene eds., Psychology Press 2016) (1978), which describes an experiment in which subjects were either paid or not paid to complete problem-solving tasks, and researchers measured how quickly subjects guessed at the answer, whether they made redundant choices, how much information they required before solving the problem, how well they understood and used clues, and how they used available resources).

⁸ *Id.*

any sort were available—they *continued* to employ less logical and efficient information-gathering procedures.”⁹

The third, and perhaps most insidious, way that extrinsic motivation undermines academic motivation is by *diminishing students’ interest in the subject matter they are studying*. Students who were told that a test would count for a grade reported less interest in the subject than students who were told that the test was simply to monitor progress.¹⁰ Once again, the students’ thinking is not entirely nonsensical. After all, if a subject is inherently worthy of interest and understanding, why must students be given a reward for studying it? The validation of a high grade might give a student a greater sense of competence or “belonging” in the subject matter, which could then encourage the student to engage more deeply with the subject matter in the future. But high grades have been shown to be reinforcing *only for those who get them*.¹¹ And students typically do not interpret low grades as an opportunity for improvement; rather, students receiving low grades generally withdraw from class work.¹²

Feedback

Feedback can be descriptive or evaluative.¹³ Descriptive feedback provides specific information in the form of written

⁹ *Id.*

¹⁰ C. Scott Rigby et al., *Beyond the Intrinsic-Extrinsic Dichotomy: Self-Determination in Motivation and Learning*, 16 *Motivation & Emotion* 165, 179 (1992).

¹¹ James W. Michaels, *A Simple View of the Grading Issue*, 3 *Teaching Socio.* 198, 202 (1976).

¹² Thomas R. Guskey, *Making the Grade: What Benefits Students?*, *Educ. Leadership*, Oct. 1994, at 14, 16.

¹³ These terms describe the *form* of feedback and should not be confused with “formative” and “summative” assessment, which describe the *purpose* of feedback. What makes assessment formative is its purpose of altering the learning process, as opposed to merely judging or ranking the end performance. See Lindsey P. Gustafson, *The Compounding Effects of Assessment: How Our Failure to Coordinate Formative Assessments May Impact Their Validity*, (May 8, 2018) available at <https://ssrn.com/abstract=3175668> or <http://dx.doi.org/10.2139/ssrn.3175668>. But formative assessment is very often given in the form of evaluative feedback, such as points, marks, or letter grades. So, “descriptive feedback” and “formative assessment” can overlap, but they are not the same.

comments or conversations about a student's current achievement (where am I now?) with respect to a goal (where am I going?) and appropriate next steps (how do I get there?). It can serve to correct or validate, but its primary purpose is to help learners understand specifically what they must do to improve. In contrast, evaluative feedback tells learners how they compare to others and is typically given in the form of points, percentage marks, or letter grades. Its primary purpose is to provide a judgment summarizing the quality of a student's learning. Grades are the quintessential form of evaluative feedback.

Research shows grading and other forms of evaluative feedback to be less effective than descriptive feedback in helping students improve future performance on problem-solving tasks.¹⁴ In fact, the mere presence of grading or other evaluative feedback can undermine the positive effects of descriptive feedback.¹⁵ A 1987 study found that, while extrinsic motivators may enhance rote learning, they decrease conceptual learning.¹⁶ And in a 1986 study, students who received evaluative grades as feedback performed well on subsequent quantitative tasks but poorly on divergent-thinking tasks. In contrast, students who received descriptive comments as feedback performed better on both quantitative and divergent-thinking tasks in subsequent attempts.¹⁷ These studies should pique the interest of any teacher who values conceptual as opposed to rote learning and seeks to help students develop problem-solving skills for divergent-thinking tasks.

In my experience, teachers typically think of "feedback" as an aid to student learning, not primarily as a method for motivating

¹⁴ Ruth Butler & Mordecai Nisan, *Effects of No Feedback, Task-Related Comments, and Grades on Intrinsic Motivation and Performance*, 78 *J. Educ. Psych.* 210, 214 (1986).

¹⁵ Ruth Butler, *Enhancing and Undermining Intrinsic Motivation: The Effects of Task-Involving and Ego-Involving Evaluation on Interest and Performance*, 58 *British J. Educ. Psych.* 1, 11 (1988).

¹⁶ Wendy S. Grolnick & Richard M. Ryan, *Autonomy in Children's Learning: An Experimental and Individual Difference Investigation*, 52 *J. Personality & Soc. Psych.* 890, 897 (1987).

¹⁷ Butler & Nisan, *supra* note 14, at 214.

students. Nevertheless, feedback and motivation are connected. The form of feedback has been shown to affect student motivation in ways beyond the ones discussed in the previous section. Students who received descriptive feedback reported more motivation for subsequent tasks, whereas students who received evaluative feedback were less motivated for subsequent tasks.¹⁸ And detailed, descriptive feedback was found to be most effective when given alone, unaccompanied by grades or praise.¹⁹ If a paper is returned with both a grade and a comment, many students will pay attention to the grade and ignore the comment. As one expert in educational research explained, “The grade ‘trumps’ the comment; the student will read a comment that the teacher intended to be descriptive as an explanation of the grade. Descriptive comments have the best chance of being *read* as descriptive if they are not accompanied by a grade.”²⁰

Sorting and Ranking

I know no teacher who relishes the task of grading. But most teachers generally accept that it simply must be done. As the saying goes, “I teach for free. They pay me to grade papers.”

Assuming for the sake of argument that sorting and ranking students is indeed necessary, is grading the best way to do it?

Research has shown grading to be a highly inaccurate and unreliable way of sorting students. Teachers vary widely in the ways they grade.²¹ Among other reasons, teachers value different things in calculating grades,²² resulting in “hodgepodge” grades that mix any

¹⁸ *Id.*

¹⁹ Anastasiya A. Lipnevich & Jeffrey K. Smith, *Effects of Differential Feedback on Students' Examination Performance*, 15 *J. Experimental Psych.* 319, 329 (2009).

²⁰ Susan M. Brookhart, *How to Give Effective Feedback to Your Students* 8 (Ass'n for Supervision & Curriculum Dev. 2008).

²¹ Howard Kirschenbaum et al., *Wad-Ja-Get? The Grading Game in American Education* 133-36 (Mich. Publ'g, 50th anniversary ed. 2021).

²² Laura J. Link & Thomas R. Guskey, *How Traditional Grading Contributes to Student Inequalities and How to Fix It*, *Curriculum Context*, Fall/Winter 2019, at 12, 12.

number of achievements, behaviors, and non-academic factors in the calculation.²³ Examples of these many factors include persistence, compliance with rules, organization, and time management—all good things to encourage, to be sure.

But should grades measure proficiency in the course subject matter? Or should they measure levels of persistence, compliance, organization, or other social and behavioral skills? And should all teachers measure and weigh these factors the same way? Is that even possible? Even rubric-based grading systems are subject to myriad biases and confounding variables, including behavioral norms that have been shown to correlate with race and gender.²⁴ Ultimately, grades are less effective at measuring learning than they are at measuring the quality of the circumstances and academic system within which the student operates.²⁵ They are hardly the objective and reliable measure of students that we make them out to be.

