“I DON’T KNOW WHY. I JUST MAKE COMPARISONS.”:
CONCEPT-BASED INSTRUCTION TO PROMOTE
DEVELOPMENT OF A SECOND LEGAL LANGUACULTURE
IN INTERNATIONAL LL.M. STUDENTS

A Dissertation in
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by
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Abstract

Although analogical reasoning is the heart of legal reasoning in the U.S. common law system, and “dominates the first year of law school” (Sunstein, 1993, p. 741), law students rarely receive explicit instruction in analogical reasoning and when they do, that instruction is often in the form of “general directives” (Hartung & George, 2009). For foreign-trained lawyers in LL.M. programs, this presents a multi-faceted tension. Not only are these students overwhelmingly learners of English as an additional language, but these students enter U.S. law schools with an already internalized legal languaculture (Agar, 1994) which either does not rely on analogical reasoning or uses analogical reasoning differently than the U.S. common law system does. Thus, these students are attempting to participate in a second legal languaculture while working to improve their English generally. Crucially, the positioning of these students in the law schools is almost exclusively focused on their status as language learners, and does not acknowledge learning needs related to their already internalized legal languaculture.

Thus, the primary purpose of this study was to explicitly teach analogical reasoning, identified as critical for participating in U.S. common law analysis. In order to achieve this, a concept-based instruction (CBI) grounded in principles of Lev Vygotsky’s sociocultural theory (V-SCT) of mind was developed and implemented in a language-and-law-skills course for pre-LL.M. students studying criminal law. Thus, the study examines in detail students’ development in Case Reading in Praxis, Analogical Reasoning in Common Law Analysis, and how students engaged with the CBI curriculum in learning to read and write as common law analyzers. The study provides insight into the process of learning a second legal languaculture, and how appropriately-attuned instruction can provide powerful mediation that aids student development.
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Chapter 1 Introduction

“I don’t know. I just make comparisons.” – Yue, Week 4

1.1 Introduction

When asked to explain the basis for the analogies written in analysis of a hypothetical legal problem, Yue, an international student enrolled in a pre-Masters of Law (LL.M.) program, replied “I don’t know. I just make comparisons” (Week 4, class 2). What is problematic about this response was not only that the analogies she had produced in the analysis were not legally sound analogies, as would be accepted by a legal reader in the United States, but also that Yue could not articulate any principles based on which she chose to make those analogies. Yue’s understanding of why she had written her analysis as she had is inadequate because, at this point in her pre-LL.M. training, she was not using analogical reasoning as a legal concept to frame her analysis. This study will explore the necessity that an international law student develop the ability to employ analogical reasoning as a legal concept in their common-law analysis. In order to do so, the study relies on tenets of Lev Vygotsky’s theory of psychology to explain the methodology used and development of reading and reasoning for common law purposes of Yue and her fellow students.

1.2 Introduction to Vygotskian Sociocultural Theory

Lev Vygotsky’s theory of psychology, referred to as sociocultural theory in instructed second language acquisition literature, forms the foundation for the instructional program employed in this study and the concepts relied on in analyzing and explaining the process of learning to participate in a new legal system after already having been trained in a different legal
system. As this theory understands higher forms of human consciousness through a different ontology and epistemology from many mainstream theories of psychology the basic tenets of the theory will be explored in this chapter in order to illuminate the decision to apply Vygotskian sociocultural theory (V-SCT) to the complex task of studying law in a second legal *languaculture*. While the important theoretical concepts – the genetic method; the mediated mind; material and psychological tools; social, inner, and private speech; material mediation; and social mediation – are introduced in this chapter, more specific theoretical information related to the development and implementation of the curriculum employed in this study will be discussed in the third chapter.

### 1.3 The Genetic Method

Researchers working within V-SCT also hold as a basic tenet of the theory that in order to understand a phenomenon, one must understand it *genetically*, through its history of formation. Vygotsky (1978) writes:

*To study something historically means to study it in the process of change;* that is the dialectical method’s basic demand. To encompass in research the process of a given things’ development in all its phases and changes--from birth to death--fundamentally means to discover its nature, its essence, for ‘it is only in movement that a body shows what it is. (p. 65)

In order to fully and accurately understand the nature of complex phenomena, for example, the study of the U.S. legal system in a second language, it is necessary to study the phenomenon as it develops rather than observing it solely in its mature, fully developed form. Studying fully developed phenomena can produce interesting, but ultimately incomplete understanding. Thus, the goal of this method is to explain psychological processes by provoking their development through introduction of auxiliary stimuli, or mediation (Lantolf & Poehner, 2014, p. 82). For this
study, the genetic method entailed studying the process of internationally-trained lawyers studying U.S. common law while simultaneously promoting their learning of the legal system. The genetic method is Vygotsky’s methodological contribution to both psychology and to the present study. The theoretical concepts which comprise his theory of mind are discussed next.

