1-1-1994

Building Blocks of Analysis: Using Simple Sesame Street Skills and Sophisticated Educational Learning Theories in Teaching a Seminar in Legal Analysis and Writing

Nancy Millich

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol34/iss4/2
BUILDING BLOCKS OF ANALYSIS: USING SIMPLE "SESAME STREET SKILLS" AND SOPHISTICATED EDUCATIONAL LEARNING THEORIES IN TEACHING A SEMINAR IN LEGAL ANALYSIS AND WRITING

Nancy Millich*

I. INTRODUCTION

Traditional law school teaching fails some law students—both in law school and ultimately on the bar examination. Law professors sometimes blame the students who have not learned the law, but the problem may be (at least in part) in the way that the professors teach the law. Legal scholars frequently criticize law professors for "inundat[ing] students with substantive and procedural rules of law, but rarely if ever provid[ing] any guidance or instruction in methods of learning." Indeed, the criticism may reveal a more basic problem, in that many, if not most, law professors either are themselves untutored in educational methodology or do not attempt to incorporate learning theories into the structure of their courses.2

In Learning Strategies for Law Students, John Marshall Law School Associate Professor of Law Paul T. Wangerin provides a comprehensive description of current learning theories as they apply to the study of law.3 Professor Wangerin specifies that among the intended audiences for his article were "teachers of legal writing courses" and instructors of programs that "principally address the academic problems of

* Assistant Professor of Law, Santa Clara University School of Law. J.D., Santa Clara University School of Law.
1. Paul T. Wangerin, Learning Strategies for Law Students, 52 Alb. L. Rev. 471, 471 (1988). See also, Jay Feinman & Marc Feldman, Pedagogy & Politics, 73 Geo. L.J. 875, 875 (1985) ("At most law schools, the purposes and methods of teaching are regarded as unfruitful, if not unfit, topics for conversation.").
2. Feinman & Feldman, supra note 1, at 895 ("Law professors have long believed that educational theorists are either charlatans or primitives.").
3. Wangerin, supra note 1.
... students who received poor grades early in law school." His article was written, in part, in the hope that the "thoughtful use of the learning strategies discussed in [the] article [could] significantly increase the effectiveness of learning and teaching by each audience."

This article explains a model upper-division Seminar in Legal Analysis and Writing developed for the latter group, "students who have received poor grades" during their first year in law school. The seminar helps the students to develop the building blocks of legal analysis by doing a series of fairly short, highly structured exercises that teach the students to do legal analysis step by step. The course's methodology differs from the traditional first-year law classes, since it integrates a simple, practical approach to legal analysis—"Sesame Street skills"—with two of the sophisticated educational learning theories advanced by Professor Wangerin—Metacognition and the Autonomous Learning Model. "Sesame Street skills" are analytical building blocks that virtually all students develop before they reach college. In class discussions, the professor helps students in the seminar to recognize the similarities between the analytical skills they need to do well in law school and the "Sesame Street skills" they have already learned in their developing years.

The seminar utilizes educational learning theories and develops the corollary skills through the interactive nature of the classes, which involve weekly writing by the students, extensive written critiques of their assignments, individual oral conferences, and rewriting and recritiquing of each exercise. This interactive cycle reinforces the sophisticated learning theories of Metacognition and the Autonomous Learning Model. One of these learning theories, Metacognition, is student-driven. It involves enabling the student to become aware of the legal learning process in order to master the

4. Id. at 473.
5. Id.
6. See infra, notes 29-32, 38 and accompanying text for sample exercises.
7. See infra text accompanying notes 36-48 (defining and discussing Metacognition).
8. See infra text accompanying notes 74-89 (defining and discussing the Autonomous Learning Model).
10. See infra text accompanying notes 36-40.
challenge of law school. The seminar achieves this goal by actively involving the students in the process of legal reasoning from the outset of the course. The other learning theory, the Autonomous Learning Model, is teacher-driven. It enables the law professor to dissect the learning process into its basic components and to focus on the aspects of learning that are most critical to a particular course. Using this Model, the professor can simplify the process of legal analysis and help the students to recognize that they have already mastered many of the analytical skills in their everyday lives.

The results of the seminar methodology appear to be very promising in terms of the students' evaluations of the course, their grades in law school, and their passage rates on the California Bar Examination. The methodology would also seem likely to work well with all upper-division students as an alternative to traditional teaching. It is also advisable to incorporate some of the methodology into first-year writing courses so that law students can begin to learn the building blocks of legal analysis from the time they first enter law school.

11. See infra text accompanying notes 36-40.
12. See infra notes 74, 79 and accompanying text.
13. The Seminar in Legal Analysis and Writing is required for all law students whose grade point average falls below a certain level. Students who have taken the course report a marked improvement in their grades on subsequent law school examinations. In addition, the students have passed the California Bar Examination at a higher rate than would have been expected based on their class rankings at the time they graduated from law school. Student evaluations of the course have been consistently high, with the average overall rating of the course for the past three years being a 1.35 on a scale of 1 to 5 (1 = outstanding, 2 = good, 3 = satisfactory, 4 = improvement needed, and 5 = unsatisfactory). Specific comments regarding the course include the following:

"Honestly the best I've had at SCU."

"More than excellent. I particularly appreciated [the] written critiques. They were very helpful."

"Excellent training for real-life lawyering."

"This is the most practical, useful and valuable law school course I've ever had."

"Prior to this class, I felt very uncertain of my abilities in legal writing. [The] instructions were clear and [the professor] initially helped us to organize our papers. After that foundation, I was able to concentrate on the substance of the writing—and always got clear and concise feedback. This is one of the best classes I've had in law school."
II. BACKGROUND OF THE SEMINAR IN LEGAL ANALYSIS AND WRITING

Many law schools require that every student undertake some significant writing after the first year as a condition of graduation. This upper-division writing requirement can typically be satisfied by producing a substantial research paper for a seminar dealing with a particular area of law or through individualized directed research under the tutelage of a professor. Writing an article for law review or an appellate brief for an upper-division moot court class also meets the requirement at most schools. In addition, students at Santa Clara University can satisfy the requirement by completing the remedial Seminar in Legal Analysis and Writing.14

Some law schools require that all students with grade point averages below a certain level take a remedial seminar in legal analysis and writing. At Santa Clara University, for example, over seventy-five percent of the students enrolled in the seminar in legal analysis and writing during the last five years have been drawn from the bottom half of the class. Virtually all of the remedial seminar students have significant problems with legal analysis; some of them also have had difficulties with writing style, grammar, and/or organization. The course must, therefore, be highly individualized, focusing on the particular needs of each student. In order to provide this essential one-on-one teaching, enrollment should be limited to around twenty students.

The primary goal of the seminar is to improve each student's legal writing and analytical skills. A secondary goal of the class is to improve the student's exam-taking techniques, both in law school and for the bar examination. The underlying theory of the course is that most law students have problems with law school exams and the bar, not because of a lack of substantive knowledge, but because of a lack of analytical skills. The focus of the course should be on legal analysis, because most entering law students do not have problems with "regurgitating" the law. Rather, they generally have problems with legal analysis. If students don't grasp the idea of what to do with the law and do not under-

14. This author is not aware of any other law schools that offer the option of a remedial writing seminar to fulfill a student's writing requirement.
stand how to apply the law to a set of facts, then they will incur problems in their substantive classes, on law school exams, and ultimately, on the bar exam.

