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# ASSESSING A COOPERATIVE WRITING PROCESS IN AN UNDERGRADUATE LEGAL WRITING COURSE

JAMES A. CROFT<sup>†</sup>

## INTRODUCTION

I teach legal writing to undergraduate students, and I primarily do so by *cooperatively* writing with them, using instructional time to work through the students' writing assignments as a class. I arrived at this process organically over several years. When I first started teaching, I was surprised by the disconnect between my expectations regarding student writing and student performance. To attempt to close that gap, I began going through parts of the research and writing process cooperatively with my students in class, and increasing the amount of work that we did together each semester until, in the semester assessed in this study, the bulk of our class time was spent collectively working through the students' writing assignments.

This study critically evaluates the efficacy of my practice of writing with the students by asking two questions. First, is there evidence that my students, who spent the semester *cooperatively* writing with me and their peers, demonstrated an improvement in their ability to write *independently*? Second, how can I improve my teaching process? I attempted to address these questions by reviewing student texts for demonstrated improvement in the following areas: (1) the ability to report on cases and statutes accurately and precisely, including the ability to expressly connect those sources to a problem; and (2) use of citations. Both

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of these qualities of writing are valued at the college level,<sup>1</sup> at the law school level, and in legal practice.<sup>2</sup> I also surveyed my

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<sup>1</sup> In pre-professional writing at the college level, students are expected to report on their sources accurately, to apply those sources to problems effectively and expressly and to cite their sources properly. *See, e.g.*, COUNCIL OF WRITING PROGRAM ADMINISTRATORS, WPA OUTCOMES STATEMENT FOR FIRST-YEAR COMPOSITION (2014) (mentioning the need to teach first-year college students to evaluate sources for accuracy and the need to teach those students citation conventions); Arthur L. Costa, *Describing the Habits of Mind*, in LEARNING AND LEADING WITH HABITS OF MIND: 16 ESSENTIAL CHARACTERISTICS FOR SUCCESS 25, 29 (Arthur L. Costa & Bena Kallick eds., 2008) (including “striving for accuracy” and “thinking and communicating with clarity and precision” as habits of mind of effective people); CHRIS THAISS & TERRY MEYERS ZAWACKI, ENGAGED WRITERS & DYNAMIC DISCIPLINES 4–7 (2006) (calling persistence, discipline and careful attention qualities of “academic writing”); DAVID ROSSENWASSER & JILL STEPHEN, WRITING ANALYTICALLY 4–10, 37–39, 110–11 (5th ed. 2006) (including defining how parts of a problem are related and making implicit points explicit as “analytical moves” and discussing the need for students to expressly make connections between their evidence and their claims, the need for students to cite their sources and the need for students to conform to style guides when writing); *The Citation Project: Reframing the Conversation about Plagiarism*, CITATION PROJECT, <http://www.citationproject.net/> [<https://perma.cc/88YJ-FBDD>] (last visited Jan. 4, 2020) (studying and documenting student use of citations in college-level source based writing).

<sup>2</sup> Similarly, the literature on law student legal writing and professional legal writing highlights the need for legal writers to report on their sources effectively and accurately, to apply those sources to problems effectively and expressly, and to cite their sources properly. *See, e.g.*, ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, SOURCEBOOK ON LEGAL WRITING PROGRAMS 7, 24–25, 55 (Eric B. Easton et al. eds., 2d ed. 2006) (discussing accuracy, precision and effective citation throughout); HUNTER M. BRELAND & FREDERICK M. HART, THE LAW SCHOOL ADMISSION COUNCIL, DEFINING LEGAL WRITING: AN EMPIRICAL ANALYSIS OF THE LEGAL MEMORANDUM tbl.21, app.B (1994) (identifying factors including the following, as elements of a strong legal memorandum: supporting claims with controlling statutes and cases; accurate descriptions of authorities; the establishment of a linkage between the problem and legal authority; and correct citation form); Jessica Clark & Christy DeSanctis, *Toward a Unified Grading Vocabulary: Using Rubrics in Legal Writing Courses*, 63 J. LEGAL EDUC. 3, 25–29 (2013) (noting the following as elements of a strong legal memorandum: supporting claims with adequate research, accurate use of cases, the express comparison of those cases to the problem at hand and citations); Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80, 85–86, 89 (2003) (surveying judges, practitioners, and legal writing teachers on the legal writing skills of recent law graduates and reporting that those respondents identified precision, accuracy and the substantiation of all statements as elements of good writing in legal memoranda and identified citation errors and sloppy language as common problems in legal writing); Kristen K. Robbins-Tiscione, *The Inside Scoop: What Federal Judges Really Think about the Way Lawyers Write*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 257, 268, 270 (2002) (surveying federal judges on their thoughts about attorney writing and finding that judges value accurate reporting on the law and effective application of the law to the facts of the case); Judith D. Fischer, *Bareheaded and Barefaced Counsel:*

students about their experience in my course.<sup>3</sup>

### I. MY COURSE

I teach legal writing in the American Bar Association-approved undergraduate legal studies program at St. John's University in New York. The course, Legal Research and Writing I, is generally the second course that students take in the legal studies major sequence. Ideally, students take the course after taking Introduction to Legal Studies, an introductory course on reading legal texts and legal analysis. And, ideally, students who enter the university as legal studies majors take the course in the second semester of their first year, after taking Introduction to Legal Studies in the first semester of their first year. Legal Research and Writing I builds on the foundational skills developed in Introduction to Legal Studies. The aim of Legal Research and Writing I is to teach students to effectively apply legal sources to a problem and to effectively communicate that application in writing.

This study looked at the writing that my students produced during the Fall 2018 Semester. In that semester, I primarily taught the course by cooperatively working through a semester-long research and writing project with the students. The project asked the students to research and write about a hypothetical double murder. Our hypothetical client, Jim, was being charged with criminal facilitation and as an accessory to first degree murder because he lent his rifle to his friend, Mike, who killed two people with it. In particular, the project asked the students to look into three issues in connection with the murders: (1) whether a reasonable jury could convict our client of criminal facilitation in connection with the homicides; (2) whether a reasonable jury could convict our client as an accessory to the homicides; and (3) whether the homicides were committed during the same "criminal transaction."

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*Courts React to Unprofessionalism in Lawyers' Papers*, 31 SUFFOLK U. L. REV. 1, 5–17, 30–31 (1997) (collecting cases on lawyers being disciplined or suffering other adverse consequences for deficiencies in their court filings, including for failure to accurately represent the law and for errors of citation).

<sup>3</sup> At the college level, there have been calls for more research into the gains that students make in writing courses. *See, e.g.*, Richard H. Haswell, *NCTE/CCCC's Recent War on Scholarship*, 22 WRITTEN COMM. 198, 209–10 (2005). I am unaware of any article that assesses the efficacy of a cooperative writing pedagogy in a single undergraduate legal writing course by deeply engaging with student writing in that course.

For each of these issues, the assignment asked the students to use the relevant New York Penal Law statutes and three or four cases interpreting those statutes. For each of the three issues: (1) we spent a class period discussing the basic statutory analysis of the issue and took notes on that analysis together; (2) after the students read the cases that we would use in our analysis and briefed one of those cases, we spent a class period or two discussing each of those cases and took notes on those cases together; (3) we outlined our written discussion of that issue, starting with a template that I provided; and (4) we discussed and took notes on how to properly cite each of the sources, using the Bluebook. Each student was required to complete the write-up for each issue on their own, and each student was given a grade for each assignment. Before the write-up for each issue was due, I gave the students a class period to work on their written discussion of the issue, with me there to help. And, after the students turned in those written discussions, and after I graded the discussions, we spent a class period going over common issues in their writing.

For example, we worked through the research and writing process for the first issue in the semester-long research and writing project over the course of the first nine class periods of our twenty-six class period semester. The issue that we looked at for those nine class periods was “whether a reasonable jury could convict Jim [our hypothetical defendant] of criminal facilitation in connection with these homicides.” The essential facts of our hypothetical case were: Jim lent his good friend Mike a rifle; and, Mike killed two people with it. The sources that we worked with were: New York Penal Law § 115.05 (Criminal Facilitation in the Second Degree); *People v. Letizia*;<sup>4</sup> *People v. Higgins*;<sup>5</sup> *People v. Johnson*;<sup>6</sup> and *People v. Harrison*.<sup>7</sup>

In the first class meeting, we worked with the criminal facilitation statute and the facts. We pulled the criminal facilitation statute, broke it into its elements and matched our facts to the elements to find a more discrete research issue—how a court would assess whether the belief element of criminal facilitation is met in our case. Collective notes on this analysis were taken in class and were posted on the course webpage. In the second class period, we read, discussed, and briefed the first case,

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<sup>4</sup> 122 A.D.2d 555 (4th Dep’t 1986).

<sup>5</sup> 299 A.D.2d 841 (4th Dep’t 2002).

<sup>6</sup> 66 N.Y.2d 398 (1985).

<sup>7</sup> 71 Misc.2d 782 (Sup. Ct. Bronx Cnty. 1972).

*Letizia*. Collective notes were posted on the course webpage. Between the second and third class periods, as homework, the students read the other three cases and briefed one of them. In the third class period, we discussed those three cases: *Higgins*, *Johnson*, and *Harrison*. Collective notes were taken and were posted on the course webpage. In the fourth class period, I taught the students how to cite cases, and we did in-class work on citing cases, including all four of the cases for this research issue. Collective notes were taken, including perfect citations for all four cases. Those notes were posted on the course webpage. In the fifth class period, I taught the students how to cite statutes, and we did in-class work on citing statutes, including the criminal facilitation statute. Collective notes were taken, including a perfect citation to the criminal facilitation statute. Those notes were also posted on the course webpage. In the sixth class period, I taught the students how to quote legal sources properly. We did in-class work properly quoting legal sources, including the sources that would be used in the write-up for the first issue. Collective notes were taken, and those notes were posted on the course webpage.

I gave the students a template to work in for the first issue's write-up, and in the seventh class period, we worked in that template to prove three legal propositions using the five sources: First, "[a] reasonable jury could convict James of criminal facilitation in connection with the murders." Second, "[i]n cases where there was evidence that the aid was provided close in time to the commission of the crime, indictments for and convictions for criminal facilitation have stood. But, in cases where there was no such evidence, courts have held that convictions for criminal facilitation would be inappropriate." Third, "cases have held that evidence of the mere transfer of a weapon, without more, is insufficient to sustain a conviction for criminal facilitation." Collective notes on those legal proofs were taken and posted on the course webpage. In the eighth class period, there was no class presentation, and the students were given the class period to work on their issue one write-up. The students were required to attend the class, and I encouraged them to ask me questions, if they had any. By the end of the class period, I had a queue of students asking me to review their writing. I gave them instant feedback before they turned in the write-up. After I graded and commented on the students' issue one submissions, we discussed anonymized samples of student work during the following class. I chose samples that had issues that were common to many students.