Our Purpose

Even if grading hurts academic motivation, is ineffective in helping students improve future performance, and is an unreliable way of sorting and ranking students, it still has to be done, doesn't it? Otherwise, how will future academic programs, employers, and clients know what they are getting when they admit, hire, or retain our former students?

Short answer: I'm not sure. But it shouldn't be the job of the teacher.

I became a teacher to guide students through the learning process, to help them develop skills they will need for their chosen profession, to show them the power and value of those skills, and to

²³ Susan M. Brookhart, *Grading Practices and Validity*, 10 *Educ. Measurement* 35, 35-36 (1991).

²⁴ Link & Guskey, *supra* note 22, at 12-14.

²⁵ See Amarendra Sharma & Abigail Carr, *Food Insecurity and Standardized Test Scores*, *Int'l J. Applied Econ.*, Mar. 2017, at 1.

instill in them a love and respect for their work that will inspire them to continue honing their craft even after they leave my classroom. That may sound campy or idealistic, but I don't think I'm alone in my thinking. I did not become a teacher to line students up and pass judgment on who should be labeled as prime, choice, select, or standard as they finish my class and go out on the figurative meat market. And I certainly don't want to do that if it *undermines* my effectiveness as a teacher.

Loving parents everywhere do their best to teach their children, to provide encouragement and support, to help them reach their potential, to show them right from wrong, to correct and discipline them, to coach and mentor them, and to prepare them for the adventures and challenges that lie ahead. Imagine a world in which each child, on the eve of their eighteenth birthday, was required to receive a grade from their parents. How would that affect the parent-child relationship?

A teacher's primary purpose is to teach, not to evaluate. Grades are not essential to the instructional process; teachers can teach without grades, and students can and do learn without them.²⁶ When teachers assume the role of grader, they become both judges and advocates—roles that are not necessarily compatible.²⁷ Teachers should be coaches who help prepare students for performance without being judges of their performance and achievement. They should give guidance and feedback while the students prepare for the performance, but summative evaluations should be made by others. That way, the mentor/coach is able to set high standards without losing the crucial role of advocate, confidant, and friend.²⁸

²⁶ David A. Frisbie & Kristie K. Waltman, *Developing a Personal Grading Plan*, Instructional Topics Educ. Measurement, Fall 1992, at 35, 35.

²⁷ Guskey, *supra* note 12, at 14.

²⁸ John H. Bishop, *Why U.S. Students Need Incentives to Learn*, Educ. Leadership, Mar. 1992, at 15, 16.

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VOLUME 3

ISSUE 1

EXPERIMENTATIONS WITH MINDFULNESS AND GRATITUDE PRACTICES IN MY LEGAL WRITING CLASSROOM

AMANDA KATE MAUS STEPHEN¹

Three years ago, I attended my first Western Regional Legal Writing Conference at Santa Clara University School of Law. I was brand new to teaching legal writing, only about a month into my first year of classes, and I was inspired by the creativity and focus on student learning that seemed to drive my new colleagues.

One presentation stood out to me: “Making Mindfulness a Part of the Legal Writing Curriculum: ‘If a Lawyer Isn’t Happy, What’s the Point?’” by Professors Katherine Brem and Lauren Simpson at the University of Houston Law Center. The presenters demonstrated how they start their legal writing classes with a mindfulness activity, and they explained some of the benefits of a mindfulness practice, including reduced anxiety and heightened wellness within their classrooms.

Although I am not a mindfulness expert, I do have anxiety myself and after a month of being in the classroom I was keenly aware of the tremendous pressure my first-year law students were under. So, I decided to take these professors’ advice and try a “mindfulness minute” in my classroom once a week. The response from my students was overwhelmingly positive. Since then, I have continued the mindfulness practice in my classroom each year, and I

¹ Amanda Stephen is a Visiting Lecturer at the University of Washington School of Law. She made this presentation at the 2022 Western States Legal Writing Conference.

have also experimented with adding a gratitude practice to my classroom.²

Why Mindfulness?

From both anecdotal experience and research, we know that law school is stressful for students. If students do not learn healthy coping mechanisms for that stress, they may develop problems with drinking, depression, anxiety, and suicidal thoughts later in law school and as practicing attorneys.³

Mindfulness can serve as a healthy coping mechanism students can practice and develop now to better handle stress in the future. Specifically, mindfulness can:

- increase positive feelings, brain functioning, the capacity for self-awareness, and ethical behavior;
- improve attention and learning in the classroom;
- help law students be more emotionally intelligent; and
- reduce anxiety.⁴

These skills are obviously helpful within the classroom, but they will be just as important as students transition from law school to the legal profession.

Mindfulness Minutes

While there are many ways to incorporate mindfulness practice into a law student's life, our packed curriculum does not usually allow us to devote significant time to mindfulness in a legal

² For additional ideas and approaches, see Shailini J. George, *Easy Ways to Incorporate Mindfulness in the Legal Writing Classroom*, 29 *The Second Draft* 34 (Fall 2016) and Rosario Lozada, *Cultivate a Community in the Classroom: Lead with Values, Vulnerability, and Gratitude*, 28 *Persps.* 5 (2020).

³ See Yamilett Lopez, *Mental Health, Substance Abuse, and Wellness in the Legal Profession: Change is Necessary*, Marquette Univ. L. Sch. Fac. Blog (Oct. 17, 2018), <https://law.marquette.edu/facultyblog/2018/10/mental-health-substance-abuse-and-wellness-in-the-legal-profession-change-is-necessary/>.

⁴ Teresa Kissane Brostoff, *Meditation for Law Students: Mindfulness Practice as Experiential Learning*, 41 *L. & Psych. Rev.* 157, 165 (May 31, 2017).

writing classroom. But having a mindful arrival practice or a “mindfulness minute” is an easy and quick way to expose students to mindfulness.

I base my mindfulness minute on the ones Professors Brem and Simpson modeled. At the very beginning of class, I set a timer for one minute and ask students to take that minute to arrive in our space. I tell students that they can close their eyes or take deep breaths if they want. I also ask them to acknowledge and let go of any nagging thoughts such as worries about mounting to-do lists or despair over a cold call gone wrong in the last class. I do not lead my students in a guided meditation, but you could do so.⁵

I encourage you not to let your inexperience with mindfulness hold you back from trying this activity. You do not have to be an expert to do this! As Angela Sordi has eloquently explained

[t]he point [of mindfulness] is not to try to achieve a particular state of mind such as happiness or contentment (although they tend to be the byproducts of mindfulness) but to simply be present with whatever arises in your mind. It can be about breathing, sitting, walking, eating, or standing while simultaneously observing mental events as they arise—you are asked to notice your thoughts, emotions, bodily sensations, sense perceptions and daydreams.⁶

So, during this minute with your students, your only goal is to help them notice what is going on in their mind, acknowledge that

⁵ For an example of what an arrival practice looks like at the beginning of a high school class, see Mindful Schools, “Arrive” - *A Mindful Minute Helps Students Arrive in the Classroom*, YouTube (Aug. 29, 2017), https://www.youtube.com/watch?v=u3jBjSs_cpk.

