

# Why Don't They Get It?: Academic Intelligence and the Under-Prepared Student as "Other"

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## Introduction

Law teachers today face classes filled with students from a multitude of backgrounds as well as students with profoundly different learning styles and levels of academic preparation and readiness. One common, if aging model posits four or five learning styles, classifying students, for example, as experiential, kinesthetic, visual, etc. in their primary (i.e., most effective) learning mode.<sup>1</sup> A more recent development has been the notion of multiple "intelligences," that expands the notion of learning styles into a deeper, more profound expression, linking learning styles with actual ability to learn and perform in a specific context.<sup>2</sup> We propose an additional "intelligence" of sorts—"academic intelligence." We use that term to refer broadly to a student's actual level of academic preparation, i.e., a student's readiness or ability to engage productively with an academic environment and to benefit from that interaction. We believe a student's academic intelligence is about more than simply cognitive skills; it's akin to culture, including not only cognitive, but also affective and social skills, all of which contribute to a student's level of success.<sup>3</sup>

1. See generally Paula Lustbader, Principle 7: Good Practice Respects Diverse Talents and Ways of Learning, 49 J. Legal Educ. 448 (1999); M.H. Sam Jacobson, A Primer on Learning Styles: Reaching Every Student, 25 Seattle U. L. Rev. 139, 142-143 (2001).
2. Howard E. Gardner, *Multiple Intelligences: The Theory in Practice* (Basic Books 1993).
3. We are using Gardner's concept simply as a jumping off point for an investigation of the intangibles, i.e., a context-specific set of abilities that often distinguish the successful

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The idea of a ninth intelligence came from our observation, after years of teaching, that for some students, their hard work and the teacher's best efforts were not enough for the student to succeed. That observation, in turn, led us to explore the notion that in some fundamental way, these students had become, in the language of anthropology and sociology, the "other"—and therefore unknowable and unreachable. However, even though academic preparedness appears to many faculty members as an intelligence of sorts,—i.e., "otherness" and therefore immutable—it is, in fact, not immutable, but amenable to the kinds of methods this Essay lays out in detail. Part One discusses the academically under-prepared student as "other" and describes the problems that conceptualization raises in the classroom. We emphasize the teacher's responsibility to bridge the gap between some students' readiness (or lack thereof) and the goals of the course. Part Two highlights the failure of traditional law school pedagogy to reach the underprepared student. Part Three goes on to suggest a framework for addressing the cognitive component of academic intelligence. We discuss the importance of explicitly teaching academic and legal reasoning skills, discussing, as examples, teaching the academic skill of case briefing, and the legal reasoning skill of issue spotting in a core first-year course.

### I. The Academically Under-Prepared Student as "Other"

Howard Gardner, in 1983, developed a theory of multiple intelligences suggesting that the traditional notion of intelligence based on IQ testing is far too limited. Instead, Dr. Gardner proposed eight different intelligences to reflect a broader range of human potential in specific settings: linguistic intelligence<sup>4</sup> ("word smart"); logical-mathematical intelligence<sup>5</sup> ("number/reasoning smart"); spatial intelligence<sup>6</sup> ("picture smart"); bodily-kinesthetic intelligence<sup>7</sup> ("body smart"); musical intelligence<sup>8</sup> ("music smart");

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student from the struggling or ultimately unsuccessful student. We do not intend our idea to be taken as a formal addition to Gardner's work.

4. Gardner, *supra* note 2. Linguistic intelligence involves sensitivity to spoken and written language, the ability to learn languages, and the capacity to use language to accomplish certain goals.
5. *Id.* Logical-mathematical intelligence consists of the capacity to analyze problems logically, carry out mathematical operations, and investigate issues scientifically.
6. *Id.* Spatial intelligence involves the potential to recognize and use the patterns of wide space and more confined areas.
7. *Id.* Bodily-kinesthetic intelligence entails the potential of using one's whole body or parts of the body to solve problems.
8. *Id.* Musical intelligence involves skill in the performance, composition, and appreciation of musical patterns.

interpersonal intelligence<sup>9</sup> (“people smart”); intrapersonal intelligence<sup>10</sup> (“self smart”); and naturalist intelligence (“nature smart”).<sup>11</sup> Gardner’s theory of multiple intelligences destabilized traditional notions of intelligence as a single, invariable faculty that could be measured at a young age through standardized testing. While the traditional approach may be useful for predicting a student’s performance in a school setting, Gardner believed it had little relevance in predicting a person’s success in the world.<sup>12</sup> Rather, because functioning in the real world occurs in a variety of contexts, a person’s success is naturally enhanced by drawing on all of the intelligences.