After working through the research and writing processes for the first issue in the semester-long assignment, as a class, we replicated this process for the other two issues. The second and third iterations of this process were slightly more efficient than the first iteration. For the second and third issues, we did not spend an entire class period on one case. We also only spent one day working through citations for each of the second and third issues.<sup>8</sup>

While most of the course was spent working on the semester-long assignment, I also assigned the students two small independent writing assignments. In contrast to the semester-long assignment, the students did these two small writing assignments almost wholly independently. We did none of the work for those assignments cooperatively as a class, but I did allow students to ask me questions about those assignments. Those independent assignments gave the students an opportunity to apply the skills that we worked on as a class and gave me an opportunity to assess whether my process of *cooperatively* writing with the students was improving their ability to write *independently*. The first of these assignments (the “First Assignment”) was assigned during the tenth class meeting, after the students completed the first piece of the semester-long assignment, and after the students had been given three class periods of instruction in citation and quotation formats. The second of these independent assignments (the “Second Assignment,” and together with the First Assignment, the “Assignments”) was assigned at the end of the semester, after the second and third (final) pieces of the semester-long assignment

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<sup>8</sup> While I organically reached my process of working through the research and writing processes with my students by adjusting to my sense of their needs over the course of several years, I think that my process can be fairly characterized as a “cooperative” writing process. Cooperative writing “focuses on individual mastery of the subject through group work.” Elizabeth L. Inglehart et al., *From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 185, 188 (2003). “Cooperative learning involves a structured framework for the group work in which the teacher defines the students’ roles, tasks, and responsibilities, as well as the form of the final product. However, each student individually produces the final product.” *Id.* There is a great deal of literature discussing cooperative learning. *See, e.g., id.* (collecting scores of sources on cooperative and collaborative pedagogy and discussing those practices as applied in a first-year law school legal writing course); Clifford S. Zimmerman, *Thinking Beyond My Own Interpretation: Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L.J. 957 (1999).

were completed. The Second Assignment was due during the scheduled final exam week.

## II. ASSESSMENT METHODS

In essence, to assess whether students improved in their ability to write *independently* after spending a semester writing with me and their classmates *cooperatively*, I engaged in a post-semester assessment process of the students' written responses to the Assignments, that is, the previously mentioned, small *independent* writing assignments.

To assess the Assignments, I: (1) created rubrics for the Assignments; (2) assessed my students' writing using those rubrics; (3) compared the results of those assessments in the aggregate, to look for trends of improvement in the class as a whole; (4) compared each student's response to the First Assignment against their response to the Second Assignment, to look for evidence of improvement by individual students; and (5) surveyed the students about their perceptions about our practice of cooperative writing.

### A. *Participants*

In the Fall 2018 Semester, twenty-eight students were enrolled in my Legal Research and Writing I course.<sup>9</sup> The participants in this study are the twenty-three of those students who gave IRB-approved informed consent to participate in the study and who completed both of the Assignments. Of the twenty-three participants, seventeen were legal studies majors and two

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<sup>9</sup> There are some crucial differences between undergraduate legal studies students and first-year law students. Undergraduate legal studies students do not have college degrees yet. Also, unlike first-year law students, undergraduate legal studies students are not wholly immersed in the law. They take one or two law classes per semester together with their other college courses (e.g., english, philosophy, history, theology, and accounting). Additionally, my undergraduate legal writing class has a much less homogeneous student population than a typical law school legal writing class. Generally, in law school legal writing classes, all of the students are in their first year of law school and all of the students are in a similar LSAT band. By contrast, in my undergraduate legal writing course, I will often have first-year students and fourth-year students in the same course. Some of those fourth-year students may have been accepted to law school. Some of my first-year and second-year students may have been conditionally admitted to the university. Accordingly, the Assignments are smaller than first-year law school assignments. I imagine that they are analogous to the "short, closed assignments" that the authors of the Sourcebook suggested would be appropriate for "early" first-year law students. SOURCEBOOK ON LEGAL WRITING PROGRAMS, *supra* note 2, at 22.

were legal studies minors. Fourteen of the students, a majority of the class, were second-year students; eight were third-year students; and one was a fourth-year student. Nineteen of the students (over eighty percent of the class) were female, and four were male. During the Fall 2018 Semester, roughly fifty-eight percent<sup>10</sup> of the baccalaureate students in the college that houses the legal studies program came from minority populations. Also, across the university, I understand that roughly forty percent of the undergraduate students are federal Pell Grant recipients. The population of this course appeared to reflect those facts. All twenty-three participants took Introduction to Legal Studies prior to taking my course or at the same time as taking my course.

### B. *The Rubrics*

Assessment instruments should be tailored to the assignment being assessed.<sup>11</sup> I created rubrics tailored to each Assignment. Those rubrics (each a “Rubric” and together the “Rubrics”) are included in the discussions of the assessments of the Assignments, below. To create the Rubrics for the Assignments, I used the processes described by Walvoord<sup>12</sup> and by Suskie.<sup>13</sup> After reviewing the students’ work, I (1) created a list of strengths and weaknesses that I saw in that work; (2) used those observations to create a draft list of assessment criteria; (3) tested the draft criteria on a sample of the students’ work; and (4) revised the assessment criteria based on that application. I then applied the

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<sup>10</sup> St. John’s University, Fall 2018 Enrollment Reports Factbook ¶ 8 (2018), <https://www.stjohns.edu/sites/default/files/uploads/Combined%2012%20Page%20Enrollment.pdf> [<https://perma.cc/6FKX-SE8A>]. That semester, 2,050 of 3,536 baccalaureate students in the College of Professional Studies identified as: Non-Resident; Black/African American; American Indian or Alaska Native; Asian; Hispanic/Latino; Native Hawaiian or Other Pacific Islander; or of Two or More Races. *Id.*

<sup>11</sup> THOMAS A. ANGELO & K. PATRICIA CROSS, CLASSROOM ASSESSMENT TECHNIQUES: A HANDBOOK FOR COLLEGE TEACHERS 4, 5, 9 (2d ed. 1993); Chris M. Anson et al., *Big Rubrics and Weird Genres: The Futility of Using Generic Assessment Tools Across Diverse Instructional Contexts*, 5 J. WRITING ASSESSMENT 16 (2012).

<sup>12</sup> BARBARA E. WALVOORD, ASSESSMENT CLEAR AND SIMPLE: A PRACTICAL GUIDE FOR INSTITUTIONS, DEPARTMENTS, AND GENERAL EDUCATION 19–20 (2d ed. 2010).

<sup>13</sup> LINDA SUSKIE, ASSESSING STUDENT LEARNING: A COMMON SENSE GUIDE 145–56 (3d ed. 2009).

Rubrics to all of the students' work, revising the assessment criteria and reassessing, as appropriate.<sup>14</sup>

The Rubrics were created for the purpose of assessing the students' responses to the Assignments after the conclusion of the semester, and were created to help me assess whether the texts produced by the students contained evidence that the students' writing abilities had improved. The Rubrics were never shared with the students.

The Rubrics only address the students' use of sources and the students' use of citations.<sup>15</sup> When I graded the students' papers during the semester, I did so holistically and commented on all aspects of their papers, including on the topics covered in the Rubrics and on organization, grammar, typos, and the inclusion of irrelevant information. However, for this study, I chose to focus

<sup>14</sup> The final Rubrics resembled both the checklist and descriptive rubrics discussed by Suskie. See SUSKIE, *supra* note 13, at 372, 391. I did not put express "levels" in the Rubrics because I found it impossible to create a uniform system of levels across the various qualities of writing that I was looking at.

<sup>15</sup> While I created the Rubrics for the Assignments, the criteria of accuracy, effective application of facts to law and effective citation are present in published legal writing rubrics. See, e.g., BRELAND & HART, *supra* note 2, at tbl.21, app.B (identifying factors including the following as elements of a strong legal memorandum: supporting claims with controlling statutes and cases; accurate descriptions of authorities; the establishment of a linkage between the problem and legal authority; and correct citation forms); Clark & DeSanctis, *supra* note 2, at 25–29 (noting the importance of law students supporting their claims with adequate research, accurately using cases, expressly comparing those cases to the problem at hand and using effective citations); Beverly Petersen Jennison, *Saving The LRW Professor: Using Rubrics In The Teaching Of Legal Writing To Assist In Grading Writing Assignments By Section And Provide More Effective Assessment In Less Time*, 80 UMKC L. REV. 353, 362 (2012) (listing the incorporation of cases and statutes into the discussion and citation form as grading criteria for a sample closed universe legal memorandum rubric); Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 MICH. ST. LAW REV. 1, 38–56 (2004) (providing sample rubrics that identify accuracy, effective application of law to facts (how and why precedent applies to the problem) and citation format as grading criteria). And, while they are less prevalent than published law school rubrics, published legal writing rubrics at the undergraduate level also mention accuracy, effective application of law to facts and citation as grading criteria. See, e.g., Ellen Boegel, *The Who, What, Where, When, Why, and How of Designing and Assessing Assignments*, 32 PARALEGAL EDUCATOR 12, 14–15 (2017) (including the following factors in her suggested case brief rubric: proper case citation, "accurate" description of the procedural posture of the case, and a "precise" summary of the facts); Carolyn Bekhor, *Using Herman Melville to Build Legal Writing Skills: A Sample Exercise*, 28 PARALEGAL EDUCATOR 32, 33 (2013) (including accuracy of law, accuracy of application of law to facts and correctness of citations in her legal memorandum rubric); Donna Steslow et al., *Closing the Loop or Jumping through Hoops: The Impact of Assessment on the Legal Studies Curricula*, 33 J. LEGAL STUD. EDUC. 97, 126–27 (2016) (including application of law to facts as a grading criteria for a legal environment of business course).

exclusively on the assessment of the students' use of sources and citations for several reasons. First, I wanted to keep the number of variables that I was working with small and manageable. Second, it is easier to systematically look at the students' use of sources and use of citations than to look at other variables, like grammar. This is because there are more judgments involved in assessing grammar than in other variables. For example, it is often unclear to me whether a perceived grammar issue is actually a grammar issue, or instead, a reading comprehension issue or an ESL issue. Third, effectively writing about legal sources and effective use of citations are focuses of the course that I assessed. In contrast, grammar is commented on in all courses, and separating relevant information from irrelevant information, is harped on in every class period in the prerequisite course to this course, Introduction to Legal Studies.

### C. Surveys

At the end of the semester, to collect data on the students' perceptions of the efficacy of our cooperative writing process, I asked the students to complete a brief survey. While the primary measures that I rely on in this study are the analyses of student writing discussed below, I did make some efforts to conform the questions in the survey to best practices. The survey had an introduction that provided the participants with context. And, the survey questions are direct and open-ended.<sup>16</sup>

### III. THE ASSESSMENT OF THE FIRST ASSIGNMENT

The First Assignment involved a baseball bat being used in anger to break a leg. This assignment asked the students to analyze and write about whether the baseball bat would likely be considered a "dangerous instrument" under the New York Penal Law. In their analysis, the students were required to use three sources: Section 10.00 of the New York Penal Law, which defines dangerous instrument; and two cases that dealt with the circumstances under which baseball bats are considered to be dangerous instruments: *People v. Ozarowski*,<sup>17</sup> and *People v.*

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<sup>16</sup> See generally FLOYD J. FOWLER, JR., IMPROVING SURVEY QUESTIONS: DESIGN AND EVALUATION (1995).

<sup>17</sup> 38 N.Y.2d 481 (1976).

*Johnson*.<sup>18</sup> Figure 1 provides the First Assignment as assigned to the students.

**Figure 1**

*First Assignment as Assigned to Students*

**Facts and the Question**

Tom and Jim are on the St. John's baseball team together and got into a fight. In the course of the fight, Tom clubbed Jim with a baseball bat, breaking Jim's leg. Tom has been charged with Assault in the Second Degree under section 120.05(2) of the New York Penal Law, assault with a "dangerous instrument." The State has taken the position that the baseball bat that Tom used in the assault is a "dangerous instrument."

Please answer the following question: Is the baseball bat that Tom used likely to be considered a "dangerous instrument" under the New York Penal Law? You are writing for me (an attorney at the firm that you work at) and your purpose is to inform me about how this question is likely to be analyzed by a court.

You must use the following three sources in your analysis: Section 10.00 of the New York Penal Law; *People v. Ozarowski*, 38 N.Y.2d 481 (1976); and *People v. Johnson* 882 N.Y.S.2d 401 (App. Div. 2009). I have also included the Assault in the Second Degree statute for background. You are not required to use the Assault in the Second Degree statute.

