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# CONSTRUCTION SITES, BUILDING TYPES, AND BRIDGING GAPS: A COGNITIVE THEORY OF THE LEARNING PROGRESSION OF LAW STUDENTS

PAULA LUSTBADER\*

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### I. INTRODUCTION

I am continually perplexed by the lack of correlation between the amount of effort students put into their studies and their performance on exams. When I began teaching, my mission was to develop an Academic Assistance Program to increase retention and enhance academic performance of students who are admitted into the law school via our alternative admissions program. Many of these students come from culturally diverse backgrounds. Many succeed even though they are predicted not to. However, some students, no matter how hard they work, are unable to perform satisfactorily on exams.<sup>1</sup> Others, expected to excel, do not.

Students also are perplexed by the lack of correlation between their efforts and performance. Each new term, students line up outside my office. Few come to share “happy” news. Most come to receive consolation and answers to questions with similar themes: “If I had worked this hard in undergraduate school, and if I was athletic, I would have been a Rhodes Scholar.”; “Why did I receive such a low grade?”; “I have never received a grade lower than a B in my life; how can I face my family?” Regardless of how well they do on exams, most students feel like failures. As a result, by the end of the second week of a semester, my fresh box of tissues is almost empty.

Many factors may explain this lack of correlation between

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1. When I began teaching, I honestly thought that all students were capable of learning legal reasoning. However, during the last several years, I reluctantly accepted the fact that a few students could not shift their patterns of thought enough to master legal reasoning. While I now concede that not all students can succeed in law school, I still maintain that most can. My goal is to teach those students how to excel in law school.

effort and performance. First, a variety of nonacademic<sup>2</sup> factors create barriers to learning. These factors include financial difficulties, motivational problems, medical and psychological problems, and pressures of daily life.

Second, as primarily white, middle-class institutions, law schools create cultural barriers to learning. Many nontraditional and diverse students experience cultural and value conflicts leading to feelings of isolation and disenfranchisement. This occurs because voices and values reflected by differences of gender,<sup>3</sup> sexual orientation, race,<sup>4</sup> class, and learning abilities<sup>5</sup> are not

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2. For an excellent discussion on how psychological factors such as isolation and alienation affect law students' academic performance, how the law school pedagogy exacerbates the problems, and how academic support programs and pedagogical reform can help students, see Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667 (1994). See generally G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225 (1986); Michael E. Carney, *Narcissistic Concerns in the Educational Experience of Law Students*, 18 J. PSYCHIATRY & L. 9 (1990).

3. For example, many feminist scholars are concerned that because traditional law school pedagogy ignores womens' ways of reasoning, learning, and knowing, female students experience alienation and isolation. The following list of articles represents some of the current scholarship in this area. See Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"*, 38 J. LEGAL EDUC. 61 (1988). See also, e.g., Jennifer Jaff, *Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning*, 36 J. LEGAL EDUC. 249 (1986); Isabel Marcus et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11 (1985); Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547 (1993); Catherine Weiss & Louise Mellinger, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988); K.C. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U. L. REV. 1141 (1985); Project, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209 (1988). See generally Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193 (1991); Symposium, *Women in Legal Education—Pedagogy, Law, Theory, and Practice*, 38 J. LEGAL EDUC. 1 (1988).

4. For example, many scholars are concerned that traditional law school pedagogy does not recognize or value students of color because they have few role models on the faculty and because many of their values, beliefs, and experiences are not reflected in the classroom. As a result, students of color are not achieving at a rate commensurate with their ability. The following list is not exhaustive. See generally Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991) (addressing the problems created by a limited canon and arguing for conscious inclusion of multicultural issues within the curriculum); Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1989) (discussing the problems created by a pedagogy that assumes an "objective" perspective that is often a white, middle-class view, that incorporates racial views in

represented. Institutions reinforce the power structure and serve to protect the status quo,<sup>6</sup> leaving little room for diverse students to find their place in the legal profession.<sup>7</sup>

Finally, traditional law school pedagogy itself creates barriers to learning because it is not responsive to law students' learning processes.<sup>8</sup> Learning theories suggest that law school

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limited ways, and ultimately alienates students of color); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989); Pat Williams, *Response to Mari Matsuda*, 11 WOMEN'S RTS. L. REP. 11 (1989); Robert A. Williams, Sr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. J. 103 (1987). See, e.g., *A Report on the NBA/ABA Legal Education Conference: An Assessment of Minority Students' Performance in Law School: Implications for Admission, Placement, and Bar Passage*, 20 U.S.F. L. REV. 525 (1986).

There are also concerns about the politics of law school, the lack of diversity among the faculty and student body, the tenure process, and what constitutes acceptable scholarship. See generally Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988); Clare Dalton, "The Political Is Personal" in *Tenure Decisions*, HARVARD L. REC., Apr. 22, 1988, at 7; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Jeffrey L. Harrison, *Confess'n the Blues: Some Thoughts on Class Bias in Law School Hiring*, 42 J. LEGAL EDUC. 119 (1992); *The 1985 Minority Law Teachers' Conference*, 20 U.S.F. L. REV. 383 (1986).

There are also numerous casebook critiques. See, e.g., Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989); Mary Irene Coombs, *Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988); Nancy S. Erickson, *Final Report: "Sex Bias in the Teaching of Criminal Law,"* 42 RUTGERS L. REV. 309 (1990); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Carl Tobias, *Gender Issues and the Prosser, Wade and Schwartz Torts Casebook*, 18 GOLDEN GATE U. L. REV. 495 (1988).

5. See, e.g., *Disability Issues in Legal Education: A Symposium*, 41 J. LEGAL EDUC. 301 (1991).

6. See, e.g., Duncan Kennedy & Karl Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (1990).

7. I do not mean to minimize these factors and valid critiques of law school pedagogy. On the contrary, I think these issues merit further exploration. However, this is beyond the scope of this Article.

8. See, e.g., Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992) (criticizing the case method because it does not duplicate adequately the kinds of tasks practitioners engage in, and claiming that the problem method is more relevant and therefore more effective, with examples of how the problem works in different contexts); Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57 (1992) (advocating for increased variation in teaching methodology); Paul F. Teich, *Research on American Law Teaching: Is There a Case Against the Case System?*, 36 J. LEGAL EDUC. 167 (1986); John C. Weistart, *The Law School Curriculum: The Process of Reform*, 1987 DUKE L.J. 317 (1987); *Teaching Legal*

pedagogy may be a major reason for the lack of correlation between student effort and performance because it does not explicitly provide a context for understanding, analyzing, and applying legal concepts.

Imagine what would happen if an inexperienced builder decided to build an inverted pyramid without understanding the fundamental principles about foundations, strength of building materials, different building structures, and architectural design. Builders might use plans but not fully understand their complexity. They might be able to build the pyramid, but it would collapse in the first windstorm. This is similar to what first-year law students experience.

First, like novice builders, students need both a context and a method to process what they learn. Because traditional law teaching does not provide either, many students feel overwhelmed and anxious. Such feelings can interfere with learning.<sup>9</sup>

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*Ethics: A Symposium*, 41 J. LEGAL EDUC. 1 (1991). See also Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992) (advocating for including ethical issues across the curricula). See generally TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, AMERICAN BAR ASSOCIATION LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (known as the MacCrate Report).

Edwards criticizes the trend toward interdisciplinary legal scholarship because it cannot be used in a practical sense. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). Edwards indicates that, although there must be a balance of training students in theory and doctrine, an understanding of the doctrine is necessary before the student can be effectively exposed to the theory. *Id.* For example, a discussion of Law and Economics is useless to a student who has no basic understanding of the doctrine of Contracts. Consequently, Edwards rejects the “graduate school” model, which incorrectly assumes doctrine is the easy part and can be self-taught or learned at the undergraduate level. The response to Edwards’ article was overwhelming. See, e.g., Derrick Bell & Erin Edmonds, *Students as Teachers, Teachers as Learners*, 91 MICH. L. REV. 2025 (1993); Paul Brest, *Plus Ça Change*, 91 MICH. L. REV. 1945 (1993); George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929 (1993); Paul D. Reingold, *Harry Edwards’ Nostalgia*, 91 MICH. L. REV. 1998 (1993); Barbara Bennett Woodhouse, *Mad Midwifery: Bringing Theory, Doctrine, and Practice to Life*, 91 MICH. L. REV. 1977 (1993).

9. Law schools create anxiety more than other graduate schools because there are more students in each course, more capable students competing for grades, more potential employers placing a great emphasis on first-year grades, and little feedback. ALFRED G. SMITH, COGNITIVE STYLES IN LAW SCHOOLS 63 (1979). Although anxiety generally is thought to affect students’ cognition, Smith found no significant correlation when he conducted a study to find a correlation between law students’ anxiety and their cognitive style. *Id.* at 65. However, Smith did find a small relationship between

Second, problems created by an inadequate context or process are compounded because those who teach law are also those who excelled in law school. Even when law teachers want to be more explicit, they often cannot break down the reasoning process to the degree necessary to communicate it effectively to some students. As experts, law teachers have internalized so much of the information and process that they are not consciously aware of all that goes into their analysis.

Third, traditional law school pedagogy is ineffective because it does not begin teaching from the students' knowledge base and does not progressively build upon fundamental concepts in a useful sequence.<sup>10</sup> Instead, it begins with more complex concepts and leaves to the student the task of getting an overview, developing a context, and understanding the interrelationships of principles.

These learning problems can be minimized, if not eliminated, when both teachers and students work from a common theoretical foundation like the "Learning Progression": a cognitive theory that explains the evolutionary learning process of law students.<sup>11</sup> Teachers can use it to design lesson plans that target specific stages that students are working through. Students can use it as a blueprint for learning. In working through the sites, students will have a more solid foundation in constructing an analysis that will not collapse under scrutiny.

This Article explains the Learning Progression. The first Part begins with a brief overview of the Learning Progression. The second Part provides a primer on learning, cognitive, and instructional theories. The third Part details the Learning Progression, site by site, with pedagogical suggestions that will assist students.

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ambiguity intolerance and anxiety. *Id.* at 65-66. See also Roach, *supra* note 2. See generally Benjamin et al., *supra* note 2; Carney, *supra* note 2.

10. See John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 9 J. LEGAL EDUC. 275 (1989) (suggesting that rather than beginning with the expectation that law students possess the expert knowledge base and schema, it is more effective for faculty to begin students at the novice level and facilitate their development).

11. It is possible that the Learning Progression could have a much broader application than law school; but for now, its use has been limited to the law school setting.



## II. THE LEARNING PROGRESSION

### A. Overview of the Learning Progression

The Learning Progression serves five important functions: it describes a progression of stages contained in learning legal analysis; it serves as a diagnostic instrument; it identifies areas in which most students have particular problems; it explains why students experience difficulty in these particular areas; and finally, it prescribes ways to solve these problems. The Learning Progression will be of particular interest to teachers of first-year courses, especially those who teach smaller sections.<sup>12</sup>

The Learning Progression consists of a preconstruction site and four construction sites, which together contain a total of twelve stages. The sites are the Technician, Drafter, Designer, and Creator. The Designer site is broken into two sub-sites: the Beginning Designer and the Established Designer.<sup>13</sup> The gaps between the sites represent the learning challenge that the students must conquer before they can move to the next site.

A student's analysis gains sophistication and eloquence while the student moves through the sites of the Learning Progression. The construction sites themselves represent a sequential progression. Each site presents its own cluster of stages that students master, and each site builds on stages mastered in previous sites.<sup>14</sup> In contrast to the sequential nature of the construction sites, the stages within each site are not particularly sequential. Once students master one stage within a site, they

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12. The Learning Progression is relevant to all aspects of legal teaching and has significant implications for academic support programs. However, a detailed discussion of how it impacts these areas is beyond the scope of this Article.

13. See Appendix A.

14. This concept of building in progression is consistent with numerous theories of development, including: Bloom's Taxonomy, Maslow's Hierarchy, Perry's Scheme, and Piaget's Developmental Education. See, e.g., TAXONOMY OF EDUCATIONAL OBJECTIVES; THE CLASSIFICATION OF EDUCATIONAL GOALS (Benjamin S. Bloom ed., 1956); ABRAHAM H. MASLOW, TOWARD A PSYCHOLOGY OF BEING (2d ed. 1968); WILLIAM G. PERRY, JR., FORMS OF INTELLECTUAL AND ETHICAL DEVELOPMENT IN THE COLLEGE YEARS: A SCHEME (1968); JEAN PIAGET, SUCCESS AND UNDERSTANDING (1978).

For discussions on how legal skills build on and interact with each other, see SOIA MENTSCHIKOFF & IRWIN P. STOTZKY, THE THEORY AND CRAFT OF AMERICAN LAW (1981); Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409 (1986). To understand the developmental process of law students from a study of interviews conducted of law students during their evolution from novice to experts, see Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121 (1994).

usually can master the remaining stages by exerting the same amount of effort and using similar approaches. Mastery of these stages enables them to build the appropriate structure on that site and begin to bridge the gap between sites.

The Learning Progression is also a recursive process. Thus, as students work within a site, they constantly revisit previous ones and refine the skills they developed in the preceding stages.<sup>15</sup> Each time they get a more complicated problem or begin mastering a new doctrinal area, they may have to start the whole process over again.

Some students may not actually move through all of the sites in this progression, while others may be capable of operating at a higher level when they begin law school. However, most students tend to follow this progression. Thus, it is useful to approach teaching as if all students move through the progression. In doing so, no harm is done to those few students who do not need to go through this specific sequence. In addition, students will move faster to higher levels of sophistication.

This Learning Progression stems from my own experience with students and is supported by a number of learning, cognitive, and instructional theories. These theories emphasize the importance of creating context, providing explicit information, and developing students' confidence and sophistication progres-

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15. This idea of recursiveness also is supported in schema theory. Studies have found that poorly-learned information is stored as a discrete component in memory, rather than as a single schema. Therefore, access to one component on recall provides only weak links to the other components that should make up the schemata. Susan T. Fiske & Linda M. Dyer, *Structure and Development of Social Schemata: Evidence from Positive and Negative Transfer Effects*, 48 J. PERSONALITY & SOC. PSYCHOL. 839 (1985). Thus, providing more memory cues should increase access to the information.

This is also consistent with Hayes-Roth's theory of knowledge assembly. According to Hayes-Roth, a schema (or knowledge structure) consists of components (cognits) and links (associations) among the components. If one component is activated in memory, it activates linked components as a function of the strength of the association between them. A schema progresses with experience; it begins as a collection of individual components and ends as a single, tightly integrated unit with strong associations among the components. Associations among related components are strengthened through experience until the entire structure can be activated in an all-or-none fashion. Barbara Hayes-Roth, *Evolution of Cognitive Structures and Processes*, 84 PSYCHOL. REV. 260 (1977).

This model is also largely consistent with standard views of learning and memory that rely on associative networks. Its view of learning as a qualitative change from piecemeal to integrated processing generally agrees with procedural models of learning that have grown out of the associative tradition. See Fiske & Dyer, *supra*. See also JOHN R. ANDERSON, *THE ARCHITECTURE OF COGNITION* (1983).

sively. The following provides a primer for those who do not have a background in these areas.

