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## Avoidance Strategy: Same-Sex Marriage Litigation and the Federal Courts

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## The Psychology Behind Case Briefing: A Powerful Cognitive Schema

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### INTRODUCTION

Every year I begin the fall semester asking my students what they know about law school. Most of them know something about the law.<sup>1</sup> They have seen movies like *The Firm* or television shows like *The Practice* and *Law and Order*. Students have seen crime investigations on *CSI*. Even on the Internet, there are numerous websites devoted to instructing students on how to manage their first year of law school, including advice on how to read an opinion or brief a case. In addition, most of my beginning students have been very successful in their undergraduate careers. They have tested well in the past (on the LSAT and other exams), and they have expectations that they will be just as successful in law school. Even though law school is a new experience, my students begin with some “schemata” (associations or expectations) to help them put the study of law in a rational context.<sup>2</sup> Cognitive and educational psychologists often discuss the importance of having a “schema” or framework that allows us to think about and categorize information.<sup>3</sup> Schemas are “clusters of information” which

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1. RUTH ANN MCKINNEY, *READING LIKE A LAWYER: TIME-SAVING STRATEGIES FOR READING LAW LIKE AN EXPERT* 18 (2005). Professor McKinney’s book is an excellent resource for new law students on how to read “like a lawyer.” Within the initial chapter on case briefing, McKinney comments that case briefing serves as a “schema” for new law students. *Id.* at 19. McKinney’s comments inspired my further research on “schema” theory upon which this article is based.

2. *Id.* at 18. Although “schema” theory will be discussed in more detail, the main assumption underlying the schema concept is that knowledge structures allow for cognitive economy, providing students with a framework for making decisions in the absence of complete information.

3. *Id.* at 17.

we use to store ideas and concepts and to help us discern new information from old.<sup>4</sup>

This initial framework or “schema,” however, is not always successful. Every fall semester, I watch students struggle with reading a legal opinion for the first time. Despite their hard work and effort, they are left confused and frustrated. Their confusion comes not because they lack any inherent skill or intelligence, but because of the unique characteristics of law school.<sup>5</sup> Why do new law students struggle with what seems to be a simple task? The answer lies in the field of cognition. If we understand more about how law students learn, we can unmask the mysteries of why case analysis is so difficult for beginning students. Legal educators need to consider the current research on cognition and how it impacts their teaching of the most basic legal concepts, including case analysis.

The purpose of this article is to provide a better understanding of how law students learn in the context of case analysis. As new students approach case analysis for the first time, the case brief is an effective “schema” to provide students with a framework within which to analyze a legal opinion. Case briefing does more than simply allow students to pull out the holding of a case; it helps beginning law students organize a legal opinion’s analytical framework accurately and efficiently.

This article will first examine why case reading and analysis is challenging to new law students. It will then introduce “schema” theory as it is understood in the field of cognitive psychology and explore how it applies to legal case analysis. Finally, this article will offer various suggestions about how we can enhance our students’ analytical skills. By learning more about the science behind cognition and how it applies to our students, we can increase our students’ understanding of the complex legal materials they read during their first year of law school.

## I. A BEGINNING LAW STUDENT’S CHALLENGE TO READ THE LAW

Reading a case is “. . . something like stirring concrete with my eyelashes.”<sup>6</sup> Most of us remember our first exposure to a judicial opin-

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4. *Id.* at 17.

5. *Id.* at 18.

6. SCOTT TUROW, ONE L 30-31 (1977). The book describes Mr. Turow’s experience as a “1L” at Harvard University. The study of how law students and lawyers read legal texts is a topic of much recent debate. This author is currently involved in an empirical study of how law students and lawyers read cases. Although the topic of legal reading is beyond the scope of this article, there are several excellent

ion. The vocabulary was unfamiliar and the structure was strange. Scholars in almost any discipline recognize that reading a case is a complex task for a new law student.<sup>7</sup> Further, the fact that many law students have been academically successful in the past provides for even greater frustration.<sup>8</sup> One of my first-year law students reflected upon how difficult case reading was for her during her first semester of law school:

It's a whole new language . . . [I]t's obviously a very different type of reading. You can't really glaze over sentences and you really have to read and think about each sentence. I'm not used to having to do that. I was a reporter you know. You take in the highlights. You skim the first three paragraphs and you can usually get everything you need out of the first three paragraphs. And if you want to read on, there may be some interesting facts and things like that but I've already learned what I need to know. With the law, it's not like that. And sometimes you're reading cases where you have no idea [what's happening]. It's a very uncomfortable process and it's an annoying process . . . and you're tempted to start reading more quickly and you're frustrated because you don't know what's going on.<sup>9</sup>

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articles on reading in general and on how law students read legal materials. See, e.g., EXECUTIVE CONTROL PROCESSES IN READING (Bruce K. Britton & Shawn M. Glynn eds., 1987) (examining how cognitive strategies may be used to improve reading speed and retention); Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, 83 IOWA L. REV. 139 (1997); Samuel S. Wineburg, *Historical Problem Solving: A Study of the Cognitive Processes Used in the Evaluation of Documentary and Pictorial Evidence*, 83 J. EDUC. PSYCHOL. 73 (1991); Dorothy H. Deegan, *Exploring Individual Differences Among Novices Reading in a Specific Domain: The Case of Law*, 30 READING RES. Q. 154 (1995); Douglas K. Hartman, *Eight Readers Reading: The Intertextual Links of Proficient Readers Reading Multiple Passages*, 30 READING RES. Q. 520 (1995) (examining the intertextual links which are made by readers); Suzanne E. Wade et al., *An Analysis of Spontaneous Study Strategies*, 25 READING RES. Q. 147 (1990); BONNIE B. ARMBRUSTER ET AL., CTR. FOR THE STUDY OF READING: EDUC. REP. NO. 40, THE ROLE OF METACOGNITION IN READING TO LEARN: A DEVELOPMENTAL PERSPECTIVE 18 (1987), <http://www.indiana.edu/~reading/ieo/digests/d96.html>.