Borrowing from Gardner’s notion of eight context-specific intelligences, we propose a ninth of sorts—academic intelligence<sup>13</sup>—an amalgam of the cognitive, affective, and social skills that we think contribute significantly to an entering student’s success in law school. These skills are ideally developed over the course of a student’s life. However, some students enter law school with part of that intelligence missing or under-developed; that student is at an immediate and serious disadvantage, not least because of the (not unreasonable) expectations of law faculty derived from their own success in law school and beyond. A student who is academically prepared (a student with “academic intelligence”) will have strong reading comprehension, writing, and study skills, be able to take effective notes in class, outline, and manage their time—in other words, the skills that determine, ultimately, who will be successful in law school. This is distinguished from the lawyering skills that have recently become the focus of much attention in legal education.

An academically prepared student, however, is one who also recognizes what is going on around her, namely the process of education: students listening in class, taking notes, and engaging in class discussions, not to mention the teaching itself. Even though in law school this happens in the context of unfamiliar doctrine and to some extent pedagogy, this student still possesses enough academic skill and readiness to be able to survive a period of adjustment without losing the major concepts so that at some point, usually fairly early in the first semester, the material begins to make sense. These

9. *Id.* Interpersonal intelligence is concerned with the capacity to understand the intentions, motivations, and desires of other people.
10. *Id.* Intrapersonal intelligence entails the capacity to understand oneself, to appreciate one’s feelings, fears, and motivations.
11. *Id.* See also Mark K. Smith & Howard Gardner, Multiple Intelligences and Education, The Encyclopedia of Informal Education (2008), available at <http://www.infed.org/thinkers/gardner.htm> (“Bringing forward evidence to show that at any one time a child may be at very different stages for example, in number development and spatial/visual maturation, Gardner has successfully undermined the idea that knowledge at any one particular developmental stage hangs together in a structured whole.”).
12. Howard Gardner, *Intelligence Reframed: Multiple Intelligences for the 21<sup>st</sup> Century* (Basic Books 1999).
13. Although beyond the scope of this essay, we can imagine a continuing recognition of intelligences that include such things as technology and beyond.

behaviors may be seen as the product of a process of acculturation that started well before school began. But not every student has had the benefit of that acculturation process. In the same way that an American traveling abroad, for example, may not always be able to interpret cultural cues to either understand what's going on or respond appropriately, the academically under-prepared student is not sufficiently proficient at processing the classroom experience to listen, take notes, and productively engage. This may be seen as another aspect of the novice-to-expert learning curve discussed in much of the learning theory literature.

Although the under-prepared student does the work (she stays up late, reads the assignments, attends class and listens, and she takes notes), her questions and responses in class and her performance on exams all indicate that in some profound way, she cannot put the material together to understand what the law is and how it works. This is the student who doesn't see that the case she read yesterday has any connection to the case she's reading today, but rather approaches every case as *sui generis*—an illustration of a unique resolution of a unique legal issue. This student's skills don't allow her to develop an academic structure that will support the synthesis of discrete pieces of information into a process of legal reasoning.<sup>14</sup>

We posit that a student's failure to perform adequately is not always a matter of IQ intelligence. Rather, we have observed a variety of underlying cognitive, affective, and social competencies that enable academically prepared students to succeed. Cognitively, first, is an understanding and appreciation of the role of technique. It's amazing but true that some students actually equate using techniques such as IRAC (or one of the common variations) with cheating on some level, or as taking the easy way out. Another is the ability to move between general and specific, recognizing hierarchical relationships such as between a definition and an example. A student who is unable to recognize that something is part of something else, or bigger or smaller than something else will, at a minimum, have a hard time keeping track of where the class is doctrinally. That student might not see that a rule is a manifestation of an overarching policy or understand the difference between broad and narrow holdings. The ability to categorize is a basic component of reading comprehension and critical thinking without which synthesizing the first six weeks or so of law school is an almost impossible task.

On a slightly more advanced level, categorization also manifests as the ability to recognize and work with relationships among ideas, such as between cases or even between sections of a case, or paragraphs in written text. Fundamentally, then, this skill is critical to understanding the role of structure in analysis: to be able to identify component parts, categorize those parts

14. Note that we are not talking about students whose poor performance is linked directly to not putting the time in—that student has a constellation of problems that are often mischaracterized as choice-driven or, at best, laziness, but which often are the manifestation of learning issues that are beyond the scope of this essay.

in relation to one another, and use the characteristics of both the individual components and the structure as a whole in order to do the process of analysis. This ability is really a precursor to analogic reasoning, which of course is the common law basis of the case method.

