Brutal Choices in Curricular Design ...

Brutal Choices in Curricular Design... is designed to explore the difficult curricular decisions that teachers of legal research and writing courses are often forced to make in light of the realities of limited budgets, time, personnel, and other resources. We wonder if, given today’s difficult economic times, there is an increased move to use adjunct instructors rather than full-time faculty in legal writing programs. The two articles that follow focus on adjunct-led programs. We invite comments about adjunct-taught programs for potential publication in the Winter 2013 Perspectives. Please send commentary to Kathryn Mercer or Helene Shapo.

Cite as: Steven J. Johansen, It's Not About the Grades ... Really., 21 Perspectives: Teaching Legal Res. & Writing 1 (2012).

It’s Not About the Grades ... Really.
By Steven J. Johansen

Steven J. Johansen is a Professor and the Director of Legal Analysis and Writing at the Lewis and Clark Law School, in Portland, Ore.

I confess I find myself in the unusual position of writing a response to a position I support. Professor Cupar has made a convincing case for not grading the first major assignment of the Fall semester.¹ I agree with her thesis that delaying graded assignments provides many benefits that outweigh any potential drawbacks. However, Professor Cupar does not go far enough. All the reasons that she offers for not grading the first assignment apply equally to the second assignment, and the third, and the fourth. If we truly want to emphasize process over product, we would be wise to avoid grades altogether and make Legal Writing a pass/fail course.

I have written about this topic in this column before.² This article will not attempt to rehash the same points I wrote about then. However, I remain convinced that grades likely do more harm than good and, at the very least, are not a necessary component of a successful Legal Writing course. That said, I know that mine is a minority view and that I am unlikely to persuade many colleagues. Instead, I thought it might be useful to explore how to get the benefits of an ungraded course even in a grade-centered environment. In other words, are there strategies that we use in an ungraded course that can still work in the world of grades?

1. Make sure students remember why they are in law school.
I like to begin my first class of the semester with a story.³ This is the story that sets the theme for the entire year:

---
³ Actually, I like to begin every class with a story, but that's another article.

---
In This Issue

1  Brutal Choices in Curricular Design …
   It's Not About the Grades … Really.
   Steven J. Johansen

7  The Newest Legal Research Game
   Changer: Bloomberg Law
   Tamara Herrera

13  We Go Out Looking for Trouble: Taking
   Library Services to the Patron's Point of Need
   Whitney A. Curtis and Robert Brammer

18  This Time It's For Real Continued: More
   Ways to Use Law-Related Current Events in the
   Classroom
   Amy R. Stein

24  A Side-by-Side Comparison Shopping
   Method: Teaching Students How to Draft More
   Principled Outlines
   Abigail A. Patthoff

28  A Novel Teaching Practice: Using
   Nonlegal Fiction to Instill Legal Values
   Scott A. Anderson

33  Googling the Law: Apprising Students
   of the Benefits and Flaws of Google as a Legal
   Research Tool
   Alena Wolotira

38  Garage—as an Abstract Noun and a Verb
   Richard K. Neumann Jr.

42  The Case for Books, Past, Present, and
   Future
   James B. Levy

46  Index to Perspectives: Teaching Legal
   Research and Writing, Volumes 1-20 (1992-2012)
   Elizabeth Edinger

Perspectives: Teaching Legal Research and Writing is published in the fall, winter, and spring of each year by West.

Editor
Elizabeth Edinger
Catholic University of America
Law Library
Washington, D.C.

Editorial Board
Penny A. Hazelton
University of Washington
School of Law Library
Seattle, Washington

Judith Meadows
State Law Library
of Montana
Helena, Montana

Kathryn S. Mercer
Case Western Reserve
University School of Law
Cleveland, Ohio

Helene S. Shapo
Northwestern University
School of Law
Chicago, Illinois

Craig T. Smith
UNC School of Law
Chapel Hill, North Carolina

Kay Todd
Paul Hastings Janofsky
& Walker
Atlanta, Georgia

Opinions expressed in this publication are those of the authors and should not be attributed to the Editor, the Editorial Board, or West.