7. See Mary A. Lundeborg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 READING RES. Q. 407 (1987).

8. Deegan, *supra* note 6, at 157.

9. Transcript 100, at 10. This transcript, as well as the other interviews referred to in this article, are part of a larger study on how law students read the law completed by this author in 2006. The results of this study will be published in Leah M. Christensen, *Legal Reading and Law School Success: An Empirical Study*, 30 SEATTLE U. L. REV. (forthcoming Spring 2007). During the interview portion of the study, I sat down with students and asked them about their reading and study strategies generally, and their case briefing strategies specifically. All interviews were done with the

This student's frustration is not unusual. Legal texts are unique in both their form and structure; they are their own special genre. In order to understand how law students read legal text, we need to understand the reading process more generally. Professor Peter Dewitz explains that reading is the product of both how we recognize words and how we comprehend the words we read.<sup>10</sup> First, word recognition is the set of strategies we use to identify words.<sup>11</sup> While beginning law students encounter many new terms, they usually can identify these words using basic phonics principles.<sup>12</sup> However, just because a reader recognizes a word does not mean that the reader comprehends its meaning.<sup>13</sup> As we know, legal cases are full of new terms for beginning readers which represent new and sometimes abstract concepts.<sup>14</sup> Reading comprehension is the process of building a mental representation of the ideas expressed by the author.<sup>15</sup> And, the most important factor that affects reading comprehension is the "real world" knowledge that the reader brings to the legal text.<sup>16</sup> The typical law student usually lacks background knowledge about the law. Yet, without this background knowledge, a new reader has a hard time making sense of all the new information in a legal text.<sup>17</sup>

Another type of knowledge needed by the legal reader is an understanding of "text structure."<sup>18</sup> Comprehension comes more quickly if the reader understands the organizational structure of the text.<sup>19</sup> Consider the typical judicial opinion with its synopsis, fact section, issue statement, and holding. A new reader could easily become confused by the unusual structure of a judicial opinion. And consider that most law students have spent four years reading, writing and studying in the humanities and social sciences, where they spent most of their time

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consent of the students. In addition, the students also consented to release their law school GPA information.

10. Peter Dewitz, *Reading Law: Three Suggestions for Legal Education*, 27 U. TOL. L. REV. 657, 657 (1996).

11. *Id.*

12. *Id.*

13. *Id.* For example, "per curiam" opinion or "pro se" litigant.

14. *Id.*

15. *Id.* at 657-58.

16. *Id.* at 658.

17. *Id.* See also Rand J. Spiro et al., *Cognitive Flexibility Theory: Advanced Knowledge Acquisition in Ill-Structured Domains*, in THEORETICAL MODELS & PROCESSES OF READING 602, 603 (Robert Ruddell et al. eds., 1994).

18. Dewitz, *supra* note 10, at 658.

19. *Id.*

doing a different type of reading.<sup>20</sup> No wonder the judicial opinion seems particularly strange during those first few weeks of law school.

In addition to word recognition and text structure, the beginning legal reader needs a third type of knowledge called “grammatical knowledge [which] helps the reader understand the relationship among concepts within a sentence.”<sup>21</sup> In legal text, the grammar and syntax can become so complex that the reader has to work hard to make sense of how the paragraphs fit together.<sup>22</sup> This presents a significant challenge to the novice reader.

Finally, readers need a fourth type of knowledge called “strategic” knowledge or more commonly referred to as reading strategies.<sup>23</sup> Reading strategies are “set[s] of mental processes used by a reader to achieve a purpose.”<sup>24</sup> For basic reading, we are usually unaware of the reading strategies we use to help us move through text.<sup>25</sup> We may evaluate, underline or question the text without thinking about these actions as actual “strategies.” However, as reading becomes more difficult, we become more aware of how we are reading the text.<sup>26</sup> While novice readers approach a new type of text for the first time using basic strategies, including underlining, making notes, highlighting, and questioning text, experts in a field have developed more specialized reading strategies. For example, a practicing attorney or “legal expert” may synthesize text, hypothesize, and connect with prior knowledge or experience. However, until novice readers become experts, their reading strategies do not come naturally. Novice readers in a new discourse have to work hard to move through the text.

One law professor experienced the frustration of being a novice firsthand. Professor Christina Kunz returned to study her undergraduate major of molecular biology after twenty years of reading the law.<sup>27</sup> Kunz described her discomfort:

As I took these courses, I became keenly aware of my status as a “novice to the discourse” in each of these fields, all of them new to me. In

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20. Peter Dewitz, *Legal Education: A Problem of Learning From Text*, 23 N.Y.U. REV. L. & SOC. CHANGE 225, 228 (1997).

21. *Id.*

22. *Id.* Dewitz provides the example that “the demands of syntax are more easily appreciated when we compare the complex prose of Faulkner to the less demanding writing of Hemingway.” *Id.* at 228.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Christina L. Kunz, *Teaching First-Year Contracts Students How to Read and Edit Contract Clauses*, 34 U. TOL. L. REV. 705, 705 (2003).

each course, I struggled to gain familiarity with new vocabulary, new genres of writing, new communities of experts, and new means of analysis. After more than two decades of feeling comfortable reading the discourse of law, I found myself in a situation akin to our students' feelings of discomfort as they too are novices to the discourse of law.<sup>28</sup>

Beginning law students struggle in the same way. The tools that our students used before no longer work in law school. Kunz understood this dilemma and attempted to rid herself of her "novice status" as quickly as possible. She developed a schema in which to understand her new discourse.