For the student who arrives at law school lacking sufficient academic intelligence in the cognitive component, meta-cognition (the process of thinking about one's own thinking and learning) can be the means by which the student develops the ability to adapt effectively to the legal pedagogy. Note taking is a good example. In the first several weeks of law school, students tend to write down everything they hear, because they don't know what they're listening for. In time, the academically prepared student approaches the task with more intentionality, beginning to develop a framework within which to make choices about what to write down. That developing framework is key to the ability to turn the process of doing the reading, studying, and taking exams into becoming a lawyer.

The second component of academic intelligence is affective. For example, students who feel comfortable in the academic environment may be more likely to access a range of services such as teaching assistants, academic support services, and writing centers, not to mention the professors themselves. Self-regulation (the ability to stay on task), self-efficacy (the quality of believing that "if I do the work, I will succeed"), and developing effective time management strategies are additional affective hallmarks of the academically prepared student.

Finally, and least amenable to the influence of faculty, is the social component of academic intelligence. The way a student presents himself has real significance in an academic setting. Take the student who routinely comes to class late, often with a cup of coffee she spent ten minutes getting. Most obviously, she has missed critical instruction that either introduces, recaps, or previews material. In addition, she jeopardizes her relationship with the teacher, which may make the teacher less willing to meet with her individually or write a favorable reference. Other examples include students who check or answer their cell phones during conferences with a teacher or in class, students who do not bring the required material to class, and students who presume an uninvited level of informality with teachers. Such behavior might not be enough to predict a student's level of academic success, but certainly may, in conjunction with the other components of academic intelligence, be significant.

The significance of the role of academic intelligence became apparent to us at a full-day retreat held for CUNY Law School's faculty some years ago. At that time, CUNY's young faculty was among the most diverse (at least in terms of race, ethnicity, gender, and sexual orientation) in the country. The morning session opened with an informal discussion about our own experiences as law students, and how they might inform our teaching and curriculum development. As we went around the circle describing what law school had been like for us, it was striking how many of us saw ourselves

as the “other:” “I was the only [woman, African-American, Latino, gay man, lesbian]” was the common thread, clearly establishing the centrality of specific types of self-identification to the academic experience. That common thread developed into a revealing discussion of how that identification as “other,” both by the students and the institution, had significant consequences in almost every aspect of the experience except the academic one. All present that day had done spectacularly well in law school; notwithstanding their lack of familiarity with both the pedagogy and substance, their deeply developed skill in academics allowed them to adapt quickly and succeed.

Their remarks revealed a striking parallel with our students. At the time of the retreat, for more reasons than simple arithmetic, black, Latino, and GLBT students were no longer an anomaly. On the contrary, law schools (and most everyone) had already begun to view what became positively characterized as diversity as valuable and a badge of prestige. But something else commonly heard from members of the faculty at that retreat (and since) was their concern over students who were struggling with the material and unable to master it, even after multiple interventions. The phrase heard repeated was “They don’t get it.” The teachers were accessible, they met with students individually, answered questions, and reviewed doctrine, yet were still unable to help some students succeed. Just as during the retreat the faculty reported that they felt both unknown and unknowable when they were students (albeit based on race, gender, class, and sexual orientation), they felt unable to know, or figure out, their students. The difference between the two settings is, of course, the consequence of the “otherness”—where the faculty were unknown on a personal or political level, their students were unknown on an academic level. The faculty simply could not grasp why their students didn’t understand the material, why they didn’t “get it.”

Our notion of academic intelligence is, we think, why some students don’t “get it” and why the faculty is often unable to breach the divide. Paralleling the issues of race, gender, and sexual orientation, but different from them and beyond even different learning styles, is the academically under-prepared student as “other.” This notion of otherness has long been used in the social sciences as an ethnocentric concept to describe a deviation from normative, civilized society.<sup>15</sup> Western, white, and typically male were traditionally considered normative. This dichotomy of white versus everyone else placed negative connotations on the people and cultures that were considered “other,”<sup>16</sup> allowing, in its most extreme form, the dominant culture to be so distanced from the “other” as to render the “other” invisible.

Traditionally, the approach to dealing with a culturally different group begins with recognizing one’s own biases, followed by discussion aimed at

15. Jörn Rüsen, *How to Overcome Ethnocentrism: Approaches to a Culture of Recognition by History in the Twenty-First Century*, 43 *Hist. & Theory*, 118, 119 (2004).