### *B. Learning, Cognitive, and Instructional Theories*

The lessons learned from these theories should be explored in depth to provide us with more grist to develop a full critique of law school pedagogy and to provide suggestions for reform. However, this type of in-depth discussion is beyond the scope and focus of this Article. Consequently, the following summary of metacognition, schemata, expert/novice, and instructional theories is intended only to provide a context in which to discuss the Learning Progression.

#### *1. Metacognition*

Cognition is the way in which we think about, approach, obtain, and process information.<sup>16</sup> Metacognition is the study of how we cognate. Metacognition can best be understood as two separate processes. First, students must understand their own cognitive style<sup>17</sup> and then select a study method that fits not only this style, but also the teaching style and the subject matter.<sup>18</sup>

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16. For examples of the differing styles of cognition among law students, see SMITH, *supra* note 9.

17. Because traditional law school pedagogy is limited to only one learning style, it does not address the varied cognitive styles represented in each class. Students whose cognitive style does not comport with the Socratic method will have to learn legal reasoning on their own. They may struggle unnecessarily until they find a way to learn the material. Rather than force students to take extra steps and translate these teaching methods to fit their cognitive style, law teachers should adapt their styles, methods, and program designs to accommodate the students' diverse patterns of thought. For an exploration of effective teaching methods other than the pure Socratic method in law school classrooms, see William Wesley Patton, *Opening Students' Eyes: Visual Learning Theory in the Socratic Classroom*, 15 L. & PSYCHOL. REV. 1 (1991).

18. Studies conducted of successful students showed that students who excelled modified their method of study based on the subject matter and teaching method. In fact, 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. See Paul Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471, 476, 477 (1988).

In conducting problem-solving protocols to identify the strategies that students employed, Smith found that students used various strategies and that some students switched strategies as they found more efficient processes. SMITH, *supra* note 9, at 85. He also found that most students tried different strategies for different types of problems. *Id.* at 86.

Some studies suggest that a few students can shift study strategies spontaneously without being prompted. This suggests that it may not be necessary for the student to identify the study strategy; it is only important that the student develop effective strate-

Second, students must assess their study method. Their accuracy in this assessment of what they have learned is essential.<sup>19</sup>

In addition to understanding their own learning process and developing more accurate feelings of knowing, law students also must understand the relationship among substantive concepts and the structure of legal discourse. Schema theory explains how people understand these relationships.

## 2. Schema Theory

Schema theory<sup>20</sup> is relevant in two ways. First, schema the-

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gies. See Charles W. Anderson & Kathleen J. Roth, *Teaching for Meaningful and Self-Regulated Learning of Science*, in 1 *ADVANCES IN RESEARCH ON TEACHING* 265, 281 (Jere Brophy ed., 1989).

In law school, successful students shift from a generic method of briefing cases to a more stylized method based on the subject and the professor's teaching style. For example, when I was a first-year student, I wrote briefs that contained the information in the order the professor was likely to elicit it. I also addressed other points that the professor was likely to bring out. Although I was aware of writing each class's brief differently, I was not consciously aware of why I did so. In fact, I remember sitting in my Torts class and having a fellow student look at my briefs during class. He asked me how I knew which information to include and how I knew to put it in the same order that the professor was discussing it.

19. In experiments conducted to explore the metacognitions students exhibited on insight-type problems, as opposed to noninsight (objective) kinds of problems, researchers found that the students' subjective metacognitions were predictive of performance on noninsight problems, but their subjective metacognitions were not predictive of performance on insight problems. Janet Metcalf & David Wiebe, *Intuition in Insight and Noninsight Problem Solving*, 15 *MEMORY AND COGNITION* 238-39 (1987). See also SMITH, *supra* note 9, at 80 (studying the correlation between students' cognitive self-images and grades, Smith found that students' cognitive self-images did not correlate to their first-year Torts grades). However, he warns that given the several limitations on his test, one cannot conclude that students' self-images do not affect academic performance in a more general sense. *Id.* at 81.

20. The 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. Ruth Hamill et al., *The Breadth, Depth, and Utility of Class, Partisan, and Ideological Schemata*, 29 *AM. J. POL. SCI.* 850 (1985). See also RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980); DAVID E. RUMELHART, 1 *SCHEMATA AND THE COGNITIVE SYSTEM*, *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 SYMPOSIUM ON PERSONALITY AND SOCIAL PSYCHOLOGY* (Higgins et al., eds., 1981); Eleanor Rosch, *Cognitive Representations of Semantic Categories*, 104(3) *J. EXPER. PSYCHOL. GEN.* 192 (1975); J. Dennis White & Donal E. Carlston, *Consequences of Schemata for Attention, Impressions, and Recall in Complex Social Interactions*, 45 *J. PERSONALITY & SOC. PSYCHOL.* 538, 538-49 (1983). See generally Trisha Beurig & Daniel W. Kee, *Developmental Relationships Among Metamemory, Elaborative Strat-*

ory discusses the need for creating contexts for learning substantive doctrines and concepts.<sup>21</sup> Second, it relates to domain-specific patterns of thought and how experts use schemata to facilitate problem solving.<sup>22</sup>

Students first must develop substantive schemata. Students arrive at a new experience with existing schemata (contexts) based on their past experience. As they receive new information, they give it meaning according to how it fits into their existing schema.<sup>23</sup> As they refine their understanding of new information, they identify the connections between the concepts. This enables them to expand or modify existing schemata or create new ones.

As students recognize the relationships among these concepts, they begin to develop domain-specific patterns of thought. Mastery of these thought patterns distinguishes a novice from an expert in a particular domain.

### 3. *Expert/Novice Theory*

Because experts have command of a large amount of domain-specific knowledge, they can classify problems and approach problem solving quickly through a series of generalizations, abstract concepts, principles, and schemata, enabling them to be efficient and precise. In contrast, novices may get lost in

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egy Use, and Associative Memory, 44 J. EXPERIMENTAL CHILD PSYCHOL. 377, 400 (1987).

21. Prior exposure and experience in a specific domain area influences the selection, abstraction, interpretation, and integration of new information. See Joseph W. Alba & Lynn Hasher, *Is Memory Schematic?*, 93 PSYCHOL. BULL. 203 (1983). See also Joseph Jackson Schwab, *Education and the Structure of the Disciplines*, in SCIENCE, CURRICULUM AND LIBERAL EDUCATION 229, 246 (1978).

22. For an explanation of how experts (who have realized understanding of the sect) differ from novices in schema development, see Arthur J. Lurigio & John S. Carroll, *Probation Officers' Schemata of Offenders: Content, Development, and Impact on Treatment Decisions*, 48 J. PERSONALITY & SOC. PSYCHOL. 1112, 1113 (1985). See also William G. Chase & Herbert A. Simon, *Perception in Chess*, 4 COGNITIVE PSYCHOL. 55 (1980).

23. Cognitive scientists view domain-specific knowledge as structured in memory like a cohesive group of concepts. In turn, this unitized body of knowledge makes information meaningful. Information—facts, figures, and beliefs—is organized semantically into coherent clusters of knowledge. The concept of knowledge, as distinguished from information, implies understanding. See DAVID E. RUMELHART & DONALD A. NORMAN, REPRESENTATION IN MEMORY (1983); Gari L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 337 (1995). See also TAYLOR & CROCKER, *supra* note 20, at 851.

the details of a problem without identifying its general category. This results in an inefficient and faulty analysis.<sup>24</sup>

Experts also internalize and organize the conventions of a particular discourse according to specific patterns of thought. These conventions carry implicit assumptions about both content and structure of the discourse, and comprise domain-specific schemata. Without such schemata, a novice, who may understand the specifics of a substantive area, will be unable to use her knowledge effectively because she will not know the structure of the discourse, the order in which to present ideas, when to emphasize different concepts, and what information she needs to make explicit versus what information is understood implicitly.<sup>25</sup>

In law school, students need to develop 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. For example, such schemata help 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.<sup>26</sup>

The transition from novice to expert is an evolutionary pro-

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24. See Chase & Simon, *supra* note 22, at 55; Lurigio & Carroll, *supra* note 22.

25. See Mitchell, *supra* note 10, at 278-79.

26. Another example in law is the (P)IRAC structure of the discourse. This structure is based on the understanding that policy influences all aspects of legal reasoning, including how broadly or narrowly an issue is stated, what rules to apply, and what facts should be dispositive to justify conclusions. Furthermore, the (P)IRAC structure reinforces the sequences of legal discourse. First, a factual situation gives rise to a legal issue. Law or rules are created to address the legal issue. The rules then are applied to the factual situation. Finally, a conclusion is reached about whether the rule should be followed in this factual situation. Thus, the legal convention of writing in the structure of (P)IRAC implies that one understand the legal system and how cases are processed.

However, law professors typically view their role as modeling the patterns of reasoning or the schemata of legal discourse. Consequently, they do not provide students with sufficient substantive information or schemata. Thus, students are left to their own devices to develop doctrine-specific schemata and often turn to commercial study aids to provide the substantive schemata.

The difference between the information gleaned from classroom discussion and the information from study aids can confuse students further. Also, study aids do not help students see the interrelationship between the doctrine-specific schemata and the legal discourse schemata. This can lead to disastrous results. By examination time, most students have developed basic schema focusing on the black-letter law, but they have developed schema of the legal discourse only partially. As a result, they may be missing fundamental understandings of the relationship between various doctrines and policy—both of the particular subject matter and of the broader legal system.

cess in which students acquire sufficient substantive knowledge, develop elaborate schemata, and exercise judgment in problem solving through experience.<sup>27</sup>

The following instructional theories reinforce the importance of changing the pedagogy to include the concepts contained in metacognition, schema, and expert/novice theories.

#### 4. *Instructional Theory*

Many learning theorists and psychologists argue that learning and cognitive development occurs in stages.<sup>28</sup> Although they break down and define such stages differently, they all recognize that students learn and develop cognitive skills progressively.<sup>29</sup> Students work from a foundation of acquired knowledge and skills; as they learn new information and skills, they build on this foundation to increase and strengthen connections among the bits of information they are acquiring.

The Spiral Curriculum reflects this concept that learning is a progressive endeavor.<sup>30</sup> Key concepts of the Spiral Curriculum are that teaching should begin with the most fundamental principles of the areas to be taught. These principles should be taught in a structure (schema) and context.<sup>31</sup> Gradually, understanding develops and deepens when opportunities are created for students to revisit these basic principles in increasingly complex forms.<sup>32</sup> Thus, the teacher begins with material gauged appropriately at the students' existing knowledge base, then provides opportunities for the students to add progressively more complex concepts.<sup>33</sup> Each time students revisit a concept, their understanding becomes better developed and more sophisticated.<sup>34</sup>

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27. See Mitchell, *supra* note 10, at 283 (suggesting that rather than beginning with the expectation that law students possess the expert knowledge base and schema, it is more effective for professors to start at the novice level and facilitate students' development of the expert schemata).

28. See *supra* note 14.

29. See *supra* note 14.

30. JEROME S. BRUNER, *PROCESS OF EDUCATION* 31 (1966).

31. *Id.*

32. *Id.* at 13.

33. *Id.* at 53-54.

34. The Elaboration Sequence is another instructional theory premised on the notion that learning is progressive. The key concept in the Elaboration Sequence is that learning occurs as a result of simple-to-complex sequencing. The idea is to begin teaching with an overview of the fundamental ideas, then progressively add layers or more detailed and complex principles for those ideas. The layering is followed by a summary

As these theories and models suggest, learning occurs when the student's experience intertwines with the discipline-based knowledge being taught. Thus, effective teaching occurs when the instruction combines both the student's experience and the domain-specific experience. In this way, teaching bridges the novice's existing substantive and syntactical schemata base<sup>35</sup> with the expert's domain-specific substantive and syntactical schemata.<sup>36</sup>

The Learning Progression articulates this process for law students. Law teachers and students could diminish the lack of correlation between student effort and performance by understanding this Learning Progression. The following Part specifi-

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of the content and relationships of the ideas being taught. *See generally* Charles M. Reigeluth, *Lesson Blueprints Based on the Elaboration Theory of Instruction*, in *INSTRUCTIONAL THEORIES IN ACTION LESSONS ILLUSTRATING SELECTED THEORIES AND MODELS* 245-88 (Charles M. Reigeluth ed., 1987).

This approach can be analogized to

studying a picture through the zoom lens of a camera. A person starts with a wide-angle view, allowing him or her to see the major parts of the picture and the major relationship among the parts, but without any detail. Once the person zooms in on a part of the picture, the person is able to see more about each of the major subparts. After studying those subparts and their interrelationships, the person can then zoom back out to the wide-angle view to review the other parts of the whole picture and to review the context of that one part within the whole picture. Continuing in this "zooming in" pattern, the person gradually progresses to the level of detail and breadth desired.

*Id.* at 247-48.

35. The author uses the term "syntactical schemata" to refer to the relationship among the various components of the legal system (such as the hierarchy of courts) and the relationship among various substantive areas (such as how the law of contracts interacts with the law of property), as well as the patterns of discourse used by legal experts (such as (P)IRAC). The author uses the term "substantive schemata" to refer to the relationships among doctrine-specific areas (such as how, in Contracts, the doctrine of Consideration relates to the doctrine of Offer, and how gratuitous promises and illusory promises relate to one another and to the doctrine of Consideration).

36. *See* Mitchell, *supra* note 10, at 283. Mitchell suggests that experts (professors) may need to learn to start with the novice (student) schema, then work toward the expert schema:

Professors seems to be telling students, "Here I am, see if you can get here." If, however, thinking like an expert is principally a function of adding general reasoning skills to a vast, complex expert knowledge base or schema, we might focus more on students' existing schema and build from their world to ours, articulating how our schemata converge and diverge from theirs. Such an effort would be facilitated if we began to recognize that noting is 'obvious,' that behind every obvious concept is a complex set of assumptions, historical knowledge, and mental procedures.

*Id.*



cally examines the sites, building types, and gaps in the Learning Progression.

### *C. Detail of the Learning Progression*

In this Part, each construction site is more fully developed. First, this Part discusses the gap between the preceding site and the current site. Second, it describes the particular construction site and building types, and gives characteristics of analysis that the students exhibit while working on that site. Third, this Part identifies stages that students must master within that site. Fourth, it explores reasons students have difficulty bridging the gap between sites. Finally, it offers teaching strategies to help students master each site and prepare to move on.

#### *1. Technician*

##### *a. The First Gap: Preconstruction*

The gap between Preconstruction and Technician is the transition students make from being nonlaw students to law students. Before students are ready to begin the building sequence, they must confront the gap between their prior learning experiences and the law school experience. They must establish a foundation of knowledge about law school pedagogy, the legal system, and the mainstream values in the legal system. They need to establish this foundation in order to move toward becoming master Technicians.

##### *b. Characteristics of Preconstruction*

Students who have not mastered the Technician site tend to write in narrative form instead of compartmentalizing their thinking. They discuss more than is necessary to resolve the limited issue at hand. They may not follow the (P)IRAC organization,<sup>37</sup> may omit a complete section (such as the rule or application), may discuss more of the rule than is necessary, or may apply the wrong rule to their analysis. They may include information about irrelevant people or events,<sup>38</sup> may fight the hypothetical and create facts, or may reach a conclusion without

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37. See *infra* notes 51-52 and accompanying text.