**Tips:**

Section 10.00 of the New York Penal Law has the definition of "dangerous instrument."

Yes, a broken bone is a serious physical injury.

**What I'm Looking For/Grading**

<sup>18</sup> 63 A.D.3d 470 (1st Dep't 2009).

This assignment will be graded using the same 10 point scale and rubric as our other writing assignments. I want one (or two) good paragraph(s) answering this question completely, effectively and concisely.

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While the answer to a legal question is rarely certain, the answer to the question of whether the baseball bat in this case is likely to be considered a dangerous instrument is as clear as possible. The baseball bat here is a dangerous instrument. The New York Penal Law defines “dangerous instrument” as any “instrument . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing . . . serious physical injury.”<sup>19</sup> Here, the baseball bat was used in a fight to cause a broken bone, a serious physical injury, making the bat a “dangerous instrument.” The two precedent cases support this observation. Both cases held that baseball bats are dangerous instruments when they are used in a way that causes serious physical injury or in a way that is readily capable of causing serious physical injury.<sup>20</sup> In *Ozarowski*, a baseball bat was used in an assault and fractured the victim’s skull.<sup>21</sup> In *Johnson*, the defendant threatened the victim with the bat.<sup>22</sup> Both cases expressly held that the bats in those cases were dangerous instruments.<sup>23</sup> All twenty-three students correctly concluded that the baseball bat in this case was a dangerous instrument.

The Rubric for this Assignment documented how well the students used the three sources to support their answer to the question—the accuracy with which the students reported on the sources, how effectively the students connected the sources to the problem and how well the students cited their sources. Table 1 shows the assessment criteria from the Rubric for the First Assignment.

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<sup>19</sup> N.Y. PENAL LAW § 10.00(13).

<sup>20</sup> *Johnson*, 63 A.D.3d at 470; *Ozarowski*, 38 N.Y.2d at 481.

<sup>21</sup> *Ozarowski*, 38 N.Y.2d at 481.

<sup>22</sup> *Johnson*, 63 A.D.3d at 470.

<sup>23</sup> *Id.*; *Ozarowski*, 38 N.Y.2d at 481.

**Table 1***Assessment Criteria for the Rubric for the First Assignment*

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**Rubric Criteria**

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**Use of Sources*****Definition of “Dangerous Instrument”***

Uses the definition of dangerous instrument.

Quotes the definition of dangerous instrument.

Gives all of the relevant parts of the definition of dangerous instrument (does not cut out relevant parts of the definition when editing).

Throughout the piece, only uses the correct defined terms: “dangerous instrument” and “serious physical injury” (does not use terms like “dangerous weapon” or “deadly instrument” or “serious harm”).

Does a good job expressly applying the definition of “dangerous instrument” to the facts, leaving little room for improvement.

***Johnson Case***

Uses the *Johnson* case.

When quoting or clearly paraphrasing the *Johnson* case, uses the opinion, not the synopsis, holdings or headnotes.

The portions of the *Johnson* case that the author chooses to use are discussed accurately.

Reporting on the *Johnson* case, the author uses the words “dangerous instrument,” “bat” and “serious physical injury.”

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**Rubric Criteria**

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The author quotes the best part of the *Johnson* case—the part that expressly held that, on the facts of that case, there was sufficient evidence to hold that the baseball bat in that case was a dangerous instrument.

The author does a good job expressly connecting the *Johnson* case to the question—whether a baseball bat can be a dangerous instrument—leaving little room for improvement.

***Ozarowski Case***

Uses the *Ozarowski* case.

When quoting or clearly paraphrasing the *Ozarowski* case, uses the opinion, not the synopsis, holdings or headnotes.

The portions of the *Ozarowski* case that the author chooses to use are discussed accurately.

Reporting on the *Ozarowski* case, the author uses the words “dangerous instrument,” “bat” and “serious physical injury.”

The author quotes the best part of the *Ozarowski* case—the part that expressly held that, on the facts of that case, there was sufficient evidence to hold that the baseball bat in that case was a dangerous instrument.

The author does a good job expressly connecting the *Ozarowski* case to the question—whether a baseball bat can be a dangerous instrument—leaving little room for improvement.

**Citing**

The author tells the reader their sources, even if those sources are not cited.

The author gives citations for all of their sources, citations that can be used to easily pull the sources, but such citations are not proper Bluebook citations.

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**Rubric Criteria**

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The author gives citations for all of their sources, citations that can be used to easily pull the sources, and the author clearly attempted to give proper Bluebook citations for all of their sources, but made some Bluebooking errors.

The author gives proper Bluebook citations for all of their sources (including, for example, subsections for the statutes, small caps or all caps for statutes, the proper reporter for cases, pin cites for cases and jurisdictional parentheticals for cases).

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Many of the criteria dealt with how well the students expressly connected the sources to the problem—the extent to which, in addition to answering the question and reporting on the sources, the student articulated how the sources lead to the conclusion. Some students only answered the question and only reported on the sources, making no express attempt to articulate the connection between the sources and the answer:

Yes, the baseball bat the Jim used to assault Tom is likely to be considered a “dangerous instrument”. A dangerous instrument can be defined as “any instrument, article or substance, including a “vehicle” as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury” (Section 10 of New York Penal Law). In People v. Johnson, the conviction was affirmed. There was enough legally sufficient evidence to support that the bat was considered a dangerous instrument and that the bat could cause serious physical injury. In People v. Ozarowski, the conviction was affirmed. Each defendant has their own intent to cause serious physical injury with a “dangerous instrument”. The bat is considered a “dangerous instrument”.<sup>24</sup>

This student answered the question and discussed the three sources, but didn’t make any attempt to expressly connect the sources to the problem. The student’s first sentence answers the

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<sup>24</sup> First Assignment, Student 1 (Fall 2018) (on file with author). All of the samples of student writing in this article are directly copied from actual student responses and are entirely unedited. Any typos or signaled alterations or omissions in the samples were made by the students.

question. The student's second, third and fourth sentences report on the Penal Law, *Johnson*, and *Ozarowski*, respectively. Implicit in this answer, but not expressly stated, are the observations that: (1) the baseball bat in this case is likely to be considered a dangerous instrument because it satisfied the test for dangerous instrument, meaning it caused a serious physical injury—a broken bone; and (2) the baseball bat in this case is likely to be considered to be a dangerous instrument because it was used in a similar manner to how baseball bats were used in the precedent cases—in those cases, baseball bats were used in a way that threatened serious physical injury or that caused serious physical injury—and in those two precedent cases baseball bats were held to be dangerous instruments. Several of the Rubric criteria dealt with how well the students expressly made these connections.

One criterion asked whether the author “does a good job expressly applying the definition of ‘dangerous instrument’ to the facts, leaving little room for improvement.” This criteria dealt with how well the students expressly connected the relevant facts and the relevant pieces of the definition of dangerous instrument. An example of a student doing this well is:

According to section 10(13) of the New York Penal Law “[a] dangerous instrument means any instrument, article or substance . . . which, under the circumstances in which it is used attempted to be used or threatened to be used is readily capable of causing death or serious physical injury.” N.Y. PENAL § 10.00(13). Based on this statute, a baseball bat is a dangerous instrument. In this case, upon clubbing Jim with the baseball bat Tom broke Jim's leg, which is a serious physical injury, thus making the baseball bat a dangerous instrument.<sup>25</sup>

This student expressly connected the relevant facts and the relevant pieces of the definition of dangerous instrument—here, the baseball bat caused a broken bone, a serious physical injury, making the baseball bat a dangerous instrument.<sup>26</sup> Students who expressly made these connections satisfied this criteria.

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<sup>25</sup> First Assignment, Student 4 (Fall 2018) (on file with author).

<sup>26</sup> Ideally, the recitation of the law and the application of that law to the facts of the problem will fit together like the common terms of the major and minor premises of a syllogism. See, e.g., Kristen K. Robbins-Tiscione, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 492–98 (2003); CATHY GLASER ET AL., *THE LAWYER'S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY* 64–69 (2002).

Many students made some express attempt to connect the facts and the definition of dangerous instrument, but fell short of satisfying this criteria. For example, one student wrote, “*Tom clubbed Jim with a baseball bat breaking Jims leg. A reasonable jury could conclude that the baseball bat that Tom used to hit Jim is a ‘dangerous instrument’.*”<sup>27</sup> This student did not expressly state that a broken bone is a serious physical injury. Similarly, another student wrote that “*Tom used a baseball bat to club Jim*” then gave the definition of “serious physical injury” then wrote “*The fight resulted in Tom breaking Jim’s leg.*”<sup>28</sup> This student clearly understood that a broken bone is a serious physical injury, but did not say so.

Other criteria assessed how well the students connected the *Ozarowski* and *Johnson* cases to the problem. Our problem dealt with whether a baseball bat is likely to be considered a dangerous instrument under the New York Penal Law. And, both of the precedent cases expressly stated that the bats in those cases were dangerous instruments. In *Johnson*, the court stated that, “[W]e find that there was legally sufficient evidence to establish defendant’s intent to use a baseball bat unlawfully against the victim, not merely against the victim’s property, and that the bat constituted a dangerous instrument within the meaning of Penal Law § 10.00(13).”<sup>29</sup> In *Ozarowski*, the court held that:

The Penal Law defines a dangerous instrument as “any instrument, article or substance \*\*\* which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.” (Penal Law, § 10.00, subd 13.) Clearly, under the circumstances here, a baseball bat qualifies as such a dangerous instrument. (See *People v Rumaner*, 45 AD2d 290, *supra*.) It is too obvious to need elaboration that when used outside its sports context, it is a dangerous instrument of the very type recognized as an effective weapon since primitive times.<sup>30</sup>

One way that students effectively connected the cases and our problem was to quote these passages. The “quotes the best part” of the cases criteria tracked how many of the students quoted these portions of the cases. It should be noted that the passage in *Johnson* was much easier to find than the passage in *Ozarowski*.

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<sup>27</sup> First Assignment, Student 3 (Fall 2018) (on file with author).

<sup>28</sup> First Assignment, Student 14 (Fall 2018) (on file with author).

<sup>29</sup> *People v. Johnson*, 63 A.D.3d 470, 470 (1st Dep’t 2009).

<sup>30</sup> *People v. Ozarowski*, 38 N.Y.2d 481, 491 n.3 (1976).

The *Johnson* opinion is only three paragraphs long,<sup>31</sup> but the *Ozarowski* opinion is over 3,300 words, and the quoted passage is in a footnote.<sup>32</sup>

The Rubric also tracked how well the students demonstrated the connection between the cases and the problem by tracking how many students used the right words in their discussions of the cases: “dangerous instrument,” “bat” and “serious physical injury.” The bat in this case was a dangerous instrument because it caused serious physical injury. The assumption for these criteria is that students who understood these connections and who could effectively communicate these connections would use these words in their writing. An example of a student using the right words in a discussion of *Johnson* without quoting from *Johnson* is: “*In People v. Johnson, the conviction was affirmed. There was enough legally sufficient evidence to support that the bat was considered a dangerous instrument and that the bat could cause serious physical injury.*”<sup>33</sup> An example of a student using the right words in a discussion of *Ozarowski* without quoting the best part of that case is:

In *People v. Ozarowski*, seven defendants were convicted of assault in the second degree – like Tom – with use of a dangerous weapon. A member of their group struck an employee of a restaurant in the head fracturing the skull. The court affirmed the conviction agreeing that the baseball bats were dangerous instruments and “each defendant had formed specific intent that one or more of their number should do serious physical injury” (*People v. Johnson* 882 N.Y.S.2d 401 (App. Div. 2009)).<sup>34</sup>

Finally, the students who “did a good job” connecting the cases to the question “leaving little room for improvement” reported on the relevant case accurately, quoted the best part of the case or used all of the correct words or both, and did a good job expressly articulating how the case adds to the analysis. An example of a student doing a good job connecting the *Johnson* case to the problem is:

There are several cases where bats are seen as “dangerous instruments.” First in *People v. Johnson*, where the court’s opinion states that “we find that there was legally sufficient evidence to establish defendant’s intent to use a baseball bat

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<sup>31</sup> *Johnson*, 63 A.D.3d at 470.