⁶ Angela Sordi, *Can Lawyers Achieve Work-Life Balance in Only Two Minutes a Day?*, *Practice Points*, American Bar Ass’n (July 28, 2017), <https://www.americanbar.org/groups/litigation/committees/mass-torts/practice/2017/mindfulness-for-lawyers/>.

without judgment, and return to the present moment with renewed focus on the classroom and learning activities.

Aside from the content of the mindfulness minute, the other consideration is how often to use it. I typically teach two classes per week for each section, and for the last three years, I led a mindfulness minute during the first class of the week. As Professor Brem suggested in her presentation, you can come up with a fun name for this practice such as “Mindfulness Monday” or “Wellness Wednesday,” depending on the day you teach and your ability to create alliterations. This year, I decided to do a mindfulness minute at the beginning of each class period. Of course, you could also do mindfulness minutes less frequently, but targeted to more stressful times throughout the year.

Whenever you choose to do them, you can personalize the mindfulness minutes to your students. At the beginning of each year, I have students fill out an introductory survey and ask them their favorite place to visit. Then, throughout the year, I put up pictures of those favorite places as the background slides during our mindfulness minutes, which they appreciated.

Gratitude Practice

Last year, I decided to experiment with another form of mindfulness in my classroom: gratitude. Like mindfulness, gratitude has tangible benefits for people who practice it regularly. Robert Emmons, a professor of psychology at the University of California, Davis, has found that gratitude practice produces the following benefits:

- Keeping a weekly gratitude journal makes you more likely to feel better about your life as a whole and be more optimistic about the coming week.
- People who keep gratitude lists are more likely to make progress toward important personal goals.

- Daily gratitude practice can help young adults have higher alertness, enthusiasm, determination, attentiveness, and energy.⁷

Clearly, these benefits could be especially helpful to busy law students and attorneys, especially if we view these practices as ways to combat depression and substance abuse within the lawyering community.

In my classroom, I designed the gratitude practice as a journaling activity at the start of the second class each week. Like the mindfulness minute, I gave students about a minute to write down at least one thing they were grateful for during the week. I asked students to use the same electronic file or notebook page each week so that all their “gratitudes” stayed together.

At the end of the semester, students completed a graded reflection where they could respond to one of two prompts. To gain feedback on my gratitude activity, I included a prompt about the gratitude journal.⁸ First, I asked students to read a short article by Maanvi Singh on the benefits of keeping a gratitude journal,⁹ which explores both the positives of gratitude journaling and the negatives. Then, I asked the students to review their list of gratitudes and reflect on what kinds of things they were grateful for this semester, whether they enjoyed keeping the list of gratitudes, and whether they would consider extending this practice into the next semester or longer, on their own.

Overall, about 20% of my students chose to answer this prompt. In the reflection responses, I received both positive and negative feedback from students. One student explained that

⁷ Robert Emmons, *Gratitude and Well-Being: Summary of Findings*, Gratitude Works, <https://emmons.faculty.ucdavis.edu/gratitude-and-well-being> (last visited Dec. 29, 2022).

⁸ The second prompt asked students to reflect on their reasons for coming to law school and how law school, so far, had furthered, frustrated, or made them question those goals.

⁹ Maanvi Singh, *If You Feel Thankful, Write It Down. It's Good For Your Health*, NPR (Dec. 24, 2018), <https://www.npr.org/sections/health-shots/2018/12/24/678232331/if-you-feel-thankful-write-it-down-its-good-for-your-health>.

looking over the gratitude list allowed them to have perspective on mental health challenges they experienced throughout the semester, notice issues of imposter syndrome that arose for them, and recommit to healthy habits. Other students stated that they enjoyed the opportunity to relax, breathe, and reflect in class (even if they were “forced” to participate) and that the practice encouraged them to reflect on personal health and emotional needs, relationships that were important to them, and why they came to law school. But some students did not like the activity. One noted that it sometimes prompted them to compare themselves to others, which did not feel good. Another explained that some weeks they could not come up with anything to be grateful for and that led them to feel embarrassed and to consider the activity just performative.

If I do this activity again, I will better prime the students for the gratitude journal by assigning some readings or videos on gratitude before our first journaling activity. The University of Washington’s Center for Child and Family Well-Being produces many excellent videos and articles about mindfulness and gratitude, including a video called “Introduction to Gratitude,”¹⁰ where Natalia Esquivel Silva explains that gratitude practice is helpful in increasing resilience and balance by counteracting the brain’s natural negativity bias. She also leads a thirty-second exercise called “Savoring the Good,” which can help rewire your brain to notice and be aware of positive experiences and provides links to additional guided gratitude practices.

Student Reactions

Although some students did not enjoy the gratitude journaling, the responses to the mindfulness activities were overwhelmingly positive in my mid-semester feedback survey and

¹⁰ Natalia Esquivel Silva, *An Introduction to Gratitude*, University of Washington Center for Child & Family Well-Being (Oct. 2021), <https://ccfwb.uw.edu/resource/introduction-to-gratitude/>.

formal course evaluations. Here are representative samples of the comments that I received from students:

- “I really enjoyed our Mindfulness Minute in the class each Wednesday. It was a great way to center myself on what was my busiest day of the week.”
- “I found that time [for a mindfulness minute] to be useful because it helped me to calm myself and focus during the lecture.”
- “I loved doing Mindful Wednesday and Gratitude Friday. They were so helpful in getting my mind right.”
- “I loved the gratitude journals and the mindfulness minute[;] it meant a lot for the teacher to assert that we are still people with human needs.”

I encourage you to try mindfulness minutes or gratitude journaling in your own classroom and to share your experiences. Incorporating these mindfulness activities into the legal writing curriculum can be quick, simple, and beneficial to student well-being.

EXPECTO PATRONUM!
GUARDING AGAINST LAWYER DISSATISFACTION
AND POOR MENTAL HEALTH OUTCOMES

KELLY GAMBLE¹

It is an open secret that law students experience higher rates of alcohol abuse, anxiety, and depression than their non-law school peers.² This is true even though law students arrive on campus with rates similar to those of the general public.³ So, what is happening to all these totally normal people who enroll in law school? Us. We are happening to them. They show up in August so excited to do good and make good and we say, “Hey, let me introduce you to the hapless Peevyhouses.”⁴

¹ Kelly Gamble is an Assistant Professor of Legal Writing and the Director of Academic Excellence at Willamette University College of Law. This essay is based on a presentation at the Western Regional Legal Writing Conference held in October 2022 at the University of Oregon School of Law.

² Jerome M. Organ, David B. Jaffe, & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. Legal Educ. 116, 145 (2016) (pre-pandemic data); David Jaffe, Katherine M. Bender, and Jerome Organ, “*It’s Okay to Not Be Okay*”: *The 2021 Survey of Law Student Well-Being*, 60 Univ. Louisville L. Rev. 441, 441–96 (2022) (rates significantly higher in 2021, mid-pandemic).