One of the keys to teaching the legal analysis seminar is not to move too quickly. The assignments are kept short, focus on very discrete issues, and gradually add complexity as students gain confidence in their ability to analyze the law.

III. USING SIMPLE “SESAME STREET SKILLS” IN TEACHING THE SEMINAR IN LEGAL ANALYSIS AND WRITING

A. Building Block One: Matching

At the first meeting of the seminar, the professor should ask the students to complete an in-class statutory exercise in order to assess each student’s performance under “exam conditions.” This first analytical exercise, known as the “Hog Problem,” deals with the burning issue of whether a statute enacted to prohibit a group of children from chasing and capturing a twenty-pound pig, greased with shortening, covers a hog-wrestling match in which four adults grab a muddy, 250-pound-hog and deposit the animal, butt first, in a barrel. The statute involved is not complex, and the context is somewhat amusing. This problem helps the students to “loosen up” and begin to internalize the idea that often there isn’t a right or wrong answer. The “Hog Problem” is as follows:

Ima Hogg has recently contacted our firm to represent her in a criminal case involving her alleged participation in a greased-pig contest. Ms. Hogg was Chairman of the State of Bliss Pork Producers’ Annual Pork Days celebration. She had organized a pig contest as a major attraction of the event. The contest involved a thirty-foot by thirty-foot pen, mud two feet deep, a fifty-gallon barrel and a 250-pound hog. “The idea was for teams of four adults to get in the mud with the hog, capture the animal, and stick him in the barrel, butt first,” said Hogg.

On the day of the celebration, there were thirty teams on hand who had registered and paid the entrance fee in order to participate in the event. Before the hog-wrestle got under way, the local police chief told the crowd that the contest was against state laws on cruelty to animals. But Hogg, along with three other officials of the Pork Producers Association, decided to test the resolve of the police by being the first to wrestle the hog. They hopped into the pen, slugged through the mud, and deposited the hog in
the barrel in one minute, thirty-five seconds. "The pig was released immediately," Hogg said. Hogg and the other officers of the Association were thereupon arrested, thus ending any further hog-wrestling at Pork Days.

Ms. Hogg was subsequently charged with violating section 815 of the State of Bliss Criminal Code, which provides that "no person shall operate, run or participate in a contest, game or other like activity, in which a pig, greased, oiled or otherwise, is released and wherein the object is the capture of such pig . . . ." Such participation under section 815 is a criminal misdemeanor, punishable by a maximum penalty of a $500 fine and ninety days in jail. Prior to the passage of the statute, greased-pig contests had been popular events at Bliss State Rodeos. In most of these contests, a thirty- to forty-pound pig, coated with vegetable shortening, was released in the rodeo arena. Approximately forty youngsters, aged eight to twelve, would try to catch the animal within twenty seconds or less. The child who caught the pig would be allowed to keep it.

Please draft an office memorandum discussing whether Ms. Hogg's conduct violated section 815. Please be sure to discuss whether Ms. Hogg's actions were covered by the provisions of the statute and whether the regulation was intended to cover such conduct.

At the start of the second class, the students' answers to the "Hog Problem" should be returned, with extensive written comments critiquing their analysis. A checklist should also be distributed that delineates the statutory elements that must be established if Ms. Hogg's conduct is covered by the statute. The checklist should also list the similarities and differences between hog-wrestling matches and greased-pig contests, which help to determine whether the regulation was intended to cover her conduct. The first part of the "Hog Problem Checklist," dealing with whether Ms. Hogg's conduct is covered by the statute, is as follows:

Is Ima Hogg's Conduct Covered By Section 815?

1. Statute quoted precisely?
2. Facts of case applied to statute?
   a. "operate, run or participate in"
   b. "a contest, game or other like activity"
   c. "in which a pig"
   d. "greased, oiled or otherwise"
   e. "where the object is the capture of such pig"
During the second class, the students use the checklist to "walk through" the application of the facts to the law to determine whether Ms. Hogg's conduct is covered by the statute. The professor should demonstrate that this "matching" process is not unlike the "Sesame Street Skills" they have already developed much earlier in their lives. In fact, at its most simplistic level, the process is not unlike matching states with capitals, which virtually all elementary school students are required to do. To demonstrate this, the professor should list the statutory elements on one half of the blackboard and ask the students what facts most closely "match" each of the elements. The result of this matching process might look like this:

<table>
<thead>
<tr>
<th>Element Of Statute</th>
<th>Facts From &quot;Hog Problem&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;operate, run, or participate in&quot;</td>
<td>&quot;organized a pig contest&quot;;</td>
</tr>
<tr>
<td></td>
<td>&quot;participated in contest by&quot;</td>
</tr>
<tr>
<td>&quot;a contest, game or other like activity&quot;</td>
<td>&quot;organized a pig contest&quot;; &quot;the contest was against state law&quot;</td>
</tr>
<tr>
<td>&quot;in which a pig&quot;</td>
<td>&quot;250-pound hog&quot;</td>
</tr>
<tr>
<td>&quot;greased, oiled or otherwise&quot;</td>
<td>&quot;mud two feet deep&quot;</td>
</tr>
<tr>
<td>&quot;the object is the capture of such pig&quot;</td>
<td>&quot;idea [of the contest] &quot;was . . . to . . . capture the animal&quot;</td>
</tr>
</tbody>
</table>

Once the students list the facts that most closely "match" each element of the statute, they are shown how this type of "checklist-matching" can help them with organizing their exams and determining which issues are worth focusing on and which issues can be dealt with more summarily. If the elements and the facts match exactly, then the students know that the element does not need to be discussed in depth. Rather, the student can simply apply "the law" (the statutory elements in this case, or the elements of a cause of action, or the factors in a common law standard) to the facts in a cursory fashion. For example, a student answer might simply state the following regarding the first element: "Ms. Hogg operated and participated in the hog wrestling match since she 'organized' the pig contest and she was one of the first adults to 'participate' in the event by wrestling the hog." Similar short statements linking the statutory elements to the facts could be made regarding the issues of whether Ms. Hogg or-
ganized a "contest" and whether the object of the contest was the "capture" of the animal.

However, the students should also be able to discern that the "match" between the other two elements (whether "a pig" was "greased, oiled or otherwise") and the facts of the Hog Problem are not as precise. Thus, students should recognize that they must spend more time analyzing these issues. The process of finding the easy matches and then focusing on the difficult matches is not unlike the "Sesame Street Skill" of working on a puzzle. Even very young children quickly learn to lay out the easy pieces first—the corners and the straight-edged pieces forming the perimeter of the puzzle. Then the child will focus on the rest of the pieces—turning them different ways to see how they might fit within the framework of the puzzle.