<sup>32</sup> See generally, *Ozarowski*, 38 N.Y.2d at 481.

<sup>33</sup> First Assignment, Student 1 (Fall 2018) (on file with author).

<sup>34</sup> First Assignment, Student 11 (Fall 2018) (on file with author).

unlawfully against the victim, not merely against the victim's property, and that the bat constituted a dangerous instrument within the meaning of Penal Law § 10.00(13)." *People v. Johnson*, 63 N.Y.S.2d 401, 470 (App. Div. 2009).<sup>35</sup>

In addition to quoting the part of the *Johnson* case where the court held that the baseball bat was a dangerous instrument, this student told the reader why the case matters—what the case adds to the analysis—with her introductory sentence: "*There are several cases where bats are seen as 'dangerous instruments.'*"<sup>36</sup> An example of a student doing a good job connecting the *Ozarowski* case to our problem is:

The following cases affirm the belief that the baseball bat is a dangerous instrument. *People v. Ozarowski*, was a case that involved a victims skull being fractured by the use of a baseball bat. The court of Appeals affirmed the defendants convictions, "clearly under the circumstances here, a baseball bat qualifies as . . . a dangerous instrument . . . it is a dangerous instrument of the very type recognized as an effective weapon since primitive times."<sup>37</sup>

Like the last example, in addition to using the best part of the case, this student expressly signaled to the reader that this case supports her observation that a baseball bat is likely to be considered a dangerous instrument by beginning her discussion of the cases with "*The following cases affirm the belief that the baseball bat is a dangerous instrument.*"<sup>38</sup>

Finally, the Rubric tracked the wide range in the students' willingness and ability to effectively cite their sources. The Rubric essentially includes four levels of student citations: (1) students who named their sources without citing them, for example, students who named *People v. Johnson* or *People v. Ozarowski* without listing the reporters that those cases are published in; (2) students who gave citations that can be used to efficiently locate those sources; (3) students who additionally tried to apply the Bluebook to those citations; and (4) students who gave effective Bluebook citations. Here is an example of a student giving citations that can be used to easily locate the cases, but not attempting to give proper Bluebook citations of those cases: "*In People v. Ozarowski 38 N.Y.2d 481, 344 N.E.2d 370, 381 N.Y.S.2d*

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<sup>35</sup> First Assignment, Student 15 (Fall 2018) (on file with author).

<sup>36</sup> *Id.*

<sup>37</sup> First Assignment, Student 19 (Fall 2018) (on file with author).

<sup>38</sup> *Id.*

438 and in *People v. Johnson* 63 A.D.3d 470, both cases used evidence of the serious injuries caused specifically by baseball bats to convict the defendants of felonies.”<sup>39</sup> Any of the citations that the student gave can be used to pull the cases, but there are many issues with these citations from a Bluebook perspective. Among other issues, this student included parallel citations and did not include the customary court and jurisdictional parentheticals that tell the reader the jurisdiction where the case was decided, the court within that jurisdiction that decided the case and the year of decision. An example of a student clearly trying to apply the Bluebook rules of citation but failing to do so is this citation to *Ozarowski* by one student: “*People v. Ozarowski*, 381 N.Y.S.2d 438, 488 (1976).”<sup>40</sup> In contrast to the last student, this student only cited to one reporter and gave a proper court and jurisdictional parenthetical, but this student cited to the wrong reporter and cited to different reporters for the first page of the case and for the pinpoint citation (“pin cite”). In this First Assignment, only two students gave me essentially error-free Bluebook citations for all of their sources. Here is how one of those students cited the three sources used in this problem: “N.Y. PENAL LAW § 10.00(13),” “*People v. Johnson*, 882 N.Y.S.2d 401, 402 (App. Div. 2009),” and “*People v. Ozarowski*, 38 N.Y.2d 481, 487, 491 (1976).”<sup>41</sup> The citation to *Ozarowski* contains multiple pin cites because the student drew from multiple pages in the case.

#### IV. RESULTS OF THE ASSESSMENT OF THE FIRST ASSIGNMENT

Table 2 below reports the results of the application of the Rubric for the First Assignment.

**Table 2**

*Results of Rubric Assessment of First Assignment*

Y	N	N/A	Rubric Criteria
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#### Use of Sources

#### *Definition of “Dangerous Instrument”*

<sup>39</sup> First Assignment, Student 12 (Fall 2018) (on file with author).

<sup>40</sup> First Assignment, Student 4 (Fall 2018) (on file with author).

<sup>41</sup> First Assignment, Student 9 (Fall 2018) (on file with author).

Y	N	N/A	Rubric Criteria
23	0	0	Uses the definition of dangerous instrument.
22	1	0	Quotes the definition of dangerous instrument.
23	0	0	Gives all of the relevant parts of the definition of dangerous instrument (does not cut out relevant parts of the definition when editing).
7	16	0	Throughout the piece, only uses the correct defined terms: “dangerous instrument” and “serious physical injury” (does not use terms like “dangerous weapon” or “deadly instrument” or “serious harm”).
14	9	0	Does a good job expressly applying the definition of “dangerous instrument” to the facts, leaving little room for improvement.
<b><i>Johnson Case</i></b>			
20	3	0	Uses the <i>Johnson</i> case.
11	0	12	When quoting or clearly paraphrasing the <i>Johnson</i> case, uses the opinion, not the synopsis, holdings or headnotes.
18	2	3	The portions of the <i>Johnson</i> case that the author chooses to use are discussed accurately.
4	16	3	Reporting on the <i>Johnson</i> case, the author uses the words “dangerous instrument,” “bat” and “serious physical injury.”
9	11	3	The author quotes the best part of the <i>Johnson</i> case—the part that expressly held that, on the facts of that case, there was sufficient evidence to hold that the baseball bat in that case was a dangerous instrument.

Y	N	N/A	Rubric Criteria
4	16	3	The author does a good job expressly connecting the <i>Johnson</i> case to the question—whether a baseball bat can be a dangerous instrument—leaving little room for improvement.
<b><i>Ozarowski Case</i></b>			
22	1	0	Uses the <i>Ozarowski</i> case.
11	1	11	When quoting or clearly paraphrasing the <i>Ozarowski</i> case, uses the opinion, not the synopsis, holdings or headnotes.
22	0	1	The portions of the <i>Ozarowski</i> case that the author chooses to use are discussed accurately.
3	19	1	Reporting on the <i>Ozarowski</i> case, the author uses the words “dangerous instrument,” “bat” and “serious physical injury.”
2	20	1	The author quotes the best part of the <i>Ozarowski</i> case—the part that expressly held that, on the facts of that case, there was sufficient evidence to hold that the baseball bat in that case was a dangerous instrument.
2	20	1	The author does a good job expressly connecting the <i>Ozarowski</i> case to the question—whether a baseball bat can be a dangerous instrument—leaving little room for improvement.
<b>Citing</b>			
23	0	0	The author tells the reader their sources, even if those sources are not cited.
15	8	0	The author gives citations for all of their sources, citations that can be used to easily

Y	N	N/A	Rubric Criteria
			pull the sources, but such citations are not proper Bluebook citations.
12	11	0	The author gives citations for all of their sources, citations that can be used to easily pull the sources, and the author clearly attempted to give proper Bluebook citations for all of their sources, but made some Bluebooking errors.
2	21	0	The author gives proper Bluebook citations for all of their sources (including, for example, subsections for the statutes, small caps or all caps for statutes, the proper reporter for cases, pin cites for cases and jurisdictional parentheticals for cases).

The results of the assessment indicate that, by that point in the semester, all of the students were doing at least some things right; they all based their answers on at least some of the sources and they all told me what their sources were.

While all of the students did these basic things correctly, the results of the assessment showed that many of the students had substantial room to improve their reporting on the sources and to improve their application of the sources to the problem. For example, three students did not use the *Johnson* case. And, while discussing the *Johnson* case, only four students used all of the correct words, only nine students quoted the most useful part of the case, and only four students did a “good job” expressly connecting the case to the problem. Meanwhile, only one student did not use the *Ozarowski* case. And, discussing the *Ozarowski* case, only three students used all of the correct words, only two students quoted the most useful part of the case, and only two students did a “good job” expressly connecting the case to the question. Sixteen of the students used at least one imprecise defined term, like “dangerous weapon” or “deadly instrument” or “serious harm,” instead of “dangerous instrument” and “serious physical injury,” the terms used in New York Penal Law. The assessment also highlighted substantial room for improvement with respect to citation. While all students listed their sources,

only fifteen students gave citations that could be used to easily locate their sources. Only twelve students clearly attempted to conform to Bluebook rules of citation, and only two students provided good Bluebook citations for all of their sources.

It should be noted that, by this point in the semester, a small minority of students were already doing a very good job under substantially all of the Rubric criteria. In this Article, I assess my course by looking for evidence of improvement in student writing—evidence of improvement from this First Assignment to the Second Assignment, discussed below. Because these students did a very good job under substantially all of the Rubric criteria for this First Assignment, our comparisons below will not capture improvement by these students. But, the fact that these students were doing so well by this point in the semester supports the assertion that the cooperative writing process was working for these students. For example, I know that the student who turned in the strongest response to the First Assignment had never taken a law class before. That semester she was simultaneously taking my legal writing class and my introduction to legal studies class.

#### V. THE ASSESSMENT OF THE SECOND ASSIGNMENT

In many respects, the Second Assignment is similar to the First Assignment. The First Assignment asked whether a baseball bat is likely to be considered a “dangerous instrument” under the New York Penal Law, while the Second Assignment asked whether a gun that misfires is likely to be considered a “deadly weapon” or a “dangerous instrument” under the New York Penal Law. Both assignments asked the students to apply three sources to a small fact pattern: Section 10.00 of the New York Penal Law, which defines “dangerous instrument” and “deadly weapon;” and two cases interpreting the relevant definitions. Figure 2 shows the Second Assignment, as assigned.

#### **Figure 2**

*Second Assignment as Assigned to Students*

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#### **Facts and the Question**

Jim Smith was recently arrested for attempted aggravated assault on a peace officer, among other crimes. Following an altercation with a peace officer at the mall, Jim tried to shoot that officer with

a pistol, but his pistol misfired several times. An important issue in Jim's case is whether a gun that misfires can be considered a "deadly weapon" or a "dangerous instrument" under the New York Penal Law.

Using these facts and (i) Section 10.00 of the New York Penal Law, (ii) the Shaffer case (486 N.E.2d 823) and (iii) the Hilton case (145 A.D.2d 352), please answer the following question: Is a gun that misfires likely to be considered a "deadly weapon" or a "dangerous instrument" under the New York Penal Law? You are writing for me (an attorney at the firm that you work at) and your purpose is to inform me about how this question is likely to be analyzed by a court.

You have to pull section 10.00 of the New York Penal Law and the Shaffer and Hilton Cases from Westlaw.

Tips:

If a gun misfires, it goes "click" instead of "boom." It is loaded, but it fails to fire. It is inoperable.