I started to systematically work at escaping my novice status as soon as possible, in each course. . . . I located students who seemed to have the feel for how to read and study this new discourse, and I asked how they were reading the assigned material. Did they read the assignments once or twice? Did they skim and then read in detail? Did they take notes in the margins or on a separate paper? What kinds of things did they look for or note in their reading? What kinds of connections existed among the readings?<sup>29</sup>

Law students begin law school with the same shortfalls. They need to ask themselves the same questions that Kunz posed to herself. Kunz also changed her teaching style based upon her experience as a novice reader in a new discipline: "[I] realized how much more we, as law professors, could assist students in more quickly gaining the 'heuristics' (tricks of the trade) of reading legal text."<sup>30</sup>

The case brief is one of those "tricks" of the trade for beginning law students. Although we often give our students an example or format for a case brief, we rarely explain why case briefing is important to successful case analysis. In fact, we may not understand ourselves the cognitive purposes behind briefing a case. We need to ask ourselves and our students: What is the psychology behind case analysis and case briefing? What can we do to make sure our students use and develop appropriate schemas to facilitate their comprehension of legal text during the first year of law school?

Beginning law students need "both a context and a method to process what they learn."<sup>31</sup> Traditional law school teaching does not

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28. *Id.*

29. *Id.*

30. *Id.* Kunz then goes on to describe how she taught critical reading skills to students in a contracts drafting class.

31. Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315, 320 (1997). Lustbader also notes appropriately that "[l]aw schools create anxiety more than other graduate schools because there are more students in each course,

always provide these analytical building blocks; therefore, students can easily feel overwhelmed. Further, the beginning law student is being taught by a legal expert. You generally cannot ask an expert how they do something because experts who engage in a process cannot express “how they know what they know.”<sup>32</sup> This is particularly true of law professors. Think of your average law professor who most likely graduated at the top of her law school class. Even when law professors try to be explicit about a particular topic or case, they “often cannot break down the reasoning process to the degree necessary to communicate it effectively to some students.”<sup>33</sup> As law professors, we need to be aware of this problem and provide our students with the necessary tools for case analysis in their first year. One of these tools is the case brief.

## II. CASE BRIEFING PROVIDES A “SCHEMA” FOR CASE ANALYSIS

### A. *What is a Schema?*

When approaching a new discourse, such as the law, an educational or cognitive psychologist would tell us to develop a “schema” or framework to allow us to think logically about the new information. “A schema is a cluster of information that we hold in our mind about a subject. It informs our perceptions, our assumptions and our processing of information.”<sup>34</sup> In simple terms, a schema is stored knowledge. During reading, comprehension occurs when the reader can match the text information to the pre-existing schema.<sup>35</sup> The new information is compared against the old.<sup>36</sup> The existing schema fills in the gaps in the text and allows for many kinds of inferences.<sup>37</sup>

Schemas are “critical building blocks of the human cognitive process.”<sup>38</sup> They permit us to process the never-ending amount of information we encounter each day.<sup>39</sup> Categories and schemas affect not only what information receives our attention, but how we categorize it

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more capable students competing for grades, more potential employers placing a great emphasis on first-year grades, and little feedback.” *Id.* at 320, n.9. If you examine graduate programs in most other disciplines, there are between five and twenty graduate students in any given year. Contrast that number to most law programs that begin minimally with 150 to upwards of 300 first-year students every year.

32. Lundeberg, *supra* note 7, at 409.

33. Lustbader, *supra* note 31, at 321.

34. MCKINNEY, *supra* note 1, at 17.

35. Dewitz, *supra* note 10, at 673 n.3.

36. *Id.*

37. *Id.*

38. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1131 (2004).

39. *Id.*



and what we remember about it.<sup>40</sup> Without experience in the law, beginning law students have no schemata and their ability to read and analyze the law is often inefficient and overwhelming.<sup>41</sup>

It is true that all beginning law students arrive with some schemata based on their past experience, i.e., movies, television shows, summer jobs, etc.<sup>42</sup> These past schemata are helpful. As beginning law students receive new information, “they give it meaning according to how it fits into their existing schema.”<sup>43</sup> As they refine their understanding of new information, the students identify the connections between the concepts.<sup>44</sup> This enables them to expand or modify existing schemata or create new ones.<sup>45</sup> “Mastery of these thought patterns distinguishes a novice from an expert in a particular domain.”<sup>46</sup>

Further, there is a difference between how novices (beginning law students) and experts (law professors or practicing attorneys) process legal information. As legal educators, we need to consider our own cognition, i.e., the way in which we think about and learn information. The fact that we read text as legal “experts” impacts how we read the law and, therefore, how we teach the law.<sup>47</sup>

40. *Id.*

41. MCKINNEY, *supra* note 1, at 18-19. Further, traditional law school teaching usually concentrates on only one learning style; it does not address the varied cognitive styles represented in each entering class. Students who have different cognitive styles than the typical “Socratic” method will have to learn legal reasoning on their own.

42. *Id.* at 18.

43. Lustbader, *supra* note 31, at 326. *See, e.g.*, Gari L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 337 (1995). Part of the learning process for beginning law students is placing new information in pre-existing schemata developed from prior experiences. Thus, for many students, the new information in law school does not fit readily into their pre-existing schemata because what they are learning in law school does not reflect their experience. Consequently, law professors need to find ways to help students analogize their experiences so they can fit the new information into a schema.