Law students must do the same with the factual pieces that do not quite fit within the framework of the statute. This is the heart of legal analysis, and in many ways, the "fun" part of taking an exam, because there is usually no right or wrong answer. Rather, students have an opportunity to turn the puzzle pieces different ways to see if they fit within the two remaining statutory requirements. First, the statute uses the term "pig," but Ms. Hogg's contest involved a "hog." The regulation was passed to prohibit cruelty to thirty- to forty-pound pigs used in greased-pig contests (or possibly, to ensure the safety of the children who participated in the contests). The student might note that although hogs and pigs are both porcine animals, a 250-pound animal would seem to be less in need of protection than a thirty- to forty-pound animal (and four adults might be less in need of protection than a group of children). However, the student might query whether it is any less cruel to stick a hog "butt first" into a barrel than to chase a pig around a rodeo ring. As to the second "mismatched" requirement, that the animal be "greased, oiled or otherwise," there is nothing in the facts to indicate that the hog was "greased" or "oiled." Thus, students must consider what the legislature meant by the words "or otherwise." Both grease and oil are slippery, as is the two feet of mud the hog was in, so if the legislature meant "or otherwise slippery," the regulation would seem to cover Ms. Hogg's conduct. On the other hand, it is possible that the legislature meant to protect pigs from having a foreign sub-
stance, such as the vegetable shortening used in greased-pig contests, applied to their skin. In this case, mud would not logically be included in the phrase "or otherwise," since mud is a natural element for pig-wallowing. In fact, mud acts as a sun screen for pigs' sensitive skin.

Once students have analyzed whether Ms. Hogg's conduct was covered by the statute, they use the second part of the Hog Problem Checklist to consider other similarities and differences between the hog-wrestling matches and greased-pig contests in order to determine whether the legislature intended the statute to cover Ms. Hogg's contest. The second part of the Hog Problem Checklist is as follows:

Does It Appear That the Statute Was Enacted to Cover Such Conduct?

1. Differences between contests prior to passage of statute & present case
   a. thirty- to forty-pound pig vs. 250-pound hog
   b. coated with vegetable shortening vs. mud
   c. forty youngsters vs. four adults
   d. twenty-second capture vs. 1 minute, thirty-five second capture
   e. pig kept vs. released

2. Possible policy reasons for passage of statute

The comparisons and contrasts that the students glean from the checklist are not unlike the challenge the law students once faced as young children when Ernie sang on "Sesame Street": "One of these things is not like the other; one of these things just doesn't belong. Can you guess which thing is not like the other before I finish my song?"

B. The Second Building Block: Thinking Like a Professor

The second analytical exercise, known as the "Big and Little Brother Problem," builds on the "matching" skills students learned in the "Hog Problem" by demonstrating how the "factors" commonly found in judicially created tests or guidelines (and, for that matter, the elements of various causes of action) are similar to the requirements of a statute. In the "Big and Little Brother Problem," the students are given a single case, Dillon v. Legg,15 and are asked to apply the case to a new set of facts. In Dillon, the California Supreme Court allowed a "bystander" to recover for negligent
infliction of emotional distress.\textsuperscript{16} The "bystander" in \textit{Dillon} was a mother who saw her daughter struck and killed by a car.\textsuperscript{17} In reaching its decision, the court provided three factors to guide future courts in similar cases:

In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.\textsuperscript{18}

Like the "Hog Problem," the students must consider the policy implications underlying the tests or guidelines as well as their factual application.

In discussing the \textit{Dillon} guidelines\textsuperscript{19} in class, the students are encouraged to "think like a professor" by considering how they might construct a law school examination using the guidelines. This "Sesame Street Skill" is commonly

\begin{itemize}
\item \textsuperscript{16} \textit{Id.} at 925.
\item \textsuperscript{17} \textit{Id.} at 915.
\item \textsuperscript{18} \textit{Id.} at 912. Almost twenty years later, in \textit{Thing v. La Chusa}, 771 P.2d 814 (Cal. 1989), the California Supreme Court refused to allow recovery to a mother who saw her "bloody and unconscious child . . . lying in the roadway" shortly after being hit by a car because the mother neither saw nor heard the accident. \textit{Id.} at 815. The court felt that "[e]ven if it is 'foreseeable' that persons other than closely related percipient witnesses may suffer emotional distress, this fact does not justify the imposition of what threatens to become unlimited liability for emotional distress on a defendant whose conduct is simply negligent." \textit{Id.} at 829. In order to avoid this result, the court replaced the \textit{Dillon} guidelines with the following test:

\begin{quote}
We conclude, therefore, that a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.
\end{quote}

\textit{Id.} at 829-30 (footnotes omitted).
\item \textsuperscript{19} See \textit{Dillon}, 441 P.2d at 912.
\end{itemize}
known outside of law school as "psyching out the teacher." Many students first become adept at "psyching out the teacher" in junior high school, when they first study a foreign language in depth. For example, language students soon learn that, rather than focus on the "easy issue" of translating a sentence using a regular verb, teachers inevitably require the more "challenging issue" of translating a sentence using an irregular verb that seems to follow no set rule of conjugation. Just as junior high school students soon learn which verbs are most apt to be tested, so, too, law school students can learn which issues are most likely to appear on a law school examination. Moreover, if law students can learn to "think like a professor" in constructing an exam question, they may also be able to "think like a professor" in analyzing the issue.

In the classroom discussion, the students are first asked to try to determine what facts a professor might use in an exam, if he or she did not want students to spend time on the issue (i.e., if he or she wanted to create a "corner" piece of the exam puzzle). Using the relationship guideline and keeping in mind the facts of the Dillon case, the clearest answer would probably be a parent-child relationship, with only a slight stretch to a husband-wife relationship. The students are then asked to "think like a professor" who wanted to create a more challenging issue. The students might suggest facts that progressed further into blood relationships, i.e., what about a nephew-uncle relationship? Or the students might begin to enjoy "playing professor" and begin to construct more elaborate facts; i.e., what about allowing recovery to a natural child adopted at birth

20. See Dillon v. Legg, 441 P.2d 912, 921 (Cal. 1968) (noting that "[t]he negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma").


22. See, e.g., Krivenstsov v. San Rafael Taxicabs, 229 Cal. Rptr. 768, 770 (1986) (finding that a cause of action was stated where an uncle observed the hit-and-run death of his nephew because the plaintiff and victim had "a close, warm and loving relationship, analogous to that of parent and child").

