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A Mystery Statute Approach: How to Teach and Test the Legal Skill of Statutory Interpretation

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I have now used the Letter to Student Lawyer teaching method through an entire two-semester course. I have found that, in addition to the students enjoying the letter exercises, they are demonstrating a better understanding of legal principles, improvement in legal analysis and application, and a noted improvement in written communication.

Some of the benefits of this teaching method are:

1. Students develop and practice the skill of written communication in responding to questions that involve legal principles they are learning;
2. Students learn how application of legal principles is useful in solving practical problems they are likely to encounter in the practice of law;
3. Students learn how to extract legal principles from their reading assignments and apply them to the issues raised in the letters;
4. Students are provided with a means for consistent improvement of skills through self-learning, collaboration, feedback, and repetition.
5. Students learn how to speak and write the language of the law with confidence.

With regard to item number 5, above, Peter Kalis, chairman and global partner of K&L Gates, is quoted in *THE NATIONAL LAW JOURNAL*, in January 2012, as saying that he considers the criticism leveled against law schools misplaced. Law schools' failure lies not in their inability to teach practical skills, but rather in their diminishing ability to produce lawyers "able to speak the language of the law with confidence."

It is with this goal in mind that I hope the reader finds the information contained in this article helpful. If you would like more samples of letters and responses on issues related to contracts, please feel welcome to contact me.

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A Mystery Statute Approach: How to Teach and Test the Legal Skill of Statutory Interpretation

By Cynthia M. Ho

Do you teach a class that focuses on statutes, rules, or code? Are you frustrated that students seem resistant to deciphering such language without study aids, even though this is what they need to do as attorneys? If so, I not only empathize, but have a possible solution to your frustration—what I dub a “mystery statute” approach to learning. Basically, to get students to focus on statutory language, rather than merely parrot what someone else (whether a professor or commercial outline) says the language means, I regularly use “mystery” statutes.

What is a mystery statute? The so-called mystery statute may be a real statute that was not

assigned, or a fictitious one that is based on a statute that was covered. The term “mystery” refers both to the fact that students are previously unfamiliar with the statute, as well as the fact that for some students, the meaning of a statute may seem a mystery. To help perpetuate the mystery with statutes that are in fact real, I present them without identifying information, such as title, or even statute number. So, for example, my students might expect to see 28 USC XXX on an exam. By removing identifying information, I force students to focus on the language, rather than relying on what they can find with an index.

I use mystery statutes in my civil procedure and intellectual property classes, where I find that it is an effective way of teaching a key skill that generally gets short shrift in most classes. Whereas there are countless sources for students to learn how to brief a case, there are almost no sources that inform students how to interpret a statute. In addition, a more intentional approach to teaching what is a core legal skill seems appropriate and also consistent with the general recommendations of the Carnegie Report.

I use a mystery statute, together with related short answer questions (does the statute provide a claim, how is it different than X that we previously learned, etc.), as one form of assessment on my civil procedure exams for 1Ls. I believe that incorporating this on an exam sends the strong signal that class is not only about learning substantive material, but also about learning the skill of statutory interpretation. In addition, performance on the mystery statute can provide valuable feedback. In particular, for students who do better on the mystery statute (and multiple choice section), I can more easily diagnose that the problem is a need to focus on exam writing, rather than to overhaul all their studying strategies.

I will confess that it does take more time to create a strong mystery statute and related short answer questions than a traditional issue-spotting essay exam. I often feel like each part is its own exam. In addition, I find it particularly challenging to write good short answer questions because removing ambiguity is much more important than with traditional issue-spotting essay questions. However, I feel strongly that this can be an important form of feedback to 1Ls, so I have been using this approach for years in civil procedure, whereas I generally do not incorporate a mystery statute in upper-level exams, even though I may use some during class.

An obvious critical question is how to create and use a mystery statute. As I recently had the opportunity to explain at the Hybrid Teaching conference, I have a three step framework for incorporating a mystery statute approach: (1) identify the issue to address, (2) illustrate it in class, and then (3) use a mystery statute to assess students. I will explain how this works with one example from my civil procedure class.

Step 1: Identify the Issue to Address. A point of common confusion in my first semester 1L course in civil procedure is that language directing federal courts that they “shall have jurisdiction” means that plaintiffs must file in federal courts. In addition to identifying the statutory interpretation issue, it is helpful to understand the basis for the problem to more effectively tackle how to disabuse students of incorrect ideas. With this example, I know from asking former students that they believe the word “shall” is mandatory, but that they forget who the language is directed to. Interestingly, although most students can parrot the fact that federal courts are courts of “limited jurisdiction,” they have a much harder time identifying the language that does this. Accordingly, the next step is critical.