³ *Mental Health Disorder Statistics*, Johns Hopkins Medicine, <https://www.hopkinsmedicine.org/health/wellness-and-prevention/mental-health-disorder-statistics> (last visited Dec. 16, 2022) (rates for general population US adults); Tori DeAngelis, *Depression and Anxiety Escalate During Covid*, American Psychological Association (Nov. 1, 2021), <https://www.apa.org/monitor/2021/11/numbers-depression-anxiety> (showing similar mid-pandemic spikes generally).

⁴ See *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962) (providing minimal compensation to a couple who allowed strip mining of their farm property then sued to force the corporation to remediate the farm); see also Eric E. Johnson, *The Peevyhouses: The Most Screwed Victims in Case-Law History*, Prawfsblawg (May 9, 2008), <https://prawfsblawg.blogs.com/prawfsblawg/2008/05/the-peevyhouses.html>

In the face of overwhelming data that the problem is law school, law schools continue to do what they do best, which is stay exactly the same, but pile on top and buttress the sides. We add wellness programs, mental health programs, academic support programs. Mentoring programs. Counseling services. All these programs try to deal with the same fundamental problem of law students' poor mental health because God forbid anything ever really change in the delivery of first-year law school instruction.⁵

Then last year, a student slumped into a chair in my office and said, "Can I ask you a weird question? ... What's the secret to happiness? [sigh] I'm asking everybody." So, I took a new approach: I shared with this student my Granderry's⁶ advice. He said to be happy a person needs three things: someone to love, something to do, and something to look forward to.

Simple, yes. It's not the all-purpose guardian Harry Potter conjures with his *expecto patronum* spell. But Granderry's advice maps onto what researchers say is the key to life satisfaction and daresay happiness: to thrive, people need to feel connected to others, competent or effective, and autonomous.⁷ Whatever my feelings are about legal education more broadly, first-year skills courses are innovative and practical and the first real glimpse of workaday lawyering that our students get. Why not make that vision a happy one?

Is it my job to make law students happy? No. It is not. But I do consider it my responsibility to not make things worse for people in my life, law students included. So, how to use happiness to make happier students and better lawyers?

⁵ It is perfect. 10/10. No notes.

⁶ My paternal grandfather, Derry Falligant, was called "Granderry" by his grandchildren.

⁷ Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 *Geo. Wash. L. Rev.* 554, 564 (2015).

Someone to Love

As much as I love finding out when law students fall in love, matchmaking cannot be my responsibility. However, I can ensure that my students experience a collegial environment and a sense of belonging.

Students need as many opportunities as possible to engage as a professional community. The engagement should be frequent, low-stakes, and goal-oriented. Interactive classroom activities have always been important, but our obligation is greater, post-pandemic-restrictions, to structure, model, and guide those community interactions. Over the last year or so, especially among my younger students, I see a noticeable deficit in interpersonal communication. Two years of being part of exclusively online communities—instead of bumping up against different kinds of people—has taken a toll.

So, I start class planning with this in mind: Do my students have the opportunity and responsibility to meaningfully contribute to the work of the class every day? I want everyone talking in every class. And not just to me. They must be accountable to each other, not always for a grade, but as a matter of professional courtesy. They have the responsibility to share what they know in a goal-oriented space with students who are like them and unlike them. I try to include peer-accountable communication every day, whether it is team-based learning and group quizzing or simple pair-share partner work on a legal writing problem.

Something to Do

The textual and instructional style of law school is fundamentally different from anything law students have experienced before. They grew up with study guides, tutorials, formative assessments, and sometimes even school policies that meant they literally could not fail. And now as law students they have few, if any, interim assessments or waypoints to orient

themselves to the content or validate their progress. Law students, who have generally found success in school, suddenly do not have their sea legs. They start feeling like they do not know what they are doing. And that feeling does not go away for many lawyers after graduation.

Certainly, in practice, new lawyers get thrown in the deep end and have to figure things out, but what if we do not do that in a first-year, experiential law class? There is experiential and there is I-do-not-like-swimming-because-my-experience-is-just-almost-drowning-every-day-but-I'm-\$150k-deep-on-these-swim-lessons-so-here-I-am. We can build a sense of efficacy by scaffolding our instruction. We can be predictable, have routines, provide a detailed syllabus, and follow it. We can develop a set of activities and procedures that can be used for a variety of topics and assignments.

Every year, I forget how much 1Ls do not know. And every year, I worry I am going to make my course too easy. And every year, I am relieved that I did not try to add extra “rigor.” Instead, I provide an enormous amount of support to give the greatest number of students an opportunity to succeed at each task. Even if I outline the memo on the board, they will still find a variety of ways to write it. The guidance I provide keeps the students on track and able to check their work. It even allows students to take risks because they can self-correct throughout the process.

Having some success—a sense of ability—builds more success and ability. It develops confidence, focus, and a desire to do it again.

Something to Look Forward To

At the end of first-year Orientation, I remind our new students that, as lawyers, they get to be the difference between what is and what should be for people and causes that need their help.⁸

⁸ I have developed and presented Willamette University College of Law's Orientation program since 2020. This year, I was formally appointed the Director of Academic Excellence. My portfolio includes student development in the 0L-1L space.

And then I send them off to learn about the Peevyhouses. Where is the room for them to make a difference? Where does their voice matter? We professors have to be the ones making space for that impact in big and small ways. Here are three ways:

First, I try to give students some sense of control over their course of development. I build in choice—not a ton, because I am not reckless, but where it makes sense.⁹ For example, if, over the semester, I want to see a certain number of pages of legal analysis and I want to practice quick-turnaround research emails, I can offer four short, quick-turnaround assignments and their due dates and students must do two. Students get control over their schedule and their workload while still meeting the demands of the course.

Second, I do a mid-semester check-in to see what is working for the class and what is not. And then I talk to the class about what I will and will not change and why. The students see me respecting them enough to engage on issues that are traditionally the exclusive realm of the professor. The course becomes something they are responsible for, not something that happens to them, and their input affects the course.

And then I reinforce their personal motivations for coming to law school. Our students often need help connecting long-term ambitions with short-term goals. I remind them that they must identify and cultivate the skills that will make them successful. Each assignment in my class provides a short-term goal that will lead to their long-term success.

Conclusion

Our best use as law professors is not pure, technical skill-building. We are world-building. Students come to law school to

⁹ Compare Rachel Croskery-Roberts, Presentation at the Western Regional Legal Writing Conference: Designing Realistic Simulations that Reignite Student Passion for the Law (Oct. 7-8, 2022), wherein Professor Roberts shared *nineteen* short, turn-around email assignments, and I fell in love with her a little.

make their own lives better as much as anyone else's. Our course can be a place where they feel a sense of belonging and ability and where they connect with the reason they came to law school rather than disconnect from it. First-year skills courses are in a prime spot to lead the charge to make happy, satisfied law students who become happy, satisfied lawyers.