23. See, e.g., Trapp v. Schuyler Constr., 197 Cal. Rptr. 411, 412 (1986) (holding recovery denied where a plaintiff and victim were first cousins because they were "family members well beyond the immediate unit of parents and children"). But cf. Leong v. Takasaki 520 P.2d 758 (Haw. 1974) (allowing a step-grandson to recover for the death of his step-grandmother).
who had never met his or her biological parents before coincidentally witnessing an accident in which both were killed? The students might also work from of the language of the guideline itself in learning to "think like a professor." They might note that the relationship guideline does not include language requiring a familial or blood relationship; rather, the guideline contrasts a close relationship with a distant relationship or no relationship at all.24 They might analyze how this language would affect whether a natural child adopted at birth could recover, by determining where on the guideline continuum an adopted child might fall. They might then consider drafting a set of facts where there was no legal or blood relationship at all. What about a foster child, who had no blood or legal ties to his or her foster parents, but had spent all of his of her life with them?25 What about a couple who were in love and living together for a period of years but were not married?26 These questions should lead the students to consider the policies underlying the guidelines—the desire to compensate meritorious plaintiffs with the often competing goal of limiting the liability of the defendant.27 Considering the policy implications of the guidelines might lead the students to more analytical questions. For example, isn't a foster child who loves his foster parents, and has spent his entire life as part of their family, likely to be as deserving a plaintiff as a natural son, especially if that son is estranged from the family? Where do you draw the line if you allow someone without blood or legal ties to recover? What about best friends28 or classmates? If you limit recovery to legal or blood relationships, how do you justify a rule that would allow recovery to a woman for witnessing an accident leading to the loss of her husband the day after her marriage, but would deny that woman recovery if she saw the same accident while

---

24. See Dillon, 441 P.2d at 925.
25. See, e.g., Mobaldi v. Regents of Univ. of Cal., 127 Cal. Rptr. 720, 723-24 (1976) (allowing recovery to a foster mother who witnessed the death of her three-year-old foster son based on "the emotional attachments of the family relationship and not legal status").
26. See, e.g., Elden v. Sheldon, 758 P.2d 582 (1988) (denying recovery where the plaintiff and victim were in an unmarried cohabitation relationship).
27. See Dillon, 441 P.2d at 922.
28. See, e.g., Kately v. Wilkinson, 195 Cal. Rptr. 902, 932 (1983) (finding that no cause of action was stated where the plaintiff and victim were best friends, because "to hold that sufficient would be to abandon the Dillon admonition that the courts exclude the remote and unexpected").
driving to the wedding? What if the defendant who caused the accident knew beforehand about the "close relationship" between the woman and her spouse and knew that she would see an accident if it occurred? Wouldn't this establish foreseeability, and the defendant's duty to the plaintiff, irrespective of the guidelines? These are the kinds of issues that can be developed in class discussion that help the students learn to "think like a professor."

The students are then required to analyze the "Big and Little Brother Problem" from the four different perspectives

29. The facts of the "Big and Little Brother Problem" are as follows:

Stephen Lewis had always wanted a son. Instead, he had been blessed (bese) with four daughters and three female cats, none of whom were the least bit interested in accompanying him on his frequent hunting expeditions. One day Mr. Lewis read a newspaper article about a local Big Brother program where lonely, often fatherless, boys were matched with male adults who could provide them with companionship and new experiences.

Hoping to find a potential hunting partner, Mr. Lewis signed up for the program last February, agreeing to see his "little brother," Johnny Boone, on at least a weekly basis. Though Johnny was even less interested in hunting than Mr. Lewis' daughters, the two shared many other activities, and both enjoyed the time they spent together.

On August 21, 1991, to celebrate the six-month anniversary of their first meeting, Mr. Lewis planned a calamari luncheon at Abalonetti's Restaurant on the Monterey Wharf for his four daughters, Johnny, and Gordon Doright, the director of the Big Brother Program. While finishing their cannoli dessert, Mr. Doright, who had driven his own car, asked Johnny to ride back to Santa Clara County with him, since he hoped Johnny might know of some other boys in need of Big Brothers. Shortly thereafter, Johnny started the drive home in the Doright car, while Mr. Lewis and his daughters followed in their car.

Upon rounding a curve in the road, Mr. Lewis observed the Doright auto smashed against a cypress tree. Knowing instantly that Johnny was in the car, either dead or dying, Mr. Lewis ran from his car and reached the wreckage before the dust had settled. Overcome by the shocking sight of his mortally wounded "little brother," Mr. Lewis collapsed. He was subsequently hospitalized for a nervous breakdown and remains under psychiatric care for high blood pressure, extreme nervousness, and insomnia due to continual nightmares.

Mr. Lewis filed a civil complaint in Santa Clara County Superior Court against Dr. Doright seeking compensation for the physical injuries he suffered as a result of Johnny Boone's death. Mr. Doright demurred on the ground that Lewis had failed to state a cause of action for physical injuries for emotional distress in accordance with relevant California law. The trial court granted Mr. Doright's demurrer. Mr. Lewis appealed but the Court of Appeal upheld the trial court's ruling. Mr. Lewis then appealed to the California Supreme Court, which has granted a hearing.

Assume that you are spending an enjoyable semester as a judicial extern for California Supreme Court Justice Lotta Law. Please write a memorandum for Justice Law explaining whether the trial court properly granted the demurrer. Your excellent research has discovered that the only relevant law is the California Supreme Court case of Dillon v. Legg, 441 P.2d 912 (Cal. 1968).
developed in the class discussion: Comparing the facts of the Problem with the facts of Dillon;\textsuperscript{30} determining where on the Dillon guideline continuum\textsuperscript{31} the facts of the problem fit; considering the policy implications of allowing (and not allowing) recovery; and discussing whether there is foreseeability irrespective of the guidelines.

C. Building Block Three: Synthesizing

The third analytical exercise, known as the "Shark Problem," involves a synthesis of cases.\textsuperscript{32} If Dillon is used for the

\begin{itemize}
  \item \textsuperscript{30} Id. at 915.
  \item \textsuperscript{31} Id. at 924-25.
  \item \textsuperscript{32} "The Shark Problem:"
\end{itemize}

Larry Lexis and Susan Shepard, second-year law students at Santa Clara University School of Law, were very much in love. Since the beginning of their first year of law school, Larry and Susan enjoyed an intimate and monogamous relationship. They began living together during the spring semester of their first year, and continued living together during the summer while both were law clerks at the firm of Dewey, Screwem and Howe.

In October of their second year of law school, Susan discovered that she was pregnant. Although Larry and Susan decided at that point that they wanted to raise a family and spend the rest of their lives together, they vowed that they would not marry until Congress removed the tax disincentives for married couples, a prospect which neither one thought was likely. Besides, they felt that their love for one another was a much stronger bond than any piece of paper. Feeling that their moral commitment to one another surpassed any type of legal commitment, they never entered into any formal or informal contract of support or other obligation.

During the fall semester of their second year of law school, Larry and Susan became very good friends with their brilliant but absent-minded tax professor, Martin Dale Hubbell. Martin and his girlfriend, Wendy Witkin, would frequently invite Larry and Susan over for cookies. When Martin suggested that the two couples spend part of Christmas vacation scuba diving off Catalina, Larry and Susan, who had never scuba-dived before, eagerly agreed.

Early in the morning on December 27th, the foursome rented scuba gear and a motorboat at Catalina Harbor, and began making their way toward the isolated waters off the western side of the island. The boat was driven by Martin, an experienced scuba diver who was well acquainted with the waters around Catalina. As they approached their destination, Martin explained that there were two bays in the area, Pleasant Bay and Vicious Bay, located on opposite sides of a jetty. He further explained that, although Vicious Bay was infested with sharks, Pleasant Bay was protected from sharks by a coral reef. Martin assured Susan (who, being four months pregnant, had decided not to scuba-dive herself) that Larry would be perfectly safe diving in Pleasant Bay.