1.4 The Mediated Mind

At the most foundational level, researchers working in V-SCT understand the human mind to be mediated. That is, humans are understood not to act on the world directly, but instead to create and use tools (psychological or material) to “mediate and regulate our relationships with others and with ourselves and thus change the nature of these relationships” (Lantolf, 2000, p. 1). Vygotsky represented mediated activity as depicted in Figure 1.1, where the dashed line between the ‘stimulus’ and a human’s ‘response’ indicates that the relationship is indirect and is mediated through some ‘auxiliary stimulus’ (Vygotsky 1978, p. 40). That is, fully developed humans do not perceive and act on the world directly, but rather do so indirectly through the use of tools, or auxiliary stimuli. Auxiliary stimuli, more conventionally referred to as tools or mediating artifacts in V-SCT literature, are “appropriated through participation in social practices” and “enable us to intentionally control, or regulate our mental functioning” (Lantolf & Poehner, 2014, p. 8). For example, when interrupted by a phone call while planting tomatoes, one might place a shovel in the ground in order to remember where to return to planting (Lantolf & Poehner, 2014, p. 8) or a novice teacher might employ using a detailed lesson plan in leading her class through a lesson in order to regulate her own teaching activity (Johnson & Golombek, 2003).

Mediated Activity (Adapted from Vygotsky, 1978)
The tools humans employ in activity may be material, referred to as tools by Vygotsky, or psychological, referred to as signs by Vygotsky. Vygotsky understood both types of tool to be “subsumed under the more general concept of indirect (mediated) activity” (Vygotsky, 1978, p. 54), but these material and psychological tools are used differently by humans and have different psychological status.

1.4.1 Material tools

Material tools (e.g., silverware, hoes, pencils) are cultural objects humans employ in activity on the environment. These tools are cultural in that they were created by humans for a particular purpose (e.g., spreading butter with a butter knife) and passed on to future generations. For example, the utensils conventionally used in cultures vary throughout the world; these tools exist in the culture and need not be recreated by each generation. Importantly, material tools can be utilized for novel, unintended purposes (e.g., using a butter knife as a screwdriver) (Lantolf & Poehner, 2014, p. 8). Humans, then, employ material tools in order to act on the physical world, changing the environment they inhabit.

1.4.2 Psychological tools

Just as cultures pass down material tools to subsequent generations and individuals in a culture must learn how to conventionally use material tools, so, too, are psychological tools
culture-specific, passed through generations, and necessary for individuals to internalize in order to function as a member of that culture. These psychological tools, are understood to be “those symbolic systems specific for a given culture that when internalized by individualized learners become their inner cognitive tools” (Kozulin, 2005, p. 3), which represent powerful means of mediation for humans. Examples of these tools, which can be used to regulate our physical or mental behavior, include music, maps, numbers, and art. According to V-SCT, however, the “most pervasive and powerful of human symbolic creations is language,” so much so that it is language “as the quintessential human signification system, that Vygotsky situated at the heart of his psychological theory” (Lantolf & Poehner, 2014, p. 9). As such, language, and specifically the development of word meaning, inhabited a central role in Vygotsky’s theory of psychology.

Importantly, from a V-SCT perspective, humans are understood to appropriate psychological tools through social interactions, and, therefore, the genesis of psychological development is understood to be located outside the individual. While a human being must be biologically endowed with a human brain, according to V-SCT, this alone is insufficient for the development of higher mental functions. In explaining that all higher functions originate as social relations, Vygotsky wrote: “Every function in the child’s cultural development appears twice: First on the social level, and later, on the individual level; first, between people (interpsychological), and then inside the child (intrapsychological)” (Vygotsky, 1978, p. 57, emphasis in original). Through interactions in the social world with other members of our culture, humans learn to use culturally-specified tools, such as language. Importantly, though, SCT views the relationship between the intermental and intramental plane as dialectic. In other words, “not only does our mental activity determine the nature of our social world, but this world of human relationships and artifacts also determines to a large extent how we regulate our mental
processes” (Lantolf, 2000, p. 79). That is, contra to material tools, which are used to change the
physical world, psychological tools are used to regulate the mental activity and behavior of the
individual and others.