38. This may happen partially because Technicians will rely on familiar schemata. For example, a student who was an architect might focus his discussion on the construction of the building, rather than on the contractual issue involved.

showing the steps of their analysis clearly and explicitly. This gap between Preconstruction and Technician is better understood by knowing what a Technician masters.

*c. Description of Technician*

Students are ready to build on the Technician site when they have a foundational understanding of the legal system, operant cultural values, and law school pedagogy. Technicians begin to learn basic syntactical and substantive schemata<sup>39</sup> of their courses. They acquire and refine study techniques, learn to organize substantive information according to legal conventions, begin to understand substantive information, learn to break rules down into their elements, learn to categorize facts according to what elements they address, and learn to include policy in their analysis, albeit superficially.<sup>40</sup> Technicians mechanically apply basic concepts and methods to familiar problems. However, they cannot transfer their understanding to a problem that has slight variations from previous ones because they have not developed the underlying principles or schemata sufficiently.<sup>41</sup>

Technicians master the structural principles that enable them to design and build a simple, single-story house. This house is only a single-story one because students lack the ability to add more than the bare essentials in their analysis. Thus, although students are learning the basic principles involved, they probably are ill-equipped to actually build anything of consequence or sophistication. However, learning to build this basic

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39. See Schwab, *supra* note 21, at 229, 246.

40. Some sources argue that law schools are not doing enough to provide their students with the technical skills necessary to understand the theory of the law or to explore with "disciplined imagination" other ramifications of the way in which disputes are resolved in our legal system. See, e.g., Wangerin, *supra* note 14, at 409.

41. Analogy and metaphor facilitate problem-solving processes because they provide opportunities for the novice to construct situation models and to develop problem and solution schemata. "However, analogical transfer does not occur spontaneously." Blasi, *supra* note 23, at 347. For example, we might tell our students that a burglary is an unlawful entry into the residence of another with the intent to commit a felony therein. Then, we might tell them that Able commits burglary when he kicks in Baker's door and enters Baker's house so that he can steal Baker's television. If we then change the scenario so that Able knocks on Baker's door and, when Baker does not answer, opens the unlocked door and enters so that he can steal Baker's television, the students may not recognize that Able's act is still a burglary. Students operating at the Technician level may have difficulty applying their knowledge—(based on the model they have seen) that burglary may be a violent entry—to a factual situation in which the entry is merely nonpermissive.

structure is essential because students must master the structural principles involved, which will allow them to build the more sturdy and sophisticated buildings contained in the next sites.

*d. Characteristics of Technician*

To illustrate the different levels of analysis, consider a Torts exam question that raises the issues of alternative medical procedures and informed consent.<sup>42</sup> In the exam question, the patient chose an alternative treatment method. The treating physician did not explain all of the risks associated with the alternative treatment because the patient also was a physician and indicated his awareness of the risks. The alternative medical treatment issue provides an opportunity to see how students develop judgment about what issues to discuss, how they progressively use more facts in their analysis, and how they elaborate on the policy analysis as they move through the Learning Progression. The informed consent issue provides an opportunity to see how students can restructure the basic factual arguments to form different conclusions as they move through the progression.

Students are working on the Technician site when they exhibit the following characteristics:<sup>43</sup>

Technicians identify a sufficient number of issues in a hypothetical problem, but they also might discuss nonissues because they are using a checklist to guide their analysis. For example, the Technician included a discussion of whether Dr. Carrass breached her duty by not ascertaining the operational facts, even though no facts raised a duty issue.

Technicians probably discuss all of the issues, even the raise-and-dismiss issues, in the same amount of depth, and are conclusory. For example, in the Torts exam, the Technician analyzed the standard of care issue in more depth than necessary.

Technicians also adhere strictly to the (P)IRAC structure in articulating their analysis. This often creates a form-over-substance problem. For instance, the Technician separated one issue into two issues when she discussed whether Dr. Carrass breached her duty as a specialist separately from her discussion of alternative treatment methods.

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42. See Appendix R. A complete set of answers characteristic of the type of analysis one would see at each site is included in the Appendix.

43. See the sample analysis in Appendix B.

Technicians include all parts of the rule, including all in-applicable elements or exceptions to the rule. For example, in the Torts exam, even though the question focused on a physician's duty to her patient, the Technician included other types of special duties in her statement of the rule.

Technicians explicitly connect the legally significant facts to the appropriate element of the rule. For example, the Technician wrote the following: "Dr. Brown could argue that Dr. Carrass's alternative methods are not recognized by a school with definite principles, and are not accepted by a respectable minority within the profession because her methods come from China and have not withstood scrutiny from the medical community in this country."<sup>44</sup>

Technicians also might include some nonlegally significant facts. They use the facts that obviously support arguments, but often miss the less obvious facts and arguments. The Technician incorporated only the most obvious fact (the treatment method coming from China) to conclude that the method did not meet the standard.

Technicians also may include ridiculous arguments, may be unable to come up with an argument for one side when there is an argument to be made,<sup>45</sup> or may add facts to the hypothetical.

Technicians may use policy in a nonintegrated way, often adding it as an appendage. For example, the Technician merely stated that the result "will protect patients."<sup>46</sup>

#### *e. Stages of Technician*

Technicians need to master the stages of Metacognition, Syntactical Schemata of the Legal System, Substantive Schemata, Factual Application, and Concrete Policy application.

##### *(i) Stage 1: Metacognition*

Technicians need to develop study plans that include where, when, what, and how they will study. These study plans must be

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44. See Appendix B, *infra* note 8 and accompanying text.

45. In studying chess players, cognitive scientists found that, although experts and novices seem to consider the same number of possible moves, the experts were able to focus only on strong moves, unlike the novices, who spent much time exploring both weak and strong moves. Blasi, *supra* note 23, at 335. This phenomenon can help explain why technicians may lack the ability to assess effectively and appropriately the relevancy of the parts of the rule or the arguments to be made.

46. See Appendix B, *infra* note 9 and accompanying text.

assessed weekly and modified until students have designed the study approach that works best for them.<sup>47</sup>

In addition to developing effective study strategies, students must acquire and refine their skills in effective reading,<sup>48</sup> note taking, writing, and listening.<sup>49</sup> If students are struggling with these skills, they will not be able to develop more sophisticated skills of understanding, synthesizing, and analyzing because their mental energy and attention will be absorbed by completing these basic study tasks. Consequently, students must become proficient at these foundational skills quickly so they have the time and capacity to focus on the more sophisticated skills.<sup>50</sup>

(ii) *Stage 2: Syntactical Schemata*

As students develop and modify their study strategies, they also develop a syntactical schemata of the legal system.<sup>51</sup> To do this, Technicians not only need to learn information about the components of the legal system, but they also must begin to understand the interrelationship of the various components. In addition, they must learn the conventions of the discourse and understand the function and interrelationship of the basic units contained in the structure of the discourse.

These units of discourse are Policy, Issue, Rule, Application, and Conclusion. The (P)IRAC structure helps students organize their thinking and writing in an order and manner most likely to be understood. Technicians learn to identify these units of dis-

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47. See Wangerin, *supra* note 18, at 474-77. See also discussion and accompanying notes on Metacognition, *supra* pp. 324-25.

48. For a good summary of two reading strategies, see Wangerin, *supra* note 18, at 487, 496; and CRAIG K. MAYFIELD, *READING SKILLS FOR LAW STUDENTS* (1980).

49. Wangerin suggests that the inventory of skills students need include time management, reading, stress management, professor analysis, note taking, review/feedback, and problem solving. Wangerin, *supra* note 14.

50. Law school pedagogy places high demands on students' learning and study strategies. Many students have never developed study strategies or been challenged to the level they are in law school. Some students succeeded in prior learning experiences even if they were not proficient with the foundational learning skills. Once these students begin law school, they quickly realize that their skills are inadequate because traditional law school pedagogy assumes that students are proficient at these skills, and the focus in class is on more sophisticated skills. Interestingly, a number of students discover that they have previously undiagnosed learning disabilities. Many of these students had developed coping mechanisms that disguised their disability. Once in law school, however, their coping mechanisms are inadequate for the active study of law.

51. For example, note the function of the executive, legislative, and judicial branches of government, local, state, and federal systems, and the hierarchy of courts.

course and understand each unit's purpose. Students first use this structure to help them brief cases. Students need to distinguish rules from policy, holdings from dicta, and legally significant facts from emotionally significant facts. They also need to break down reasoning.

The (P)IRAC structure helps students analyze cases and articulate their own analysis of a hypothetical problem. They will begin a new paragraph for each component and use pat phrases such as, "The issue is . . . . The rule is . . . . The plaintiff might argue . . . . The defendant might argue . . . . The court probably will . . . . This finding serves the policy of . . . ." <sup>52</sup>

As Technicians' understanding of the components of the legal system and the conventions and units of the discourse develops, their understanding of the basic moves of legal analysis also develops.

### *(iii) Stage 3: Substantive Schemata*

In addition to developing a syntactical schema, Technicians develop schemata for each of the substantive areas they are learning. Thus, they learn ways to organize the pieces of doctrine according to where those pieces fit in an overall schema for that subject matter. <sup>53</sup>

Substantive schemata help students assimilate new information and categorize it so they can use it when needed. Substantive schemata are important because, without it, students tend to focus on the finer points and lose the forest for the trees. When asked to solve a problem, they may be able to recall many specifics about the area of law, but they are recalling only a jumble of details and cannot organize their thinking quickly and logically.

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52. This is known as a "script format." It is important for the students to write out all potential arguments and learn to evaluate them before they can move into an integrated format in which they include only the most persuasive arguments and do not discuss the analysis in terms of role playing.

53. Part of learning involves 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. For example, students who have never purchased a home may have difficulty fitting information about mortgages into a pre-existing schema. Consequently, law teachers must find ways to help students analogize their experiences so that they can fit the new information into a schema. In the case of mortgages, the professor may want to explain how mortgages are similar to car loans.

These students are unable to generalize because they do not understand fully the underlying principles that unite the pieces or the interrelationships of the pieces.<sup>54</sup>

As students acquire a context and schema for the substantive area, they also learn rules and policies.<sup>55</sup> Technicians learn basic doctrinal areas, synthesize rules, and draw general principles from their synthesis. They also memorize rules and basic policy concepts; differentiate between majority and minority rules of law, model codes, and restatements; and develop an appreciation for, although perhaps not the skill to apply, the more subtle areas of the legal doctrines.<sup>56</sup>

Technicians use substantive schemata to help them understand, recall, and identify issues, and analyze problems in those substantive areas. Students will rely on their schemata to guide their analysis of a case or a hypothetical problem. At this level, they will address every main topic contained in their schema, even irrelevant topics, or merely a raise-and-dismiss issue. Students must train themselves to consider each topic at this point. Later, once they internalize this process, they will do it quickly and subconsciously.

Students must create their own schemata to refine their understanding.<sup>57</sup> Once they understand, they can transform their schema to a more conventional one. Finally, students will use this conventional schema<sup>58</sup> to help them identify, analyze, and

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54. See *supra* note 23.

55. Technicians are learning how to read cases and usually can identify the relevant facts and discuss the rules and reasoning. However, they may not be able to connect each case to a more abstract or general principle. Drawing these connections begins in the outlining process. For example, as students are learning Torts, they need to understand which are related to intent and which are related to negligence. Once they have the main distinctions in place, they also can understand the relationship between intentional infliction of emotional distress and negligent infliction of emotional distress. At the Technician level, the connections they draw, such as these, tend to be more obvious.

56. This can explain why students at the Technician level often do not see the more complex issues in a given doctrinal area or legal problem. Experts rely on deeper structures in categorizing problems, while novices rely more on surface features. Blasi, *supra* note 23, at 344-45.

57. Many students rely on commercial study aids that have a pre-formed schemata. In merely memorizing a pre-formed schemata, students deprive themselves of the opportunity to understand and internalize the doctrine and the relationship among the various pieces. See Mitchell, *supra* note 10, at 284.

58. As Technicians, students begin by using these conventional schemata mechanically. Once they progress to the succeeding sites, they will internalize the schema so

organize issues contained in hypotheticals.

*(iv) Stage 4: Factual Application*

As students use their substantive schemata to guide their analyses of hypothetical problems, they learn to recognize which facts bring a particular rule into issue. Technicians may not be able to determine when to raise and dismiss a relevant issue and when to discuss it in depth.

Because they rely on their syntactical and substantive schemata, Technicians can identify a sufficient number of relevant issues, apply appropriate rules and exceptions, and analyze cases based on factual analogies.<sup>59</sup> They also develop the ability to categorize facts and connect them to appropriate elements. At this stage, students can identify facts that support opposing views. However, they probably cannot use seemingly neutral facts.<sup>60</sup>

Technicians learn to write nonconclusory analysis by including explicitly the element of the rule and the legally significant fact(s) in every sentence. They learn to make every connection explicitly between the rules, policy, facts, and analogous cases.

*(v) Stage 5: Concrete Policy Application*

In addition to applying appropriate rules and connecting facts to the elements of those rules, Technicians learn basic policy concepts. However, their understanding of policy is typically superficial. At this stage, they do not comprehend fully that policy is the foundation for developing new rules, arguments, or conclusions. Consequently, when they use policy, they do so without developing it. Often, they use it merely to conclude that the result is "fair."

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they can move through the schema quickly and subconsciously as they analyze hypotheticals. The more they internalize the schemata, the more they will comprehend sophisticated concepts and then apply more subtle analyses of the substantive area.

59. See discussion of expert/novice theory and accompanying notes, *supra* pp. 326-28.

60. In legal writing, students at this stage can write a general synthesized rule, write a mini-brief for each case, organize their discussion section around the cases, and then write the analysis in script format. In script format, students write a paragraph for each side's argument and one for the conclusion. Later, they will be able to write in a more integrated format in which they synthesize the arguments into one paragraph. At this point, it is important to require students to explain the connections they make between the facts in the analogous cases and the facts in the present case.



f. *Why the Preconstruction to Technician Transition is Difficult*

In some respects, students find the Technician level more challenging than any other level. Students are challenged because they are learning volumes of new information and many new skills while being expected to perform as if they already have internalized them. Moreover, students may not understand law school pedagogy or may have poor study strategies.

What is expected of students at the undergraduate level is vastly different from what is expected in law school. Prior to law school, learning mainly involved memorizing and regurgitating predigested, prepackaged, and organized information obtained from textbooks, lectures, and the media. Consequently, they are ill-prepared to read critically, synthesize rules, or analyze material to the extent required in law school.

In addition, many students do not understand the rhetorical situation of the exam. In law school exams, correctly identifying or stating a rule is not sufficient. Students are expected to *know* the rules. However, their *use* of the rules determines their grade. Students also assume they are writing to a law professor who already knows the law and the facts of the hypothetical. As a result, students often omit rules and/or facts and do not make their connections explicit because they assume the professor knows the answer.