Larry decided that he would be the first to dive. Martin helped Larry put on his scuba gear, and told Larry how to use the equipment. As Susan blew him a kiss, Larry jumped into the water and began his first-ever scuba dive. What Larry did not know was that this would also be his last scuba dive, since, due to a horrible navigational error by Martin, they had mistakenly ended up in Vicious Bay.
single case assignment, the professor should add the cases of Justus v. Atchison,33 Krouse v. Graham,34 and Mobaldi v. Regents of the University of California35 for the synthesis exercise. As part of this assignment, the students are shown how their “Sesame Street Skills” can assist them in understanding common law development. The guidelines developed by the California Supreme Court in Dillon were modified by Justus and Krouse, and were ultimately replaced by the standard in Thing v. La Chusa.36 This type of common law development and modification of “rules” is familiar to virtually all high school students. For example, assume that Mr. and Mrs. Jones established a “rule” during their son Johnny’s freshman year that he had to be home by 10:00 p.m. on a school night. The first modification of the rule might occur when Johnny informed his parents that the local library was open until 10:00 p.m. and he wanted to study until the library closed. The rule might then be modified to allow Johnny to be home at 10:30 p.m. on a school night if he was studying at the library. The next common law development might occur when the rule was modified to allow for Johnny’s late arrival.

From the moment Larry jumped into the water, Susan lovingly watched the bubbles which rose to the surface every time Larry exhaled. After about 15 minutes, however, the bubbles suddenly stopped. Horrified, Susan jumped up, clutched the rail and stared into the water, wondering what possibly could have happened to Larry. Within a minute after the bubbles stopped, Susan saw a dark pool of blood form on the surface. She screamed hysterically, bringing Martin out of his absent-minded reverie. Upon seeing the blood, Martin hurriedly put on his scuba gear and jumped into the water. He was under the surface for about ten minutes, during which time Susan anxiously hoped against hope that her lover might yet be alive.

Susan could see Martin coming to the surface with a body in his hands. Martin’s head popped out of the water and he announced, with tears in his eyes, “I’m sorry, Larry’s dead.” Susan then reached down and pulled Larry’s mangled corpse onto the boat and cradled him in her arms. As a result of the entire episode, she suffered severe emotional distress, which resulted in a miscarriage.

Susan brought an action against Martin in the Superior Court of Santa Clara County for negligent infliction of emotional distress. Martin admitted negligence, but demurred on the ground that the complaint filed to state a cause of action under Dillon v. Legg and its progeny. The trial court dismissed the complaint. The California Court of Appeal affirmed. The California Supreme Court has granted a hearing, thus vacating the Court of Appeal’s decision.

33. 565 P.2d 122 (Cal. 1977).
34. 562 P.2d 1022 (Cal. 1977).
35. 127 Cal. Rptr. 720 (1976).
36. 771 P.2d 814, 817 (Cal. 1989). For an explanation of the standard of Thing, see supra note 18.
after a school activity, such as rehearsal for a school play, or after a sporting event, such as a football game. Ultimately, there might be so many exceptions that the rule would be thrown out entirely and a new rule established that would simply allow Johnny to remain out until 10:30 p.m. on a school night.

D. Building Block Four: Analyzing Multiple Cases

The final analytical exercise that focuses on establishing the building blocks of legal analysis is known as "The Shark Problem Revisited." This exercise adds additional cases to those relied on in the synthesis problem, using the same set of facts, and helps the students to understand the concepts of precedent and authority. The format is changed from a neutral office memorandum or client letter to a persuasive writing style. The students are required to write two separate Memoranda of Points and Authorities or two separate appellate briefs—first from the plaintiff or appellant's perspective, then from the defendant or respondent's perspective. Approximately half of the cases in the assignment, including both controlling and persuasive authority, favor the plaintiff, while the other half favor the defendant.

37. In addition to the exercises establishing the building blocks of legal analysis, the course has five additional assignments, including an in-class essay examination and four performance tests.

38. "The Shark Problem Revisited:"

In the synthesis problem you just completed, you were asked to write an objective memorandum using the facts of Shepard v. Hubbell and four cases. Your next assignment involves doing two advocative Memoranda of Points and Authorities using the stipulated facts of Shepard v. Hubbell and any (or all) of the cases listed below. If you decide not to use a case in your argument, please briefly explain why you reached that decision. You should assume that the Shepard case is back at the trial court level. For this assignment, you should focus on your legal analysis, your advocative writing style, and your use of authority. Case List:

- Mobaldi v. Board of Regents of Univ. of Cal., 127 Cal. Rptr. 720 (1976).
The concepts of precedent, and controlling and persuasive authority, are also familiar "Sesame Street" ideas, at least to any child with older siblings. For example, once Johnny's parents set his curfew as 10:30 p.m. on a high school night, his younger sister, Jennifer, will assume that the rule set by her parents for her brother will also set a precedent for her, meaning that she will also be able to stay out until 10:30 p.m. once she starts high school. Jennifer's early awareness of levels of authority would also be apparent if, after Jennifer was a freshman in high school, Johnny was baby-sitting, and he tried to insist that Jennifer had to be in at 10:00 p.m. (rather than 10:30). Jennifer would immediately contact her parents (as a higher court) to set her brother straight, demonstrating her understanding of the controlling authority of her parents over her brother. Jennifer might also show an understanding of persuasive authority, if she wanted to convince her parents to allow her to stay out until 11:00 p.m. on a school night. She might try to argue to her parents that "all her friends' parents let them stay out until 11:00 p.m." (an argument that most parents find unpersuasive). It is also clear that Jennifer would have a nascent concept of an equal protection analysis if her parents tried to impose a different curfew on her than they imposed on her brother. Although she might phrase the argument with the words "that's not fair," the basis of her objection would be that you cannot treat males and females differently.

E. Building Block Five: Self-Confidence

The final "Sesame Street Skill," self-confidence, is an attribute the seminar often needs to rebuild after the first year in law school. Many of the seminar students come into the class with very poor self-images as a result of receiving low marks, perhaps for the first time in their academic careers. Occasionally students will manifest their insecurities by blaming the law school or a particular professor for their academic difficulties. Although sometimes initially hostile to the seminar class, these students will generally "come around" as they begin to see their legal analysis and writing improve. Instilling self-confidence requires a positive attitude on the part of the instructor, both in terms of believing in the value of the class and in terms of believing in the abilities of the individual students. A positive, helpful approach can go a
long way toward changing a student's negative self-image (and counteracting some of the occasional harshness of the Socratic method). Perhaps this point is best illustrated by quoting a passage from You Just Don't Understand, a fascinating book by Deborah Tannen on male-female communication differences:

Martha bought a computer and needed to learn to use it. After studying the manual and making some progress, she still had many questions, so she went to the store where she had bought it and asked for help. The man assigned to help her made her feel like the stupidest person in the world. He used technical language in explaining things, and each time she had to ask what a word meant she felt more incompetent, an impression reinforced by the tone of voice he used in his answer, a tone that sent the metamessage "This is obvious; everyone knows this." He explained things so quickly, she couldn't possibly remember them. When she went home, she discovered she couldn't recall what he had demonstrated, even in cases when she had followed his explanation at the time.