Importantly, the appropriation of psychological tools, and therefore psychological
development, is not understood to be a smooth, linear process. As Kozulin explains: “Vygotsky
perceived psychological development as a dynamic process full of upheavals, sudden changes,
and reversals. This process, however, ultimately leads to the formation of the cultural, higher
mental functions” (2005, p. 106). This understanding of development has crucial implications
when applied to the development of conceptual knowledge in schooling activity, as will be
discussed later in this chapter.

1.5 Types of Speech: Their Forms and Regulatory Functions

Vygotsky understood language to be humans’ most powerful psychological tool and
specifically was concerned with ontogenetic development of language as a psychological tool.
As such, Vygotsky researched and categorized the various functions and structural appearances
in children’s language development. Although Vygotsky researched and wrote about children,
this should not be construed to mean that his theoretical and methodological insights are relevant
only for research involving children and inapplicable for research and educational activity
involving adults. Rather, it should be remembered that Vygotsky’s method was genetic and
sought to understand psychological phenomena in their entirety; this method, then, required
provoking and describing phenomena in development and not merely in their fully formed state.
Thus, while Vygotsky discusses children’s development of language in terms of social speech,
egocentric speech, and inner speech, it should not be interpreted that once a child has developed
control over language such that it has become inner speech in both function and form that
development has ended. Rather, as will be seen in the discussion of private speech, Vygotsky’s insight into the powerful regulatory function of speech is useful in the context of adults as well.

1.5.1 Social speech

Social speech is speech that is intended for others; it is employed to communicate with and regulate interlocutors and is the first form of speech humans develop. As discussed above, the idea that the human mind is mediated forms the core of Vygotsky’s theory. Critical to his theory of the mediated mind is the premise that speech first exists on the social plane, intended to regulate others (e.g., an infant pointing and verbalizing ‘wawa’ to indicate to the mother she wants water), and later develops into an internal, psychological speech aimed at regulating one’s own mental and physical activity. That is, in contrast to other theories of child language development (e.g., Piaget), the child does not develop from egocentric to social speech; rather, speech is first social and passes through an egocentric phase before it, to use Vygotsky’s phrase, “goes underground” (Vygotsky, 1986, p. 33) and turns into inner speech.

1.5.2 Egocentric speech

In ontogenetic development, Vygotsky described egocentric speech as a phase in which children employ what, structurally, takes the form of social speech but functionally serves “as a means for regulating their own mental functioning” (Lantolf & Thorne, 2006, p. 72). Vygotsky’s insight into egocentric speech, then, crucial for understanding private speech, was that while egocentric speech has the appearance of social speech, the function it serves is psychological, regulating the self rather than a social other. For the purposes of this study, understanding that 1) egocentric speech is social speech in the process of “going underground” and 2) it serves a psychological function while still retaining formal appearances of social speech is sufficient in order to understand Vygotsky’s developmental historical method and, ontogenetically, later
externalizations of private speech. Before private speech emerges, however, an individual must develop inner speech.

1.5.3 Inner speech

*Inner speech*, for Vygotsky, is “speech for oneself” (Vygotsky, 1986, p. 221) and represents the ability to use language as a psychological tool internally. Crucially, inner speech differs in form and function from social speech. Inner speech “has no form—it is pure meaning” (Lantolf & Thorne, 2006, p. 75) and is an “intrapersonal communication” involving “I” and “me” rather than “I” and “you”. Functionally, inner speech “is the means proposed by Vygotsky (1987) through which humans regulate their mental life, paralleling how humans regulate their social life” (Lantolf & Poehner, 2014, p. 45). Inner speech, then, is how culturally-formed human beings regulate their internal activity and their behavior.