Furthermore, as novices, students may not be sufficiently familiar with the syntactical and substantive schemata of the legal system, conventions of discourse,<sup>61</sup> and doctrinal areas. Their experiences may not relate directly to the examples used in cases and hypotheticals. As a consequence, they may lack the context that would enable them to form their own schemata.<sup>62</sup> Finally, this lack of context may undermine their confidence and gener-

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61. The term "conventions of discourse" refers to those patterns and ways of communicating (written and oral) that are the accepted norm in a given community of expertise. It includes such norms as methods of organizing information, deciding what information needs to be included in the communication, and using particular terms of art. In law, such conventions include the use of (P)IRAC structure to organize legal arguments, and the omission of unnecessary information such as doctrinal areas that are not in issue.

62. As noted earlier, learning involves students bringing their pre-existing schemata to the learning task. If they do not come to law school with a schema to enable them to make the necessary connections to what they are learning, they will not understand what they are trying to learn.

ate feelings of alienation and disenfranchisement.<sup>63</sup> Thus, they may lose their motivation to and interest in study.

*g. Teaching Strategies to Develop Technicians*

Teachers can help students become Technicians in a variety of ways. They can teach effective study strategies,<sup>64</sup> explicitly review rhetorical situations, and clearly explain to the students what is expected of them. Teachers also can expressly construct syntactical and substantive schemata<sup>65</sup> and model the structure of the discourse, reasoning, and articulation.<sup>66</sup> Finally, they can give the students plenty of writing practice to help them become comfortable with their knowledge while providing meaningful feedback.<sup>67</sup>

*h. Checklist to Determine Mastery of Technician*

Teachers can use the following checklist to determine when a student is ready to move to the next site.<sup>68</sup>

63. *Supra* notes 3-5 (discussing feminist and critical race theory).

64. Teaching learning strategies and providing feedback to students is necessary to help them become independent learners. Without such instruction and feedback, students often will not know when or how to modify their strategies because they will not be able to assess the effectiveness of their learning strategies. See Mary Levin & Joel Levin, *A Critical Examination of Academic Retention Programs for At-Risk Minority College Students*, 32 J.C. STUDENT DEV. 323, 328 (1991). See also Carney, *supra* note 2, at 17; James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1692 (1991). Such strategies should not be limited to reading and time management; instead, they should cover the gambit of briefing, outlining, and analysis. In addition, it is helpful to teach a variety of different approaches to allow students to find the approach that works best for them.

65. See Mitchell, *supra* note 10, at 283.

66. See Guinier et al., *supra* note 3; Carney, *supra* note 2, at 27 (suggesting that seminar classes in the first year would reduce the degree of psychological distress of law students).

67. Students need a feedback mechanism to test explicitly whether their perception of how they learn is accurate. See *supra* note 19. In law school, with the exception of many legal writing courses, students receive formal feedback only once a semester during exams, and even then the information is limited to a grade. The feedback from classroom discussion is not necessarily accurate because students are frequently over-anxious when they are on the "hot seat." Neither the professor nor students get an accurate or complete picture of how well students understood the assigned reading or applied their knowledge to solve legal problems. One way law teachers can assist all students is to provide sample problems with various examples of analysis. This would enable students to analyze a problem and then "check" their analysis on their own.

68. Mastering the stages of the Technician site is analogous to mastering the broad focus of the camera lens in the example of elaboration theory. Once the broad focus is

- (1) The student has clear structure and organization to her analysis;
- (2) is able to articulate rules;
- (3) at times is able to be explicit in her analysis;
- (4) identifies most of the issues;
- (5) is aware that policy implications are relevant;
- (6) strictly adheres to the (P)IRAC structure, which often leads to form-over-substance analysis;
- (7) discusses all parts of the rule, even those that are not relevant, or is imprecise in articulating the rule;
- (8) includes counter-arguments even when there are no arguments to be made;
- (9) cannot tell when an area of law is in issue, when to raise and dismiss an issue, and when to discuss an issue at length, and will add facts to discuss nonissues;
- (10) fails to discuss most of the facts provided;
- (11) analyzes at a very superficial level;
- (12) adds policy in a meaningless way; and
- (13) is typically inefficient.

## 2. *Drafter*

### A. *The Gap Between Sites*

The transition from Technician to Drafter is difficult. Whereas in the Technician site it was enough for students to apply a schema by rote, as Drafters they must learn to transfer their knowledge to new situations and understand why they would apply the doctrine or policy.<sup>69</sup> To bridge this gap, students need to shift their thinking patterns and begin to gain a deeper understanding of what they are learning.

### b. *Description of Drafter*

Like Technicians, Drafters tend to rely more on superficial schemata to help them identify issues and organize their analysis. Unlike Technicians, they incorporate more substantive and organizational sophistication in their analysis. This sophistication

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mastered, students can begin to bring the more subtle areas into focus. *See supra* note 34.

69. For example, in our legal writing program, students write two memos in which they make factual analogies to cases to help determine the outcome. The third memo requires students to make a rule-choice based on policy. Students inevitably try to make factual analogies to cases to help them resolve the rule-choice instead of making reasoning and policy analogies to cases.

helps Drafters move away from mechanically applying basic concepts, and allows them to add their own analysis. Drafters begin to evaluate what issues to discuss, to reorganize the elements of the rule according to relevance, develop arguments, and justify conclusions.

Drafters learn to build a two-story house that incorporates factual and policy analysis on both the concrete and the abstract levels. The first story of the structure requires the student to analyze facts and explain why a particular rule, argument, or result is consistent with policy. The second story requires the students to explain the broader policy implications of a given rule-choice or decision. The second story also reflects the Drafter's ability to analyze more complex problems.

*c. Characteristics of Drafter*

Students are working on the Drafter site when they exhibit the following characteristics.<sup>70</sup>

- (1) Drafters realize they do not have time to discuss all of the issues they identified; they think of an argument but are unsure whether to make it; or they know that an issue does not merit the amount of discussion they give it but are afraid to shorten their discussion.
- (2) Drafters tend to adhere to the (P)IRAC structure in a formalistic way, but they do not necessarily label each sentence by the component they are addressing, e.g., "The issue is . . . ." Instead, they may use a question to form the issue statement.
- (3) Drafters may vary the order in which they address elements of a rule rather than addressing them in the order they appear in the statute or common law rule. For example, they may discuss all of the elements not in issue before they address the element in issue.
- (4) Drafters focus on relevant rule parts, leaving out nonapplicable exceptions. For example, in the Torts exam, the Drafter knew to focus her discussion on the physician/patient duty rather than on the other specific duties, but still included more of the rule than was required.
- (5) Drafters limit their analysis to issues the hypothetical actually raised. Because they do not fight the hypothetical, they do not add facts or speculate about possible issues if other

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70. See Appendix B.

facts were known. However, when in doubt, which is often the case, Drafters will raise a nonissue, albeit more briefly than a Technician. For example, in the Torts exam, the Drafter still included a brief discussion of whether Dr. Carrass breached her duty to ascertain the operational facts on which she based her diagnosis. However, unlike the Technician, the Drafter did not speculate on what facts might be present.

(6) Drafters develop more in-depth analysis by using more facts in the hypothetical. They also begin to distinguish among issues that should be raised and dismissed and those that merit a more complete discussion. In addition, Drafters begin to eliminate arguments that do not merit inclusion. For example, in the Torts question, the Drafter, unlike the Technician, used facts to establish that Dr. Carrass was a specialist, and quickly raised and dismissed the issue of whether Dr. Carrass owed a higher duty as a specialist.

(7) Finally, Drafters begin to develop their understanding of policy, which helps them appreciate more of the subtle areas of the doctrine. They also incorporate policy in their analysis meaningfully. For example, the Drafter developed policy arguments to establish a medical community broader than that of the United State in determining what community should set the standard.

#### *d. Stages of Drafter*

To do this level of analysis, Drafters must master the following stages: Abstract Policy Analysis, Reasoning, and Organization. Students in this site become Drafters as they learn the reasons behind the concepts and why they use the methods they use to solve problems.

##### *(i) Stage 6: Abstract Policy Analysis*

Drafters recognize that “black-letter law” really should be named “grey-letter law.” Once they understand that law is not static, they begin to focus on the policy underlying doctrinal concepts. As a result, they look for policy, as well as the rules. In addition, Drafters learn to identify and synthesize policy. Students learn to use policy to justify rule-choices, give meaning to a rule, make arguments, and justify conclusions or results. They

also learn to analyze abstract problems based on policy.<sup>71</sup>

*(ii) Stage 7: Reasoning*

As students begin to internalize policy, they also begin to read between the lines of cases and begin to see more of the ambiguity in hypothetical situations. They use more facts and policy to create arguments, thereby developing their reasoning.

*(iii) Stage 8: Organization*

As their reasoning develops, Drafters gain some confidence, which allows them to vary the order of their analysis and to determine what to include.<sup>72</sup> However, their confidence is tentative; so when in doubt, they stick with formalistic organization.

As Drafters develop, they enrich the knowledge and skills they mastered at the Technician level. Drafters will revisit the stages they learned, this time with more depth of understanding because their syntactical and substantive schemata are further developed.

*e. Why the Technician to Drafter Transition is Difficult*

Students find the transition from the Technician to Drafter sites difficult for a variety of reasons. Because they are novices, some students may spend most of their time and mental energy reminding themselves of the conventions of the discourse. This leaves little time or energy to develop their analysis. Other students may lack the confidence to second-guess the experts—judges, legislators, scholars, and attorneys.

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71. Numerous students stumble when asked to integrate policy into their analysis or to develop their reasoning. They have no real sense of what policy is. When discussing policy, they write something like, “and this makes good policy because we should only punish someone who is blameworthy.” Although they use the appropriate buzz words, the words are meaningless. Even if students have a general idea of what policy is, they often have not expounded on basic policy concepts.

72. For example, they may discuss all of the elements that require a raise-and-dismiss analysis together, then address the one element that is in issue even when, according to the schema, the one in issue may be the second element. The Drafter level can be tricky because it requires the students to know their audience. This becomes even more crucial at the Designer level. Some teachers prefer that students raise nonissues and explain why they are not in issue; others prefer that students discuss all potential issues; and still others prefer that students discuss only the most relevant issues. Similarly, some teachers want students to analyze problems according to the structure of the rule and to write in (P)IRAC form, while others want students to discuss only the elements of the rule that require in-depth analysis.

Further, students may have difficulty developing policy. Because persons who are disempowered never have been in a position of authority to make policy, they feel inadequate. Alternatively, teachers are asking students to articulate and argue mainstream values that they do not comprehend fully or that conflict with their own.<sup>73</sup>

*f. Teaching Strategies to Develop Drafters*

Teachers can help students bridge this gap between Technicians and Drafters by demonstrating the next level of sophistication, providing context, and building confidence. Warning students to expect the gap may enable them to maintain their focus because they will know their struggles are normal.

Teachers can help students shift their approaches to learning by modeling different variations on students' present study techniques.<sup>74</sup> This not only tells students that they should shift their approach but also gives them ideas on ways they can develop new strategies. Showing students the similarities between their old strategies and the new ones assists them in making the necessary changes to their study approach. For example, to show students how to develop policy analysis, I have them treat policy as they would a rule, by breaking out and treating the different aspects of the policy like they would the elements in a rule. For instance, in the Torts question, the policy of promoting alternative medical practices would be an "element" that students would apply to the facts in the question.

Teachers can help students develop their analysis by being explicit about expectations and providing plenty of examples of

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73. Often, to get the right answer, students must argue that mainstream values are correct. For example, in Contracts, issues of unconscionability often revolve around a sales contract between a rich corporation and a poor (minority) consumer. If the contract clearly articulates that the rate of interest is 23% and the item purchased is a television or a stereo (not a refrigerator or some other item that patriarchal society labels a necessity), then the court probably will not find the interest term of the contract unconscionable. Mainstream values presuppose that all consumers can shop around and bargain for the best deal because of competition in the marketplace. Unfortunately, that is not reality in a highly class-divided society. Many law students have lived under powerless conditions or are at least more willing to recognize them. However, in order to get the "right" answer, the student must argue to the professor (who statistically most likely has lived in a position of power all of his life) that the contract terms are not unconscionable, when the student's own conscience is telling him or her that the social conditions that force the consumer to sign the contract are patently unfair.

74. See *supra* note 19.

Drafter-level analysis. If one uses only Creator-level examples, students will try to imitate that example; but, because they have not fully developed the underlying principles of the analysis yet, their attempt will result in failure.

Teachers can help students develop a sensitivity to the more subtle areas of the doctrine or help them understand the subtle use of facts by asking them to write and answer their own hypotheticals that bring the subtleties into issue. This is an especially effective technique for students who do not use a sufficient number of facts in their analysis.

Teachers can help students who are wrestling with policy by explicitly identifying policy and modeling different possible approaches. Teachers can have students identify experiences in which they have worked with policy in their own pre-law school world and then help them transfer those skills to legal analysis. Another useful technique is to play "Policy Bingo" in class. When a student hears another student give a policy explanation in class, the student shouts "Bingo" and then articulates the policy.

Teachers can help students who experience a conflict between mainstream legal values and their own by encouraging them to write their own opinions and determine whether those opinions would change the outcome. Teachers then can use the students' ideas to help them form policy arguments. It is essential to encourage students not to abandon their own value system<sup>75</sup> and not to try to make them believe in something they do not believe in.<sup>76</sup> One way to help them keep their own voice is

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75. It is crucial that we help our students understand that by teaching them how to argue for those mainstream values, we are not condemning them to a position of having sold out their own value system. It is important to be explicit about the fact that the law school exercises represent one perspective and value system and that the students must follow the rules if they are to be rewarded with success at this level. However, we also must reinforce that they are working toward a time when they will be encouraged to argue for changes in the system and the recognition of new values.

It is also important to recognize that, although the law school exercises may represent a reality to the casebook author, professor, or some students, it is not the *only* reality. Teachers have a duty to expose students to differing views of reality. Otherwise, students for whom the view of reality comports will not know there are other views; and students for whom the view of reality does not comport will feel further disenfranchised.

76. For example, a student in criminal law challenged the premise that everyone operates out of free will. Her point was that people who are disenfranchised, are poor, or come from abusive backgrounds often are not in a position to exercise free will.



to suggest they keep journals. The point is to get them to think on a deeper level about what the laws are trying to promote and why.

*g. Checklist to Determine Mastery of Drafter*

Teachers can use the following checklist to determine when a student is ready to move to the next site.

- (1) A Drafter still follows the (P)IRAC structure, but does not label every sentence;
- (2) narrows the discussion of the rules to those parts that are most relevant;
- (3) includes an argument only where there is one to be made;
- (4) begins to understand when to raise and dismiss an issue and when to discuss it in depth, but still tends to raise nonissues;
- (5) uses more of the facts than a Technician, but still needs to use more of them;
- (6) includes policy in a meaningful way, and
- (7) develops more in-depth analysis.

*3. Designer*

*a. The Gap Between Sites*

Just as the transition from Technician to Drafter is a problem area, the progression from Drafter to Designer presents its own set of difficulties. Moving to the Designer level requires students to refine their schemata of the legal system, concepts, and conventions of the discourse on a more sophisticated level. In addition, it requires students to see more subtle connections between doctrinal areas and policy and, more importantly, to develop greater confidence in their analytical abilities.