44. *Id.* at 326.

45. *Id.*

46. *Id.*

47. *Id.* at 321. Further, an assumption underlying the schema concept is that knowledge structures allow for cognitive economy, providing people with a mechanism for making decisions in the absence of complete information. Dewitz, *supra* note 10, at 660. Lustbader provides a helpful list of citations about the basics of schema theory, including RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (Prentice Hall, 1985); David E. Rumelhart, *Schemata and the Cognitive System*, in *HANDBOOK OF SOCIAL COGNITION* 161 (Robert S. Wyer & Thomas K. Srull eds., 1981); SHELLEY E. TAYLOR & JENNIFER CROCKER, *SCHEMATIC BASIS OF SOCIAL INFORMATION PROCESSING, SOCIAL COGNITION: THE ONTARIO*

For example, experts understand legal terminology easily and can solve problems efficiently and accurately by using generalizations, abstractions and developed schemata.<sup>48</sup> However, novices can get lost in the details of a case or problem without even being able to identify its general category or point.<sup>49</sup> If you analyze how a first-year law student reads legal text, they take in all information equally. Every detail has an equal importance because the novice reader does not yet know what to take in and what to discard as irrelevant.

Beginning law students “need to develop a schemata for the legal system, the structure of the discourse, and the conventions of that discourse in order to analyze legal problems accurately and efficiently.”<sup>50</sup> The case brief is an effective tool to help beginning students organize a legal opinion in a way that enhances understanding and makes the information manageable to the student.<sup>51</sup>

### B. *The Case Brief Is a Powerful Schema*

Case briefing gives students the framework within which to enter the discourse of law. A case brief is nothing more than a schema. Especially in the first semester of law school, case briefs help new law students preserve their thoughts and observations as they begin to organize the content of cases.<sup>52</sup> By going through the process of drafting a case brief, students free up their short term memory which allows them to think about what the case actually means.<sup>53</sup>

Most law students prepare their case briefs on their laptop computer. A typical brief contains the following components: case heading, parties’ names, procedural history, facts, issues or questions

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SYMPOSIUM ON PERSONALITY AND SOCIAL PSYCHOLOGY (Giggins et al., eds., 1981); Eleanor Rosch, *Cognitive Representations of Semantic Categories*, 104(3) J. EXPER. PSYCHOL. GEN. 192 (1975); J. Dennis White & Donald E. Carlston, *Consequences of Schemata for Attention, Impressions, and Recall in Complex Social Interactions*, 45 J. PERSONALITY & SOC. PSYCHOL. 538 (1983).

48. Lustbader, *supra* note 31, at 326.

49. *Id.* at 326-27.

50. *Id.* at 327. For example, Lustbader states that “such schemata helps students understand what policy arguments to make, the hierarchy of the policy arguments, the appropriate time and place (court) to make the arguments, and the amount of detail needed to explain the policy.” *Id.* IRAC is another example of lawyers’ use of structure in the discourse of law. Lustbader makes the insightful comment that “most law professors typically view their teaching role as ‘modeling’ the patterns of reasoning or the schemata of legal discourse. Consequently, they don’t provide students with sufficient substantive information or schemata.” *Id.* at n.26.

51. MCKINNEY, *supra* note 1, at 19.

52. *Id.* at 23.

53. *Id.*

presented; holding, reasoning/rationale; and a separate section for the reader's own thoughts.<sup>54</sup> During the first week in law school, many professors hand out examples of case briefs without further explanation. Law professors assume that students will teach themselves how to analyze a case by examining the components of a case brief and filling in the blanks.<sup>55</sup> Law students are particularly diligent during the first semester of law school, and they figure out how to "fill in" the parts of a case brief. However, all too often, students stop there. In fact, many students stop briefing cases altogether after first semester because they consider it too time-consuming. Consider the words of a typical first-year law student:

Interviewer: Do you use case briefs as a study strategy?

Student: No, I used it in the first week. I had a hard time writing out the holdings. I actually have a hard time when I'm writing out the brief. Not concentrating . . . [i]t's time-consuming and inefficient.<sup>56</sup>

By giving up case briefing so soon in her law school career, this student may have missed out on the benefits of the case brief as a cognitive schema. Although a brief serves as an organizational tool, it also serves as a way to help students think critically and creatively about the law. This is a key aspect of case briefing that often goes unrecognized by both students and educators. Further, those students who continue to brief their cases may have an academic edge over those students who have stopped briefing cases.

One student in the top five percent of her class after the first semester of law school, for example, disclosed that she still briefs every case before class. Although she highlights text and writes in the margins during her initial read-through of the case, she briefs the case during her second reading. She appeared to recognize that the process of briefing a case enhanced her overall case analysis.

Interviewer: Tell me a little bit about what reading strategies you use [in general]?

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54. *Id.* at 19-22. Almost any first year Legal Research and Writing text contains a small section on case briefing. However, these chapters may not explain *why* we have students brief cases. Students fail to grasp the basic premise that case briefing is a framework to enhance understanding of case analysis.

55. Deegan, *supra* note 6, at 157-58.

56. Transcript 102, at 10.

Student: [T]ypically I start by reading the case once through. I highlight what I think is the issue, rule of reasoning, procedural history all in the margin. I highlight it and then put the “R” next to it. I read it through that one time and depending when it’s due for class, I’ll either brief it right after that or wait until the next day. When I brief it is when I really understand it. I understand it the first time through, but when I brief it, it really solidifies in my head.<sup>57</sup>

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Interviewer: Do you still brief cases after you read them?