1.5.4 Private speech

Once “underground”, inner speech does not always remain so, and is occasionally re-externalized as private speech when an individual is faced with a complex task. Vygotsky himself did not use the term private speech, but it has been taken up as a useful concept in the context of adult speakers (see, e.g., McCafferty, 1992, 1994). As this study is concerned with adult second language (L2) users of English learning a second legal culture, private speech is useful because understanding the regulatory power of language allows researchers to consider language not only in terms of the extent to which it is or is not target-like, but why, in the course of development, a student may employ language in the manner in which she did. That is, understanding private speech and the regulatory power of language affords a researcher and a teacher a developmental lens through which to understand student utterances, whether in the L1 or L2, and subsequently offer attuned instruction or mediation.
In some aspects, private speech resembles egocentric speech. Whereas egocentric speech represents a phase in the child’s ontogenetic development of the ability to employ language in regulating the child’s own mental activity, private speech is understood to be “externalized speech deployed by adults to regulate their own mental (and possibly physical) behavior” (Lantolf & Thorne, 2006, p. 75). That is, egocentric speech and private speech can be distinguished as egocentric speech is social speech on its way to becoming inner speech while private speech is inner speech externalized by a speaker who ontogenetically has already developed inner speech.

Private speech can, at times, be recognized by its formal appearance. Often private speech is characterized by being quieter in volume than private speech and frequently is not syntactic in nature. Rather private speech is often reduced, externalizing only what Vygotsky referred to as the psychological predicate; it has frequently been discussed, then as being subvocal or quieter than social speech and not as syntactic as social speech. Vygotsky’s reference to the psychological predicate relies on the idea that social speech is organized by topic-comment and the distinction between ‘given information’ and ‘new information’. The psychological predicate, then, refers to ‘new information,’ to be contrasted with a grammatical subject or even psychological subject, understood to be ‘given information.’

While private speech can be subvocal or reduced in volume, and take a psychological predicate rather than syntactic form, it may also employ language in its social speech form. As Frawley (1997) pointed out, what is important about private speech is the regulatory function it serves. Private speech is employed by adults when confronted by a difficult task that requires the externalization of inner speech in order to regain control over thinking or behavior. For example, when learning to drive a car with a manual transmission, a speaker may vocalize language that
resembles social speech, “OK, now the clutch down, shift into second, gas down, clutch up,” but the function of such speech would be to talk herself through the activity of successfully shifting into second gear rather than for communication with another person who may or may not be present. The function of private speech, then, is not to “merely encode new information but serve[s] to maintain the individual’s focus on what is being done” (Lantolf & Thorne, 2006, p. 76).

Private speech may also take the form of *private writing*, which serves the same externalizing and mediating function as private speech. Like private speech, private writing, “allows the self to act as a temporary ‘other’ … what appears in private writing is ‘cognitive not communicative’ reflecting the writer’s mental processes not the writer’s concern for a future reader (Verity, 2000, p. 183). As the writer is not concerned with communicating with a future writer, private writing is also frequently reduced in form. Private writing represents “the written externalization of portions of one’s inner dialogue with the self” (DiCamilla & Lantolf, 1994, p. 351). The portions that are externalized, as will be discussed below, are done so in an attempt to regulate oneself in a cognitively difficult task.

### 1.5.5 Private writing

Like private speech, a consideration of private writing requires an understanding that language can serve not only a social but a self-regulatory function. For educators, particularly educators of L2 students, this is not an insignificant point. As DiCamilla and Lantolf (1994) explain, what may appear to be sloppy or poor *social writing* may actually be an indication of a student employing private writing as a means of externalizing the activity and their thinking for themselves in order to gain control over it: “when viewed from a cognitive rather than a communicative perspective, linguistic patterns in private writing which may otherwise seem odd,
if not, ungrammatical, help to explain the mental operations of the writers involved in the task of writing” (DiCamilla & Lantolf, 1994, p. 351). DiCamilla and Lantolf discuss specifically how irregular use of referents and modals may in fact be indicative of the relative degree of attention a writer directs to the entity referred to as she attempts to gain control over her own internal activity.

Understanding the regulatory power of language, both in oral and written form, from a V-SCT perspective has important implications for education. Adult humans, when confronted with complex tasks, that they are unable to handle completely internally, may externalize their thinking in some way, orally or in written form, in order to regulate thinking or behavior. In this context of developmental education, which, from a V-SCT perspective should be organized around systematic abstract knowledge referred to as scientific concepts, learners may exhibit private speech or private learning when confronted with a complex task.