Authors are encouraged to submit brief articles on subjects relevant to the teaching of legal research and writing. The Perspectives Author's Guide and Style Sheet are posted at west.thomson.com/signup/newsletters/
perspectives/perstyle.aspx. Manuscripts, comments, and correspondence should be sent to:

Elizabeth Edinger, Associate Director, Catholic University of America Law Library, 3600 John McCormack Rd.,
N.E., Washington, DC 20064. Email: edinger@law.edu

west.thomson.com/journal/perspectives

Published by West as a service to the Legal Community.
A few years ago, my wife and I were channel surfing and came across a show by the American Film Institute. The show was running through the top 100 heroes and villains in 100 years of American film. Guess who the number one hero in all of American film is? Luke Skywalker? No. Superman? No. Scarlet O’Hara? No. The number one hero of American film is ... Atticus Finch. A lawyer. I tell you this to remind you of why you are here. You are not here to get good grades. You are not here to make law review. In fact, this really isn’t about you at all. You are here because someday, you will be somebody’s Atticus Finch. In a few short years, someone will be sitting with you at a counsel table and counting on you to help resolve what could be the most challenging problem of their life. We work hard here because we want to be prepared when that happens. Law school is not about us. It’s about our clients.

Obviously, a story told on the first day will lose its impact before the first leaves fall. However, this story establishes the framework for my entire year. As the semester ebbs and flows, there are times when students will be especially busy. When I see my students are starting to feel overwhelmed, I will urge them to “remember why you are here.” It is a mantra they hear often. More important than repeating this message, however, is living it.

One way to de-emphasize grades is to emphasize the client. For example, when explaining objectives for assignments and how students will be assessed, I put expectations in terms of the skills that will help their clients. I never put expectations in terms of grades. This allows me to put the emphasis where it should be—on becoming a better lawyer.

For example, if I wanted to emphasize the grade, I might say, “If you have more than three citation errors, you cannot earn an A on this assignment.” Instead, I shift the focus to the real reason I want them to get their citations right: “If you can’t even cite correctly, your boss will not be able to trust you. If your boss can’t trust you, you won’t be able to help clients, because you won’t have a job.” All of my comments, whether in writing or during conferences, are about how well the student has communicated with his or her intended audience and served his or her client’s needs. Unless the student is in danger of failing the course, no comments are about what kind of grade the student has earned. In a credit/no credit course, this is easy to do. That said, it is possible to keep this focus in graded courses as well. In fact, I do it in my Professional Responsibility course, which is generally a large lecture format with a mandatory curve.4

Some have argued that, within the culture of their school, it simply is not possible to lessen the perceived power of grades; students are simply too focused on grades and will respond to nothing else. Perhaps this is true at some schools. But most students come to law school because they want to become successful lawyers (or perhaps to use their legal education to succeed in some other endeavor). I suspect few come to law school because they just want one more chance to get the best grades in class. If the culture of a school is too grade centered, the cause may lie with the people who spend their careers there, not the people who merely visit for three or four years. Perhaps if we keep our focus on why our students are here, they will be more likely to do the same.

2. Assess often, grade rarely.

When I was a young lawyer, I had the opportunity to write a brief on a case before the Oregon Supreme Court. I still remember the day the decision arrived in the mail (snail mail—this was a long time ago). I ripped open the envelope and immediately turned to the last page. Affirmed! We had won! At that point, I really didn’t care why we had won—that was just a detail. I had won and that meant I was brilliant. It was only some time later, when I actually read the opinion, that I discovered the court had decided in our favor based upon reasons that neither party had argued in their briefs. While winning was great for our client, I really couldn’t take much credit for the victory.

When we grade, our students act a lot like I did those many years ago. A good grade is a win. A bad grade is a loss. Nothing else really matters. Of

---

4 For example, students often ask, “What do I need to know for the exam?” My answer is always the same: “Whatever you will need to know to serve your clients effectively and keep yourself out of trouble with the bar.”
“[T]he goal of each project is not the grade. It is to develop skills that will transfer to their future projects.”

course, as teachers, we know that our formative assessments—for example our margin comments—are designed to help the student learn from the assessment and are way more important than the grade. Students should be writing for us—and receiving feedback from us—so that they can learn to think and write more effectively. But if an assignment is graded, the grade is what the student will care the most about. The solution is easy—provide formative assessment as much as possible and grade as little as possible.