FRIEND OR FOE? LEXIS ARTIFICIAL INTELLIGENCE (AI) IN LEGAL WRITING

KARIN MIKA¹

Artificial Intelligence (AI) programs in the law are becoming more popular, moving from downloadable forms,² to generating and critiquing contracts and handbooks, and even generating text.³ Lexis has two major research products that appeal especially to first-year students. The first product is Brief Analysis, which analyzes documents and provides suggestions for additional research.⁴ Brief Analysis is more appropriately used to expand research for briefs, motions, and other types of persuasive writing,⁵ but could be used to review research and citations for objective memos. The second

¹ Senior Professor of Legal Writing, Cleveland State University College of Law. This essay is based on a presentation at the Rocky Mountain Legal Writing Conference held in March 2022 at Arizona State University's Sandra Day O'Connor College of Law. The five images in this essay are reproduced from the LexisNexis products analyzed here.

² See, e.g., LegalZoom, <https://www.legalzoom.com/forms> (last visited Jan. 27, 2023); Rocket Lawyer, <https://www.rocketlawyer.com/> (last visited Jan. 27, 2023); US Legal Forms, <https://www.uslegalforms.com> (last visited Jan. 27, 2023).

³ In November of 2022, the Company OpenAI released an app called ChatGPT that is capable of generating text based on prompts. The app learns from repeated input and can perform functions as diverse as creating plays and short stories and answering standard college essay questions. Although the app has performed poorly in answering some law school essay questions and writing memos, there is no doubt that products of this type will play a role in the future in composing legal documents and perhaps even judicial opinions. See Jenna Greene, *Will ChatGPT make lawyers obsolete? (Hint: be afraid)*, Reuters (Dec. 9, 2022), <https://www.reuters.com/legal/transactional/will-chatgpt-make-lawyers-obsolete-hint-be-afraid-2022-12-09/>.

⁴ Westlaw has a comparable product called "Quick Check." See *Quick Check: Intelligent Brief Analysis*, Thompson-Reuter, <https://legal.thomsonreuters.com/en/products/westlaw-edge/quick-check>.

⁵ The critique of the brief has the potential of being set up for a particular party or as a particular motion.

product is a downloadable add-on that enables research to be done side-by-side with the writing of a document.⁶ Although the product has many helpful functions, including formatting options, first-year students would likely be most enthusiastic about the function that checks the cite format of the document written.

Both Lexis products are useful research tools as well as beneficial in checking the accuracy of citations. However, as is true of most programs that help legal writers and researchers by invoking particular algorithms, its output is only as good as its input. Moreover, even though the products can verify the pagination for cases cited, the program does not automatically correct citations and put them into appropriate citation format.⁷ Whether for research purposes or cite-checking purposes, the output could be misleading for first-year students who rely literally on the information presented.

1. Brief Analysis

The best way to examine the utility of the Lexis AI programs is through looking specifically at a piece of legal writing. For purposes of this essay, the writing being used is a first-year memo that addressed tavern owner liability in Ohio. The facts involved a group of students who were celebrating. The night ended with one of the students crashing her car into the business across the street from the bar. In Ohio, tavern owners may be held liable for harm caused by intoxicated patrons when it is demonstrated that a bartender knowingly served a “visibly intoxicated” patron. The

⁶ See *Lexis for Microsoft Office*, LexisNexis, <https://www.lexisnexis.com/en-us/products/lexis-for-microsoft-office.page>.

⁷ The default citation setting for both products is the *Bluebook*. The Lexis add-in has a few states that may be selected for the default setting, but the *ALWD Citation Manual* is currently not an option for either product (although the *Bluebook* setting would produce citations almost identical to the *ALWD Citation Manual*).

governing statute is Ohio Revised Code § 4399.18, and the main governing case is *Gressman v. McClain*, 533 N.E.2d 732 (Ohio 1988).

After uploading the memo into the Brief Analysis program, the user is sent to the Dashboard, which is divided into six categories:

- Procedural Information (reviews criteria related to a motion, if a motion has been uploaded)
- Recommendations (provides recommended cases/statutes to include)
- Similar Briefs (provides access to other briefs written about a similar issue)
- Jurisdiction (enables access to law of other jurisdictions that may have similar statutes)
- Cited in Your Document (provides Shepard's analysis of the authority cited)
- Quote Check (analyzes quotations for accuracy).

The Dashboard also presents “Extracted Concepts,” or keywords that may be used in doing research on this issue. Of these, the Recommendations, Cited in Your Document, and Quote Check features are most likely to attract novice users.

a. Recommendations

The feature that first-year students would most likely be interested in is the “Recommendations” tab. When a student accesses the recommendations, the material in the student’s memo is highlighted, with key words being flagged. After highlighting key words, Lexis recommends cases and/or secondary sources that are linked by clicking the tab at the bottom of the passage.

Ohio Revised Code § 4399.18 establishes the rule of law in Ohio for a liquor permit holder's liability when serving an intoxicated patron. Ohio Rev. Code Ann. § 4399.18 (West 2016). The permit holder or his employee may be held liable for damages off the premises caused by negligent actions of a patron, "[i]f the permit holder knowingly sold an intoxicating beverage to [a] noticeably intoxicated person...and the person's intoxication proximately caused... [the damages]." *Id.* Both factors must be shown by a preponderance of evidence. *Id.* Ohio case law has determined that being "noticeably or visibly" intoxicated is subjective and not simply defined by a set number of drinks consumed in a certain period of time. *Piras v. Screamin Willie's*, 27 N.E.3d 973, 978 (Ohio Ct. App. 2015). "Noticeably intoxicated" is not limited to a specific blood alcohol level or a patron acting out of the ordinary. *Gressman v. McClain*, 533 N.E.2d 732, 735 (Ohio 1988). However, if a bar owner has actual knowledge of a patron's intoxication, other witnesses support that the patron is noticeably intoxicated, and the patron's unusual behavior indicates intoxication, the court may conclude that the bar assumed the risk in continuing to provide the patron with alcohol. *Id.*; see also *Kulin v. Van Hart, Inc.*, No. 07 CA 850, 2008 WL 44165222, at *3 (Ohio Ct. App. Sept. 25, 2008). Nonetheless, this has proved to be a difficult standard to achieve in Ohio. 533 N.E.2d at 736.

10 Cases

4 Treatises

With respect to the test case on Ohio tavern owner liability, the unfortunate aspect of the program is that, when the tab for the suggested cases is accessed, none of the cases suggested are cases cited within the memo. This could be misleading for the novice legal researcher who might be concerned that the research was done incorrectly. However, in this particular memo, the cases cited within the memo are more on point than the ten cases Lexis suggested. These recommended cases deal more generally with tavern owner liability in Ohio and include numerous insurance cases that have only a tangential relationship to the fact pattern. Thus, in this instance, the memo writer's research was more accurate than the recommendations of the AI program.