*b. Description of Designer*

There are two subcategories within the Designer site: Beginning Designer and Established Designer. Beginning Designers have developed their analysis so it is thorough; but because they may lack confidence, they include more than is necessary, and they write in script format. In contrast, Established Design-

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Because she rejected the premise, she could not develop any type of policy argument. Rather than force her to believe in the premise, I merely asked her to begin her analysis with the phrase, "Assuming the validity of the premise that people operate out of free will . . . ." She then could make the necessary arguments.

ers develop the thorough analysis of Beginning Designers; but because they have more experience and confidence, they eliminate any extraneous information and write in an integrated format.

The transition from Beginner to Established Designer level is not a major shift in the analytical process. Instead, once Designers learn to develop their analysis, they can learn to integrate it with relative ease. As such, this transition does not usually create a huge gap for students to cross.

Designers learn not only how to build a complex, elaborate house and a simple A-frame house, but also when to build which type. The elaborate house represents the students' ability to expand and develop their analysis in sophisticated ways. The A-frame house represents the students' ability to streamline their analysis where an in-depth analysis is not needed. Beginning Designers tend to build the more elaborate houses, even when such elaboration is not necessary. However, Established Designers tend to build more A-frame structures, but only after they have considered all potential elaborations.

### *c. Characteristics of Designer*

#### *(i) Beginning Designer*

(1) The Beginning Designer can distinguish among non-issues, raise-and-dismiss issues, and significant issues, as well as focus on the more interesting aspects of the question. For example, the Beginning Designer eliminated any discussion of general or special duties owed, and instead began her analysis with the duty owed by a physician who uses alternative methods of treatment.

(2) Beginning Designers can develop their analysis to include all legally significant facts and focus on only essential arguments. Thus, they no longer include irrelevant or insignificant facts or arguments. They also develop creative fact-based and policy-based arguments.

(3) The Beginning Designer also supports her conclusions. For example, in her conclusion of the issue of whether Dr. Carrass's methods met the standard for alternative medical treatment, the Beginning Designer incorporated policy.

#### *(ii) Established Designer*

Once Beginning Designers learn to develop their analysis, they begin to gain confidence and can integrate such analysis,

resulting in clear and concise articulation. Established Designers deviate from the(P)IRAC structure, organize around concepts, and integrate their analysis. For example, in the Torts exam, after discussing the rule for alternative medical treatment, the Established Designer integrated the arguments for both sides.

*d. Stages of Designer*

The stages contained in the Established Designer site are Sophistication, Judgment, and Proficiency.

*(i) Stage 9: Sophistication*

During prior stages, students focused primarily on syntactical and substantive schema and on ensuring that all necessary units for complete analysis were present. As students' confidence increases and as they revisit earlier concepts and develop more complete schemata, they can shift their attention to the content of their analysis. Consequently, during the beginning of the Designer level, students develop the ability to do more in-depth and creative analysis of a problem.

Designers develop more sophisticated analysis that goes beyond the obvious. For example, they use more facts, even facts that are seemingly neutral, to develop factual arguments. They also use facts more creatively and develop more policy-based arguments. Designers manipulate and shape the organization of their analysis to serve the area of law in question and the problem they are resolving.

*(ii) Stage 10: Judgment*

Designers can distinguish weaker arguments from stronger ones and distill legal arguments down to their essence without eliminating important analytical steps. Thus, they save themselves and the reader from going through exhaustive arguments that lead nowhere. Designers organize more around the reasoning in the cases and are not limited to following the structure of (P)IRAC, the rule, or the cases. They also begin to know when to expand and develop their analysis, and when to streamline it.

*(iii) Stage 11: Proficiency*

Designers can perform the previous ten stages with increasing speed for progressively more complicated and sophisticated

problems containing multiple issues.<sup>77</sup>

*e. Why the Drafter to Designer Transition is Difficult*

Many students find themselves caught in the gap between the Drafter and Designer sites because, at the Drafter level, they could rely on mechanical formulas to guide their analysis. In contrast, the Designer level requires students to break out of the safe formulas and to exercise judgment in developing their analysis. Many students are afraid to deviate from the safe route of mechanically following (P)IRAC and analyzing the elements of a rule in the order they were written. Many resist changing the order of their analysis because they lack confidence in their own analytical abilities. Finally, many omit or fail to develop additional arguments because they lack confidence in their judgment.

*f. Teaching Strategies to Develop Designers*

In many respects, as students progress to higher levels, it becomes more difficult for teachers to employ generic strategies to help students bridge the gaps. This is partly because the higher levels require students to develop their individual approaches and partly because they require students to have greater confidence in their own analysis. Probably the best way to help students at this level is to develop strategies that will build students' confidence.

Teachers can help students by modeling the different progressions of analysis and providing examples of different levels of sophistication, different approaches, and different ways to organize the analysis. These examples should include the teacher's comments on the strengths and weaknesses of the different examples. Such examples guide students in ways to increase the level of sophistication in their analysis.

In addition to giving students permission to be more flexible and creative, teachers need to provide opportunities for students to practice more creative analysis before they have a grade at stake. This can be accomplished by giving students progressively more difficult and complex problems to solve and then having them critique different approaches to the analysis. Teachers also can ask students to write progressively more complex hypotheti-

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77. Experts do not necessarily take less time solving problems; however, they are more efficient at sorting through possible solutions.

cals and have them explain how the hypothetical presents more challenging issues.

Teachers also can ask students to think about their choices in their analysis, help them see alternatives, and evaluate the choice and the reasoning processes involved in making that choice. This can be done by interviewing each student about his or her analysis, or setting up peer interviews. In these interviews, students will ask why an argument was left out. Did the student think of it but deem it unworthy? Did the student operate under a values conflict that prevents him or her from seeing the other side? Why did the student include an argument that did not make sense?<sup>78</sup> Role-playing exercises also help students develop concern about the problem, the parties, and the outcome.<sup>79</sup>

Teachers can use the following checklist to determine when a student at the Beginning Designer level is ready to move to the Established Designer level.

- (1) The Beginning Designer cuts right to the chase and quickly raises and dismisses nonsignificant issues;
- (2) focuses the discussion on grey areas;
- (3) integrates analysis with the rule section when appropriate;
- (4) develops the analysis to include more facts and policy;
- (5) uses parallelism in both the content and structure of her analysis, but still is stuck in the script format, which is overly cumbersome and inefficient;
- (6) evaluates the strengths and weaknesses of the arguments raised; and
- (7) reaches more reasoned conclusions.

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78. In having the students justify why they included an argument, the teacher can reinforce positively what the students are doing and help them gain confidence in their judgment.

79. For example, a student in Criminal Law did not develop the other side's argument. She was asked to analyze a hypothetical in which a man beat a woman to death with a boat oar. The hypothetical had many facts that suggested the man was provoked. However, the student determined that the man committed first-degree murder. She did not explore any other possibilities. It was her belief that when a man beats a woman to death, it is first-degree murder, period, end of discussion. She could not think of any circumstances in which such a situation would not be first-degree murder. However, when asked what she would do if her son were the defendant in the case, she stopped to consider the situation from the point of view of a mother trying to protect her son from life imprisonment or the death penalty. In so doing, she was able to work through the argument to support a lesser offense.

g. *Checklist to Determine Mastery of Designer*

Teachers can use the following checklist to determine when a student is ready to move from the Established Designer to the Creator level.

- (1) The Established Designer takes the developed analysis of the Beginner Designer and integrates all of it, including the rule and the arguments;
- (2) does not use the (P)IRAC structure because it is not needed, although it is implicit in the discussion;
- (3) organizes her analysis around concepts instead of parties; and
- (4) is more efficient in her analysis.

4. *Creator*

a. *The Gap Between Sites*

The gap between Designer and Creator is the most challenging for law students and practitioners alike because the Creator level requires them to operate at an expert level. Most students work within the Designer site for a long time before they are ready to move to this last stage. Some may not progress through this stage until they have been in practice for a number of years; and some may never reach this stage.

b. *Description of Creator*

Creators break the mold. They look at a legal problem, decide the outcome they want to achieve, and feel confident that they can achieve their vision. Creators often operate from intuition. Creators build a modernistic, inverted pyramid because they understand the structural principles involved, and they know how far they can stretch the materials and principles with which they are working.

c. *Characteristics of Creator*

Again, because the main feature of Creator-level analysis is its uniqueness, it is difficult to list common characteristics of such analysis. Typically, Creators approach problems from the abstract policy perspective and then develop the analysis that will allow them to achieve the result they desire.

*d. Stages of Creator*

*(i) Stage 12: Expert*

Expert is the only stage in the Creator site. People operate at this level when they have so internalized the previous sites that they need not think consciously about the schemata and underlying principles. Therefore, they are free to think outside of the established conventions when those conventions are either unnecessary or ineffective.<sup>80</sup> Consequently, they may spend little time or effort rehashing established modes of analysis. Instead, they offer not only a different way to view the immediate problem, but more importantly, to challenge the existing doctrines. They also reintegrate their own values because they know how to cast them in the structure and language that will make their values heard and accepted.

Creators are comfortable with, and have enough sense about, the universe of law to explore all of their ideas freely. Experts are willing to take the risks that people in the preceding sites were afraid to take. In fact, Experts probably do not view the action as risky because they have confidence that they can accomplish their goals.

*e. Why the Designer to Creator Transition is Difficult*

Students have difficulty bridging this last gap because they lack experience, confidence, and time to fully internalize all that is contained in the preceding sites.

*f. Teaching Strategies to Develop Creators*

This last gap is the most difficult to teach, model, and articulate because the main characteristic of the Creator level is its fresh and unique approach to the analysis. Probably the best help is to ensure that students are well-established Designers before encouraging them to try new approaches. Teachers can create risk-free opportunities for students to try new approaches to increase the likelihood that they *will* consider more creative approaches. Therefore, teachers must allow students to try new approaches; but if those approaches do not work, teachers should allow students to return to the Designer level and “redeem” themselves.

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80. See Mitchell, *supra* note 10.

*g. Checklist to Determine Mastery of Creator*

Teachers can use the following checklist to determine when a student is operating at the Creator level.

- (1) The Creator implicitly follows an (P)IRAC structure, but organizes more around concepts;
- (2) approaches the subject first from a policy perspective and then develops factual analysis to make specific points;
- (3) considers the practical and future implications of the court's decision;
- (4) focuses on more creative arguments in regard to the facts;
- (5) demonstrates doctrinal understanding, but argues to change standards where appropriate; and
- (6) has the confidence and experience to eliminate discussion of unnecessary issues so he or she can concentrate on the salient issues of the hypothetical.

### III. CONCLUSION

This Learning Progression outlines law students' evolutionary learning process. It describes the evolution and provides diagnostic and prescriptive ideas on how teachers can use it to increase their effectiveness.

This Learning Progression is diagnostic because it helps teachers and students to identify what point in the progression the student is working through. As such, teachers can focus students on specific stages that will enable the students to master the particular site. For example, instead of telling students their analysis is incomplete, this Learning Progression helps to pinpoint whether the students are struggling with the first level of application contained in the Technician site, or whether the struggle is at the Designer site. Such pinpointing enables the teacher to describe what is occurring and to develop specific exercises to help the students master the particular site.

As a diagnostic tool, the Learning Progression provides teachers with a common vocabulary to explain the students' errors. For example, the author has students first discuss their exam answers with their teachers before they come see her for help. Often, these students will say that they have three problems: Professor A said the analysis was undeveloped; Professor B said it was conclusory; and Professor C said it was over-inclusive. Understandably, this student feels completely overwhelmed. In reality, this student's only problem was that



the student was stuck in the Factual Application stage at the Technician site.

In addition to its descriptive and diagnostic functions, this Learning Progression also identifies particular problem areas known as the gaps between the sites. In doing so, it helps teachers prepare students for areas of particular difficulty. Preparing students to approach and then bridge these gaps enables students to keep their confidence because they understand that their difficulties are normal and expected.

This Learning Progression also explores reasons the gaps are present to help teachers understand the learning challenge for the students and to reassure students that there are logical reasons for their difficulties.

Moreover, this Learning Progression offers specific teaching strategies to help students master the sites and build the bridges between the sites. Some general strategies include: (1) reviewing the Learning Progression with the students so they know where they are going and understand how to get there; (2) explicitly teaching learning strategies and providing meaningful feedback; (3) handing out written hypothetical problems before class to help students focus their reading and briefing; (4) preparing them for in-class discussion; and (5) providing them with practice in writing out their analysis.<sup>81</sup>

Possibly the best way teachers can use this model is to remember that most students must progress through this series in sequence. Teachers can use this model explicitly to help students understand where they are and where they are going. In addition, by referring to this model, teachers can better gauge realistic expectations of their students. In so doing, teachers may construct examples, learning exercises, and exam questions that match the students' developmental levels. Consequently, teachers who expect Established Designer analysis on the first set of examinations may want to grade less harshly those students who are operating at the Beginning Designer level.

It is hoped that this Learning Progression will serve as a starting point for teachers to engage in a more thorough dialogue about the reasons for the gaps so that law teachers can develop more effective teaching strategies and change teaching

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81. See Moskowitz, *supra* note 8.

methods to better assist students as they progress through the building sequence.

As teachers employ this Learning Progression and engage in such dialogues, law school pedagogy should become more effective. Thus, students' learning will be more enhanced, and they possibly will perform at a higher level at exam time. If that happens, my box of tissues may last longer than the first few weeks of a semester.

APPENDIX A  
 GRAPHIC OF THE LEARNING PROGRESSION

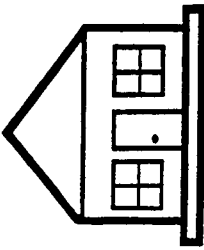
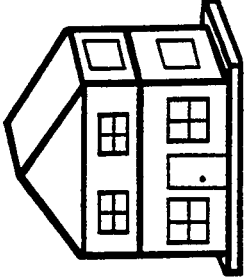
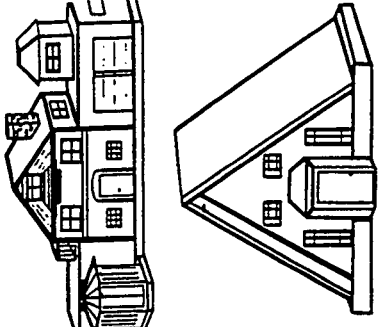
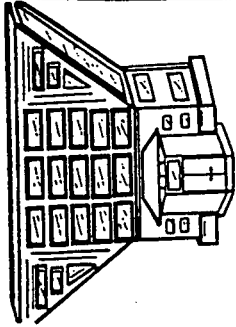
<p><b>TECHNICIAN</b></p> <p><b>Application</b></p> <ol style="list-style-type: none"> <li>1. Metacognition</li> <li>2. Syntactical Schemata</li> <li>3. Substantive Schemata</li> <li>4. Factual Application</li> <li>5. Concrete Policy Application</li> </ol>	<p><b>DRAFTER</b></p> <p><b>Analysis</b></p> <ol style="list-style-type: none"> <li>6. Abstract Policy Analysis</li> <li>7. Reasoning</li> <li>8. Organization</li> </ol>	<p><b>DESIGNER</b></p> <p><b>Shaping</b></p> <ol style="list-style-type: none"> <li>9. Sophistication</li> <li>10. Judgment</li> <li>11. Proficiency</li> </ol>	<p><b>CREATOR</b></p> <p><b>Mastery</b></p> <ol style="list-style-type: none"> <li>12. Expertise</li> </ol>
			

TABLE A

APPENDIX B  
EXAMPLES OF STUDENT ANALYSIS

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ILLUSTRATIONS OF STUDENT ANALYSIS IN THE  
LEARNING CLUSTERS

*1. A Torts Hypothetical*

*The Torts Exam Question*

Dr. Carrass is the only physician in this country to offer her controversial treatment of a rare brain tumor. This brain tumor is benign (noninvasive) and not ordinarily fatal. It grows slowly and typically goes undiagnosed until its growth begins to interfere substantially with the neurological function of the brain. Persons afflicted experience extreme dizziness, severe headaches, and loss of both vision and memory.