While the citations that I gave you for the Shaffer and Hilton cases are sufficient to find those cases, they are not proper Bluebook citations. In your answer, I need proper Bluebook citations.

**What I'm Looking For/Grading**

This assignment will be graded using the same 10 point scale and rubric as our other writing assignments. I want one (or a few) good paragraph(s) answering this question completely, effectively and concisely.

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Like the First Assignment, in my opinion, there is a clear correct answer to the questions posed in the Second Assignment. A gun that misfires is not likely to be considered a deadly weapon or a dangerous instrument under the New York Penal Law. While, on their face, the statutory definitions of "deadly weapon" and "dangerous instrument" can be read to capture a gun that misfires, the *Shaffer* and *Hilton* cases suggest that a gun that misfires is neither a deadly weapon nor a dangerous instrument. Section

10.00 of the New York Penal Law defines “deadly weapon” as “any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged.”<sup>42</sup> *People v. Shaffer* held that, to establish that a gun is a “deadly weapon,” the People must prove that the gun is “both operable and loaded with live ammunition.”<sup>43</sup> Accordingly, the *Shaffer* court further held that a gun that misfired was not a deadly weapon.<sup>44</sup> Section 10.00 of the New York Penal Law defines “dangerous instrument” as “any instrument . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.”<sup>45</sup> As with deadly weapons, in *People v. Hilton*, the court held that, to establish that a gun is a dangerous instrument, the People must prove that the gun is “loaded and operable.”<sup>46</sup> Because it is difficult to prove that a gun that misfires is both loaded with live ammunition and is operable, it will be difficult for the prosecution to prove that such a gun is a deadly weapon or a dangerous instrument.

Because the Second Assignment asked two questions—whether the gun is likely to be considered a deadly weapon and whether the gun is likely to be considered a dangerous instrument—there was more room for error and confusion in that assignment. Some students only answered one of the two questions, while others conflated the two questions. Some students applied the case interpreting the dangerous instrument definition in the deadly weapon context and vice versa. And, apparently, some of the students interpreted my question of whether the gun is a deadly weapon “or” a dangerous instrument as stating that the gun must be one of those two things, excluding the possibility that it is neither. Table 3 lists the assessment criteria for the Rubric for the Second Assignment.

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<sup>42</sup> N.Y. PENAL LAW § 10.00(12).

<sup>43</sup> 66 N.Y.2d 663, 664 (1985).

<sup>44</sup> *Id.*

<sup>45</sup> N.Y. PENAL LAW § 10.00(13).

<sup>46</sup> 147 A.D.2d 427, 429 (1st Dep’t 1989).

**Table 3***Assessment Criteria for the Rubric for the Second Assignment*


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 Criteria
 

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**Use of Sources*****Definitions of “Dangerous Instrument” and “Deadly Weapon”***

Uses the definition of dangerous instrument.

Quotes the definition of dangerous instrument.

Gives all of the relevant parts of the definition of dangerous instrument (does not cut out relevant parts of the definition when editing).

Does a good job expressly applying the definition of dangerous instrument to the facts—leaving little room for improvement.

Does a good job expressly applying the definition of dangerous instrument to the facts—leaving little room for improvement—AND that application is consistent with the *Hilton* case.

Uses the definition of deadly weapon.

Quotes the definition of deadly weapon.

Gives all of the relevant parts of the definition of deadly weapon (does not cut out relevant parts of the definition when editing).

Does a good job expressly applying the definition of deadly weapon to the facts—leaving little room for improvement.

Does a good job expressly applying the definition of deadly weapon to the facts—leaving little room for improvement—AND that application is consistent with the *Shaffer* case.

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**Criteria**

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Does a good job expressly applying the definition of deadly weapon or dangerous instrument to the facts—leaving little room for improvement—AND such application is consistent with *Hilton* or *Shaffer*, as applicable.

Only uses the correct defined terms: “dangerous instrument,” “deadly weapon” and “serious physical injury” (does not use terms like “dangerous weapon” or “deadly instrument” or “serious injury”).

***Hilton Case***

Uses the *Hilton* case.

When quoting or clearly paraphrasing the *Hilton* case, uses the opinion, not the synopsis, holdings or headnotes.

The portions of the *Hilton* case that the author chooses to use are discussed accurately.

The *Hilton* case is used in the author’s analysis of the “dangerous instrument” question and not in the author’s analysis of the “deadly weapon” question.

The author’s conclusion on the “dangerous instrument” question is consistent with the *Hilton* case.

Reporting on the *Hilton* case, the author uses the words “dangerous instrument,” “gun,” “loaded” and “operable.”

The author quotes the best part of the *Hilton* case—the part that stated that, to establish that a gun is a dangerous instrument, the prosecution must prove that it is both loaded and operable.

The author does a good job expressly connecting the *Hilton* case to the question—whether a gun that misfires can be a dangerous instrument—leaving little room for improvement.

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 Criteria
 

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***Shaffer Case***

Uses the *Shaffer* case.

When quoting or clearly paraphrasing the *Shaffer* case, uses the opinion, not the synopsis, holdings or headnotes.

The portions of the *Shaffer* case that the author chooses to use are discussed accurately.

The *Shaffer* case is used in the author's analysis of the "deadly weapon" question and not in the author's analysis of the "dangerous instrument" question (except to point out that a gun that misfires is not operable).

The author's conclusion on the "deadly weapon" question is consistent with the *Shaffer* case.

Reporting on the *Shaffer* case, the author uses the words "deadly weapon," "gun," "loaded" and "operable."

The author quotes the best part of the *Shaffer* case—the part that stated that, to establish that a gun is a deadly weapon, the prosecution must prove that it is both loaded and operable.

The author does a good job expressly connecting the *Shaffer* case to the question—whether a gun that misfires can be a deadly weapon—leaving little room for improvement.

**Citing**

The author tells the reader their sources, even if those sources are not cited.

The author gives citations for all of their sources, citations that can be used to easily pull the sources, but such citations are not proper Bluebook citations.

The author gives citations for their sources, citations that can be used to easily pull the sources, and the author clearly

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**Criteria**

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attempted to give proper Bluebook citations for all of their sources, but made some Bluebooking errors.

The author gives proper Bluebook citations for all of their sources (including, for example, subsections for the statutes, small caps or all caps for statutes, the proper reporter for cases, pin cites for cases and jurisdictional parentheticals for cases). Because of the way the *Hilton* case was pulled, citing to A.D.2d was acceptable.

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As closely as possible, the criteria in this Rubric mirror the criteria in the Rubric for the First Assignment, but because of the additional confusion mentioned above, additional criteria were added to track those issues.

Like the Rubric for the First Assignment, the Rubric for the Second Assignment tracked how many students did a "good job" expressly applying the statutory definitions to the facts. Additional criteria were added to track how many students did a good job applying those definitions to the facts *and* did so in a way that was consistent with *Hilton*, which discussed "dangerous instruments," and *Shaffer*, which discussed "deadly weapons," as applicable. Looking at the definitions of "dangerous instrument" and "deadly weapon" without considering the cases interpreting those definitions, a student could reasonably conclude that a gun that misfires is a deadly weapon and/or a dangerous instrument, but the *Shaffer* and *Hilton* cases suggest the opposite conclusions. This was not an issue in the First Assignment because, in that assignment, the statutes and the cases clearly pointed to the same conclusion. Since interpreting the statutes in a way that was inconsistent with the cases was not an issue in the First Assignment, to allow for a more consistent comparison of student performance in this area across the Assignments, the Rubric for the Second Assignment separately tracked how many students did a good job applying the statutes without considering the cases and how many students did a good job applying the statutes in a way that was consistent with the cases.

An example of a student doing a good job applying the definitions of "deadly weapon" and "dangerous instrument" to our problem is:

According to New York Penal Law, section 10.00(12), a “deadly weapon means any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged.” N.Y. PENAL LAW § 10.00(12). Also, according to New York Penal Law, section 10.00(13), a “dangerous instrument means any instrument, article or substance . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.” N.Y. PENAL LAW § 10.00(13). The pistol Jim used misfired, it was inoperable, and therefore it was not capable of causing death or a serious physical injury, making it neither a “deadly weapon” or “dangerous instrument”.<sup>47</sup>

At bottom, deadly weapons and dangerous instruments are things that are readily capable of causing “serious physical injury.” This student pulled this concept out of the definitions and expressly stated that guns that are inoperable are unlikely to cause such injuries.

Here is an example of a student doing a good job applying the definition of “dangerous instrument,” but doing so in a way that is inconsistent with the *Hilton* case:

According to the New York Penal Law § 10.00 a dangerous instrument is defined as “any instrument, article or substance, including a ‘vehicle’ as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.” N.Y. Penal Law §10.00(13). In our case Jim tried to shoot at the peace officer. However, even though the gun was loaded it misfired, the gun was still attempted to be used to shoot the peace officer which, if successful, would have caused death or a serious physical injury.<sup>48</sup>

This student did a good job applying the “attempted to be used” in a way that is “readily capable of causing . . . serious physical injury” language of the statute to our problem. Unfortunately for this student, the *Hilton* case interprets this statute as requiring proof that a gun is “operable,” and a gun that misfires is not operable.

As in the Rubric for the First Assignment, the Rubric for the Second Assignment included several criteria that tracked how well the students connected the cases to the problem. For both cases, the Rubric tracked: how many students quoted the best parts of

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<sup>47</sup> Second Assignment, Student 9 (Fall 2018) (on file with author).

<sup>48</sup> Second Assignment, Student 22 (Fall 2018) (on file with author).

those cases, the parts of those cases that stated that, to prove that a gun is a deadly weapon or a dangerous instrument, the prosecution must prove that it is loaded and operable; how many students used all of the correct words in reporting on the cases: “gun,” “loaded,” “operable,” and “dangerous instrument” for *Hilton*, or “deadly weapon” for *Shaffer*; and how many students did a “good job” expressly connecting the cases to the question. All of these criteria mirror criteria in the Rubric for the First Assignment. But, because of the additional room for error in this assignment, two additional criteria were added for each case: (i) whether the student’s conclusion on the dangerous instrument question was consistent with the *Hilton* case and whether the student’s conclusion on the deadly weapon question was consistent with the *Shaffer* case; and (ii) whether the student used *Hilton* in their analysis of the dangerous instrument question (instead of the deadly weapon question) and used *Shaffer* in their discussion of the deadly weapon question (instead of the dangerous instrument question). For example, this student used the *Hilton* case, which deals with dangerous instruments, in their discussion of the deadly weapon question: “In the case of *People v. Hilton*, the court believed that there was not sufficient evidence to prove that the defendant Hilton actually possessed a loaded and operable firearm. Proof that a gun merely was displayed is insufficient to qualify as a ‘deadly weapon’. *People v. Hilton*, 145 A.D.2d 352 (1988).”<sup>49</sup> *Hilton* only discussed “dangerous instruments.” The words “deadly weapon” are not in the *Hilton* case.

As I mentioned above, the other criteria dealing with how well a student connected the cases to the problem mirror the criteria in the Rubric for the First Assignment. This student’s work is an example of using all of the right words in the discussion of *Hilton*: “gun,” “loaded,” “operable,” and “dangerous instrument”:

According to *People v. Hilton*, the defendant had claimed to have a gun and threatened to kill someone. None of the other victims, however, saw a weapon during the incident, nor was any testimony ever elicited that a weapon was fired or recovered. In this case, order to sustain a conviction, the prosecution must affirmatively prove that the accused “actually possessed a dangerous instrument at the time of the crime”, readily capable of causing death or serious physical injury and that that the gun

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<sup>49</sup> Second Assignment, Student 3 (Fall 2018) (on file with author).

was loaded and operable. This evidence was insufficient, therefore the case was dismissed.<sup>50</sup>

This student's work is an example of quoting the best part of *Hilton*, the part that states that, to establish that a gun is a dangerous instrument, the prosecution must prove that it is loaded and operable.