1.6 Conceptual Knowledge: Scientific and Spontaneous Concepts

Related to Vygotsky’s understanding of the mediated mind and psychological tools are his writings on the development of conceptual knowledge. Again, concepts are understood to be cultural as “[h]uman cultures create categories for organizing events and objects in the world” (Lantolf & Poehner, 2014, p. 9). These categories are passed to subsequent speakers and generations through linguistic signs, or language. Importantly, Vygotsky understood these concepts as largely divided into two kinds – everyday concepts and scientific concepts. Vygotsky’s distinction between everyday and scientific concepts is directly related to his view of educational activity as a very particular type of development. Everyday concepts originate from concrete, lived experiences; are inductively formed and empirical; require a long period of development; and their internalization results in unsystematic, and often incomplete knowledge.
Scientific concepts are developed through formal education, deductively formulated, systematic, abstract, and generalizable.

One develops everyday concepts through experience in the everyday world; this creates an incredibly sense-laden and powerful, if incomplete and frequently erroneous, way to understand the world. Everyday concepts are loosely organized meanings resulting from the activity of daily life. They are empirical, often based on immediately observable properties of an object. They require extensive practice experience to develop. Spontaneous concepts are functional but erroneous (e.g., whales are fish) or incomplete (e.g., flowers grow because it rains).

Conversely, scientific concepts are abstract, systematic, generalizable, and theoretical; scientific concepts reveal the essential quality of an entity or process (Lantolf & Poehner, 2014, p. 61). Unlike everyday concepts, scientific concepts are available to conscious reflection and should comprise the basic unit of instruction in properly organized education.

Everyday and scientific concepts form a dialectic unity in that humans rely on both and the weakness of one type of concept is the strength of the other. From a V-SCT perspective, education should be organized around scientific concepts. For example, in schooling activity, students learn that the earth rotates around the sun (scientific concept), rather than the sun rising and setting as perception of the everyday world would lead us to believe (everyday concept). Everyday concepts are open to spontaneous usage, and application to various concrete solutions; they are developed with the richness of empirical content and saturated with personal experience, but this empirical development results in their being tied to concrete situations, and not sufficiently abstract to be flexible and not directly accessible to consciousness (Vygotsky, 1987, p. 218). Scientific concepts are inherently/by definition more abstract, therefore open to conscious awareness that allows for intentional and volitional use, greater flexibility and control.
to the individual. They lack, however the richness of personal experience of everyday concepts; the internalization of scientific concepts process must be linked to practical, goal-oriented activity. Vygotsky explains the interdependence of everyday and scientific concepts:

In working its slow way upward, an everyday concept clears a path for the scientific concept in its downward development. It creates a series of structures necessary for the evolution of a concept’s more primitive elementary aspects, which gives it body and vitality. Scientific concepts in turn supply structures for the upward development of the child’s spontaneous concepts toward consciousness and deliberate use. (Vygotsky, 1962, p. 109, as cited in Kozulin, 2005, p. 108)

Development of spontaneous and scientific concepts, then, is interdependent and the purpose of their development is to use concepts consciously and deliberately.

The preceding discussion has explained the key concepts of Vygotsky’s theory of psychology necessary in order to understand developmental education in the V-SCT tradition and the theoretical orientation of the present study. Education inhabits an important space in V-SCT; Vygotsky considered schooling a special kind of human activity, one that is a leading activity in the development of school-aged children. The remainder of the chapter discusses how V-SCT has been taken up in instructed second language research, with specific emphasis on material mediation and social mediation, and what these crucial aspects of developmental education afford teacher-researchers in the V-SCT tradition.

1.7 V-SCT Developmental Education

As mentioned previously, from a V-SCT, education should be organized by scientific concepts and represent the most accurate, systematic knowledge available about an entity or
process. When education is organized around scientific concepts, development comprises the ability to employ abstract conceptual knowledge in concrete activity, or, to use Vygotsky’s phrase, that the conceptual knowledge has “ascended to the concrete”. Important to Vygotsky’s insight into education is that he discussed educational activity using the Russian word obuchenie, “teaching-learning” (Cole, 2009). Unlike many contemporary (Western) approaches to education, then, V-SCT understands teaching and learning to be dialectically interconnected rather than separate activities.

In instructed second language development, in the past decade, Vygotsky’s insights for developmental-education have primarily been taken up in one of two veins of research through dynamic assessment (following Poehner, 2005) and concept-based instruction (following Negueruela, 2003). It is not necessary to choose between the two as an either-or approach to research and teaching, but rather it may be useful to understand the two strands of educational research, as do Lantolf & Poehner (2014), as illuminating social mediation and material mediation to various degrees. That is, dynamic assessment and concept-based instruction differ in focus in the L2 teaching/learning context but they do not represent different understandings of instructed second language development. For clarity, this discussion of concept-based instruction and dynamic assessment focus on the aspects of material mediation and social mediation respectively that each illuminate. Indeed, the curriculum developed for the present study draws from both the DA and CBI literature for the important insights each provides for thinking about properly organized instruction.