Student: Yeah. Everything. Well, there are rare occasions where I don’t need to or I’m too lazy. But, yeah, I still brief pretty much everything including the notes after the case and everything. Um, just because that’s my way of understanding it. That’s my “learning.” When I write it down is when it solidifies in my head. So, I’ll read it through the first time carefully and then, based upon what I highlighted, I usually do end up rereading the whole case. I don’t just read what I’ve highlighted because it’s not always correct. Or I miss something. So, I go through and write down everything that I think is important, mostly the reasoning and rule of law. I don’t spend a lot of time on the facts.

Interviewer: Have you felt that these strategies have been successful for you?

Student: Yeah. Extremely successful. Because when I read it through—I mean for me, that’s pretty passive. I mean, yeah, I’m trying to mark out what the issue and the holding is [sic] and everything, but I won’t remember it the next day. Now, if I brief it, then I do remember it the next day. And, plus, it’s right in front of me. I don’t like paging through the case and trying to find where I put my “H.” So, I like having it all in front of me and I think it’s been really successful. I mean I always—I won’t say never. But I hardly ever feel lost in class, and if any-

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57. Transcript 111, at 7.

thing, I might do it too thoroughly, because I just know everything.<sup>58</sup>

This student possessed a fairly sophisticated understanding of both how she learned most effectively and the underlying benefits of case briefing. She understood that she did not learn the case until she “briefed” it. Legal educators do not always stress the subject of case briefing after the first week of law school. Yet the way in which law students use their case briefs evolves over the course of any semester. When asked to describe how her case briefing strategies changed throughout the course of the semester, the student above responded, “My briefing has gotten a lot better. I mean it’s—before I just didn’t know—when I started law school, I did not know what was important at all. But, now I can just pick out right away—this has nothing to do with what we’re talking about . . .”<sup>59</sup>

This student, like so many of our first year students, began to develop her own schema about the law. Over time, as her legal vocabulary increased and her understanding of an opinion’s unique structure became more refined, her case analysis improved.

### C. *Taking Students Beyond Their Yellow Highlighter*

By the end of the first semester of law school, most students choose to “book brief” their cases by underlining or highlighting components of a legal opinion. This is a good start, but it is rarely enough. Students believe they are saving time by simply marking their casebooks with a highlighter. However, using the highlighter to move through the assigned reading rarely accomplishes what the novice legal reader needs at this point in his law school career.<sup>60</sup>

One first-year student who was still struggling with case analysis after first semester admitted she spent a great deal of time highlighting cases as she read. She used a color-coded system of highlighting, using a different color to represent the different structural components of a judicial opinion. She explains:

Interviewer: Tell me a little bit about what reading strategies you use?

Student: [I] summarize as I go. Like, reread, because there is a lot of stuff in here that I just don’t get the first time. I understand the words, but I have no idea

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58. *Id.*

59. *Id.* at 8.

60. MCKINNEY, *supra* note 1, at 176.

what the meaning is so I have to read it two or three times and underline.

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Interviewer: So you highlight?

Student: Oh, I highlight a lot. I underline. I tend to write a lot of words in the margins in pencil. . . . If it's a rule of law, I'll highlight in a certain color. So I use orange for a rule of law. The reason I use different colors a lot of time is just because I'll use all one and I stop looking at it.<sup>61</sup>

If possible, we want to prevent our students from falling into this habit. Blindly highlighting one's casebook or computer briefing without doing something more holds some students back.<sup>62</sup> When a student highlights text, she marks what has been written by the author.<sup>63</sup> The student fails to engage in her own analysis or evaluation. The student fails to "talk back" to the text.<sup>64</sup> Even the best highlighting only "capture[s] the author's words."<sup>65</sup> Effective case analysis requires more than simply highlighting the author's language. One of the most important functions of a good case brief schema is to force students to consider their own thoughts and reactions to the case.<sup>66</sup>

Experts in rhetoric believe that thinking, speaking and writing are inseparable.<sup>67</sup> Therefore, law students can use case briefs to enhance their understanding of the law by writing their briefs by hand or by typing them into their computers in a way that allows them to be conscious of their own thinking. Contrary to simply highlighting, the process of writing allows students to more accurately assess what they do and do not understand about the case.

61. Transcript 112, at 6.

62. MCKINNEY, *supra* note 1, at 176.

63. *Id.*

64. Elizabeth Fajans & Mary Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993).

65. MCKINNEY, *supra* note 1, at 176.

66. A model case brief should contain a section for the student's own thoughts and/or conclusions.

67. MCKINNEY, *supra* note 1, at 177. See also Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 LEGAL WRITING I (2000) (discussing writing as a means of communication and learning); JAMES N. BRITTON ET AL., *DEVELOPMENT OF WRITING ABILITIES* (1975) (advocating a unified approach to language, with students starting with more personal forms of writing (expressive writing) and moving to those that are more public writing (transactional writing)).

While almost all students and educators agree that case briefing helps them prepare for class, it does more than that. Not only does writing a case brief help a student's understanding of the case, it is a way of "chunking" information to free up working memory so the student can think about the main idea of a case.<sup>68</sup> The case brief is not an end in itself.