In *People v. Hilton*, the defendant was convicted of burglary in the first degree, robbery in the first degree, attempted robbery in the first degree, assault in the first degree, and assault in the second degree. The people could not call the gun a 'dangerous instrument' because to prove a gun is a dangerous instrument "[t]he prosecution must affirmatively prove that the accused actually possessed a dangerous instrument at the time of the crime, readily capable of causing death or serious injury. Hence where the dangerous instrument alleged is a gun, the People must prove that the gun was loaded and operable." *People v. Hilton*, 145 A.D.2d 352, (N.Y. App. Div. 1988). In this case in order to prove that the gun was a dangerous instrument the People must first prove there was a gun then prove that the alleged gun was loaded and operable. The conviction of robbery in the first degree was dismissed.<sup>51</sup>

This student's work is an example of using all of the right words in the discussion of *Shaffer*: "gun," "loaded," "operable," and "deadly weapon":

In *People v. Shaffer*, the Court failed to establish that the gun used was a deadly weapon. According to the Court, the fact that the "defendant may have before the burglary fired one round does not itself establish that the four remaining bullets in the gun were live, particularly where his attempt to fire again immediately failed, and where the gun failed to fire four times when directed at his intended victim". *People v. Shaffer*, 66 N.Y.2d 663, 664 (1985). The defendant's misfires do not prove that the gun was both operable and loaded with live ammunition, therefore, it cannot be found as a deadly weapon.<sup>52</sup>

This student's work is an example of a student quoting the best part of *Shaffer*, the part that says that, to establish that a gun is a deadly weapon, the prosecution must establish that it is both loaded and operable:

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<sup>50</sup> Second Assignment, Student 17 (Fall 2018) (on file with author).

<sup>51</sup> Second Assignment, Student 4 (Fall 2018) (on file with author).

<sup>52</sup> Second Assignment, Student 11 (Fall 2018) (on file with author).

In People v. Shaffer, the Court states the elements required to establish a gun as a deadly weapon. The court states “The People failed to establish that the gun found at the scene was a ‘deadly weapon’(Penal Law § 10.00[12] )—that is, both operable and loaded with live ammunition—a necessary element for attempted aggravated assault upon a peace officer”. People v. Shaffer, 66 N.Y. 2d 663 (1985).<sup>53</sup>

Even where a student used all the right words in their discussion of a case or quoted the best part of a case, there was often real room for improvement in such discussions. For example, the student who wrote the passage about *Shaffer* immediately above could have done a better job by telling the reader that the gun in *Shaffer* misfired—doing so would have highlighted the connection between that case and our problem. As with the Rubric for the First Assignment, the Rubric for the Second Assignment tracked how many students did a “good job” expressly connecting the cases to the question. Those students reported on the relevant case accurately, quoted the best part of the case or used all of the correct words, or both, and did a good job expressly articulating how the case adds to the analysis of the problem. This student’s writing satisfied that criteria:

The pistol Jim used misfired, it was inoperable, and therefore it was not capable of causing death or a serious physical injury, making it neither a “deadly weapon” or “dangerous instrument”. Past cases have given proof of this. In the case People v. Shaffer, the defendant tried to fire at a peace officer four times but failed. The four bullets were not tested that they were live. The ruling was that “[t]he People failed to establish that the gun found at the scene was a “deadly weapon” —that is, both operable and loaded with live ammunition.” People v. Shaffer, 66 N.Y.2d 663, 663 (1985). In the case People v. Hilton, the defendant in a robbery claimed to have a gun, but it was never seen or recovered at the crime scene. The court stated that “where the dangerous instrument alleged is a gun, the People must prove that the gun was loaded and operable.” As a result, the use of a “dangerous instrument” cannot be used as a factor in this case. People v. Hilton, 145 A.D.2d 352 (App. Div. 1988).<sup>54</sup>

In her response, immediately before the excerpt quoted above, this student provided the statutory definitions of “deadly weapon” and “dangerous instrument.” Her first sentence above applied those

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<sup>53</sup> Second Assignment, Student 22 (Fall 2018) (on file with author).

<sup>54</sup> Second Assignment, Student 9 (Fall 2018) (on file with author).

definitions to our question and suggested that guns that are inoperable are not readily capable of causing death or serious physical injury, which are the essential elements of those definitions. Her second sentence tells the reader that she got this idea from the cases, previewing for the reader what her report on the cases will show and why the reader should care: “*Past cases have given proof of this.*” Her discussions of the cases remained focused on the guns in those cases, used all of the correct words, and quoted the best parts of those cases.

The citation criteria in the Rubric for the Second Assignment are the same as the citation criteria for the Rubric for the First Assignment.

#### VI. RESULTS OF THE ASSESSMENT OF THE SECOND ASSIGNMENT AND AN AGGREGATE COMPARISON OF STUDENT PERFORMANCE ON BOTH ASSIGNMENTS

Table 4 reports the results of the application of the Rubric to the Second Assignment.

**Table 4**  
*Results of the Rubric Assessment of the Second Assignment*

Y	N	N/A	Criteria
<b>Use of Sources</b>			
<b><i>Definitions of “Dangerous Instrument” and “Deadly Weapon”</i></b>			
22	1	0	Uses the definition of dangerous instrument.
21	1	1	Quotes the definition of dangerous instrument.
21	1	1	Gives all of the relevant parts of the definition of dangerous instrument (does not cut out relevant parts of the definition when editing).
8	14	1	Does a good job expressly applying the definition of dangerous instrument to the facts—leaving little room for improvement.

Y	N	N/A	Criteria
6	2	15	Does a good job expressly applying the definition of dangerous instrument to the facts—leaving little room for improvement— <u>AND</u> that application is consistent with the <i>Hilton</i> case.
20	3	0	Uses the definition of deadly weapon.
19	1	3	Quotes the definition of deadly weapon.
19	1	3	Gives all of the relevant parts of the definition of deadly weapon (does not cut out relevant parts of the definition when editing).
7	15	1	Does a good job expressly applying the definition of deadly weapon to the facts—leaving little room for improvement.
7	0	16	Does a good job expressly applying the definition of deadly weapon to the facts—leaving little room for improvement— <u>AND</u> that application is consistent with the <i>Shaffer</i> case.
10	13	0	Does a good job expressly applying the definition of deadly weapon or dangerous instrument to the facts—leaving little room for improvement— <u>AND</u> such application is consistent with <i>Hilton</i> or <i>Shaffer</i> , as applicable.
16	7	0	Only uses the correct defined terms: “dangerous instrument,” “deadly weapon” and “serious physical injury” (does not use terms like “dangerous weapon” or “deadly instrument” or “serious injury”).
<b><i>Hilton Case</i></b>			
23	0	0	Uses the <i>Hilton</i> case.

Y	N	N/A	Criteria
15	1	7	When quoting or clearly paraphrasing the <i>Hilton</i> case, uses the opinion, not the synopsis, holdings or headnotes.
20	3	0	The portions of the <i>Hilton</i> case that the author chooses to use are discussed accurately.
15	8	0	The <i>Hilton</i> case is used in the author's analysis of the "dangerous instrument" question and not in the author's analysis of the "deadly weapon" question.
12	9	2	The author's conclusion on the "dangerous instrument" question is consistent with the <i>Hilton</i> case.
10	13	0	Reporting on the <i>Hilton</i> case, the author uses the words "dangerous instrument," "gun," "loaded" and "operable."
9	14	0	The author quotes the best part of the <i>Hilton</i> case—the part that stated that, to establish that a gun is a dangerous instrument, the prosecution must prove that it is both loaded and operable.
4	19	0	The author does a good job expressly connecting the <i>Hilton</i> case to the question—whether a gun that misfires can be a dangerous instrument—leaving little room for improvement.
<b><i>Shaffer Case</i></b>			
23	0	0	Uses the <i>Shaffer</i> case.
17	0	6	When quoting or clearly paraphrasing the <i>Shaffer</i> case, uses the opinion, not the synopsis, holdings or headnotes.

Y	N	N/A	Criteria
21	2	0	The portions of the <i>Shaffer</i> case that the author chooses to use are discussed accurately.
22	1	0	The <i>Shaffer</i> case is used in the author's analysis of the "deadly weapon" question and not in the author's analysis of the "dangerous instrument" question (except to point out that a gun that misfires is not operable).
21	1	1	The author's conclusion on the "deadly weapon" question is consistent with the <i>Shaffer</i> case.
16	7	0	Reporting on the <i>Shaffer</i> case, the author uses the words "deadly weapon," "gun," "loaded" and "operable."
10	13	0	The author quotes the best part of the <i>Shaffer</i> case—the part that stated that, to establish that a gun is a deadly weapon, the prosecution must prove that it is both loaded and operable.
4	19	0	The author does a good job expressly connecting the <i>Shaffer</i> case to the question—whether a gun that misfires can be a deadly weapon—leaving little room for improvement.
<b>Citing</b>			
23	0	0	The author tells the reader their sources, even if those sources are not cited.
20	3	0	The author gives citations for all of their sources, citations that can be used to easily pull the sources, but such citations are not proper Bluebook citations.
16	7	0	The author gives citations for their sources, citations that can be used to easily pull the

Y	N	N/A	Criteria
			sources, and the author clearly attempted to give proper Bluebook citations for all of their sources, but made some Bluebooking errors.
4	19	0	The author gives proper Bluebook citations for all of their sources (including, for example, subsections for the statutes, small caps or all caps for statutes, the proper reporter for cases, pin cites for cases and jurisdictional parentheticals for cases). Because of the way the <i>Hilton</i> case was pulled, citing to A.D.2d was acceptable.

A comparison of the Rubric results for the First Assignment and the Second Assignment shows improvement in the students' use of cases, statutes and citations.

In the Second Assignment, all students used both the *Hilton* and *Shaffer* cases, unlike in the First Assignment, where three students didn't use the *Johnson* case, and one student didn't use the *Ozarowski* case. The fact that the students who did not use one or both of the cases for the First Assignment used both cases for the Second Assignment may suggest that those students gained confidence working with cases over the course of the semester.

Comparing the Rubric results also shows an improvement in the way that the students connected the cases to the problems. In the First Assignment, four students used all of the correct words ("dangerous instrument," "bat" and "serious physical injury") in their discussion of the *Johnson* case and three used all of the correct words in their discussion of the *Ozarowski* case. By contrast, in the Second Assignment, ten students used all of the correct words ("dangerous instrument," "gun," "loaded" and "operable") in their discussion of the *Hilton* case and sixteen students used all of the correct words ("deadly weapon," "gun," "loaded" and "operable") in their discussion of the *Shaffer* case. Similarly, there was an increase in the number of students who quoted the best parts of the cases in the Second Assignment over the First Assignment. In the First Assignment, nine students quoted the best part of the *Johnson* case and only two students quoted the best part of the *Ozarowski* case. By contrast, in the

Second Assignment, nine students quoted the best part of the *Hilton* case, and ten students quoted the best part of the *Shaffer* case.

This increase in the number of students who used the correct words in their discussions of the cases and/or quoted the best parts of the cases is strong evidence that the students' ability to see and express the connections between the cases and the problems increased over the course of the semester.

A comparison of the Rubric results also shows a modest improvement in the number of students who did a "good job" expressly connecting the cases to the problems. In the First Assignment, four students did a good job expressly connecting the *Johnson* case to the problem and only two students did a good job expressly connecting the *Ozarowski* case to the problem. In the Second Assignment, four students did a good job expressly connecting the *Hilton* case to the problem and four students did a good job expressly connecting the *Shaffer* case to the problem. This is admittedly only a very modest increase, but, as stated above, the Second Assignment was more complicated than the first.