The student researcher might also be misled if the memo omits the governing law or has missed the main case on the issue. The Lexis program will not correct a student's work or analyze any facts to determine whether the student chose the correct statute or even the correct jurisdiction. The program takes the student's material presented at face value. If the excerpted passage above is analyzed in Brief Analysis without citations to either the governing statute or supporting cases, the program neither provides the statute, nor suggests that the researcher missed *Gressman* as the main case on point.

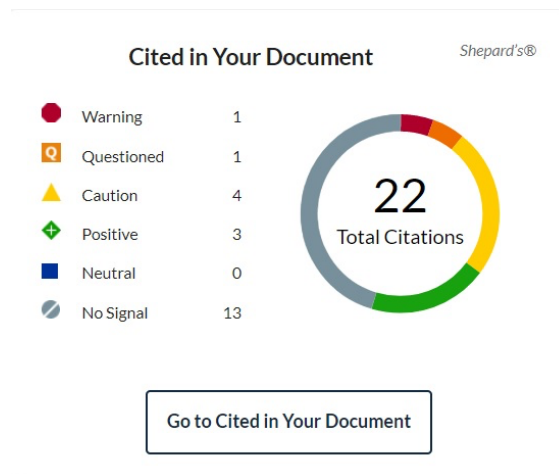
Thus, when using Brief Analysis for research recommendations, the first-year student must use caution. Brief Analysis does not provide the “right” answer or necessarily inform the researcher what important cases might have been missed. Depending on how law is phrased in the memo or what descriptions are included, Brief Analysis will make its best guess as to suggestions for additional authority. Brief Analysis also does not inform the researcher if the law is wrong or incomplete.

b. Cited in Your Document (Shepard’s Analysis)

The next Dashboard item that students might be interested in would be the Shepard’s Analysis. Shepard’s Analysis provides a quick picture as to whether the law cited in the student’s memo is still good law. It also provides references to other Secondary Sources on related topics.⁸ Shepard’s Analysis does not Shepardize any unreported Westlaw cases that are cited in the memo. These cases would have to be researched on Lexis to obtain the Lexis citation so that the Lexis citation could be Shepardized.

The initial visual of the Shepard’s Analysis is extremely appealing and alerts the researcher immediately as to whether there are any sources cited that might be problematic.

⁸ Shepard’s Analysis provides a citation to Comments, *Dramshop Liability: Should the Intoxicated Person Recover for His own Injuries?* 48 Ohio State L.J. 227 (1987). Although the article is not directly on point with the fact pattern, the article presents collected research on Ohio’s law concerning tavern owner liability under the statute.



However, similar to the other functions of Brief Analysis, the Shepard's information could be misleading. At first glance, it appears that the writer may have cited law that is no longer valid as well as cases that have been called into doubt by other courts. In fact, when the writer accesses the Shepard's material, the first thing that the writer will see is that it is the statute itself that has been flagged with a warning.

Although this might be disconcerting for the student researcher, further investigation reveals that there is pending legislation in Ohio for the entire Code segment covering liquor laws in Ohio. Tavern owner liability is not specifically mentioned, nor is there any change to the statute being relied upon. All pending changes relate only indirectly to what the student researched for the memo. Moreover, none of the proposed changes to the Code have been enacted.⁹ Similarly, the memo's cases that have either been questioned or appear with a "caution" are still appropriate to use because the basis for the "negative" treatment is not directly relevant to the subject matter of the memo.

⁹ When the statute is accessed on Westlaw, there is no pending legislation noted, nor is there any pending legislation noted on the official online cite for the State of Ohio. See Ohio Laws and Administrative Rules, <https://codes.ohio.gov/ohio-revised-code/section-4399.18> (last visited Jan. 27, 2023).

Thus, the novice researcher must also use caution and critical thinking with this aspect of Brief Analysis. The information presented cannot be taken at face value or in any literal sense but must be examined in order to determine whether any authority used should be removed from the memo, or retained as appropriate.

c. Quote Check

The final Dashboard item in Brief Analysis that might be relevant to first-year students is Quote Check. For our test case, Quote Check flagged three quotations in the memo as incorrect. One of the three quotations was not part of the discussion section and apparently confused the AI program. Similarly, the second quotation flagged as incorrect was the modified part of the statute that included ellipses and brackets. Although the wording is not the exact quote from the statute, the modification is properly done pursuant to national citation conventions.

The program does provide useful information for the third quotation flagged as incorrect:

⊗ This quote is Incorrect

① The pinpoint page in your citation is Incorrect

Quote from your brief:

...permit holder or his employee may be held liable for damages off the premises caused by negligent actions of a patron, ^[i]if the permit holder knowingly sold an intoxicating beverage to [a] noticeably intoxicated person?and the person?s intoxication proximately caused... [the damages].? Id. Both factors must be shown by a preponderance of evidence. Id. Ohio case law has determined that being ? "noticeably or visibly" ...oticeably or visibly? intoxicated is subjective and not simply defined by a set number of drinks consumed in a certain period of time. Piras v. Screamin Willie?s, 27 N.E.3d 973, 978 (Ohio Ct. App. 2015). ?Noticeably intoxicated? is not limited to a specific blood alcohol level or a patron acting out of the ordinary. Gressman v. McClain, 533 N.E.2d 732, 735 (Ohio 1988). However, if a bar owner

Quote from source citation:

"noticeably [or visibly]"

Source Citation: [Piras v. Screamin Willie's, 27 N.E.3d 973, 978 \(Ohio Ct. App. 2015\)](#)

The program notes that the quotation itself is incorrect, as is the pincite for the quote, but both notes are confusing. Although the program accurately points out the quotation is incorrect (the case cited does not include the word “visibly” in the quote provided), the explanation is confusing. The program does not indicate specifically that the second part of the quotation is not in the case being cited but suggests that there are brackets in the original quote. The program also states that the pincite is incorrect, but then includes a citation that is the same as the cite included in the memo. The program does not tell the researcher that the pincite is incorrect because the quote is not in the case. Thus, the information given is only helpful if the researcher goes to the original case to determine why the quotation and pincite have been flagged as incorrect.

The other issue with the Quotation Check is that it will not flag what *should* have been in quotation marks. Thus, if a student includes the exact wording of the statute in a memo without quotation marks, the program will conclude that there is no mistake because no text was quoted. This is also true of exact wording from cases.

Thus, like the other functions of Brief Analysis, the Quote Check function conclusions require more than accepting verbatim the information provided. The tool is useful only to the extent that the student uses it for something more than merely cite checking or proofreading.

2. LexisNexis Add-In (Word Version)

The second Lexis product beneficial to students is the LexisNexis add-in or extension for Word. The add-in allows the student to access Lexis while composing a document, allowing the student to cut and paste directly from cases, Shepardize in real time, add hyperlinks, and access template documents. There are also advanced features, such as creating an appendix or a table of contents.

The add-in may be acquired by accessing the “Get Add-in” icon from the Inset Tab in the Word Toolbar. The icon takes the user to the Word “app” store where all the available add-ins are listed. An active subscription to Lexis is necessary for the add-in to work.