#### D. Case Briefing Promotes "Chunking"

We want students to think about the "chunks" of information they have written in their briefs so they can analyze the case on their own and see how it fits into the context of any course. This is where a student's learning truly occurs. In addition, this is a key facet of case analysis that both professors and beginning law students often misunderstand. Experts in any field have ways of chunking information into rational groups.<sup>69</sup> Once clumped into a rational group, the same amount of information takes up less storage space in working memory, thus freeing more space in working memory for the challenging task of actually thinking about the material.<sup>70</sup> Therefore, the ability to recall more information is a function of the size and information content of the individual chunks.<sup>71</sup>

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68. MCKINNEY, *supra* note 1, at 176-77. In addition, studies of successful students showed that students who excelled in a particular law school class modified their study methods based upon both the subject matter and professor for that class. "Excellent students can read subtle cues from the professor and frequently are unaware that they are grafting the professor's way of thinking onto their own." Lustbader, *supra* note 31, at 324 n.18 (referring to Paul Wangerin, *Learning Strategies For Law Students*, 52 ALB. L. REV. 471, 476, 477 (1988)). This suggests that successful students shift from a generic method of briefing cases to a more personalized method based upon the particular professor teaching the class.

69. MCKINNEY, *supra* note 1, at 174. Cognitive scientists understand that knowledge is structured in memory like cohesive groups of concepts or "chunking." In turn this "chunking" of knowledge makes information meaningful. Information, including facts, figures, and beliefs, is organized into clusters of knowledge. "The concept of knowledge, as distinguished from information, implies understanding." Lustbader, *supra* note 31, at 326 n.23. See also DAVID E. RUMELHART & DONALD A. NORMAN, REPRESENTATION IN MEMORY (1983); Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 337 (1995); SHELLY E. TAYLOR & JENNIFER CROCKER, SCHEMATIC BASIS OF SOCIAL INFORMATION PROCESSING, SOCIAL COGNITION: THE ONTARIO SYMPOSIUM ON PERSONALITY AND SOCIAL PSYCHOLOGY (Higgins et al. eds., 1981).

70. MCKINNEY, *supra* note 1, at 175.

71. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 344 (1995). Blasi cites the following example: "[M]ost people who glance at the following string of symbols will have some difficulty remembering it: WYSIWYG/P6/QWERTY/AS400. To a person with limited

In discussing the unique abilities of “experts” to organize and “chunk” material, Professor Gary Blasi noted that “if expertise in a particular domain is associated with the ability to match problem patterns with stored problem schemas, we expect to see differences in the ability to perceive and remember patterns.”<sup>72</sup> “In effect, experts should be able to detect and remember patterns in complex sets of phenomena” far more easily than novices.<sup>73</sup> This theory of expertise also suggests that a “problem which requires a novice to process many small chunks of information requires an expert to process a smaller number of larger chunks.”<sup>74</sup> Given that the human brain processes information at the same speed in everyone, we usually expect experts to solve problems more quickly because they have less information to process.<sup>75</sup> Research in this area has shown that experts solve problems quickly and find solutions from memory while novices are left with the slower, heuristic method of searching for a solution.<sup>76</sup>

As novice law students evolve into more expert legal readers, they too will be able to detect and remember patterns in cases that were largely invisible when they first began reading cases. This is precisely why case briefing enhances case analysis: it is a “chunking” tool. It is a way that experienced law students and lawyers have found to take apart a case and re-cluster the information in a manageable way.<sup>77</sup> While information in cases could be “chunked” in many ways, case briefs are so widely used and understood that they provide a common language with which to discuss case analysis.<sup>78</sup>

### III. FROM NOVICE TO EXPERT: ENHANCING YOUR STUDENTS’ CASE ANALYSIS

Most of us would agree that one of the tasks of law school is to teach students how to think like lawyers, but, in truth, lawyers do not really think differently than anyone else.<sup>79</sup> Case briefing is the beginning of a law student’s journey toward a fuller understanding of the

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knowledge of computers, this is a string of twenty-three individual symbols, possibly bearing an encrypted message. But a more computer-literate person will quickly recognize this string of symbols as four discrete chunks, each representing a known concept or object, and will easily remember it.” *Id.* at 343.

72. *Id.* at 343.

73. *Id.*

74. *Id.* at 344.

75. *Id.*

76. *Id.* at 344-45.

77. MCKINNEY, *supra* note 1, at 177.

78. *Id.*

79. *Id.* at 34.



nuances and flexibility of legal text. Accordingly, when we introduce case analysis to our students during the first semester of law school, we can do more than simply provide an example of the case brief format. Handing out an example brief should not be the beginning and end of the lecture.<sup>80</sup> Our job is to bring the beginning law student “into the community of academic discourse.”<sup>81</sup> How do we make this happen? The remaining section of this article will provide specific ways in which we can enhance our students’ understanding of case analysis by using and expanding upon the traditional case brief.

### A. *Help Students Learn “How” They Learn*

Reading is a self-regulated process. Our students do most of their law school studying and learning by themselves at home or in the library. There is a benefit to encouraging students to become self-regulated learners. Students can learn how to teach themselves. They should not read or brief cases passively, thinking only about the text in terms of what they will be asked to regurgitate in class. Students need to explore and evaluate the cases they read. Creative case analysis is one way to introduce the idea that law students have control over what they learn and how they learn it. The idea of metacognition is also helpful: law students need to consider “how” they learn. Students who understand how they learn read most effectively and study more efficiently.

Consider the following example. One student, in the top ten percent of her first-year class, described the best piece of advice she could give to new law students as follows:

I would say know how you learn. I’m an auditory learner and so I can read an opinion and I can visually see the words, but that is not going to help me. It really helps to get those CD’s about cases that you can listen to while exercising, while you’re going to bed. And, they’ll review the context of the case and it will just drive home what we’ve been doing in the classroom. So, if you’re an auditory learner, try to find

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80. In fact, professors might consider beginning by exploring legal “reading” first, then moving on to the components and reasons behind why we ask students to brief cases. Students cannot understand the purpose and components of a case unless they have begun to use some essential reading strategies beneficial to new law students.