Still confused, and dreading the interaction, Martha returned to the store a week later, determined to stay until she got the information she needed. But this time a woman was assigned to help her. And the experience of getting help was utterly transformed. The woman avoided using technical terms for the most part, and if she did use one, she asked whether Martha knew what it meant and explained simply and clearly if she didn't. When the woman answered questions, her tone never implied that everyone should know this. And when showing how to do something, she had Martha do it, rather than demonstrating while Martha watched. The different style of this "teacher" made Martha feel like a different "student": a competent rather than stupid one, not humiliated by her ignorance.

40. Id. at 66-67.
IV. Applying Educational Theories to the Seminar in Legal Analysis and Writing

A. Applying the Theory of Metacognition

1. Introduction

Most law students have succeeded in their undergraduate careers because they have mastered traditional learning methods. They have developed the skills of memorization, note-taking, and review that are recommended by many texts dealing with how to succeed in law school. However, they have failed to understand that law school requires an additional layer of learning—the application of a body of law to a set of facts. Furthermore, they have not recognized that "traditional study skills materials generally do not teach students to monitor and then change their learning and studying activities as the situation demands." It is only when the students focus on modifying their learning and studying skills to become proficient in legal analysis that their grades on law school exams begin to show improvement. This "awareness [by the students] of the learning process" itself is referred to by learning theorists as Metacognition. As students "become increasingly aware of processes involved, they can exercise degrees of control over some of them."

2. Stage 1: Students' Evaluating Their Learning Abilities With Respect To The Learning Task At Hand

Metacognition involves two discrete stages. In the first stage, the student introspectively evaluates his or her own learning abilities with respect to the learning task at hand.

---


42. See Wangerin, supra note 1 at 477 (citing Brown & Palincsar, Inducing Strategic Learning from Texts by Means of Informed, Self-Control Training, 2 Topics In Learning & Learning Disabilities 1, 3-4 (1982)).

43. Id. at 474-477.


45. See Wangerin, supra note 1, at 476 (citing Schmitt and Newby, Metacognition: Relevance to Instructional Design, 9(4) J. Instructional Dev. 29 (1986); see also, Baker and Brown, Metacognitive Skills & Reading, Handbook Of Reading Research, 353, 353 (P. Pearson Ed. 1984)) (describing this
Learning theorists believe that “effective studying comes from an understanding of the processes of learning and a realization that different kinds of learning processes can bring about different results.” In the seminar, the assignments are structured so that the students must focus on the “learning process” of legal analysis. The traditional learning skills of memorization, note-taking, and review are not relevant abilities to the learning task at hand. The students are provided with a “canned world of law,” and their analysis of a particular set of facts is limited to those cases. The students are not required to do any independent research. In fact, they are specifically precluded from adding any new cases to their legal world. Similarly, they do not need to rely on their memory and review of the law, or their notes regarding a particular substantive legal principle, because the cases are always available for reference. Rather, the students have to focus on the more abstract learning skills of interpretation and analysis.

3. Stage 2: Students’ Evaluating Their Study Acts And Modifying Their Learning Approaches

The second stage of Metacognition involves the ability of students to evaluate periodically their study activities and modify their learning approach if demanded by the learning task at hand. Learning theorists describe this stage of Metacognition as involving four sub-processes: “[1] checking the outcome of any attempt to solve the problem; [2] planning one’s next move; [3] monitoring the effectiveness of any attempted action; and [4] testing, revising and evaluating one’s strategies for learning.” Once again, the seminar is structured in a way that ensures that the students will continually evaluate the success of their analytical activities and modify their approaches, if necessary. Every class assignment is extensively critiqued, both in writing and in individual student conferences. The written critique of most of the assignments is completed within a week. The critiqued as-

46. See Wangerin, supra note 1, at 476 (citing Baker and Brown, supra note 45, at 353-54).
47. See id. at 476-77.
48. See id. (citing Baker and Brown, supra note 45, at 354).
Assignments are then returned to the students, with individual conferences scheduled the following day, so that the students have an opportunity to review the comments and are ready to discuss them. The written critique gives the students a chance to check the outcome of their attempt to solve the analytical problem and to monitor the effectiveness of their attempted solution. During the conference, the students have an opportunity to thoroughly discuss their analysis and to plan their next move.

In the conferences, the students should be encouraged to articulate the reasons for the conclusions made in their analysis. Frequently, the students are able to state orally the steps they have taken, even though this logical progression is lacking in their written product. The explanation for this apparent anomaly could be the fact that the students do not understand (or perhaps do not believe) that it is the explanation of the logical steps they took to reach their conclusions, not the conclusions themselves, that are crucial to their analysis (and to their success in law school). The cure for this anomaly is for the professor to encourage the students to write down all their thought processes, even if they feel their thinking is too simplistic or self-evident. The seminar should be offered only on a credit/non-credit basis in order to stimulate the students' analytical freedom, unhampered by concerns of whether their ideas will result in good grades.

All assignments are then rewritten by the students and recritiqued by the professor. Both the original and the rewritten assignments are turned in to facilitate comparison and comment. At times, the students rewrite only a portion of their assignment, allowing them to focus their attention on the weakest part of their analysis. Thus, each student has ample opportunity for testing, revising, and evaluating his or her strategies for accomplishing the task of legal analysis. After their rewrites are completed, the students are given analytical checklists and/or sample answers for each assignment so that they can further evaluate their work.

At least part of the class should be spent discussing the checklist, because many students benefit from repetition.49

In addition, both a written and an oral presentation of the

49. See Feinman & Feldman, supra note 1, at 900 & n.61 ("When the whole class exhibits certain difficulties, simply reteaching in a traditional manner may be appropriate.").
analysis satisfies the needs of both the students who are visual learners and those who are auditory learners.

Throughout this cycle of critique, conference, rewrite, and recritique, the students are encouraged to think creatively about the possible ways to analyze a particular legal problem. This process of trying to think of different ways to do the same thing is referred to by educational theorists as "divergent thinking." By contrast, convergent thinking occurs when students limit their options. Use of divergent thinking helps free the students to "play" with different analyses of the issues raised by the seminar assignments and helps them internalize and accept the fact that there may be several different, equally "correct," answers to the same question.

B. Applying the Autonomous Learning Model

1. Introduction

Professor Wangerin opines that "perhaps the best example of the work being done by educational psychologists in connection with the metacognitive aspects of studying skills and learning strategies" is the Autonomous Learning Model for studying and learning developed by John Thomas and William Rohwer. Although this Model is very complex, it enables an instructor to dissect the learning process into its basic components and to focus on the discrete portions of the Model that are relevant to a particular course. Reference to the following charts may help readers visualize the skeletal components of the entire Model and see the relationship of the detailed, highlighted parts of the Model, which are those focused on in the seminar, to the Model as a whole.