For first-year students, the functions that might have the most utility are the “Check Cite Format,” as well as “Check Quotes.” The add-in allows the student to set the Citation Format as “Bluebook” and offers various citation formats from select individual states.¹⁰ While selecting “ALWD” citation format is not an option, the results with the “Bluebook” option should be virtually the same.

Similar to Brief Analysis, the Lexis Cite Checking function must be used with a degree of caution. Examining the same memo as Brief Analysis, the Cite Check has yielded the following information for the initial citations in the memo:

The screenshot displays the LexisNexis Cite Check interface. At the top, it shows 'Check Cite Format: The Bluebook®' with a 'CCF Help' icon, 'Zoom: 100%', and icons for email and print. Below this, the citation statistics are shown: 'Citations : 63' with a green checkmark for 6, a yellow exclamation mark for 50, a yellow checkmark for 0, a red question mark for 7, a red checkmark for 0, and a red X for 0. There are also 'Show: All Citations' and 'All Signals' dropdown menus. Under 'Shepard's® : 26', there are icons for 24 yellow triangles, 1 green diamond, and 1 yellow square. At the bottom of the interface, there are buttons for 'Correct All', 'Use Current All', 'Not a Cite', 'Add Citation', and 'Refresh Report'.

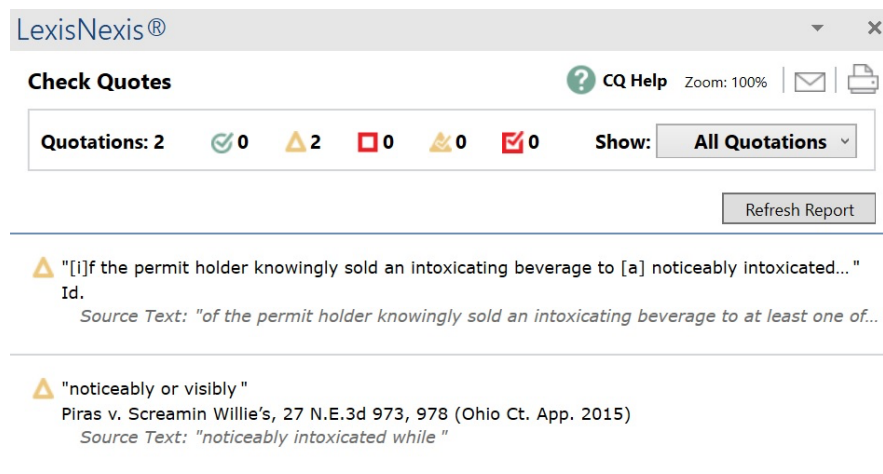
The main content area lists the following citations and suggestions:

- ! *Piras v. Screamin Willie's*, 27 N.E.3d 973, 978 (Ohio Ct. App. 2015)
Suggestion: *Piras v. Screamin Willie's*, 27 N.E.3d 973, 978 (Ohio Ct. App. 2015)
- ✓ *Gressman v. McClain*, 533 N.E.2d 732, 735 (Ohio 1988) ▲
- ✓ *Id.* ▲
Parent: *Gressman v. McClain*, 533 N.E.2d 732, 735 (Ohio 1988)
- ! see also *Kulin v. Van Hart, Inc.*, No. 07 CA 850, 2008 WL 44165222, at *3 (Ohio Ct. App. Sept. 25, 2008) ▲
Suggestion: see also *Kulin v. Van Hart, Inc.*, No., 07 Cal. 850, 2008 WL 44165222, at *3 (Sept. 25, 2008)

¹⁰ The current states are California, New York, Florida, Texas, Illinois, Washington, New Jersey, Pennsylvania, and Washington.

The information provided may be useful for those familiar with the *Bluebook* but provides extraneous information that may be confusing to the novice *Bluebook* user. One thing not evident on the results page is that the program is not able to identify underlined text as correct and thus may make inappropriate suggestions to correct the citations, or even make suggestions to correct citations that were already correct in the document. In the final citation in the picture above, the program suggests a change to the citation that makes the citation incorrect pursuant to what is required by the *Bluebook*. The add-in includes a universal “Correct All” button. This choice might be tempting for a first-year student to use, but it could lead to disastrous results.

The second function that might have the most utility for first-year students is the “Check Quotes” function:



As opposed to Brief Analysis, the Lexis Check Quotes function flags only two quotes in the document as necessitating review. Like Brief Analysis, the first quote flagged by the Lexis add-in is the modified statute quoted in the student memo. Like Brief Analysis, the program does not seem able to recognize whether a modified quote is accurate even if it comports with *Bluebook* Rule 5.2.

The second quotation flagged by the Lexis add-in is identical to the second quote flagged by Brief Analysis. Both programs have highlighted that the quotation being used in the memo is inaccurate and that the language quoted in the memo was not the language used in the case.

Conclusion

Both Brief Analysis and the Lexis add-in provide for useful tools for student legal researchers and attorneys. However, both require a higher degree of knowledge about research and citation than is generally present in novice legal researchers and writers. Although first-year students introduced to these tools may believe them to be a shortcut to improve both research and citation accuracy, the tools are not sophisticated enough to replace the human element. AI has many uses in the law and does make some aspects of document preparation more streamlined, but all AI products must be used with caution and as a supplement to, not a replacement for, in-depth researching and proofreading.

THE BENEFITS OF INTEGRATING STATUTORY CONSTRUCTION AND ANALYSIS IN A FIRST-YEAR LEGAL WRITING COURSE

LAUREN SANCKEN AND MIREILLE BUTLER¹

As a first-year associate at a law firm, one of Lauren Sancken's most memorable assignments involved the statutory interpretation of a newly enacted Washington statute. The client's case would be built around her analysis. It was an exciting, challenging assignment, with one problem: she had never been taught how to interpret an ambiguous statute using legislative history. As a result, she did not have the slightest idea how to locate and use legislative history to build an argument. With the help of her supervising attorney and reference librarian, she was able to locate the legislative history, listen to congressional testimony, and create an argument, but she wished she had possessed the skills already.

That first, insecure experience as a new practitioner made her eager to ensure that as a first-year legal writing instructor, her students would be prepared with statutory analysis skills when they finished law school.

Mireille Butler's experience was quite different. As a corporate securities attorney, she did not have to grapple much with research in her practice. Later, as a professor teaching legal research and writing at various institutions, the curriculum she taught

¹ Lauren Sancken and Mireille Butler are both Associate Teaching Professors at the University of Washington School of Law. They presented this material at the Western Regional Legal Writing Conference held in October 2022 at the University of Oregon School of Law.

focused on case law.² She saw no room to add principles of statutory analysis to an already busy first year.

And she did not see much utility in doing so, until she started teaching Legal Analysis, Research, and Writing at the University of Washington School of Law. There, she soon came to understand that teaching statutory analysis and construction allowed her to deepen her students' understanding of fundamental legal analysis and writing concepts while also teaching them how to develop new, critical skills.