16. *Id.* at 120.



revealing cross-cultural similarities, and ultimately reaching an understanding and acceptance of others.

Through this pattern, the “other” for the faculty at the retreat has turned now into “diversity.” The imperative has shifted, no longer allowing cultural diversity to be the basis of the feelings of otherness, and making sensitivity training possible, and even standard (if not unnecessary).

The chronology from “otherness” to diversity goes something like this: (1) invisibility (the underrepresented group is ignored completely or mistreated); (2) activism on behalf of the underrepresented group; (3) visibility (appearance within the normative group, often as a result of legislation); (4) recognition of inequality and the beginning of institutional and societal efforts to remedy it; (5) integration and accommodation; and (6) real equalization (an actual change in what is considered normative). Of course this chronology is seriously condensed and truncated, but we think it is still useful as a framework for exploring ways to work with academically under-prepared students.

Using the chronology as a paradigm with respect to academically under-prepared students as “other,” it appears that we are somewhere between visibility and the efforts to remedy the inequality. The increasing presence and vitality of academic support programs in law schools across the country attest to the movement between steps three and four in the chronology. However, those programs, as constituted in most law schools (separate from the mainstream curriculum), can actually perpetuate the faculty’s perception of the under-prepared student as “other” and inhibit movement beyond step three. Instead, teaching methodologies geared toward these students must be integrated more directly into the mainstream doctrinal curriculum. As in the cultural diversity discourse, doctrinal faculty members themselves must understand and acknowledge difference (not cultural here, but academic), and learn and practice sensitivity, in a way they haven’t necessarily thought to do before. As law professors, we must examine our own perceptions and assumptions about entering students, which often are based on our own academic experiences that do not parallel those of the students we are concerned with here. In the academic model, unlike the cultural diversity model, there is no understood common ground which then forms the starting point of acceptance and equalization. Rather, the individual teacher’s responsibility must identify where the student is and start her teaching there.

## **II. Ignoring the Problem: The Current State of Legal Pedagogy**

As regards the academically under-prepared student, it seems clear that the goals and methods of legal education are at odds. Professors often complain that on exams, students consistently miss issues, provide incomplete or inaccurate rules, and use facts poorly. However, when those same professors are asked to list, from their own course syllabi, the topics that the course covers, these results are for the most part predictable. Torts classes nationwide

cover intentional torts, negligence, products liability, etc. A typical contracts syllabus usually starts with contract formation (some start with damages) and goes on to include defenses, parol evidence, and third-party beneficiaries. Civil procedure courses cover personal and subject-matter jurisdiction, the Erie Doctrine, venue, and other procedural devices. There is something wrong with this picture. We want our students to develop the legal reasoning skills necessary for crafting sound legal arguments, yet the message we send them, at least on paper, is that today we are studying homicide, tomorrow theft crimes, next week and for the rest of the semester, a doctrine of some other name. The disconnect is obvious—we are assuming either that our students arrive in our classes with academic and reasoning skills sufficient to efficiently apply to the doctrine we are teaching, or by teaching doctrine in a certain way (whatever way we teach it), students will develop those skills. Our final exams, sadly, tell a different story.

Admittedly, in doctrinal classes, professors demonstrate both academic skills (such as case briefing and exam writing), and legal reasoning skills (such as identifying relevant facts and synthesizing rules), as they analyze cases and other materials. They develop those skills when they use hypotheticals and refine them during Socratic dialogue. But it seems as if they hardly ever explicitly name them as part of the subject matter for the day. And while it's true that some first-year casebooks adopt a lawyering skills orientation in the form of practice exercises and problems, they typically fail to advise students that the cases or notes may also serve the purpose of teaching legal reasoning skills. Rather, the introduction, table of contents, and chapter headings of typical casebooks describe only, or primarily, the doctrine to be covered in the book. So too do typical syllabi list substantive units rather than academic skills to be covered.

Of course, most legal reasoning skills and at least case briefing are taught explicitly at most law schools in separate legal research and writing and “lawyering” courses. Typically, however, neither faculty nor students consider the skills learned in these courses as transferrable to their doctrinal classes.<sup>17</sup> In addition, some academic skills, such as close case reading and note taking, and some legal reasoning skills, such as issue spotting, tend to be overlooked, even in courses with a skills focus.