While the evidence is less clear on this point, I think that a comparison of the Rubric results also suggests an increase in the students' ability to apply the statutes to the problems. A comparison of the Rubric results shows a decrease in the number of statutory defined term errors across the Assignments, meaning there was an increase in the number of students who only used the correct statutory defined terms, "dangerous instrument" and "serious physical injury" in the First Assignment, and "dangerous instrument" and "deadly weapon" and "serious physical injury" in the Second Assignment. Only seven students used only the correct defined terms in the First Assignment, and sixteen students used only the correct defined terms in the Second Assignment. This increase suggests an increase in the students' ability to see and express the connections between the statutes and the problems over the course of the semester.

A comparison of the Rubric results does show a decrease in the number of students who did a "good job" expressly applying the statutes to the facts. In the First Assignment, fourteen students did a good job expressly applying the definition of "dangerous instrument" to the facts. And, in the Second Assignment, only seven students did a good job expressly applying the definition of "deadly weapon" to the facts and only six students

did a good job expressly applying the definition of “dangerous instrument” to the facts. In that assignment, ten students did a good job expressly applying one of those definitions to the facts. But, as stated above, because the Second Assignment was more complicated than the First Assignment, a decrease in student performance under this metric does not necessarily suggest a decrease in student ability in this area.

Comparing the Rubric results, there is also evidence that the students’ willingness and ability to cite their sources improved over the course of the semester. In the First Assignment, fifteen students gave citations that could be used to easily pull their sources. In the Second Assignment, that number increased to twenty students. In the First Assignment, twelve students attempted to give proper Bluebook citations. In the Second Assignment, that number increased to sixteen students. In the First Assignment, two students gave proper Bluebook citations for all of their sources. And, in the Second Assignment, that number increased to four students.

#### VII. RESULTS OF COMPARISONS OF STUDENT PERFORMANCE ON THE FIRST ASSIGNMENT AND THE SECOND ASSIGNMENT, INDIVIDUALLY

I also compared each student’s First Assignment to their Second Assignment to look for evidence of individual improvement over the course of the semester. For fifteen of the twenty-three students, I found clear evidence of improvement in at least one of the following areas: use and application of cases, use and application of statutes, including use of defined terms, and use of citations. For the other eight students, evidence of improvement was less clear. Some of these students performed very well on the First Assignment, leaving very little room for evidence of improvement on their Second Assignment. Others turned in roughly middle-of-the-pack work for both Assignments. Others arguably regressed over the course of the semester. As noted several times above, the Second Assignment was more difficult than the First Assignment. And, many of the students completed the Second Assignment during the final exam period. One or both of these factors may have contributed to the apparent regression in these students.

The area where there is the strongest evidence of improvement is the use of citations. Eleven students showed clear improvement in the use of citations. Some of these students

showed substantial improvement, going from not giving any citations in the First Assignment to giving citations that can be used to pull their sources in the Second Assignment. Others showed more subtle improvements by giving statutory subsections, case pin cites and court and jurisdiction parentheticals in the Second Assignment, for example.

Ten students clearly improved in their use of the cases. The most obvious examples of such improvements are the students who did not use one or both of the cases for the First Assignment but who used both of the cases for the Second Assignment. Others, like this student, clearly improved in the way that they reported on the cases and/or connected the cases to the problem in the Second Assignment. Here is the discussion of the cases from this student's First Assignment:

In People v. Johnson, the court affirmed the New York County Supreme Court's decision to convict Johnson of criminal possession of a weapon in the third degree and criminal mischief in the third degree. According to the court, "[t]he jury could have reasonably inferred that defendant menaced the victim by conveying an implied threat to strike him with the bat, and that defendant also used the bat in a manner that was readily capable of causing serious physical injury." People v. Johnson, 882 N.Y.S.2d 401, 402 (App. Div. 2009). In People v. Ozarowski, the court stated that, in order for the convictions of both the first and second counts of assault in the second degree to be upheld, "the court below was required to find from the evidence of the conspiracy itself that each defendant had the specific intent to do 'serious physical injury' as well as the intent to do 'physical injury' by means of a dangerous instrument." People v. Ozarowski, 38 N.Y.2d 481, 491 (1976). These two court cases allow us to argue that the baseball bat Tom used to injure Jim would most likely be considered a "dangerous instrument." It was "readily capable of causing serious physical injury." In addition, Tom had "intent to do physical injury by means of a dangerous instrument" to Jim when he picked up the baseball bat during their fight.<sup>55</sup>

In this First Assignment, the student did not expressly tell the reader that the *Johnson* court held that the baseball bat was a dangerous instrument, did not tell the reader that the dangerous instrument that the *Ozarowski* court was referring to was a baseball bat, and did not tell the reader what injuries the bat

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<sup>55</sup> First Assignment, Student 13 (Fall 2018) (on file with author).

caused in that case. Doing so would have better connected the cases to the problem in that assignment: whether a baseball bat that is used in anger to break a bone, cause a serious physical injury, is a “dangerous instrument” under the New York Penal Law. Also, in this First Assignment, while this student discussed what the cases added to the analysis after reporting on the cases, the student did not preview for the reader how the cases would add to the analysis before reporting on the cases. The first sentence copied above is the first sentence of that paragraph in the student’s paper.

By contrast, here is the discussion of the cases from this student’s Second Assignment:

When assessing whether a gun would be considered a “deadly weapon” or a “dangerous instrument,” courts look at whether the gun is operable and loaded with live ammunition. In People v. Shaffer, the Court of Appeals modified the convictions for burglary in the first degree, criminal use of a firearm in the first degree, and attempted aggravated assault upon a peace officer to burglary in the second degree, criminal possession of a weapon in the fourth degree, and attempted assault in the second degree. The court held that “[t]he People failed to establish that the gun found at the scene was a “deadly weapon” (Penal Law § 10.00[12])—that is, both operable and loaded with live ammunition.” People v. Shaffer, 66 N.Y.2d 663, 663 (1985). Although the defendant was in possession of a gun that successfully fired one bullet, the People failed to prove that the remaining four bullets in the gun were live, therefore rendering the gun inoperable. In People v. Hilton, the Appellate Division reversed the conviction for first-degree robbery. The court noted that “where the dangerous instrument alleged is a gun, the People must prove that the gun was loaded and operable. . . . Therefore, proof that a gun merely was displayed is insufficient.” People v. Hilton, 535 N.Y.S.2d 708, 710 (1989). The People failed to prove sufficient evidence that the defendant actually possessed a gun that was loaded and operable, and therefore failed to prove the robbery was committed with a “dangerous instrument.”<sup>56</sup>

In contrast to their First Assignment, in the first sentence of the paragraph discussing the cases in their Second Assignment, this student told the reader what the cases will add to the analysis, stating: “*When assessing whether a gun would be considered a ‘deadly weapon’ or a ‘dangerous instrument,’ courts look at whether*

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<sup>56</sup> Second Assignment, Student 13 (Fall 2018) (on file with author).

*the gun is operable and loaded with live ammunition.*"<sup>57</sup> This sentence almost perfectly summarizes what the student should have taken out of the cases and what the student will report that the cases held. It connects the cases to the two questions in that assignment, whether a gun that misfires is a "deadly weapon" and whether a gun that misfires is a "dangerous instrument," and it highlights for the reader what the cases said about those questions. For the prosecution to prove that a gun is a "deadly weapon" or to prove that a gun is a "dangerous instrument," they must prove that the gun was both loaded and operable. This student then went on to quote the language of both cases holding that, for a gun to be a "deadly weapon" or a "dangerous instrument," it must be both loaded and operable—quoting the best part of each case and using all of the correct words to describe each case, in contrast to their discussion of the cases in their First Assignment.

A comparison of how students performed in the First Assignment and the Second Assignment also reveals student improvement in the use of and application of statutes and in the use of defined terms. This student's work shows an improvement in the use of defined terms. Here is their First Assignment:

The baseball bat that Tom used is likely to be analyzed by the court as a "dangerous instrument" based on section 120.50(2) of the New York Penal Law and Penal Law § 10.00 § 10.00. McKinney's Penal Law § 120.05(2) states "A person is guilty of assault in the second degree when with intent to cause physical injury to another person, he causes such injury to such person ...by means of a deadly weapon or a dangerous instrument." Tom acted in the midst of a fight indicating his intent to cause bodily harm. Under Penal Law § 10.00 § 10.00 a dangerous weapon is defined as "Any instrument, article or substance, ... which, under the circumstances in which it is used, ... is readily capable of causing ... serious physical injuries". The court will conclude that Jim's broken bone is a serious physical injury therefore by definition the bat must be considered a "dangerous instrument" making Toms actions assault in the second degree. In the People v. Ozarowski, 381 N.Y.S.2d 438 (1976), seven defendants were convicted of assault in the second degree and possession of a dangerous weapon amongst other crimes all of which were affirmed. Here, these defendants used exactly the same weapon as Tom and inflicted similar injuries

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<sup>57</sup> *Id.*

(both victims sustained broken bones). It is, therefore, reasonable to assume that Toms use of the baseball bat is enough for him to be found guilty of assault in the second degree and identically the bat should certainly be analyzed by the court as a dangerous instrument.<sup>58</sup>

This student's intent to cause "bodily harm" language should have read intent to cause "physical injury," the language from the assault statute that the student quoted and a defined term under the New York Penal Law. Introducing the definition of "dangerous instrument," the student used the term "dangerous weapon" instead. And, in their last sentence, the student misspelled the defined term "dangerous instrument." This student's writing clearly demonstrates that the student understood the problem, understood how the statutes fit with the facts and understood how to use defined terms. In the middle of the writing, the student gave a good application of the facts to the statutes using the correct defined terms: "*The court will conclude that Jim's broken bone is a serious physical injury therefore by definition the bat must be considered a 'dangerous instrument' making Toms actions assault in the second degree.*" But, this student still used the imprecise language noted above in this writing.

By contrast, this student is more precise with his language in the Second Assignment:

A gun that misfires is neither likely to be considered by the court a "dangerous instrument" nor a "deadly weapon" in accordance with the New York Penal Law. A "dangerous instrument" is defined as "any instrument, article or substance, including a 'vehicle' ... which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury". N.Y. PENAL LAW §10.00(13). The key element of this definition to be evaluated is "readily capable". The weapon used by Jim Smith was not at all readily capable to cause death or serious injury as it misfired several times and did not discharge. The gun was not operable and therefore can not be considered a "dangerous instrument" or "deadly weapon". A "deadly weapon" is defined as "any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged." N.Y. Penal Law § 10.00(12). Because a shot was not "discharged" it is not under New York Penal Law considered a deadly weapon. A gun that misfires, therefore, should not be

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<sup>58</sup> First Assignment, Student 10 (Fall 2018) (on file with author).

considered a “dangerous instrument” or a “deadly weapon” because while the gun may or may not be loaded, in order to be deemed either of the two it must be operable or “readily capable of causing death or other serious physical injury” N.Y. PENAL LAW §10.00(13).