Providing regular formative assessment doesn’t require grading. We can provide regular formative assessment throughout a semester without providing summative assessments at all. First, I find it helpful to divide the typical memo problem into smaller, discrete assignments so that students are completing a writing assignment nearly every week. One week, students might be drafting a synthesized rule explanation. The next week, they will draft an application based upon that rule. The next week, they might be revising both for clarity and conciseness. None of these steps need to be graded. All can benefit from formative assessment. Some of what they learn from the rule explanation they will use in the application. Before you start rolling your eyes at the amount of work this might entail, remember that formative assessment can take many forms. One week, we might do a directed self-assessment where students review their own draft based on some specific learning targets. One week, we may do a similar peer assessment. The next week, I may do a live assessment conference with students. Finally, after working on small parts of a larger project, and assessing their work multiple times, students take all they have learned from the formative assessment and produce a final version of the assignment—and, unless that is the last assignment of the grading period, I wouldn’t grade that either.

It is only on the very last assignment, one that is hopefully a response to several opportunities for formative assessment, that we need resort to the summative assessment of grades. Even if we accept that grades are a practical necessity, it does not follow that everything students do must be graded. If we want students to focus on our formative assessment, then we should do as much formative assessment as possible, saving the actual grading until students have had as much opportunity to develop their skills as possible.

I find it valuable to remind students that every assignment is practice for the next one. The organizational structure and reasoning skills we work on in our first memo will better prepare us for our second, more complicated memo. The predictive writing of the first semester prepares us for the persuasive writing of the second semester. The skills they develop in their appellate brief will prepare them for their upper-level writing courses. And so it goes. Consequently, the most important question I ask students comes at the end of each assessment: “What have you learned from this assignment that will help you on your next assignment?” This reminds students that the goal of each project is not the grade. It is to develop skills that will transfer to their future projects. The reason to work on the first step of a project is to be able to produce a better product in the last step of the project.

3. Expect success but don’t fear failure.

Recently, I had lunch with a former student. Becca excelled in law school and after graduating she clerked for our state Supreme Court. She is now happily working in the Appellate Division of the Oregon Department of Justice. Over lunch, she mentioned how much of her time is spent writing briefs and memos. What she found surprising was how easy it has become. “A few years ago, writing a memo seemed nearly impossible. I spent hours and hours on my first writing assignments and made a lot of mistakes. Now, this type of writing is second nature to me.” While Becca is certainly a success story, she would deny that she has a natural talent for law. Rather, she will tell you that her road to success was paved with a lot of hard work and it was not without a few bumps along the way.

In her excellent book, Mindset, Carol Dweck explains that how we perceive our ability to learn

The next time you conference with a student, try this: ignore everything that needs improvement. Instead, find what the student has done right.

Explain why that section of the paper works. Ask the student to think about how she can transfer those successful strategies to other parts of the paper. Only after examining the successes, have the student identify those parts of the paper that were not as successful. Not every student will catch all the shortcomings of every paper. But, most students will have greater confidence in their ability to build on their successes and greater incentive to do so. Again, it is not grades that motivate students, but our expectation that they will succeed. By focusing on their success, we teach our students that we expect success rather than failure. As we encourage and reinforce success, we should also embrace the opportunity presented by failure.

Early assignments are designed to build skills. If a student does poorly, it merely reflects that they have not yet developed those skills. This is valuable information for the student; it shows them where they need to continue to focus their efforts. It is not necessary to label them as a C student because their academic journey is far from over. Rather we need to let them know they will succeed. Failure on a specific assignment is only information about how well he or she demonstrated a skill at a particular point in time. That information will help succeed in the future. It does not identify the limit of the student’s ability. While no one likes to fail, if we can encourage our students to maintain a growth mindset, if we can encourage them to reflect on how today’s failure will bring about tomorrow’s success, perhaps we can ease the perceived power of grades.

Dweck’s work suggests we can help our students if we promote two simple concepts: expect long-term success and embrace short-term failure. Start from a belief that all students can become successful writers. From that belief flows the conclusion that initial failure does not mean long-term failure.

We all know that when we comment on papers, we need to include positive as well as negative comments. But for many of us, this is a challenge. Our instinct is to look for what has gone wrong. Our thoughtful, detailed comments tend to focus on where the student has not met the teaching objective. When a student hits the target, we tend to either comment only briefly (“nice job!”) or not at all. On the other hand, we write extensive comments when the student has missed the mark. Knowingly or not, when we do this, we send a message that the student is not succeeding—even if she is performing better than we might expect a novice to do. This also makes it easy for us to come to expect failure. After reading many papers of mixed quality, it is natural to start focusing on the flaws of each new paper we pick up. Perhaps our students would be more successful if we started expecting and looking for more success.