The situation doesn't seem to be improving. The MacCrate Report and the Carnegie Report, both well-publicized efforts to improve legal education, focus more on the integration of practice-oriented skills than legal reasoning and academic skills, and the attention now being paid to law school pedagogy centers on clinical and so-called “problem solving” methodologies, rather than techniques that will support and improve students' development of academic and legal reasoning skills. The fact that the Carnegie Report focuses on the development of lawyering skills indicates its assessment (or assumption) that

17. Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 *U. Balt. L. Rev.* 173 (2010).



law schools are doing a more-than-adequate job of teaching legal reasoning skills. MacCrate is explicit in that assessment. Of course, Carnegie's focus was not on academics. Regardless, we believe that Carnegie and MacCrate both overlook a critical component of legal education, assuming a standard level of academic preparation and an equal starting point for all entering law students, which disserves the students who enter law school with less than an optimum level of academic intelligence.

Students in the first year can and must learn academic and legal reasoning skills explicitly, rather than by intuition, so that they are better prepared in their second and third years to focus on the denser doctrines and more practice-oriented skills. These skills should be taught across the curriculum, incorporated directly into doctrinal classes.

### **III. Teaching Academic and Legal Reasoning Skills Explicitly**

The challenge for educators and administrators is to make the promise of access real by recognizing their responsibility (and ability) to effectively teach to this diverse group. To do that, they need to develop classroom approaches that address not only the range of skills, knowledge, and attitudes and the range of learning styles or modes the students bring with them, as well as differing levels of academic preparation. What follows is a discussion of the cognitive component of academic intelligence and how professors can use a range of teaching methods and materials that address a wider variety of student needs. These techniques will strengthen students' academic and legal reasoning skills, while facilitating self-referential thinking (metacognition) on the part of students about how they approach the doctrine covered in the course—what filters they use, what judgments and assumptions they make, and how they choose to synthesize the material.

The key to our approach is to incorporate academic and legal reasoning skills directly into the syllabus either by name only or with a short notation, and then to teach those skills explicitly, along with the substance of the course. Students are directed to pay particular attention to a reading assignment not just for the doctrine, but also for its illustration of the skills we expect them to learn. Just as the author of the course book searches out readings that set out a rule or theory in a certain way, and just as the professor constructs the syllabus to correspond to particular sections of the course book in a particular order, we believe some of those choices can be matched up with academic or reasoning skills instruction without too much intrusion on the established design of the course. We offer below, as an example, a way to explicitly teach one academic skill (case briefing) and one legal reasoning skill (issue spotting). The discussion is not meant to be a complete treatment of the many ways those skills can be taught, but rather, a simple illustration of the nature of our proposition.

*A. Case Briefing*

Case briefing is something students need to be able to do immediately. However, they receive little to no actual instruction about how to do it, especially as regards our perception of the link between case briefing and preparation for our class. For some students, by the time they become even semi-proficient at case briefing, a significant amount of doctrine has escaped and will have a hard time finding its way back into their outlines, let alone their exams. If we want our students to be deliberate about case briefing, why not pick a case early in the semester and explicitly teach the actual skill of case briefing while teaching the doctrine from that case? This is really the only logical way to teach a case early in the semester anyway, since many students in the room are still developing a sense of how to recognize and articulate a rule, spot issues, identify relevant facts, distinguish between broad and narrow holdings, etc. (the components of the typical case brief).

For starters, students must understand why we ask them to read and brief cases and how they can use their briefs to analyze problems and prepare for class. This might start with a short discussion of the case method, something we assume many teachers already do. However, we must also communicate our individual goals to students so they can learn to read and brief with a purpose for our particular doctrine and class. It is both a revelation and a relief for students to learn that different teachers have different expectations about the kind and amount of information that should appear in case briefs for class. What do you want students to get out of the process? Have you developed, for example, a particular doctrinal lens (e.g., contracts) through which students should read and brief cases for your class? What should their expectations be, and how will they know whether they are “on the right track?”

We cannot attempt to provide universal answers to those questions, because the answer depends on the style, choices, and expectations of individual teachers, whether we think so or not. (As the students’ skills and comfort level develop, their case briefs for contracts and criminal law, for example, might look quite different from one another.) However, we think that the primary purpose of the case brief is to prepare for class. In terms of self-regulation, did the students feel prepared for class? Did they see the connection between both the content and organization of their case briefs and the questions the teacher asked and the responses provided by other students? Were they able to critique those responses, recognizing both errors and incomplete answers, and those that were better than theirs would have been? Did they get a sense of how the case fits into the overall picture of the particular doctrine, or into the specific chapter or section for which it was assigned? Did their case brief surface questions about doctrine or the role of the case in the syllabus? Finally, can they identify how they might have briefed the case differently (better) in preparation for class?