To date, the traditional course of treatment is surgical removal of the tumor or reduction of its size, followed by radiation. Once the tumor is detected, immediate surgical intervention is the recommended treatment because, as time passes, surgical intervention becomes more dangerous and the likelihood of a cure diminishes. Although 90% of patients who have surgery and radiation treatment suffer extreme nausea, weight loss, and hair loss, 95% percent of people treated experience partial restoration of their vision and memory. In the patients who forgo treatment, the tumor continues to spread, with consequent deterioration of neurological function to the point of incapacitation.

Dr. Carrass, a neuro-oncologist (specialist in brain cancer), received her medical degree and residency training from Harvard. Dr. Carrass grew increasingly disappointed with traditional methods for treating this disease. After hearing about an

ancient treatment used in China, she went to China and studied at a clinic. Two years later, she completed the course of study and received her certification to practice this treatment. Upon her return to the United States, she opened a residential clinic. Dr. Carrass' treatment includes biofeedback, meditation, herbal baths, massage, and a special diet. Medical insurance plans do not cover this treatment.

Dr. Smith is a nationally renowned neuro-oncologist. He and Dr. Carrass appeared together on the Oprah Winfrey Show in March 1991 to debate the merits of traditional versus alternative treatments. Dr. Carrass claimed that the clinic in China has had remarkable results from the treatment. She claimed that the patients had not had any side effects, and that they now function at levels higher than those who underwent the traditional treatment. Dr. Carrass did admit that a few patients showed no improvement after treatment and actually continued to deteriorate as if they had not been treated. She explained, however, that those patients did not follow the regimen strictly, and that they did not truly believe they could be healed.

Dr. Smith severely criticized Dr. Carrass's methods and argued that the risks associated with her methods far outweighed the benefits. He further explained that patients would be worse off after having tried Dr. Carrass's methods because of the risks involved when surgical intervention was delayed.

Dr. Brown, an oncologist (specialist in cancer), watched the Oprah Winfrey Show with interest. A short time later, he began to develop the first symptoms of the disease and subsequently was diagnosed with it. Dr. Brown was hesitant to undergo traditional treatment because he had seen the devastating effect of radiation treatment on his patients. In a leap of faith, he went to Dr. Carrass' clinic. Dr. Brown told Dr. Carrass that he was an oncologist and that he had seen her on the Oprah Winfrey Show. He stated that he was wary of the problems with traditional treatment but very impressed with her explanation of the disease and the results she was obtaining with her treatment method. He explained that he had given it a lot of thought and did not want to suffer the ill effects of radiation treatment, so he asked Dr. Carrass if she would treat him. Dr. Carrass did not follow her usual procedure of explaining the disease or her treatment of it. She merely asked Dr. Brown if he was certain that he wanted her to treat him. Dr. Brown assured her that he did.

Dr. Brown did not respond to the treatment. Two years have elapsed, and now his vision is almost completely impaired. In addition, he no longer can remember simple items and has such severe headaches that he often is confined to his bed. He consulted Dr. Smith, who informed Dr. Brown that, at this stage, his tumor is so large that surgery is very risky and could leave him partially paralyzed. Dr. Brown is very upset about his condition and wants to sue Dr. Carrass for malpractice.

Discuss the possible causes of action and defenses that each party could raise.

## II. EXCERPTS OF SAMPLE STUDENT OUTLINE

### I. *Negligence*

#### A. *Duty*

1. *General—exercise reasonable care*
2. *Special—duty owed dependent on relationship*

##### a. *Relationships*

- i) *Landowner to Trespasser*
- ii) *Landowner to Invitee*
- iii) *Landowner to Licensee*
- iv) *Common Carrier to Passenger*
- v) *Innkeeper to Guest*
- vi) *Doctor to Patient*

*General Rule:* Physicians must have and use the knowledge, skill, and care ordinarily possessed and employed by members of the profession in good standing. A physician will be liable if harm results because he does not use them. When a physician holds himself out as a specialist, the standard is modified accordingly.

*Policy:* Higher standard for specialist is to protect patients.

*Exceptions:* When a physician offers alternative methods of acceptable treatment, the physician is entitled to be judged according to the school of thought the physician professes to follow. The “school” must be a recognized one with definite principles, and it must be accepted by a respectable minority within the profession.

*Policy:* Tension between wanting to promote alternative

medical practices that may be more effective and less costly and wanting to protect patients and preserve the high quality of medical care currently offered in the United States. Also, concern that courts are not medical experts, so not competent to judge medical practices.

### III. EXAMPLES

#### A. *Technician*

The Technician might analyze this problem in the following manner:

The issue is was there a duty Dr. Carrass owed to Dr. Brown.<sup>1</sup> In negligence law, there is a general duty to exercise reasonable care. In this case, Dr. Carrass owed Dr. Brown a duty to exercise reasonable care.<sup>2</sup> In addition to general duties, negligence law sometimes provides for special duties. For example, owners of land owe special duties to occupiers of that land, and the type of duty depends on the status of the occupier. Common carriers and Innkeepers owe special duties to their patrons.<sup>3</sup> Physicians owe a special duty to their patients. Here, Dr. Brown could argue that because Dr. Carrass was treating Dr. Brown, she owed him a special duty as well as a general duty. Dr. Carrass does not have a good counter-argument.<sup>4</sup> The court will probably find that Dr. Carrass owed Dr. Brown a special duty of care.<sup>5</sup>

The next issue is what standard of care did Dr. Carrass owe Dr. Brown.<sup>6</sup> In negligence law, physicians must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing. A physician will be liable if harm results because he does not

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1. The Technician begins with the (P)IRAC structure and labels the parts of his or her analysis.

2. The Technician mechanically recites his or her outline; so in this example, the Technician discusses a general duty even though it is not relevant in this situation.

3. Here the Technician includes more of the rule than is necessary.

4. The Technician lacks confidence in his or her own judgment, and relies on the established format of an argument and counter-argument. Consequently, the Technician thinks he or she needs an argument, but cannot think of one. To be safe, the Technician writes that there is no argument. In later stages, the Technician will simply not raise the argument.

5. Here the Technician knows he or she should reach a conclusion, but does not explain why this is the conclusion.

6. The Technician uses the same repetitive (P)IRAC and organization of the issue. This is not wrong, but is rather clumsy and shows a lack of sophistication.

use them. When physicians hold themselves out as specialists, the standard is modified accordingly.

The next issue is whether Dr. Carrass breached this standard of care. Dr. Brown could argue that the treatment employed by specialists of this disease is to surgically remove the tumor and follow with radiation therapy. Because Dr. Carrass did not treat Dr. Brown with this method, she breached her duty. Dr. Carrass could argue that she is a specialist of the disease and that because her alternative method of treatment is a valid method of treatment in China, she did not breach her duty. The court will probably find that, because Dr. Carrass did not follow the regular course of treatment established by specialists in the United States, she breached her duty.<sup>7</sup>

The next issue is whether Dr. Carrass can claim she was using alternative methods. According to negligence law, when a physician offers alternative methods of acceptable treatment, the physician is entitled to be judged according to the tenets of the school the physician professes to follow. The "school" must be a recognized one with definite principles and it must be accepted by a respectable minority within the profession.

Dr. Brown could argue that Dr. Carrass's alternative methods are not recognized by a school with definite principles and are not accepted by a respectable minority within the profession because her methods come from China and have not withstood scrutiny from the medical community in this country.<sup>8</sup>

Dr. Carrass could counter-argue that her methods are recognized by a school with definite principles because the Chinese clinic from where she received her training was well established and required that physicians receive special certification before they could treat patients. In addition, her methods are in line with a respectable minority of her colleagues in China.

The court will probably find that Dr. Carrass's methods do not satisfy the requirement for alternative methods because her methods are not recognized by the medical commu-

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7. Technicians know that they must compartmentalize their analysis. Here is an example of form over substance. It really does not make sense to discuss the issue of whether Dr. Carrass breached her duty by not following the traditional method of treatment separately from the issue of alternative methods of treatment.

8. Here is an example of explicit analysis. The elements of the rule and the legally significant facts are well connected.



nity in the United States. This result will protect patients.<sup>9</sup>

Another issue is whether Dr. Carrass breached her duty by not ascertaining the operational facts. In negligence law physicians are required to exercise reasonable care in ascertaining the operational facts upon which their diagnoses or treatments are based. If Dr. Brown had a condition that would have interfered with his ability to follow Dr. Carrass's therapy, if Dr. Carrass did not ascertain information about such a condition, and if knowledge about such a condition would have affected her diagnosis or treatment, Dr. Carrass would have breached this standard of care. However, the facts do not indicate whether this was the case.<sup>10</sup>

Another issue is whether Dr. Carrass breached her duty by not getting informed consent from Dr. Brown. A physician has a duty to inform a patient of the risks<sup>11</sup> involved in treatment or surgery.<sup>12</sup> Failure to obtain informed consent used to be viewed as vitiating consent, so it was treated as battery. However, since 1960 it has usually been viewed as a standard of professional conduct in negligence.<sup>13</sup> In order to prevail, the plaintiff must show that he did not have sufficient information upon which to base his decision and that he would have chosen a different course of treatment had he known all of the information.

Dr. Brown could argue that Dr. Carrass did not tell him anything about his condition or the risks associated with her treatment. As such, he did not have all of the information to make an informed decision. In addition, he could argue that if he had realized the severity of the risks of postponing surgery, he would have elected to have the traditional treatment even with the radiation.

Dr. Carrass could argue that because Dr. Brown was a specialist in cancer, he was well aware of the risks of postpon-

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9. Here the Technician's conclusion does not evaluate the strengths or weaknesses of the arguments, and the policy argument is merely a meaningless appendage.

10. Technicians may add facts to discuss nonissues because they are reciting their exam checklist and not responding to the factual situation.

11. This is a possible incomplete statement of the rule because it could include the fact that the physician must disclose the likelihood and the severity of the risk. Because other rules were well developed, this could lead the reader to believe that the writer did not know the entire rule.

12. The Technician is not precise in her statement of the rule. It is not that the physician must be the agent of information; rather, it is that the physician must ensure that the patient has sufficient information on which to base his decision.

13. Here, for no apparent reason, the Technician is including information about the evolution of the doctrine.

ing surgery. She could also argue that it would be inefficient to require physicians to review all of the information with a patient who already had sufficient information upon which to base his or her decision.<sup>14</sup>

The court will probably find that Dr. Carrass did breach her duty by failing to inform Dr. Brown about his condition and the risks associated with her treatment. Her failure to do so violated the elements of the informed consent doctrine. This decision would further the policy of autonomy by ensuring that patients have sufficient information upon which to make decisions.<sup>15</sup>

Note that the Technician has the following characteristics in her analysis:

- (1) She has clear structure and organization to her analysis;
- (2) is able to articulate rules;
- (3) at times she is able to be explicit in her analysis;
- (4) identifies most of the issues; and
- (5) is aware that policy implications are relevant;
- (6) strictly adheres to the (P)IRAC structure, which often leads to form over substance analysis;
- (7) discusses all parts of the rule, even those that are not relevant, or is imprecise in articulating the rule;
- (8) includes counter-arguments even when there are no arguments to be made;
- (9) is not able to tell when an area of law is in issue, when to raise and dismiss an issue, and when to discuss an issue in length, and will add facts to discuss a nonissue;
- (10) fails to discuss most of the facts provided;
- (11) analyzes at a very superficial level;
- (12) adds policy in a meaningless way; and
- (13) is typically inefficient.

### *B. Drafter*

The Drafter might analyze this problem in the following manner:

What duty did Dr. Carrass owe Dr. Brown?<sup>16</sup> In negligence law, there is a general duty to exercise reasonable care.

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14. Here is an example of how the Technician has the beginnings of an argument, but does not develop it or evaluate its strengths or weaknesses.

15. This is an example of how the Technician does not develop her conclusions and how she uses policy without any apparent meaning.

16. Here the Drafter still follows the (P)IRAC structure, but does not label each piece of his or her analysis.

In this case, Dr. Carrass owed Dr. Brown a duty to exercise reasonable care. In addition to general duties, negligence law provides for certain special duties. For example, physicians owe a special duty to their patients.<sup>17</sup> Here, because Dr. Carrass was treating Dr. Brown, she owed him a special duty as well as a general duty.<sup>18</sup>

What standard of care did Dr. Carrass owe Dr. Brown? In negligence law, physicians must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing. A physician will be liable if harm results when he does not possess or use such skills. When a physician holds himself out as a specialist, the standard is raised accordingly.<sup>19</sup> Here, because Dr. Carrass was a graduate of the Harvard Residency Program in Neuro-oncology, she was considered to be a specialist in brain cancer.<sup>20</sup> Consequently, she owed Dr. Brown the duty to use the knowledge, skill, and care ordinarily possessed and employed by such specialists.

Did Dr. Carrass breach her duty by offering alternative treatment?<sup>21</sup> According to negligence law, when a physician offers alternative methods of acceptable treatment, the physician is entitled to be judged according to the tenets of the school the physician professes to follow. The "school" must be a recognized one with definite principles, and it must be accepted by a respectable minority within the profession.

Dr. Brown could argue that Dr. Carrass's alternative methods are not recognized by a school with definite principles and it is not in line with a respectable minority of the profession because her methods come from China and have not withstood scrutiny from the medical community in this country. He could continue by arguing that the standard for determining what is acceptable medical treatment should be what is accepted by the medical community in the United States. To allow other countries to determine a standard

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17. Here the Drafter begins to narrow his or her discussion of the rules to the most relevant parts.

18. Here the Drafter eliminates an argument section when there is no argument and begins to raise and dismiss when appropriate.

19. In combining the discussion of standard of care of a physician and that of a specialist, the Drafter shows understanding of this doctrine on a more sophisticated level.