2. Study Activities And Study Outcomes

As illustrated in Chart 1, the Autonomous Learning Model requires students to consider four variables in deter-

51. See Wangerin, supra note 1, at 512-13.
52. See id. at 479-80 (citing John Thomas & William Rohwer, Academic Studying: The Role of Learning Strategies, 21 Educ. Psychologist 19 (1986)).
53. This chart is an edited and substantially modified version of the charts appearing in Wangerin, supra note 1, at 481 and in Thomas & Rohwer, supra note 52, at 23.
CHART 1: THE AUTONOMOUS LEARNING MODEL

Student & course characteristics

- Memorization → Verbatim knowledge (regurgitation)
- Selection → Interpreted knowledge (paraphrasing)

Study Activities → Cognitive Activities → Integration → Constructed knowledge (analysis) → Generalizing (applying law to facts)

Informational Product
Performance Capability

Recognizing & producing already learned information (issue-spotting & rule statement)

Self-management activities → Cognitive monitoring

Study Outcomes

CHART 2: PORTIONS OF THE AUTONOMOUS LEARNING MODEL USED IN THE SEMINAR

Informational Product
Performance Capability

Study Activities → Cognitive Activities → Integration → Constructed knowledge (analysis) → Generalizing (applying law to facts)
mining for themselves the ideal method of studying and learning: student characteristics,\textsuperscript{54} course characteristics,\textsuperscript{55} study activities,\textsuperscript{56} and study outcomes.\textsuperscript{57} As indicated in Chart 2, the seminar focuses only on the last two of these variables: the actual learning methods, or "study activities;" and the material the student hopes to master by the learning method, or the "study outcomes." The other two variables, student characteristics and course characteristics, require student self-assessment, which is beyond the scope of the seminar (and, indeed, probably beyond the scope of all law school classes).\textsuperscript{58} As illustrated in Chart 1, the Autonomous Learning Model divides study activities into "cognitive activities" and "self-management activities."\textsuperscript{59} Chart 2 reveals that the seminar deals only with cognitive activities.\textsuperscript{60} As indicated in Chart 1, cognitive activities are further subdivided into four subactivities: memorization, selection, integration, and cognitive monitoring.\textsuperscript{61} Thomas and Rohwer have also

\textsuperscript{54} Wangerin, \textit{supra} note 1, at 485-86.
\textsuperscript{55} \textit{Id.} at 485 (citing Thomas & Rohwer, \textit{supra} note 52, at 26).
\textsuperscript{56} \textit{Id.} at 483-85 (citing Thomas & Rohwer, \textit{supra} note 52, at 23-25).
\textsuperscript{57} \textit{Id.} at 481-83 (citing Thomas & Rohwer, \textit{supra} note 52, at 22).
\textsuperscript{58} The first of these variables, student characteristics, suggests that students consider their own individual skills, experiences, and mental and physical abilities in the process of assessing what studying methods are apt to work best for them. See Thomas & Rohwer, \textit{supra} note 52, at 26-27. This type of self-assessment would also seem to be crucial in determining what courses to take and what professor to take the course from, and indeed, whether to have enrolled in law school in the first place. Similarly, the second variable, course characteristics, suggests that the students take into account the learning requirements of the course and the idiosyncrasies of the professor teaching the class in determining the method of study and the outcome desired. See Wangerin, \textit{supra} note 1, at 485. Wangerin points out, for example, that Property courses frequently require memorization of a number of specific and ancient rules, while Contracts courses require memorization of "only a few rules, emphasizing their factual application." Wangerin, \textit{supra} note 1, at 485.
\textsuperscript{59} See Thomas & Rohwer, \textit{supra} note 52, at 25.
\textsuperscript{60} Like the variables of student and course characteristics, self-management activities require the students to assess their individual ability to manage the time and effort demanded by their courses, in the hope of learning how to "maintain and enhance the attention, effort and time [they] devote to learning." Thomas & Rohwer, \textit{supra} note 52, at 25. Basically, self-management activities seem to combine the worthy goals of maintaining good study habits and taking care of one's mental and physical needs. However, no matter how worthy these goals may be, or how individualized the instruction in a class may be, it is unlikely, and possibly inappropriate, for law school professors to try to ascertain whether their students are getting enough rest or are working too hard on one assignment and not hard enough on others.
\textsuperscript{61} See Thomas & Rohwer, \textit{supra} note 52, at 24.
divided study outcomes into two categories: "Informational products" (the forms of the knowledge that will come from study activities)\(^{62}\) and "performance capabilities" (the ways in which students can act on that knowledge).\(^{63}\)

### 3. Cognitive Activities And Resultant Study Outcomes

#### a. Introduction

Chart 1 illustrates the links between cognitive activities and the resultant study outcomes. Three of the cognitive activities—memorization, selection, and integration—lead directly to specific study outcomes.\(^{64}\) Memorization leads to verbatim knowledge.\(^{65}\) Selection, which involves differentiating between and within sources of information, produces interpreted knowledge.\(^{66}\) Integration, which involves the study of new material in light of previously studied material, leads to constructed knowledge.\(^{67}\)

#### b. Verbatim And Interpreted Knowledge Leading To Recognizing And Producing Already Learned Information (Spotting Issues and Stating Rules)

Although both verbatim and interpreted knowledge are relevant to law school learning, the seminar does not focus on these skills. Verbatim knowledge is the most familiar to entering law students, based on their undergraduate experience, since it represents the knowledge acquired by learning and remembering the substantive material covered in law school classes, casebooks, and other course materials.\(^{68}\) As noted above, the teaching of substantive law is not the focus

---

\(^{62}\) See Wangerin, supra note 1, at 480 (citing Thomas & Rohwer, supra note 52, at 22).

\(^{63}\) See Thomas & Rohwer, supra note 52, at 22.

\(^{64}\) The fourth subactivity, cognitive monitoring, "occurs when students continually assess the need for and adequacy of different kinds of cognitive activities in different kinds of learning situations . . . . It is . . . thinking about thinking itself." Wangerin, supra note 1, at 484. In other words, it is considering whether the cognitive activity of memorization is the appropriate learning method for mastering the numerous exceptions to the hearsay rule and whether the chosen method is successful. Once again, this is an activity that can, in fact, only be done by the individual student.

\(^{65}\) Id.

\(^{66}\) Id.

\(^{67}\) Id.

\(^{68}\) Id. at 482, 484 (citing Thomas & Rohwer, supra note 52, at 22).
of the seminar. Since the seminar requires no rote memoriza-
tion, the students do not have to worry about acquiring the
informational product outcome of verbatim knowledge.
Rather, the seminar requires the students to go beyond the
simple "regurgitation" of verbatim knowledge and mandates
the application of that knowledge in a particular factual
context.

The seminar also does not focus on interpreted knowl-
edge, at least as that term is defined in the Autonomous
Learning Model: "Interpreted knowledge . . . is knowledge
that allows people to paraphrase information and state the
general point or rule of materials read." Professor
Wangerin notes that in "law school, students develop inter-
preted knowledge when they learn how to state the rule or
holding in a particular case, or when they try to describe in
somewhat different words the essence of a particular stat-
ute." Although the seminar forces students to identify the
relevant rule or holding of a particular case or statute, the
students are cautioned not to paraphrase the language of the
rule or holding, since "trying to describe in somewhat differ-
ent words the essence of a particular statute" frequently re-
sults in ascribing a somewhat different meaning to the
words. Perhaps more than in any other learning discipline,
precise language is crucial in the law. The holdings in nu-
merous cases have turned on the meaning of a particular
word or phrase.