In class, the case (and therefore the brief) is the vehicle for two related pedagogic goals: learning the doctrine, certainly, but also developing the students’ ability to read and analyze cases. Class time can be used for a

number of purposes related to the student's case brief, for example to confirm it, correct it, or expand it into realms not immediately apparent to the student. The class might also use the case brief as the jumping-off point for an in-depth discussion of case analysis. A related value of briefing cases—one rarely recognized by students or teachers—is to identify questions that the process of briefing reveals. Indeed, students should walk into class with questions about the case, primed to listen to whether and how the class discussion answers those questions. (If the discussion fails to do that, the student should contemplate whether the question he had was relevant or off-point.)

Since many professors do not give credit for class participation, and even fewer look at students' briefs, the purpose of class preparation may not provide sufficient incentive for diligent case briefing. Accordingly, professors should emphasize that careful case briefing will improve students' analytical and legal reasoning skills, as well as their understanding of the doctrine. The very act of reducing one's understanding of the case to writing will help the student crystallize its meaning and, as mentioned above, flush out any questions she may have. There are a variety of approaches you might consider for teaching case briefing in the context of your own class, or for letting your students in on your expectations. You might hand out sample briefs for some cases early in the semester. Doing so has several advantages. It brings the process and fundamental role of case briefing out of the closet by acknowledging that it's both difficult and possible to learn, that it takes practice, and that models (yours, not the canned briefs so many students come to rely on) are a tried-and-true mode of learning. It also provides a platform for discussing the value of briefing beyond the doctrine the case was assigned for. In addition, it can serve as metacognition for the teacher—doing a case brief yourself (handing out one brief a week, for example) puts you in the students' position and reminds you of where they are vis-à-vis the material. It can also reveal mistaken assumptions that teachers often hold about complexity of the opinion and the process of reducing it to a case brief, especially after years of teaching the same material. Working with a sample brief in class can inform your teaching in the same way that people say doing scholarship informs the content of the teaching.

There are many ways to use a sample brief. For example, if the students briefed the case prior to class, during class you can give them five to ten minutes (either individually or in groups) to compare their briefs to the sample. Ask the students to identify and characterize the differences between their brief and the sample. Ask them to identify any underlying purpose for the choices the teacher made that were different from theirs. Point to categorical differences between the two briefs, such as in structure, thoroughness, precision, substance, etc. For example, how does the length of their brief compare to the length of the sample? Are the categories and headings they used different from the model? Are there substantive differences?

One risk of case briefing is that in the process of organizing the facts, issues, rules, arguments, and holdings, students will oversimplify the material, walking away with the mistaken belief that there is only one issue and one

holding, or with the oversimplified idea that the court's reasoning is the single argument of logic. The other risk is that students' case briefs will be longer than the opinions they are briefing. In other words, as is true with novice learners in all disciplines, beginning law students are unsure how to make choices about what to exclude. The goal is to help students begin to recognize what is necessary from the case (understanding that there will always be some gap between the student's case brief and the class discussion). By comparing their briefs to the teacher's, students see not just what the teacher included, but also what she didn't. The focus need not be on the specific differences between the student's brief and the teacher's. Rather, specific differences can be used to identify categorical differences that will illustrate some case briefing principles and inform the way students will brief cases as their case briefing skills develop and improve, and as they become more expert readers. Obviously, the earlier you are in the semester the more you should expect significant differences between the model brief and the students' briefs.

Another exercise that might be done over the first several weeks of the semester is regular "minute papers" with various sections of the briefs. At the beginning of class, have everyone write out and hand in their issue statements, or rule sections, or holdings from a case you think appropriate. Even if you don't grade them or use them in class, they will give you a great sense of where the students are in a relatively short time.

Of course, you can on your own set aside some time at the end of a class early in the semester to go out of role and discuss the kinds of questions you asked, why you asked them, and where in the text the answers were. After all, why not let students in on the pedagogy underlying your questions? Try to categorize, or characterize, your questions—some are answerable directly from the text; some require inference or application; some are policy questions. Do their briefs need to prepare them for all of those types of questions? Can their briefs do so? Having this out-of-role discussion raises some very interesting points. Students are often dismayed and confused when their briefs do not anticipate all the questions asked by the teacher or provide all the information discussed in class. For the teacher, it's worth considering the extent to which a "good" brief includes the answers to the questions asked. Questions that ask for analytic inference, such as the reasons underlying a party's argument, or for the identification of specific information, such as a precedent cited by a party or the court, rarely are answerable from even the best case briefs. So how are students supposed to come up with the answers to such questions? Memory (remember they may have read the case three or four days prior to class)? Reference to some annotation they made either in the book or in their notes apart from the brief (and where did they learn to do that)? As we pointed out above, class is more than a focused discussion of what is already in the case brief. How do students bridge that gap? Such a discussion has to be the result, first, of serious self-reflection on the part of the teacher about the questions she asks, where the answers to those questions come from, and how the questions are posed (including the method of choosing a student to respond and the

