Mind the Gaps: Teaching Students to Address Flaws in Their Analysis

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MIND THE GAPS: TEACHING STUDENTS TO RECOGNIZE AND ADDRESS FLAWS IN THEIR ANALYSIS

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The Problem: Students Fail to Recognize the Flaws (Gaps) in Their Analysis –

(1) They fail to spot issues,

(2) they fail to develop the law by defining key terms, and

(3) they fail to explain themselves in their application.
An Example of A Legal Gap –

Under Michigan law, only conduct that is based on sex can amount to sexual harassment. Mich. Comp. Laws Ann. § 37.2103 (West 2004). Bob’s conduct was based on sex because he teased Brittany about being pregnant, which he would not have done had she not been a woman. Therefore, Bob’s conduct satisfies this requirement and can amount to sexual harassment.

- But what does “based on sex” mean? There is a recent case that defines the term to mean conduct that is inherently sexual in nature – gender-based conduct isn’t enough.
An Example of A Gap in Analysis –


Based on the facts in our case, Bob’s conduct is clearly not based on sex.
Translate the Syllogism Into Easily Recognizable Concepts –

Major Premise = Law (from codified law and case law)
Minor Premise = Application of Facts to Law
Conclusion = Conclusion
Use the Classic Syllogism to Connect the Concepts –

All men are mortal. = A law of nature
Socrates is a man. = Facts applied to the law
Therefore, Socrates is mortal. = Conclusion

A Gender-Neutral Version –

All human beings are mortal.
Socrates is a human being.
Therefore, Socrates is mortal.
A Perfect Syllogism –

• A person must be 21 years old to be admitted. (From a Michigan statute.)

• Tom is a 21-year-old person. (Set forth in your application.)

• Therefore, Tom may be admitted.
A Common Problem – Students Leave Out the Application

- A person must be 21 years old to be admitted. (From a Michigan statute.)

- Therefore, Tom may be admitted.

Students fail to connect the facts to the law. That is, they fail to explain why Tom may be admitted. They assume the readers will do that for them.
Syllogisms Help Students Spot the Gaps –

- A person who plays a dangerous sport assumes the risk of injury. (From a Michigan statute.)

- Tom played tackle football. (Set forth in your application.)

- Therefore, Tom assumed the risk by playing tackle football.

This does not work. There is a legal gap: we must define a dangerous sport according to the law (not according to our own opinions on whether football is dangerous).

How do we fill this legal gap?
(1) Look to a past football case.


- Tom played tackle football, which is a dangerous sport according to Michigan law. (Set forth in your application.)

- Therefore, Tom assumed the risk of injury by playing tackle football.

This works. There are no logical gaps.
(2) Analogize to a similar case involving a different sport.

- What if our client was injured playing hockey? Does someone who plays hockey assume the risk of injury?

Use the court’s reasoning in the tackle football case –

- A person who plays a dangerous sport assumes the risk of injury. Tackle football is a dangerous sport because there is contact on every play and the goal is to use this contact to prevent players from scoring. *Doe v. Benson*, 100 Mich. App. 200, 202, 300 N.W.2d 400, 404 (1999).

- Tom played hockey, which is a dangerous sport because __________________________. (Use the reasoning of the football case to help you explain why hockey may or may not be a dangerous sport.) Moreover, hockey may be even more dangerous than football because _____________. (Include any logical extensions from the football case).

- Therefore, Tom assumed the risk of injury by playing hockey.
(3) Look to definitions in statutes. Also, look to legislative intent if there is a lack of authority defining the term.

- A person who plays a dangerous sport assumes the risk of injury. A dangerous sport means that the sport poses a substantial risk of significant injury. The legislature enacted this law to prevent players from recovering for injuries in sports that traditionally have caused life-threatening injuries that cannot be fully eliminated by wearing equipment. (You found this definition in the statute, but there were no cases interpreting this definition, so you looked to the legislative intent behind the statute.)

- Tom played tackle football, which involves a substantial risk of significant injury because _________________________________. (Now use the definition and the legislative intent to create arguments on why football does (or does not) impose a substantial risk of significant injury.)

- Therefore, football is a dangerous sport, so Tom assumed the risk of injury by playing tackle football.
An Example from My Students’ First Memo –

• Personal coercion may amount to an arrest.

• Brett took Jane’s poodle away from her.

• Therefore, Jane was falsely imprisoned through personal coercion.

This will not work. We do not know what personal coercion means under the law.
Students Must Use A Case to Define Personal Coercion –

- Personal coercion may amount to false imprisonment. If a store employee detains a valuable item of a customer, then the customer has been personally coerced. (From the Clarke case.)

- Brett took Jane’s poodle away from her.

- Therefore, Jane has been personally coerced, which amounts to false imprisonment.

Do we have enough law?

- Analogizing to a past example of a valuable item would help to explain this rule.
After Students Fill the Legal Gaps, They Must Fill the Gaps in their Analysis –

- Personal coercion may amount to false imprisonment. If a store employee detains a valuable item of a customer, then the customer has been personally coerced. Taking bed sheets worth $250 is taking a customer’s valuable item. (From the Clarke case.)

- Brett took Jane’s poodle away from her.

- Therefore, Jane has been personally coerced, which amounts to false imprisonment.

What’s the problem? There is a gap in the analysis.

- Why is the dog valuable? Many students assume a poodle is valuable. The fail to connect the dots. That is, they fail to use the facts to explain why Jane’s poodle is a valuable item.
Another Example –

- To get promoted, an employee must be qualified.
- Megan had good performance reviews and won numerous employee-of-the-month awards.
- Therefore, Megan was qualified and is eligible for promotion.

Does this work? No. Being qualified could mean having an advanced degree. We must define the term.
Use A Past Decision to Define the Term –

- To get promoted, an employee must be qualified. An employee who has had good performance reviews and has won multiple employee-of-the-month awards in the past two years is a qualified employee. *Adams v. Burns*, 100 Mich. 101, 108, 200 N.W.2d 300, 303 (1999).

- Megan had good performance reviews and won numerous employee-of-the-month awards.

- Therefore, Megan was qualified and is eligible for promotion.

This does not work. There is a gap in the application – the application is not specific enough to make the analogy work.
Sometimes Defining A Term Leads to Defining Another Term –


- Megan met her employer’s legitimate expectations because she had good performance reviews and won numerous employee-of-the-month awards in the past two years.

- Therefore, Megan was qualified and is eligible for promotion.

This does not work because we cannot assume we know what a legitimate expectation is. We must define that term.

Common Question: How do we define that term when there is no black-letter law on it?

- Students must use past cases to help them fill this gap.

The Problem? Many students have trouble distilling a rule from multiple, specific holdings and applying it to their case.