81. Fajans & Falk, *supra* note 64, at 171. Fajans and Falk provide the example of Professor Theresa Godwin Phelps, who recognized that first-year students needed to be initiated into a new discourse community where they will find “their legal personalities by mastering a new ‘tribal speech.’” *Id.* (citing Teresa G. Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089, 1091 (1986)).

something other than just reading a case brief. Try to make flashcards for yourself or do something inventive.<sup>82</sup>

She figured out how she learned best and sought out ways to facilitate her learning. If we can convince our students to take responsibility for their learning styles, we can help them develop their legal schemata more efficiently.

### B. *Provide Structure and Background Knowledge*

One of the initial hurdles a beginning law student faces when reading a judicial opinion is a lack of background knowledge. “A novice reader of the law simply lacks the background knowledge necessary to comprehend what she reads.”<sup>83</sup> Without this basic background information, beginning students cannot comprehend legal text in an efficient manner. The novice reader has difficulty with new terms and new meanings. In contrast, the expert reader uses background knowledge to her benefit. Background knowledge “acts as a screen or filter” for what the expert reads.<sup>84</sup>

The following example illustrates that even very successful law students still struggle with case analysis. This particular student, who was in the top five percent of her class after first semester, described that one of her biggest frustrations was not being able to discern what was relevant in a case from what was irrelevant:

When I started law school, I did not know what was important at all. Because of the certain tone of judicial opinions, I think when you first start out you think everything is important and it sounds so above your head. So, you're like well, if I don't understand this it must be important. But, now I can just pick out right away—this has nothing to do with what we're talking about or this is definitely what this court finds to be the most important issue that the case turns on or the most important fact. . . . And I definitely can pick out the rule of law so much faster now.<sup>85</sup>

Knowing that law students need background information, professors can provide clues as to how to discern main concepts out of the text. Before examining a case in class, provide the background infor-

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82. Transcript 102, at 10.

83. Dewitz, *supra* note 10, at 661.

84. *Id.* Dewitz makes an excellent comparison between the expert reader and the expert chess player. When the expert reads in her field, it is like a chess master surveying a chess game. “The chess board is alive with predictable patterns that are easy to comprehend. To the novice chess player, the game board is a random array of black and white pieces.” *Id.* at 662.

85. Transcript 111, at 8.

mation necessary for students to understand the context of the case. Ideally, provide background information before you assign the case. Introduce the new legal concepts. Preview the case with your students and its importance within the larger structure of the course. Highlight and define new terms. These simple strategies provide the necessary background information that can enhance a novice law student's understanding of case analysis in the first year.

### C. *Model Your Expertise: "Think Aloud" in Class*

As Dewitz points out, "[e]xperts and novices also differ in the thinking strategies they use while reading a legal text."<sup>86</sup> We can teach case analysis by modeling how we read a case. A law professor understands the structure of legal cases and uses that knowledge to her advantage.<sup>87</sup> However, instead of "hiding the ball" in class, consider explaining the structure of a case and how you would go about reading it. A professor can "think aloud" in front of the class. In a "think aloud" or verbal report, participants state their thoughts as they read and think out loud. Verbal reports "allow access to the reasoning and purpose underlying cognitive behaviors."<sup>88</sup> Using a "think aloud" in class provides the student with a glimpse into the cognitive processes used by the professor when analyzing a case. This is tremendously useful to the new law student. Consider the following example of a "think aloud" I have used in class during the first few weeks of the fall semester:

Professor: The first thing I do before I begin to read a case is to think about why I'm reading the case. I guess you'd call this my "purpose" for reading. If you ask any practicing lawyer how they read a case, they will usually tell you that they always have a purpose for reading. So, when I read a case, I assume I'm a practicing lawyer because that role is most familiar to me. I pretend to read the case in preparation for a client interview. Don't be afraid to put yourself in a "role" or give yourself a "purpose" for reading the case other than simply reading it to prepare for class.

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86. Dewitz, *supra* note 10, at 663.

87. *Id.* at 668.

88. Suzanne E. Wade, et al., *An Analysis of Spontaneous Study Strategies*, 25 *READING RES. Q.* 147, 150 (1990) (citations omitted).

So, I pick up *Smith v. Olsen*. I usually preview the opinion to see how long the case is. This case is pretty long, twelve pages. Yikes. Okay, this is the Arizona Court of Appeals decision, so it's not the highest court. There may be other precedent out there that could be more authoritative than this opinion, so I'll need to make note of that. This decision was published in 1989, so it's not that recent. I'll probably want to find out if there are more recent cases addressing this issue. Looks like the Supreme Court denied review that same year. Hmm . . . guess they didn't want to hear the case. I wonder why? Oh wait, there's a footnote there that states that three of the justices wanted to take review of at least three of the issues. Interesting. I'll make a note of that.

Using a "think aloud" in class is a simple way to illustrate several important concepts of case analysis. In the two paragraphs above, I established a purpose before beginning to read, put the case in context, noted the court and date of the decision, and noted that the highest court of the state denied review of the case. Although we might assume our students naturally pay attention to all these details, they do not. Showing students how you would analyze a particular case is very helpful. What notes would you take? What parts of the opinion would you find noteworthy? What portions of the opinion would you skim? Why is the case important? Is the decision correct? How will the opinion serve as precedent for future cases?

When students witness you using this formula, they begin to understand the many facets of case analysis. They learn to read actively. Most importantly, when you verbalize your thoughts, you make what is normally hidden, i.e., your cognitive processes, visible to your students.