For a more detailed exploration of the power of mindset in legal education, see Carrie Sperling and Susan Shapcott’s forthcoming article, Fixing Students’ Fixed Mindsets: Paving the Way for Meaningful Assessment, 18 J. Leg. Writing Inst. (2012).

6 For a more detailed exploration of the power of mindset in legal education, see Carrie Sperling and Susan Shapcott’s forthcoming article, Fixing Students’ Fixed Mindsets: Paving the Way for Meaningful Assessment, 18 J. Leg. Writing Inst. (2012).

7 By failure, I do not mean flunking a class or earning an F on an assignment. I mean the far more typical failure of earning a mediocre grade on an assignment or failing to demonstrate the expected skills of a particular assignment. To many of our students, failure is anything less than achieving excellence.
Encouraging a growth mindset also dovetails well with delaying grades as long as possible. By not grading most assignments, we reinforce the idea that each assignment is practice for the next one. The goal of the October assignment is to learn from practice so that the December assignment will be better. The goal for the December assignment is to make the April appellate brief better. Those goals are most likely to be met when we recognize where we have succeeded and learn from where we have failed.

To this point, I have largely ignored the elephant in the room. Every discussion I have ever had about ungraded courses (or assignments) ultimately gets around to the undeniable point that some students will not work as hard when there is not a grade on the line. We know that without the incentive (or threat) of grades, some students will not be motivated to work as hard as they need to. To this point, I have largely ignored the elephant in the room. Every discussion I have ever had about ungraded courses (or assignments) ultimately gets around to the undeniable point that some students will not work as hard when there is not a grade on the line. We know that without the incentive (or threat) of grades, some students will not be motivated to work as hard as they need to.

Professor Cupar cautions that by not grading her first memo, a small number of students did not take the assignment seriously enough and that these students were “six weeks behind where they would have been.” Let me suggest that it may have been more accurate that they were six weeks behind where they could have been had they put in the time and effort necessary to succeed in the course. There is no guarantee that those students would have worked any harder had the course been graded. They may have been just as far behind if they became convinced that they weren’t going to get a good grade no matter how much effort they put in. Sadly, that is something that many students become convinced of very early in their law school career.

It is unquestionably true that some students will not meet the demands of an ungraded course. It is also true that some students will not meet the demands of a graded course. However, most students will meet whatever expectations we set for them. If we expect students to demonstrate an understanding of the writing process, they will do so if we provide clear instruction and an opportunity to practice. If we expect students to tell their client’s story through the use of effective persuasion strategies, they will do so if we model those strategies and provide clear illustrations of how they are implemented in court documents. If we expect students to master citation form and the proper use of active voice, they will do so if we explain these concepts and show how technically sound writing reflects on one’s credibility. On the other hand, if we expect our students to do only that which they need to do to earn a particular grade, they will do that too.

To be sure, some students are tempted to slack off in my class. So, when necessary, I have a private talk with them. Some just need a swift metaphor kick in the pants. Others need some advice for balancing the demands of law school and the rest of their busy lives. It is better to deal with those relatively few students on an individual basis than it is to design an entire course—loaded with lots of arbitrary rules and the looming threat of the dreaded curve—with the elusive goal of catching the inevitable slackers. I learned long ago that most students are willing to work plenty hard in a class they see as relevant to their goal of practicing law. In other words, I start from the premise that the great majority of my students will work diligently because they recognize that hard work will lead to success. I design my course for those students—the ones who are motivated to learn the skills necessary to be a good lawyer.

By starting from an expectation of success, I design my course for students who will meet deadlines, read the materials, and put in the necessary work to develop good thinking and writing skills. This enables me to promote collaborative learning, focus on formative assessment, and minimize my role as Academic Cop. Further minimizing the power of grades by delaying them as long as possible encourages a growth mindset and keeps students focused on long-term goals rather than short-term success or failure. Finally, reminding students that our real purpose in law school is to prepare us to serve our clients will further reduce our students singular focus on grades—and make it easier for them to appreciate the bigger picture of our legal profession and their role in it.

© 2012 Steven J. Johansen