Two precedents that support this assertion are People v. Shaffer and People v. Hilton. In People v. Shaffer, A gun was found loaded with four bullets all of which failed to fire, therefore the original convictions of attempted aggravated assault upon a peace officer, burglary in the first degree, and criminal use of a firearm in the first degree were ordered by the courts to be “modified by reducing” because of the courts inability to affirm the weapon to be “deadly”. People v. Shaffer, 495 N.Y.S.2d 965 (App. Div.1985). In People v. Hilton, the courts were unable to support the claim that the weapon in question should be considered a “dangerous instrument”. “(W)here the dangerous instrument alleged is a gun, the People must prove that the gun was loaded and operable. Therefore, proof that a gun merely was displayed is insufficient.” People v. Hilton, 145 A.D.2d 352, (App. Div. 1988).<sup>59</sup>

In this writing, this student was much more precise with their use of statutory language and statutory defined terms. Apart from the one reference to “serious injury,” there are no clear defined term errors. The student consistently used the terms “deadly weapon” and “dangerous instrument” throughout. And the student was precise in their application of the language of those definitions—using the precise statutory phrases “readily capable,” “discharged” and “readily capable of causing death or other serious physical injury” in their analysis.

Other students’ work also showed clear improvement in the use of and express application of statutes. This paragraph from this student’s First Assignment includes their application of the statute to the facts:

Yes, the baseball bat is considered a dangerous instrument. Under New York Penal Law §10.00, the definition of a dangerous instrument means,

“any instrument, article or substance, including a “vehicle” as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or

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<sup>59</sup> Second Assignment, Student 10 (Fall 2018) (on file with author).

threatened to be used, is readily capable of causing death or other serious physical injury.”

N.Y. Penal Law §10.00(13). Due to the fact that Tom and Jim got into a fight, Tom used a baseball bat to club Jim. Under New York Penal Law §10.00, the definition of serious physical injury means,

“physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.”

N.Y. Penal Law §10.00(12). The fight resulted in Tom breaking Jim’s leg.<sup>60</sup>

This student clearly understood the relevant law and suggested the correct conclusion, but did not explicitly connect the former to the latter. In the First Assignment, the baseball bat was a “dangerous instrument” because: (1) something is a dangerous instrument if it is used in a way that is “readily capable” of causing “serious physical injury”; and (2) the baseball bat in that case was used in such a way—it was used in a fight to cause a broken bone, a serious physical injury. Immediately after giving the definition of “serious physical injury,” the student stated “[t]he fight resulted in Tom breaking Jim’s leg,” suggesting that they think that the broken bone is a “serious physical injury,” but they did not expressly say that.<sup>61</sup> And, because the student’s last sentence is a few sentences after the definition of “dangerous instrument,” it would have been better if the student would have expressly pointed out that the facts that they just gave established that the bat was a “dangerous instrument.” By contrast, this student did a much better job applying the statutory definition of “dangerous instrument” to the facts of the Second Assignment. Here is the “dangerous instrument” portion of that student’s Second Assignment:

According to New York Penal Law 10.00(13), a dangerous instrument is defined as “any instrument, article or substance, including a “vehicle” as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.” N.Y. Penal Law §10.00(13). In People v. Hilton, the court stated, “[t]hus, to sustain a conviction under section 160.15(3), the prosecution must affirmatively prove

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<sup>60</sup> First Assignment, Student 14 (Fall 2018) (on file with author).

<sup>61</sup> *Id.*

that the accused “actually possessed a dangerous instrument at the time of the crime,” readily capable of causing death or serious physical injury. . . . Hence, where the dangerous instrument alleged is a gun, the people must prove that the gun was loaded and operable.” *People v. Hilton*, 145 A.D.2d 352 (App. Div. 1988). The People failed to prove sufficient evidence and that they weren’t persuaded by the threat posed from defendant to victim. Like in *Hilton*, Jim had possession of a gun that was loaded, but it was inoperable because it misfired. Also, Jim’s gun was present, but wasn’t readily capable of causing death or serious physical injury due to the fact that it misfired. Therefore, the gun cannot be found as a dangerous instrument.<sup>62</sup>

In this excerpt of the Second Assignment, the student expressly connected the material facts of the problem—gun and misfire—with both the “operable” language of *Hilton* and the “readily capable of causing death or serious physical injury” language of the dangerous instrument definition, and the student specifically stated that the gun could not cause those effects “*due to the fact that it misfired.*”<sup>63</sup> This student also concluded with a sentence tying this application back to the question of whether the gun is a dangerous instrument, stating, “[t]herefore, the gun cannot be found as a dangerous instrument,” which was useful because the definition of “dangerous instrument” was several sentences before the application of the definition to the facts.<sup>64</sup> In each of these ways, this student’s application of the statutory definition of “dangerous instrument” to the facts of the problem in the Second Assignment is better than their application of the definition of “dangerous instrument” to the facts in the First Assignment.

#### VIII. DISCUSSION OF SURVEY RESULTS

At the end of the semester, to get a sense of whether the students thought that our process of cooperative writing was effective, I asked the students to complete the survey given in Figure 3 below.<sup>65</sup>

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<sup>62</sup> Second Assignment, Student 14 (Fall 2018) (on file with author).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> When I drafted this survey, I didn’t fully appreciate the distinction that the literature draws between “collaborative” pedagogy and “cooperative” pedagogy. While this survey asks about “collaborative” writing, the students were brought through the “cooperative” writing process described above and the students understood that I was asking about that “cooperative” process.

**Figure 3***End-of-Semester Survey Given to Students*

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**Exit Survey**

The purpose of this course is to improve your ability to communicate a legal analysis in a way that is customary in the profession.

One of the main ways that I tried to help you improve your ability to write in a way that is customary in the profession was by collaboratively working through the semester-long assignment with you. For each of the research issues in that assignment, we: discussed the basic statutory analysis together and took notes on that analysis together; discussed each of the cases together and took notes on those cases together; outlined our response together; and bluebooked our response together.

1. In light of the purpose of this course, how effective was our process of collaboratively working through the semester-long assignment? Why?
2. In light of the purpose of this course, what course activities contributed the most to your learning in this course? Why?
3. In light of the purpose of this course, what course activities contributed the least to your learning in this course? Why?
4. In light of the purpose of this course, how would you suggest improving this course?

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The students' responses to the end-of-the-semester surveys suggested that the students perceived that our process of writing cooperatively was effective, but that they would have benefited from more independent writing in the course.

In response to the survey question that asked the students whether they thought that our process of writing cooperatively was effective, all of the students responded that they thought that our process of cooperatively writing was effective. In particular, students reported that our process of cooperatively writing helped them understand the sources that we would be using in our

writing, helped them understand my expectations for their writing, and gave them a chance to ask questions about the sources and the writing if they were confused. For example, one student wrote:

Collaboratively working through semester-long assignments was very effective because it almost made writing kind of like a habit, we knew what to write and how to write it. It allowed us to collaboratively think and express ourselves in a proper way. If done individually, there might have been more doubts/questions on the assignments.<sup>66</sup>

Another wrote that:

I think it was very effective. Taking the notes together helped me learn legal language more and what we were focusing on. Also, starting our drafts for our write ups together was very helpful because we repeated it a few times, teaching us important things to include in our write ups with a legal question, a "story" and law and cases we looked at.

Another wrote that: *"I think it was pretty good because we went step by step together. If there was a mistake that was made often, we went over it and spoke on why."* Another wrote that: *"It was effective b/c it taught me how to write in the legal way. It felt like one-on-one help."*

While all of the students reported that they thought that our process of cooperatively writing was effective considering the purpose of the course, some students did identify drawbacks of that process. One student stated that: *"I think that things moved a bit slowly because we had to move at the pace of the entire class."* Another student suggested that the process might have allowed her to succeed in the class without actually learning the material, stating that: *"My only concern is that with the amount of in-class work we do, I wonder how much I'm able to do on my own (if I'm actually understanding the structure & support, etc.)."*

Over half of the students favorably mentioned the independent writing assignments (the "Assignments" assessed above) in their responses to the end-of-the-semester survey. Several students thought that the independent writing assignments contributed the most to their learning in the course. Several students did note that our process of cooperative writing prepared them for the independent writing assignments. For example, one student stated that: *"The fact that we would work*

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<sup>66</sup> I did not edit any of the student survey responses. Any typos, spelling issues or grammar issues come from the students' responses.

*collaboratively and then have independent assignments really helped with my understanding. First I learned and watched the professor do it then used what I saw and learned and had to apply it myself and do it independently.*” Similarly, another student stated that: *“The independent writing assignments where we had to look up the statutes and cases ourselves were the most helpful because it allowed me to use the skills learned in the writing assignments. Also, it gave an insight as to what lawyers do on a regular basis.”*

When asked to suggest improvements for the course, many students suggested more independent writing. For example, one student wrote that: *“I think that this course could be better improved by having more independent assignments. Having the write it yourself makes you think more. There should still collaboratively writing but also have more independent writings throughout the semester.”* Another wrote that: *“I would suggest more independent writing assignments because I feel like those assignments let us use what we learned in class more effectively. When we have troubled in certain areas when doing them then we’ll know where to improve in and what to do.”* And, another wrote that:

I think collaboratively writing is helpful when just learning how to write professionally. However, maybe it would be more helpful to allow us to do things on our own? Like, I know by the 3<sup>rd</sup> issue write-up, we had to do more on our own, but the process (formulating the points) is done mostly by you and not us.

#### CONCLUSION

I entered this assessment of my course with two questions in mind. First, is there evidence that my students, who spent the semester *cooperatively* writing with me and their peers, demonstrated an improvement in their ability to write *independently*? And second, how can I improve my teaching process?

There is evidence that my students, who spent the semester *cooperatively* writing with me and their peers, demonstrated an improvement in their ability to write *independently*. The evidence suggests that many of my students improved their ability to report on legal sources effectively and accurately, to expressly connect those sources to legal problems, and to cite their sources properly. As discussed above, a comparison of how the class performed in the aggregate on the First Assignment with how the class

performed in the aggregate on the Second Assignment showed evidence of improvement in all three areas. A comparison of how each student performed on the First Assignment against how that student performed on the Second Assignment showed clear evidence of improvement in at least one of these three areas by fifteen of the twenty-three students. And, in the end-of-the-semester surveys, each student reported that they thought that our process of cooperatively writing was effective.

The evidence also suggests that my teaching process may have helped my students to improve their ability to read and understand cases and statutes. Three students did not use one or both of the cases in the First Assignment, but all students used both cases in the Second Assignment. This increase in student willingness to use the required sources may be evidence that those students were better able to read and understand those sources later in the semester. The fact that the class at large performed better on the Second Assignment than on the First Assignment also suggests that student ability to read and understand cases and statutes improved over the course of the semester because an improved ability to write about sources suggests a better understanding of those sources. Finally, in the end-of-the-semester surveys, students reported that our process of cooperatively writing helped them understand the sources that we were working with.

This assessment of my course also helped clarify how I can improve my teaching. First, I should ask the students to do more independent writing. Before assessing the Assignments, I had a strong sense that I should ask the students to do more independent writing, and in the end-of-the-semester surveys, many students suggested that adding more independent writing would improve the class and improve their ability to conduct legal research and writing. Second, assessing the Assignments, I was surprised at the amount of difficulty that some students had expressly connecting claims (the answer to the question) and evidence (the cases and statutes). This can be addressed by adding more in-class work on making such connections. Third, when assessing the Assignments, I was surprised by how few students gave me proper Bluebook citations for their sources, especially given the fact that, over the course of the semester, we devoted six whole eighty-five minute class periods to effective citation. This deficiency may be the result of the amount of citation help that I gave students. Because of the amount of help that I gave students

with citations, students may not have had an incentive to learn to do citations independently. This can be addressed by asking the students to do more Bluebooking independently and by adding Bluebooking quizzes into the course—to incentivize the students to learn to Bluebook independently.<sup>67</sup>

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<sup>67</sup> Revising this paper years after the semester discussed here, I can report that I have implemented all of these changes, that I have assessed the course again after making these changes, and that, in that assessment, I saw measurable improvements in student performance in the areas assessed in this paper over the results reported in this paper.