#### D. *Revise Your Case Brief Format*

Consider revising your case brief format to incorporate more of the types of questions you want students to consider as they read through a case in class. Research on legal reading has shown that students may be more successful in law school if they adopt the reading strategies of expert legal readers.<sup>89</sup> By revising your case brief to

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89. Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, 83 IOWA L. REV. 139, 160 (1997).

include important questions for any case, we can help our students develop their legal schemata. The following example provides a revised case brief format and poses questions that a student should be able to answer if they have read the case well.

### 1. CONTEXTUALIZE THE CASE<sup>90</sup>

*Where is the case from?*

What court wrote the opinion?

What year was the opinion written?

How will this case act as precedent to your issue?

*Why are you reading the case?*

What is your purpose for reading the case?

What should you focus on?

### 2. OVERVIEW

*Briefly skim the synopsis of the case.*

What is the subject matter?

What are the keynotes?

What are the main issues?

### 3. READ THE CASE

*What's the procedural posture?*

What is the summary of legal proceedings?

What are the issues in dispute?

*Outline the Facts.*

Who are the parties and what do they want?

Create a picture of the facts.

*Identify the key issues.*

What issues is the court deciding and/or reviewing?

*What did the court decide?*

Identify the holding and the rule(s) applied by the court.

Why did the court so hold?

What occurred in the case procedurally?

Is the judgment reversed or affirmed, or, is the motion denied?

### 4. REREAD TO GET THE BIG PICTURE

*Make sure you understand all the legal terms.*

*Distinguish relevant from irrelevant facts.*

Using the issue and holding, note which facts are legally relevant to the court's decision.

*Understand the court's rationale. Can you write it out in your own words?*

What is the court's reasoning?

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90. Lundeberg, *supra* note 7, at 430-32. This example is based in part on Lundeberg's suggestions about revising the typical brief format.

What is dicta?  
 What rules is the court applying?  
 What is the policy behind the rules?

#### 5. EVALUATE THE CASE

*Do you agree with the decision?*

Was it well-written? Well-reasoned?

Why are you reading the case, i.e., why is it in your casebook?

Why did the court come to this conclusion?

#### 6. MAKE NOTES

*Summarize the case in your own words.*

In the margin or in a separate case brief, use your own words to summarize the case, its facts, the law, and the law as applied to the facts.

Why is the case important?

Is the judge correct?

What influenced the judge's decision?

Were facts or law more important to the outcome?

How will this decision serve as precedent for future cases?

When students use this formula, they begin to understand there are many facets to case analysis. Further, when a law professor uses this format in front of the class, it is even more beneficial. In any context of learning, "it is the job of the expert to make explicit the secrets of her craft."<sup>91</sup> In the legal academy, much of what we do is "cognitive [in nature] and largely hidden," and we do not usually consider how we can explain what we now do naturally.<sup>92</sup> If we work to make our cognitive processes more visible, we can enhance the learning of our students and allow them to achieve more.

#### E. *Think Creatively About the Law*

Finally, after students grasp the initial structure of case analysis, i.e., they are comfortable with the case brief as their "schema," they need to go further. It is all too easy to read a case only to plug its components into the corresponding sections of the case brief. Students cannot stop there. Case briefing is only the beginning of case analysis, not the end. Students want to adhere too closely to the format of the traditional case brief. However, if their case analysis never develops beyond identifying the structural components of a case, their full understanding of any case will be limited. Students need to have

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91. Dewitz, *supra* note 10, at 672.

92. *Id.*

their own opinions about cases and about the law. Good lawyers and law students question the decisions, evaluate the results of the case, and consider the implications of any rule. This is precisely what we test in exams. We want our students to read the law creatively as well as critically. Further, the best students are open to the possibility that there are several different interpretations of any given text.

One successful first-year student in the top ten percent of her law school class understood this concept well. In an interview, I asked her to consider what advice she would give to a beginning law student about to start his or her first semester:

We're often taught to believe that because there is a holding in a case, there is a right answer. And I really don't believe that you can do well in law school if you just accept that. I think you should always be open and never discount your reaction because if you feel it, then you can make an argument for it. Don't back down just because the holding is a position that the majority of the court took. Use your own thoughts and ideas, and intuition.<sup>93</sup>

One way to "unblock" student reading is to teach a creative interaction between the reader and the text.<sup>94</sup> Again, the instructor plays a crucial role in allowing this to happen. Like case analysis and legal reading in general, professors can model creative reading in class. During appropriate places in the first semester, "think aloud" as the class studies an important case. Show students how any rule of law changes depending on context and circumstances. Take the student beyond merely paraphrasing the text to becoming open to all the text's possibilities. By explaining to novice students how we read and understand cases, we can take away some of the mystery about case analysis.

#### CONCLUSION

Case briefing is an effective tool for new law students to use in case analysis because the brief focuses their thinking and streamlines their reading. A good case brief can provide the new law student with a "schema," or framework, for understanding the complexities of a judicial opinion. However, case briefing is not productive when it becomes an end in and unto itself, serving as a substitute for active and creative reading or independent thinking.

Legal educators can have a profound effect on how quickly beginning law students acclimate to their new world. The more students learn about the world of law, the better their analysis of cases becomes.

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93. Transcript 102, at 11.

94. Dewitz, *supra* note 10, at 672.

The better their analysis of cases becomes, the more they will grasp from their class discussions. Although some can argue that most good lawyers had to struggle in law school and that this struggle is emblematic of good learning, the research says otherwise. In any context of learning, and particularly in law school, it is our job to share some of our cognitive processes. As legal educators, we have the power to dramatically affect how our students learn. By understanding the cognitive processes behind case analysis, we can unmask the cognitive mysteries of how we understand the law. We are limited only by our imaginations.