Indeed, teaching statutory analysis to first-year law school students not only reinforces important principles of legal analysis and writing (from gaining a better understanding of the hierarchy of legal authorities to continuing to practice IRAC/CRAC methods of organization), but it also prepares students better for the actual practice of law.

With this goal in mind, each winter quarter, we devote our ten weeks of instruction to a series of exercises that help students learn the building blocks of statutory analysis while continuing to hone their research, analysis, and writing skills. We introduce students to statutes and regulations as primary sources of authority in this second quarter of law school.³ Through a series of four skill areas with accompanying assignments, students learn critical skills in how to locate and analyze a controlling statute and regulations, as well as cases and contextual sources like legislative history needed for interpreting a statute. For those professors teaching legal analysis, research, and writing on a two-semester basis, these skills should likely be added to the second half of the first semester, as

² The curriculum was typical of most other law schools' first-year legal writing programs: predictive, objective writing in the fall, followed by persuasive writing in the spring. See Ass'n of Legal Writing Dirs. & Legal Writing Inst., *Report of the 2019-2020 Institutional Survey*, Question 6.7, available at <https://www.alwd.org/images/resources/ALWDLWI2019-20InstitutionalSurveyReport.pdf>.

³ We include regulations because statutory and regulatory research is often connected and because reading statutes and regulations requires similar analysis.

part of the open-library memorandum universe, and reinforced when introducing persuasive writing in the second semester.

Finding, Reading, and Analyzing a Statute

The first skill we teach students is how to locate, read, and analyze a statute. We design and lead a workshop that walks students through the statutory research process to find the appropriate sections of a state or federal statutory code. Once they have found an applicable statute, we teach students to read the statute slowly and carefully, taking out highlighters and other note-taking tools to flag operable words like “must” and “shall” and “except.” Through this process, students are also able to deepen their appreciation for precise, unambiguous writing, and continue to learn writing techniques. Students realize first-hand that missing commas, passive voice, and misplaced modifiers create ambiguity. And when learning to read statutes, they immediately see that sentences where subjects, verbs, and objects, are close to one another are much easier to understand.

Students learn that statutes have a general anatomy—a title, preamble or purpose, definitions, scope (to whom does it apply?), general rules (what is encouraged or prohibited?), exceptions, and consequences or enforcement mechanisms. When students understand the outline of a statute, they can begin to digest it to see how various parts may apply to their client’s situation. We encourage students to zoom out on a statute and look at it holistically before zooming in on any one section. Missing the forest for the trees is easy to do with statutes, and we try to caution our students against it!

Once students have some familiarity with the statutory research and analysis process, we give them a short, ungraded assignment to help them build confidence in this skill and reinforce basic principles of legal analysis and writing. Students write a short email to a supervising attorney about whether a fictional client may

decline to rent his condo to someone with a service animal. We design a research workshop to guide students to the correct statute and regulation and help them find cases from there. We also use in-class presentations to show students how to structure a response to a statutory question. This is where we reinforce learning of legal writing organizational concepts, albeit in a different setting: it's still all about IRAC (or CRAC or any another acronym for an organizing schematic). The legal rule section is now simply based on the statute. The students find this practical setting enjoyable, as they can relate easily to the issue, the short email is manageable, and they begin to feel like attorneys.

Using Cases to Analyze a Complex Statute

The second skill we teach students is how to use cases to interpret an undefined term in a statute. Students write a formal memorandum on whether a conversation between two parties is “private” under the Washington Privacy Act, which prohibits the recording of “private conversations” absent certain exceptions.⁴ Because the term “private conversation” is undefined in the statute, students must use case law to find a definition as well as illustrative cases. The same assignment also requires students to investigate whether any exceptions might apply to the scenario that would allow for the recording to be lawful even if it was a private conversation. The assignment requires students to fully analyze a statute to communicate a holistic analysis. It requires student to understand the interplay between various sources of law and to continue practicing the critical skills of organizing and writing a complex legal analysis.

⁴ The Washington Privacy Act is codified at Wash. Rev. Code § 9.73.030.

Interpreting an Ambiguous Statute

The third skill we teach students is how to use a statutory interpretation framework to resolve an ambiguous statutory term. When a statutory term is defined neither in the statute nor in case law, students must understand the process by which a court assigns its meaning. Students learn about the process Washington state courts use to resolve ambiguity—first, looking to identify the “plain meaning” of the ambiguous term through intrinsic sources of construction (related statutes, canons of construction), and then, using extrinsic sources of construction (case law interpreting the term in a non-statutory context, legislative history) if the term is still ambiguous or to further bolster support for the term’s meaning.⁵

We give students an ungraded assignment that requires them to advise the headmaster of a fictional school about whether Twitter, the social media platform, constitutes a social networking site under a Washington statute that prohibits employers from asking to access an employee’s social networking accounts.⁶ Students are supported by a research workshop that guides them through the various steps of statutory interpretation and helps them to find a statute’s legislative history and relevant bill information. Students submit an outline of their analysis showing how they might structure a formal memorandum on the topic, although we do not require students to submit a memorandum due to time constraints.

This assignment is not only intellectually but also organizationally challenging for students, who discover that, even when writing about a more esoteric topic, they are still required to use the same IRAC or CRAC structure they have been taught. The only difference is that (a) now the rules are about how to interpret a statutory term and (b) the application is about applying those statutory interpretation rules to define the ambiguous term “social

⁵ This approach is laid out in *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 110 P.3d 1132 (2005).

⁶ The students must interpret Wash. Rev. Code § 49.44.200.

networking site” and conclude whether Twitter fits under that definition. A bonus to this assignment is that the classes we teach on this topic also allow us to discuss the importance of judicial philosophies and why issues of interpretation are frequently heard by the United States Supreme Court and many highest state courts.⁷

Putting It All Together: Final Summative Assessment

Our final assignment asks students to apply the various skills they’ve learned throughout the quarter to analyze a state or federal statute. Students must locate the relevant statute, then assess and analyze how the statute might answer the legal question, filling any gaps by using case law, legislative history, and other tools. Students have been asked a variety of statutory questions for this assignment, including whether something constitutes “fair use” under the Copyright Act, whether a student debt is dischargeable under the Bankruptcy Act, and whether an employer’s conduct is retaliatory under Washington’s Discrimination Act. Students are supported by various research workshops, group presentations on the statutes and the various cases students have found, and peer reviews, before they submit their final, graded assignments. And as always, class activities also include sentence-level writing practice and citation quizzes.

Conclusion

This series of exercises allows writing professors to integrate seamlessly statutory construction and analysis into their first-year legal writing courses. Students feel initially challenged but soon realize that the legal analysis and writing skills they have already developed can be used in any area of the law. Questions of statutory and regulatory analysis and construction are some of the hardest

⁷ For an interesting example of statutory construction and varied analysis in the Supreme Court, see *Yates v. United States*, 574 U.S. 528 (2015).

legal tasks for newly minted lawyers, yet essential to the practice of law. Teaching students the building blocks of this type of analysis helps prepare students to answer all types of complex legal questions confidently, ensuring that students graduate with the skills to become well-rounded, competent lawyers.