Step 2: Illustrate. After identifying that I want students to understand “shall have jurisdiction,” I then illustrate this language and alternatives in class. In particular, I contrast language that provides federal court jurisdiction with language that provides them exclusive jurisdiction. Once I point out the key word “exclusive” (often displayed in red on a PowerPoint slide), some students have an “aha” moment and look for this word thereafter as pivotal. However, even for students who have an “aha” moment, they sometimes fail to repeat this when the word does not show up in red font.

Step 3: Assess. The last step is to assess whether students understand the issue that I have attempted to illustrate. This assessment piece can happen in class, outside class, or on an exam. So, continuing with the above example, after showing the students contrasting language, I may provide “mystery” language that is similar, but slightly different than what was just illustrated. I usually do this on a PowerPoint slide with a multiple-choice question that contains not only the correct answer, but also common error(s) and do an in-class polling (through a “clicker” device). Usually, not everyone gets the right answer. For critical issues that I want to reinforce, I may repeat this process with a slightly different, yet similar provision in a later class or through an internet-based question, such as on TWEN, before asking it again on an exam.

Test before you Assess. Although there are only three steps from identifying to assessing students with a mystery statute, there is one additional sub-step built in. Basically, before you formally (summatively) assess students using a mystery statute, testing your statute and accompanying questions is key. I find it invaluable to ask a colleague or even a former student about whether questions are phrased correctly to get the desired answer, as well as whether time estimates are appropriate. In fact, I often find this step more important with mystery statutes than standard issue-spotting essay questions. In addition, sometimes during this testing phase, I will find that the statutory language taken from a real statute can be further edited down to more easily focus on the issue at hand given my desired time constraints.

Getting Fancy. The above example obviously focused on a relatively simple situation of a single clause, but the same approach works for more complex issues or statutes. The mystery statute can obviously be longer, with multiple components. By including multiple components, I can ask students how the components fit together. However, even if there is only one component, students can still be asked how the mystery statute works with existing statutes that they know. Some 1Ls assume that every new statute replaces all others, so this is a point that I often ask in the short answer questions.

Even with the approach explained above, the mystery statute could have an additional question to ask a related frequent point of confusion: whether the language “shall have jurisdiction” creates a cause of action. Many students think that it does, even after I show them different statutory language that creates a cause of action (and even though they are told on the first day of class that our focus is not on the substantive law).

What about the students? A final question might be student reaction. As with things that are difficult, some students will be very resistant. Other students are able to immediately see the value of learning a legal skill even as they are developing it; some 1Ls remark that they like feeling like a “real lawyer” in their first semester. Still others may not see the value initially, but later find that they have developed a valuable skill. I had a former student tell me that he believes his

ability to carefully and accurately read statutes so impressed attorneys that he was interning with, that they offered him a permanent position. This is, of course, a single anecdote that is far from representative of my typical experience with students, but it nonetheless helps reinforce my belief in the value of this approach.

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A *Bluebook* Snob Goes ALWD

By Jeanne M. Lamar

As a 1986 law school graduate, my world of legal citation was strictly by *The Bluebook*. Decades later, after years as a litigator in state and federal courts that uniformly adhered to *Bluebook* conventions, I began working in the law school setting. There I learned that another citation manual existed, something called “Allwood.” My reaction was less than enthusiastic. Citation had always seemed an unyielding and almost mathematical discipline. Did I really need to learn a new system? Did the new book hold promise for practitioners in state or federal courts?

The answers were yes and yes. Yes, I did need to learn and understand the *ALWD Citation Manual: A Professional System of Citation* in order to guide my students whose legal writing professors were assigning ALWD rather than *Bluebook* in their courses. Although not many courts have adopted ALWD, change is in the air. Federal judicial conferences have sought public comment on simplified citation standards, at least one Circuit Court of Appeals judge has repeatedly called for the abolition of *The Bluebook*, and legal writing professionals have lauded ALWD’s succinct and coherent citation system.

During my first cursory review of the *ALWD Manual*, I tried not to treat the bright green tome with too much suspicion, but neither did I give it much attention. At least not until I needed to lead a citation workshop for law students required to use the *ALWD Manual*, which meant I had to create exercises based exclusively on ALWD. In the process I began to appreciate the plain language of ALWD and its straightforward and transparent organization. I enjoyed the logic of using one consistent set of rules for all kinds of legal documents, a no-brainer when training law students preparing to enter the competitive marketplace of the practice of law.

ALWD is singularly well-designed to educate law students on proper citation form for lawyers. This is a critical skill in a job market where, increasingly, interns and first-year lawyers must arrive with practical skills and be productive during their first weeks of employment. First year associates are expected to provide usable (and billable) work product in the form of research and legal memoranda. Mastery of legal citation is an essential marker of competence for anyone seriously attempting to land a job in our profession’s new economic landscape.