time given to come up with the answer). Then the discussion can be had with the class, out-of-role. Ultimately, the goal is to help students develop their case reading skills. This occurs in at least two stages, starting with the ability to identify and understand the information that comprises the basic components of a case brief, and then moving to the more sophisticated skills of inference, analysis and critique. We believe that the reading comprehension skills associated with law school in general, and case briefing in particular, deserve far more explicit attention than they currently receive.

### *B. Issue Spotting*

Issue spotting is possibly the least taught aspect of the law school curriculum. Indeed, law school course syllabi, casebook tables of contents, and commercial bar reviews, by organizing doctrine and opinions by issue, all take issue spotting off the table. And even if a particular issue is not explicitly mentioned in the table of contents, it is more than likely identified in a paragraph or note before the opinion appears.

The key to issue spotting is the ability to see connections between authority (including policy) and facts in complex analytic and rhetorical contexts. In other words, issues live in the interaction among law, policy, and facts, and yet those connections are not readily apparent to many students. We believe the teacher has the responsibility—or at least an opportunity—to teach the skill of issue spotting explicitly. We have identified several aspects of issue spotting that teachers can help students with, including the baseline ability to recognize instances of facts triggering issues, dealing with complicated sub-rules, spotting hidden issues, and seeing connections among doctrines within your course and across law school courses.

On the most basic level, students need to hear explicitly that facts trigger issues. It gives them a way to begin to develop a technique of issue spotting—certainly a skill critical to good performance on exams. For many students, the very notion that facts trigger issues is surprising. This is due to a number of factors. First, students tend to view the assigned opinions as monolithic narratives, without realizing that the facts as found (and subsequently reproduced in the casebook) were really the product of vigorous argument. Second, the case itself is likely to identify or set out the issue in some way that ostensibly relieves students of the need to do so themselves. Finally, the casebook, by labeling chapters and sections so clearly, makes it unnecessary for students to grapple with what the issue is. Students therefore are likely to miss the organic connection between facts and rules that create the issues. Consider a simple exercise about working with facts: Assign a case that has a rule with elements. In class, break the students into small groups. Assign each group one element or sub-rule. Have the groups identify the facts from the case that implicate the element they have been assigned (whether highlighted by the court or not). Does the court focus on any particular element(s), and if so, which one(s) and why? Have the class add or modify facts that trigger their assigned element or sub-rule in a way that might change the analysis. You

may do something like this already—but the key here is pointing out that this will help with issue spotting. It teaches students to pay attention to the role of facts in triggering issues and satisfying or not satisfying elements. What this means for their outlines is that they should include case facts, pay attention to hypotheticals and include them (often there is just one changed fact in a hypothetical that changes the outcome), and under each doctrine they should make a special note of the kinds of facts that trigger the doctrine.

Another tricky aspect of issue spotting is the ability to recognize some of the less obvious connections among doctrines and use those connections to surface issues on an exam. Students need repeated practice at identifying issues—explicitly highlighting some of the less obvious connections among doctrines will assist this practice. After studying various doctrines in discrete units, it is useful to remind students to step back and look at the big picture, at how these different doctrines might fit together in analyzing a hypothetical. After all the doctrine has been covered, you can point out issues that are likely to arise from the same set of facts. Some examples from contract law include: (1) contract interpretation and the parol evidence rule (generally when the meaning of a term is in dispute, parties will attempt to introduce extrinsic evidence); (2) damages and limitations (students should always remember to consider whether any limitations apply when calculating damages); and (3) substantial performance and damages (the damages calculation will be dependant on whether the court finds there has been substantial performance). Other times, claims will naturally be raised in the alternative. For example, whenever there is a question about whether the requirement of consideration has been satisfied, students should also consider whether the plaintiff could bring a claim under promissory estoppel. Similarly, if the facts of an alleged offer are incomplete or not clear, there might also be an issue of indefiniteness. Making these connections explicit will help with issue spotting—if you remember to consider the possibility, you will be more likely to recognize the presence or absence of facts that trigger the alternate doctrine. Linking these doctrines can be done in review sessions, but should be done at opportune junctures through the course as well.