20. Here the Drafter begins to use more facts in his or her analysis.

21. Here the Drafter separates the discussion of alternative treatment from the standard of physician and specialist because he or she does not fully understand how these three concepts interrelate.

would result in a decrease in the high quality of medical care currently offered in this country. He could point to the fact that insurance companies do not pay Dr. Carrass for her type of treatment to support his argument.<sup>22</sup>

Dr. Carrass could counter-argue that her methods are recognized by a school with definite principles because the Chinese clinic from which she received her training was well established and required that physicians receive special certification before they could treat patients.<sup>23</sup> She could further argue that the United States medical community is too limited in the methods of treatment it recognizes. Further, the standard of medical care will not be diminished by allowing other, well-established methods of treatment that have been proven effective in other countries to be used.<sup>24</sup> Finally, she could argue that insurance companies frequently do not cover other forms of acceptable medical treatment such as chiropractic medicine.<sup>25</sup>

The court will probably find that Dr. Carrass's methods do not satisfy the requirement for alternative methods because her methods are not recognized by the medical community in the United States.<sup>26</sup>

Did Dr. Carrass breach her duty to ascertain the operational facts on which she based her diagnosis and treatment of Dr. Brown? Physicians are required to exercise reasonable care in ascertaining the operational facts upon which their diagnoses or treatments are based. There are no facts which address this issue.<sup>27</sup>

Did Dr. Carrass breach her duty by failing to obtain Dr. Brown's informed consent? A physician has a duty to ensure that a patient is aware of the likelihood and severity of the risks<sup>28</sup> involved in treatment or surgery.<sup>29</sup> Such information

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22. Here the Drafter develops his or her analysis by including and discussing more facts and policy.

23. The Drafter uses parallelism in the content and structure of her arguments.

24. Here the Drafter cannot develop an argument related to medical insurance on behalf of Dr. Carrass; thus, this analysis is incomplete.

25. Here the Drafter brings in a useful analogy to make the argument stronger.

26. Although the Drafter uses a more developed analysis, the Drafter still lacks the confidence to weigh the arguments accordingly. Consequently, the conclusion is undeveloped.

27. Here the Drafter recognizes that this probably is not in issue because there are no facts, but is hedging his or her bets by including a brief discussion of it.

28. Here the Drafter is more precise in his or her rule articulation.

29. The Drafter eliminated the evolution of this doctrine because he or she did not use it in the analysis.

should include the nature of the pertinent ailment or condition, the risks of the proposed treatment, and the risks of any alternative methods of treatment. This should also include the risks of failing to undergo any treatment at all.<sup>30</sup> In order to prevail, the plaintiff must show that he did not have sufficient information upon which to base an informed decision and that he would have chosen a different course of treatment had he known all of the information.<sup>31</sup>

Dr. Brown could argue that he did not have sufficient information on which to base his decision to undergo Dr. Carrass's alternative treatment. Dr. Carrass did not adequately ascertain whether Dr. Brown knew anything about his condition or the risks associated with her treatment. If he had realized the severity of the risks of postponing surgery, he would have chosen the traditional method of treatment. Consequently, he did not give informed consent.

Dr. Carrass could respond that Dr. Brown came to her specifically because he wanted her alternative method of treatment. He was an expert on other forms of cancer. He also had sufficient information because he watched the *Oprah Winfrey Show*.<sup>32</sup> During that show, the risks associated with traditional methods of treatment and with her method were discussed at length.<sup>33</sup> In fact, he told her that he was impressed with her statements and her results. Thus, it was reasonable for Dr. Carrass to assume that Dr. Brown had sufficient information upon which to make an informed decision. In addition, she could argue that it would be inefficient to require her to waste time reviewing all of the information that he already knew. Consequently, although she did not personally review the information with Dr. Brown, he was able to make an informed decision. In this respect, the policy of the rule is satisfied.<sup>34</sup>

The court will probably find that Dr. Carrass is not liable

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30. The Drafter has expanded on the rule here because this level of detail is important to the development of more complete arguments.

31. The Drafter appropriately elaborates on this rule to show a more sophisticated understanding of the rule and policy.

32. The Drafter's analysis is more and more explicit because she connects the relevant elements of the rule to the legally significant facts.

33. Here the Drafter has developed more of an argument by incorporating the legally significant facts that demonstrate that Dr. Brown knew about the risks associated with treatment.

34. The Drafter still has difficulty using policy in a meaningful way. Thus, statements such as this are conclusory because the Drafter did not adequately connect the policy to the situation.

for failing to obtain informed consent from Dr. Brown.<sup>35</sup> Even though she did not explicitly ascertain how much Dr. Brown knew, it was reasonable for Dr. Carrass to assume Dr. Brown knew enough to make an informed decision because he was an oncologist. In addition, he told her that he was impressed with the statements she made on the *Oprah Winfrey Show*, and he specifically sought out her treatment. This finding would support the purpose of this rule because Dr. Brown had enough information to effectuate his own autonomy.<sup>36</sup>

Note that the Drafter has the following characteristics in her analysis:

- (1) She still follows the (P)IRAC structure, but does not label every sentence;
- (2) narrows the discussion of the rules to those parts that are mostly relevant;
- (3) includes an argument only where there is one to be made;
- (4) begins to understand when to raise and dismiss an issue and when to discuss it in depth, but still tends to raise non-issues;
- (5) uses more facts, but still needs to use more of them;
- (6) includes policy in a meaningful way, and
- (7) develops more in-depth analysis.

### C. *Beginning Designer*

The Beginning Designer might analyze this problem in the following manner:

Dr. Carrass may have breached the duty to provide acceptable treatment and the duty to obtain informed consent.<sup>37</sup>

Dr. Carrass may have breached her duty by offering unaccepted methods of treatment. Physicians must have and use the knowledge, skill, and care members of the profession

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35. Note the change in conclusion from the Technician's analysis. The Drafter goes beneath the surface of the rule and explores in more depth the policy of the rule. As a result, the Drafter is able to reach this conclusion even though, technically, Dr. Carrass did not comply with the rule.

36. Here the Drafter supports his or her conclusion with more reasoning and policy.

37. Here the Beginning Designer moves away from the (P)IRAC structure when appropriate. The Beginning Designer avoids irrelevant issues, such as the general duty of care. Further, beginning an answer with a statement like this requires the student to have thought the problem through to avoid having to change the analysis halfway through the answer.

in good standing ordinarily possess and employ. Physicians who hold themselves out as specialists will be held to the standard of the specialist. When a physician offers alternative methods of acceptable treatment, the physician is entitled to be judged according to the tenets of the school the physician professes to follow, only if two requirements are met.<sup>38</sup> First, the "school" must be a recognized one with definite principles. Second, it must be accepted by a respectable minority within the profession.<sup>39</sup>

Dr. Brown could argue that the traditional treatment specialists in this disease employ is the surgical removal of the tumor, followed by radiation therapy. Further, he could argue that Dr. Carrass's alternative methods are not recognized by a school with definite principles and are not in line with a respectable minority of the profession because her methods come from China and have not withstood scrutiny from the medical community in this country. He could continue by arguing that the standard for determining what is acceptable medical treatment should be what is accepted by the medical community in the United States. To allow other countries to determine the standard would result in a decrease in the high quality of medical care currently offered in this country. Courts should continue to restrict alternative methods of care to those methods that meet the United States' standards in order to protect vulnerable patients from trying courses of treatment that might leave them in worse condition than if they had undergone the traditional treatment. Moreover, he could argue that because the medical insurance plans do not cover the cost for Dr. Carrass's treatment, Dr. Carrass's methods generally are not recognized as acceptable treatment alternatives.<sup>40</sup>

Dr. Carrass could counter-argue that she held herself out as a specialist in alternative methods for treating the disease, not as a traditional specialist. The reason for the higher standard for specialists is to protect patients who rely on what the physician has represented. When she appeared on the *Oprah Winfrey Show*, Dr. Carrass publicly denounced the traditional

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38. This is more precise language and gives the reader a better cue that two requirements need to be satisfied.

39. Here the Beginning Designer shows his or her more sophisticated understanding of the law by combining in one category the sections dealing with physicians, specialists, and alternative treatment.

40. Here the Beginning Designer develops the analysis by evaluating facts and using them effectively with policy.

methods of treatment. Thus, any patient who had seen this show and sought her treatment would do so precisely because Dr. Carrass was not a traditional specialist. In fact, Dr. Brown, an oncologist, specifically chose not to undergo traditional methods of treatment when he contacted Dr. Carrass.

Dr. Carrass also could argue that her methods are recognized by a school with definite principles because the Chinese clinic from which she received her training was well established and required that physicians receive special certification before they could treat patients. She could add that this school constitutes a respectable minority in the international medical community. In addition, she could cite herself as a respectable minority in this country because, as an expert in neuro-oncology, she advocates the alternative treatment method.

She could argue further that the United States medical community is too limited, perhaps even outdated and archaic, in the methods of treatment it recognizes. The standard of medical care will not be diminished by allowing other, well-established methods of treatment to be used that have been proven effective in other countries. Patients turn to alternative methods of treatment because they do not deem the traditional methods effective.

Dr. Carrass could argue that whether insurance plans cover treatment should not determine whether such treatment is an acceptable alternative.<sup>41</sup> Insurance companies have a vested interest in finding reasons not to pay for treatment. She could cite acupuncture<sup>42</sup> as an example where many insurance companies frequently do not pay for the treatment, but where such treatment is recognized by a school with definite principles.<sup>43</sup>

The court probably will find that Dr. Carrass's methods do not satisfy the requirement for alternative methods because her methods are not recognized by the medical community in the United States. It is important to maintain a standard of care that reflects the high quality of medical care

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41. The Beginning Designer makes an argument regarding insurance on behalf of Dr. Carrass. This shows that the Beginning Designer is developing her analysis more completely.

42. Although the Drafter used an analogy to chiropractic medicine to reinforce her argument, the Designer uses a more precise analogy to acupuncture. This shows that the Designer is operating on a more sophisticated analytical level.

43. Here the Beginning Designer is confident with his or her analysis to make appropriate analogies to develop the argument.



already established in this country. If the court were to recognize this alternative form of treatment, then all types of questionable treatments would be used, thereby leaving patients no protection from unscrupulous health care professionals.<sup>44</sup> Courts should not be in the business of evaluating methods of treatment from other countries. Courts should leave such evaluations to the medical experts in this country.<sup>45</sup>

Dr. Carrass also may have breached her duty by not ensuring that Dr. Brown had sufficient information on which to base his decision regarding treatment. The purpose of requiring that consent be informed is to effectuate autonomy and promote self-determination. Thus, a physician has a duty to ensure that a patient is aware of the likelihood and severity of risks involved in treatment or surgery. Generally, courts review informed consent issues on a case-by-case basis to determine whether patients have sufficient information on which to base their decisions and whether those patients would have chosen a different course of treatment had they known all of the facts.<sup>46</sup>

Dr. Brown could argue that when Dr. Carrass did not review anything about his condition or the risks associated with her treatment, she failed to ensure that he had sufficient information on which to base his decision. Although he was an oncologist, he was not a neuro-oncologist. He went to Dr. Carrass as a patient, not as a colleague. Thus, she should have given him the same level of disclosure that a nonspecialist would have received.

In fact, it is unclear from the facts how much Dr. Brown knew about Dr. Carrass's treatment. A talk-show debate, when the issue was still in the abstract (because Dr. Brown had not yet been diagnosed), is not an adequate foundation on which to base an informed decision.

In addition, he could argue that even if he was aware of the risks of postponing surgery, he was under some form of

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44. The Beginning Designer includes a discussion of how the outcome might affect future behavior and cases. Earlier in their development, students attempt to predict the future impact of a decision, but these attempts tend to be more the dramatic "slippery slope" and "parade of horrors" arguments that carry little meaning. The Beginning Designer can better support predictions on future behavior.

45. Here the Beginning Designer develops more reasoning in his or her conclusions.

46. The Beginning Designer writes a rule that logically integrates policy and is precise and focused.

emotional upheaval because of his diagnosis. Thus, his decision-making capacity may have been impaired by his emotional reaction to his recent diagnosis. As a result, he needed a full and complete disclosure. By not fully disclosing the likelihood and severity of the risks associated with her treatment, Dr. Carrass prevented Dr. Brown from making an informed decision.<sup>47</sup>

On the other hand, Dr. Carrass could argue that Dr. Brown demonstrated that he had sufficient information on which to base his decision when he told her that he was an oncologist and that he saw her on the *Oprah Winfrey Show*. During that show, Dr. Smith specifically discussed the risks associated with postponing surgery.<sup>48</sup> Dr. Brown rejected the traditional methods of treatment because he did not want to suffer the debilitating effects of radiation that he had observed in his patients. He said he was wary of the problems with traditional treatment but impressed with her explanation of the disease and the results she was obtaining with her treatment method. He explained that he did not want to suffer the ill effects of radiation treatment and then assured her that he wanted her to treat him. Under these circumstances, Dr. Brown was well informed about the risks associated with his disease, the traditional methods of treatment, and Dr. Carrass' alternative treatment methods. Consequently, although she did not discuss with Dr. Brown his condition or the risks associated with her treatment, Dr. Carrass acted as a reasonable treating physician,<sup>49</sup> both when she relied on his representation that he had sufficient information and when she accepted his assurance.

In this case, the purpose of requiring disclosure is satisfied even though Dr. Carrass did not follow her usual procedure of explaining the disease or her treatment. The determining factor is not whether the treating physician provided the information, but whether the patient had sufficient information. The source of information is not relevant.<sup>50</sup> In addition, she could argue that it would be inefficient to require her to waste time reviewing all of the information that

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47. Here the Beginning Designer has developed arguments for Dr. Brown that demonstrate a higher level of understanding and more use of facts and policy.

48. Here the Beginning Designer uses more specific facts to support and strengthen his or her argument.

49. The Beginning Designer demonstrates an understanding of subtleties such as the reasonable physician standard.

50. Here the Beginning Designer integrates policy into her argument.

he already knew. The costs of medical care are high enough without requiring physicians to repeat information to their patients when they know the patients are well-informed.

The court probably will find that Dr. Brown had sufficient information on which to base his decision and that he probably would not have chosen a different course of treatment had Dr. Carrass specifically reviewed the risks involved. When Dr. Brown sought treatment from Dr. Carrass, he told her that he (1) was an oncologist, (2) had seen the *Oprah Winfrey Show*, in which Dr. Smith cautioned against Dr. Carrass's treatment method, (3) was impressed with her results; and he indicated that his decision was informed. Considering these factors, it was reasonable for Dr. Carrass to conclude that Dr. Brown had sufficient information on which to base his decision. It would be not only inefficient, but also unduly burdensome, to require physicians to review information when a patient has assured the physician that he has sufficient information.<sup>51</sup>

Note that the Beginning Designer has the following characteristics in her analysis:

- (1) She cuts right to the chase and quickly raises and dismisses nonsignificant issues;
- (2) focuses the discussion on the grey areas;
- (3) integrates analysis with the rule section when appropriate;
- (4) develops the analysis to include more facts and policy;
- (5) uses parallelism in both the content and structure of her analysis, but is still stuck in the overly cumbersome and inefficient script format;
- (6) evaluates the strengths and weaknesses of the arguments raised; and
- (7) reaches more reasoned conclusions.

#### *D. Established Designer*

The Established Designer might analyze this problem in the following manner:

Physicians must have and use the knowledge, skill, and care ordinarily possessed and employed by members of the profession in good standing. Physicians who hold themselves out as specialists will be held to the standard of the specialist.

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51. The Beginning Designer develops his or her conclusion by including a weighing of the factual and policy arguments.