69. Id. at 482 (citing Thomas & Rohwer, supra note 52, at 22).
70. Id.
71. Id.
72. See, e.g., United States v. Locke, 471 U.S. 84, 94-95 (1985) (holding that
a provision of the Federal Land Policy and Management Act, providing that
holders of certain mining claims to federal land must, "prior to December 31 of
each year," file certain documents or lose their claims, rendered several holders
of claims who had made their filings on December 31st "out of luck"); Griffin v.
requiring that the owner of a vessel, who failed to pay a discharged seaman the
balance of his unpaid wages within a specified time, "shall pay the seaman a
sum equal to two days pay for each and every day during which payment is
delayed beyond the respective periods," removed the courts' latitude in assess-
ing the wage penalty even though the result in Griffin was to reimburse the
seaman $302,000 for $412 in lost wages), and Holy Trinity Church v. U.S., 143
U.S. 457, 457, 472 (1892) (holding that by prohibiting the importation of any
"foreigner . . . to perform labor or service of any kind in the United States," Congress
did not intend to prevent an American church from contracting for the
services of an English minister).
As illustrated in Chart 1, verbatim and interpretive knowledge lead to the performance capabilities of recognizing and producing already learned information. This portion of the Autonomous Learning Model is roughly the equivalent of the I (Issue) and R (Rule-stating) portions of the IRAC method of taking law school exams. Recognizing already-learned information allows the student to spot the issues in a given fact pattern. Producing information that has been learned already allows the student to "regurgitate" the memorized black-letter law. These are crucial skills to acquire in law school, and thus, this portion of the Autonomous Learning Model is applicable to law school learning. This portion of the Model, however, does not reach the heart of the seminar, which is to teach the students to conduct legal analysis by applying the law they have produced to a set of facts.

c. Constructed Knowledge Using The Component Skills Of Legal Analysis And Leading To Generalizing

Constructed knowledge, which results in the performance capability of generalizing, is the most directly relevant portion of the Autonomous Learning Model to the seminar. It is also the portion of the Autonomous Learning Model that is the key to law school learning. Constructed knowledge involves "an understanding of the relationships that exist between seemingly unrelated bits of information." It is this skill that law students seem to have the most difficult time developing, "perhaps because their undergraduate educations placed little or no emphasis on this kind of knowledge." Students who wish to develop constructed knowledge "must constantly look for relationships between seemingly unrelated bits of information."

73. See Wangerin, supra note 1, at 480 (citing Thomas & Rohwer, supra note 52, at 22).
74. Id. at 482, 484 (citing Thomas & Rohwer, supra note 52, at 22).
75. Thomas & Rohwer, supra note 52, at 22. Thomas & Rohwer further define "constructed information" as consisting of at least the following subcategories: "(a) underlying presuppositions, intentions, and entailments; (b) within text connections, such as inferences and comparisons; and (c) connections of textual information with prior, extratext knowledge." Id.
76. Wangerin, supra note 1, at 482.
77. Id.
The seminar helps the students develop constructed knowledge by focusing on each of the component skills of legal analysis that Wangerin describes as rule application, synthesis, analogy, and reconciliation. These component skills are learned gradually in the seminar as the assignments increase in complexity. In the "Hog Problem," the students must use deductive reasoning to apply a simple statute to a set of facts, a process referred to by Wangerin as "rule application." In the "Big and Little Brother Problem," the students continue to develop the skill of rule application by applying a new set of facts to a single case. The "Shark Problem" helps to develop the component skill of synthesis by requiring the students to integrate the evaluation and interpretation of the common law tests or guidelines from the single case in subsequent cases. This synthesis process involves the use of inductive reasoning in merging the separate legal authorities. The students must then deductively apply their synthesis of the initial test or guidelines and their judicial gloss to a new set of facts.

The "Shark Problem Revisited" hones the last two component skills of analogy and reconciliation by adding additional cases to those relied on in the synthesis problem, including both cases favoring the plaintiff and cases favoring the defendant. This dichotomy forces the students to rely on the skill of analogy in attempting to show that the facts of the favorable cases are sufficiently similar to the facts of the hypothetical case, and that the principles of stare decisis require that the result in the present case be the same as the result in the prior cases. Conversely, the students must rely on the component skill of reconciliation, which Professor

78. Id. at 519-22.
79. See id. at 519 (citing Paul T. Wangerin, Skills Training in "Legal Analysis": A Systematic Approach, 40 U. MIAMI L. REV. 409, 429-464 (1986)).
80. See id.
81. See id. at 519-22; see also supra notes 29-31 and accompanying text (discussing the "Big and Little Brother Problem").
82. See Wangerin, supra note 1, at 519-22; see also supra notes 32-36 and accompanying text (discussing the "Shark Problem").
83. See Wangerin, supra note 1, at 512, 519-21.
84. Id. at 511-12, 519-21.
85. See supra note 38 and accompanying text (discussing the "Shark Problem Revisited"); see also Wangerin, supra note 1, at 519-22.
86. Wangerin, supra note 1, at 520. This also helps students deal with differing levels of authority, since they must analyze both controlling and persuasive decisions.
Wangerin describes as the "mirror image of analogy," to show that the facts of the unfavorable cases are sufficiently dissimilar to the facts of the hypothetical problem (a process commonly known as distinguishing) that the principles of stare decisis do not require that the court reach the prior result. Wangerin points out that users of the component skill of reconciliation may also "revert to the skill of synthesis by inductively creating new legal rules" that are consistent with the previous cases but produce the desired result in the present problem. These reformulated rules can then be deductively applied to the facts of the problem. In the second part of the "Shark Problem Revisited," the students represent the opposing side and must reverse the roles of analogy and reconciliation.

As students develop the component skills of legal analysis in the seminar, they also acquire the "performance capability" of generalizing. Generalizing "requires students to apply learned information to wholly new factual situations." This is the learning skill at the heart of the seminar. It is also clearly the most important skill for a law student to acquire. As Professor Wangerin notes: "Students in virtually all law school courses will succeed only if they are capable of generalizing about the information products already learned. This is so because law school exams rarely ask students simply to recognize or recall information learned." Like law school exams, the seminar assignments require students to do far more than simply recognizing or recalling the information learned. Rather, the students have an opportunity to hone their analytical abilities and master the critical skill of generalizing from constructed knowledge.

V CONCLUSION

A combination of "Sesame Street Skills," Metacognition, and The Autonomous Learning Model can be used in a remedial seminar to benefit students who have experienced difficulty with legal analysis and exam-taking. If the same teaching methods were incorporated into the traditional first-year
legal analysis, research, and writing courses, a similar benefit might accrue earlier in each student’s law school career. During the 1992-94 academic years, Santa Clara University School of Law is experimenting with a “Coordinated Curriculum” for one-third of the first-year students, which may include some of the teaching approaches that have been implemented in the seminar. It is hoped that this experiment will achieve Professor Wangerin’s goals of increasing the effectiveness of teaching and learning for all of our first-year law students, and serve as a model program for other law schools.