Students also have trouble when an exam question tests the articulation and application of sub-rules. Although the relationship between rules and sub-rules may be clear to teachers intimately familiar with the structure and organization of the doctrine they are teaching, first year students often do not make the connections as clearly as they need to in order to be able to spot issues involving a sub-rule. Some doctrines are taught over the course of several class periods if not longer, and students can miss the connection between the rules learned at the end with what came before. Those connections may be essential for issue spotting.

Consider, for example, the rules for acceptance, which include the objective test (whether a reasonable person would consider the offeree's words or conduct to manifest assent), revocation (whether the offeree even has the right to accept), the mirror image rule, UCC § 2-207 and battle of the forms (whether



the attempted acceptance was valid), the mode of acceptance (whether the manner of acceptance was proper), and the mailbox rule (whether the timing of the attempted acceptance was sufficient), among other issues. And within each of those issues is a complex web of sub-rules, not the least of which is whether the UCC applies. Consider now one of those topics, revocation. The rule for revocation includes sub-rules relating to the process of revoking, as well as option contracts and whether the offeror has the right to revoke. Then, of course, there are a variety of ways to make an offer irrevocable, each of which has its own set of rules. By the time students learn about an offeree's reasonable reliance on an offer creating an option contract, they may lose sight completely of the relevance of that rule in the bigger picture of contract formation and the facts that might trigger it.

At a minimum, teachers can point out to students the complex interrelationship among rules taught as part of a single doctrinal unit such as acceptance or consideration. One way to reinforce the connection is simply to periodically ask organizing questions, such as "what is the relationship between option contract and acceptance" (this question seems to be extremely difficult for students to understand and answer, until they have some repeated exposure to it—well worth the time and effort, we think). Another way to assist students in developing this academic skill is to talk with them about how they outline. Their outlines, which on a good day contain accurate doctrine, should also alert them to the kinds of facts that trigger issues. This approach is especially useful with sub-rules like irrevocable offers. Finally, flow charts and other visual representations can be very effective tools both for figuring out and displaying organizational relationships. There are some very good proprietary computer software programs that make creating charts and diagrams fairly easy.

Another aspect of effective issue spotting is that certain issues are likely to be hidden, with no obvious clues in the fact pattern that the issue is triggered. An example of a hidden issue in contracts is the statute of frauds. The fact pattern might never mention whether there was a writing, so there may be nothing obvious to remind the student to consider whether a writing was necessary. Of course there may be some fact to trigger the issue of the statute of frauds, such as the contract's being for the sale of goods over \$500 or for the sale of real property, but these facts may be too indirect to trigger the issue for a student who is not paying close attention. Similarly, parole evidence rule issues can be hidden where the call of the question does not refer to a fact as "evidence" or use the word "admissible." Further, any time damages are being determined, there is always the possibility that the calculation will be limited either by foreseeability, certainty, or mitigation. These issues are embedded in any damage calculation—the fact pattern will not necessarily have specific facts geared to those limitations and the call of the question might not ask whether the court could or should limit the damages in any way.

A cohesive collapsed outline (an outline reduced to a checklist) can be critical for spotting hidden issues, reminding the students of all the issues they

should consider on the exam. Teachers might also suggest to students that they annotate their outlines and checklists with a note to themselves reminding them to consider where the exam might include hidden issues triggered by the absence of facts. Giving practice multi-issue exam questions will, of course, provide a forum for discussing how to spot the hidden issues.

There are certainly many ways to teach academic and legal reasoning skills, some of which many of us already do. It may take little more than simply referring explicitly to the skill required for arriving at the answer to the question posed. Similarly, posing a thought question, such as “consider how this case would appear in your outline,” can be quite an effective way of encouraging metacognition. Or, while discussing an opinion, you might point out the multiple appearances of the holding or the way in which the opinion follows an IRAC structure, in order to improve students’ case reading skills. The possibilities are endless. Our goal is for professors to understand that explicitly including skills in their teaching is neither complicated nor overly burdensome and well worth it.

#### **IV. Conclusion**

The process of learning is too often left to intuition and happenstance. At least in this country, students are not taught how to learn. Those who figure it out for themselves, by nature, intuition, or exposure to a unique teacher, rise to the top. Those who don’t, for whatever reason, are at risk of becoming the “other,” and tagged as unreachable. We believe deeply, however, that many more students can do better if the process of learning itself becomes the subject under discussion. This requires recognizing the academically underprepared students in our classrooms, having confidence that they can succeed, and being willing to bridge the gap and do what it takes to help them.