Although the specialists in this disease traditionally treat patients by surgically removing the tumor and following with radiation therapy, Dr. Carrass held herself out as a specialist of alternative methods for treating the disease, not as a traditional specialist. The reason for the higher standard for a specialist is to protect patients who rely on what the physician has represented. When she appeared on the *Oprah Winfrey Show*, Dr. Carrass publicly denounced the traditional methods of treatment; so any patient who saw this show and sought her treatment would do so not because she was a traditional specialist, but because she was specialist in alternative methods of treatment. In fact, Dr. Brown specifically chose not to undergo traditional methods of treatment when he contacted Dr. Carrass. Consequently, because she held herself out as a specialist in alternative methods, Dr. Carrass is entitled to be judged according to the tenets of the school she professes to follow if two requirements are met. First, the "school" must be a recognized one with definite principles. Second, it must be accepted by a respectable minority within the profession.<sup>52</sup>

Even though medical insurance plans do not cover the cost of Dr. Carrass's treatment, this should not determine whether such treatment is an acceptable alternative. Insurance companies have a vested interest in finding reasons not to pay for treatment. Acupuncture medicine is an example where many insurance companies do not pay for the treatment, although it is recognized as a school with definite principles.<sup>53</sup>

Although the medical insurance coverage should not be determinative, the fact that Dr. Carrass's alternative methods do not meet the standards set by the medical community in the United States should be considered. While the Chinese clinic from where she received her training was well established and required that physicians receive special certification before they could treat patients, the standard for determining what is acceptable medical treatment should be what is accepted by the medical community in the United States. To use the broader international community to find a respected minority would result in a decrease in the high

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52. The Established Designer breaks free from the (P)IRAC structure and synthesizes the rule and analysis so it addresses only the salient points. As a result, the analysis is much smoother and well integrated.

53. The Established Designer organizes by argument points, not necessarily by parties.

quality of medical care currently offered in this country. Courts should continue to restrict alternative methods of care to those methods that meet the United States' standards in order to protect vulnerable patients from trying courses of treatment that might leave them in worse condition than if they had undergone the traditional method. Finally, courts should not be in the business of evaluating methods of treatment from other countries. Courts should leave such evaluations to the medical experts in this country.<sup>54</sup> Because there is no school or respectable minority in the United States that endorses Dr. Carrass's treatment methods, she has breached her duty.

Although an argument could be made that Dr. Carrass also breached her duty by failing to obtain Dr. Brown's informed consent, the court probably will conclude that Dr. Carrass did not breach her duty. Dr. Brown had sufficient information on which to base his decision. Consequently, he effectuated his autonomy. As a result, he would not have chosen a different course of treatment even if she discussed the diagnosis and the risks associated with her treatment and with postponing traditional treatment.<sup>55</sup>

Dr. Brown was aware of the likelihood and severity of the risks associated with the disease, the traditional treatment, and the alternative treatment.<sup>56</sup> While it is true that Dr. Brown was not a neuro-oncologist, he was better informed than most other patients because he was an oncologist. Consequently, he was aware of the effects of radiation and, in fact, told Dr. Carrass that he specifically did not want to undergo traditional treatment.

In addition, although it is unclear from the facts how much Dr. Brown knew about Dr. Carrass's treatment, Dr. Brown indicated that he had sufficient information. He told Dr. Carrass that he had seen the *Oprah Winfrey Show*. It is true that an argument could be made that information gleaned from merely watching a talk-show debate is not sufficient. This argument could be strengthened by the fact that

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54. The Established Designer discusses both sides of an issue and supports his or her conclusion.

55. The Established Designer integrates elements of the rule into the discussion and organizes around concepts.

56. Here the Established Designer keeps his or her analysis clear by giving reader cues as to what the court will do and then supports his or her conclusion. Also, the Established Designer integrates the rule into her analysis. Thus, although there is an implicit (P)IRAC structure, the analysis is smoother.

when Dr. Brown saw the show, he had not yet been diagnosed, so the issue was still in the abstract. However, during the show, Dr. Smith specifically cautioned against Dr. Carrass's treatment because of the severity of the risk of postponing surgery. More importantly, during his initial consultation with Dr. Carrass, Dr. Brown said he was wary of the problems with traditional treatment but impressed with her explanation of the disease and the results she was obtaining with her treatment method. He explained that he did not want to suffer the ill effects of radiation treatment and then assured her that he wanted her to treat him. Under these circumstances, Dr. Brown was well informed about the likelihood and severity of the risks associated with his disease, the traditional methods of treatment, and Dr. Carrass's alternative methods of treatment. Consequently, although she did not discuss with Dr. Brown his condition or the risks associated with her treatment, Dr. Carrass acted as a reasonable treating physician when she concluded that he had sufficient information based on his own expertise and statements about his understanding of her methods.

Another possible argument could be made that Dr. Carrass did not act reasonably in relying on Dr. Brown's representation that he had sufficient information. Dr. Brown's decision making could have been affected by an emotional reaction to the recent diagnosis. As a result, Dr. Carrass should have done more to ensure that Dr. Brown considered all of his alternatives objectively. However, given Dr. Brown's representation about his knowledge and his assurance that he wanted her to treat him, Dr. Carrass acted reasonably.

In this case, the purpose of requiring disclosure has been satisfied. The purpose of requiring that consent be informed is to effectuate autonomy and promote self-determination. Thus, it is less relevant whether the patient had such information. In this case, Dr. Brown had such information. Dr. Brown was an expert regarding cancer, and he knew the risks associated with both the traditional method of treatment and Dr. Carrass's method. He had seen the exchange between Dr. Carrass and Dr. Smith on the *Oprah Winfrey Show*. Dr. Brown also assured Dr. Carrass that he wanted her to treat him. Under these circumstances, Dr. Brown was well-informed about his disease and about Dr. Carrass's treatment. It would be not only inefficient, but also unduly burdensome, to require physicians to review information, especially when a

patient has assured the physician that the patient has sufficient information. Thus, the court probably will find that Dr. Carrass did not breach her duty.

Note that the Established Designer has the following characteristics in his or her analysis:

- (1) She takes the developed analysis of the Beginner Designer and integrates all of it, including the rule and the arguments;
- (2) does not need the (P)IRAC structure, although it is implicit in the discussion;
- (3) organizes her analysis around concepts instead of parties; and
- (4) is more efficient in her analysis.

### *E. Creator*

The Creator might analyze this problem in the following manner:

The general standard of care established for physicians is that they must have and use the knowledge, skill, and care ordinarily possessed and employed by members of the profession in good standing.<sup>57</sup> This standard ensures that patients receive a high quality of medical care.<sup>58</sup> When addressing alternative medical treatments, courts must balance society's interest in maintaining high-quality medical care versus society's interest in supporting attempts to minimize the exorbitant costs of medical care in our country by encouraging the use of effective but less costly treatments.<sup>59</sup> Courts have settled on a compromise that provides that physicians can employ alternative methods of treatment, but only methods accepted by a recognized school of thought. This "school" must have definite principles, and it must be accepted by a respectable minority within the profession.

The real question here is whether the court should take a narrow or broad view of what constitutes a recognized

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57. Note that the Creator is unique in his approach to problem solving. Thus, this example is merely *one* of several possible ways that a Creator might analyze this hypothetical.

58. The Creator eliminates the discussion of higher standard for specialists because it is not relevant to the issue.

59. The Creator begins with a policy discussion that focuses the reader on the main issues involved.

“school” or a respectable minority.<sup>60</sup> Because of their concern over maintaining a high quality standard of medical care, courts are reluctant to take a broad view and define the medical community in international terms. However, an argument could be made in support of an international community standard. An international standard would include alternative practices that are recognized in other countries but not in the United States. Such a standard could facilitate the use of new methods of less expensive medical treatment. Moreover, in taking a broad view, the court would implicitly acknowledge the monopoly that the medical community in the United States has on medical treatment. This medical community has a motive not to promote alternative methods of medical treatment, especially when such methods are less profitable than those used by the medical community. Consequently, if the court wants to keep the fox from guarding the chicken coop, the court could adopt a broad view.<sup>61</sup>

If the court were to adopt this broader view and apply an international standard, it would find that Dr. Carrass’s methods meet the standard set by a “school” that is recognized in China. Apparently, it is true that Dr. Carrass’s techniques are scientifically valid and helpful in some cases (at least, as validated in studies on *Chinese* patients; no data is given as to effectiveness on non-Asians). The Clinic in China from which Dr. Carrass received her training was certainly well-established, and it did require that physicians receive special certification before they could treat patients in the clinic.

While these arguments do support Dr. Carrass’s argument for a baseline of care that includes accepted practices in other countries, the court probably will take the narrower view and find that the medical community in the United States should set the standard for what is acceptable medical care in this country. Currently, the United States provides some of the highest-quality medical care in the world. If the court applied an international medical community standard, this standard would be lowered by the law of averages. Lowering the standard could result in a decrease in the high quality of medical care currently offered in this country.

In addition, the court probably will take the narrow view

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60. Here the Creator eliminates much of the less relevant discussion in order to spend more time on the salient issues.

61. The Creator analyzes more on a policy level and brings in only the specific facts of the case when she needs to make a specific point.



to protect vulnerable patients from trying courses of treatment that might leave them in a worse condition than if they had undergone the traditional method. Although the issue of personal autonomy and self-determination for one's well-being is valid, the court will recognize that patients must be protected from unscrupulous medical care practitioners. Thus, the court will limit the scope of the medical community to the United States to protect less knowledgeable patients.

The court also will take the narrow view in order to keep litigation costs down. To consider alternatives in other countries as a baseline would involve additional litigation costs. These cost may be unduly burdensome to plaintiffs. In addition, the narrow view will further judicial economy and integrity because neither courts nor lay jurors are medical experts. Thus, courts should leave the evaluation of methods of treatment from other countries to the medical experts in this country.

For these reasons, the court most likely will take this narrow view and find that the "school" must be recognized by the medical community in the United States. Dr. Carrass does not meet this narrower standard. First of all, Dr. Carrass's alternative methods do not meet the standards set by a respectable minority of physicians in the United States. In fact, she is the only physician in this country that uses her methods. One physician, even when that physician was trained as a specialist at the Harvard Residency Program of Neuro-oncology, does not constitute a respectable minority.

Secondly, Dr. Carrass's methods are not accepted by the United States medical insurance industry. Medical insurance plans do not cover the cost of her treatment. However, the court should determine that whether insurance covers the cost of treatment should be a neutral factor. Insurance companies have a vested interest in finding reasons to not pay for treatment. Further, they frequently do not pay for alternative treatments that are recognized by a school with definite principles, such as acupuncture.

For these reasons, although arguments could be made to expand the standard of acceptable medical practices to include the international medical community, the court likely will continue to take a narrow view and decide that Dr. Carrass's treatment methods are not accepted by a respectable minority in the United States medical community. Consequently, the court should find that Dr. Carrass breached her duty to provide acceptable treatment.

In addition to breaching this duty, when Dr. Carrass did not follow her usual procedure of explaining the disease or her treatment of it to Dr. Brown, she may have breached her duty by not ensuring that Dr. Brown had sufficient information on which to base his decision.

As the law currently stands, a physician has a duty to inform a patient of the likelihood and severity of the risks involved in treatment or surgery. The determining factor in informed consent cases is whether the patient had sufficient information on which to base his or her decision. The purpose of requiring that consent be informed is to effectuate autonomy and promote self-determination. Therefore, it is not necessary for the physician to be the source of this information. Rather, it is enough for the physician to ascertain whether the patient has sufficient information.

It is true that, in situations where the patient is arguably as informed or more informed than the physician, requiring full disclosure is time-consuming, inefficient, and unnecessary. However, it is equally true that the courts should establish ways to protect a patient whose decision making may be affected by his reaction to the diagnosis. In cases such as this, the treating physician, at a minimum, should take steps to ensure that the patient is fully aware of all facts relevant to treatment. Thus, courts should determine what steps a reasonable physician would take to ensure that the patient had sufficient information.

When viewed from this perspective, Dr. Carrass did not take adequate steps to ensure that Dr. Brown was fully aware of the information he needed to make an informed decision. Even though Dr. Brown assured Dr. Carrass that he wanted her to treat him, a reasonable physician would have done more to ensure that the patient was sufficiently informed. Although Dr. Brown was an oncologist, and he rejected the traditional methods of treatment because he did not want to suffer the debilitating effects of radiation treatment that he had observed in his patients, he was not a neuro-oncologist; so he was not a specialist in the same field. Consequently, because he was not a specialist, he may not have realized the implications of postponing brain surgery. Furthermore, even if Dr. Brown was a specialist, because he came to Dr. Carrass as a patient, Dr. Carrass, at a minimum, should have asked him questions to ensure that he understood the risks associated with her treatment method.

Moreover, unlike Dr. Carrass, a reasonable physician

would not have relied on a patient's assurances that he was sufficiently informed when his information source was a television talk-show program. It is true that Dr. Brown saw the exchange between Dr. Carrass and Dr. Smith on the *Oprah Winfrey Show*. During this show, Dr. Smith specifically cautioned against undergoing Dr. Carrass's treatment because of the risks involved with postponing surgery. It is also true that Dr. Brown told Dr. Carrass that he was impressed with her explanation of the disease and the results of her treatment. However, a reasonable physician would not assume that such behavior demonstrated that Dr. Brown was sufficiently informed. A talk-show debate is not an adequate foundation on which to base an informed decision. Further, Dr. Brown saw this show before he was diagnosed, so his interest in the disease and its treatments was general, not specific to his own condition. Arguably, a person would listen with more care if that person knew the information would have a direct effect on his own life. Finally, unlike Dr. Carrass, a reasonable physician would have realized that Dr. Brown may not have been thinking clearly when he consulted her regarding his treatment. He could have been under some form of emotional upheaval based on his diagnosis. In fact, a reasonable physician would have been alerted to his possible psychological state because he was seeking a course of treatment that was different from the treatment he recommended to his own patients. As a result, Dr. Carrass should have engaged in a more detailed discussion about the studies regarding her treatment. Dr. Carrass should have ensured that Dr. Brown had sufficient information about the specifics of his disease and treatment options.

If the court allows physicians to merely accept a patient's assurance that he has sufficient information, without checking to be sure that he does have such information, then the requirement for informed consent will become meaningless. In this case, Dr. Carrass did not act as a reasonable physician because she did not take adequate steps to ensure that Dr. Brown had sufficient information about the likelihood and severity of the risks associated with her treatment. By failing to discuss such risks, Dr. Carrass deprived Dr. Brown of the opportunity to make an informed decision. Under these circumstances, the court likely will find that Dr. Carrass did not act as a reasonable physician because she did not take additional steps to ensure that Dr. Brown was sufficiently aware of the information he needed to make an informed decision.

Note that the Creator has the following characteristics in her analysis:

- (1) She implicitly follows and (P)IRAC structure, but organizes more around concepts;
- (2) approaches the subject first from a policy perspective and then develops factual analysis to make specific points;
- (3) considers the practical and future implications of the court's decision;
- (4) focuses on more creative arguments in regard to the facts;
- (5) demonstrates her doctrinal understanding, but argues to change standards where appropriate; and
- (6) has the confidence and experience to eliminate discussion of unnecessary issues, so she can concentrate on the salient issues of the hypothetical.