1.7.1 Concept-based instruction and material mediation in developmental education

While Vygotsky originally proposed that scientific concepts should be the basic unit of instruction, it was Piotr Gal’perin, who elaborated on Vygotsky’s ideas and more thoroughly
developed a framework for instruction. Gal’perin’s framework, elaborated Vygotsky’s views on education into a ‘step-wise procedure’ of developmental education. Gal’perin’s framework was originally translated into English as Systemic-theoretical Instruction (STI), but is alternately labeled Concept-based Instruction (CBI). Because CBI is understood to less rigidly follow Gal’perin’s step-wise procedure, relying instead on the basic tenets of STI as guiding principles to be implemented in specific contexts as contextually appropriate, I refer to this project as an instantiation of CBI rather than STI.

At its core, a CBI approach requires that instruction be organized around the teaching of scientific concepts. Teachers explain concepts to students, often through the aid of visual/material didactic materials, and guide the students in concrete-practical activity in order for the students to appropriate the concept such that they can employ the concept in their own practical-concrete activity. Critical to a CBI approach to education is that the teachers’ explanation systematically presents students conceptual knowledge prior to guiding them through purposeful activities that require use of the conceptual knowledge in practical activity. Internalization is understood to be achieved when students have developed the ability to employ the concept as a psychological tool in activity (Lantolf, 2011). The key processes of materialization/visualization and verbalization of the conceptual knowledge are vital for the transformation from (teacher) explanation to (student) internalization to occur (Lantolf, 2011, p. 308).

These processes, explanation, materialization, verbalization, interrelate to make an important point: the quality of instruction matters. In fact, CBI represents an important development in the field of instructed second language acquisition because it “makes a critical proposal for L2 instructors; the quality of explanations provided to L2 learners – in both
textbooks and classroom explanations – has a central impact on L2 development, which is understood to be a conceptual process whereby meaning is constructed around conceptual categories” (Williams, Abraham, & Negueruela, 2013, p. 365).

In a traditional CBI curriculum, the procedure from explanation to internalization includes five steps:

(1) orienting stage: construction of orienting basis of the action;
(2) material(ized) stage: mastering the action using material or materialized objects that represent the concept;
(3) stage of overt speech: mastering the action at the level of communicative speech;
(4) stage of covert speech: mastering the action at the level of speaking to oneself;
(5) mental stage: transferring the action to the mental level (Haenen, 1996).

The first two stages, orienting and materialized, involve the materialization/visualization of the concept under study, frequently through one or more Schema of a Complete Orienting Basis of an Action (SCOBA), discussed below. The remaining stages in a traditional CBI study correspond to the verbalization component of CBI, first in communication with another (e.g., the teacher), then the self audibly, and finally the self internally.

Specific details and chronology of the instructional program developed for this study will be outlined in Chapter 3, but I explain further what is meant by materialization in a CBI approach below. Verbalization, either employing the concept in communication with the other or the self in problem-solving activity is understood to be a necessary component of CBI. In this study, however, I frame the verbalization stages in terms of social mediation, a concept well understood through principles of dynamic assessment, and the zone of proximal development, discussed in the next section.
Researchers in instructed second-language acquisition have developed CBI programs primarily in the teaching of grammatical concepts and investigated learner development in response to those programs. For example, Negueruela (2003) demonstrated that CBI fosters L2 development as learners reach enhanced levels of awareness and control over their L2 Spanish and internalized sophisticated understandings of grammatical meanings. Yáñez-Pietro (2008) studied students’ development in verbal aspect in working with learners of Spanish reading Spanish literature. Additionally, both Lee (2012) and Lai (2012) demonstrated that using concept-based instruction in teaching specific grammatical concepts to foreign language students allowed students to outperform students who were given only “traditional” instruction. Lee (2012) found that using visual images in the form of SCOBAs and verbal instruction was an effective pedagogical approach in teaching English phrasal verbs. Lai (2012) investigated the temporal system of Chinese and found that a beginning-level Experimental class which received instruction in the Chinese temporal system based on metaphoric mappings informed by cognitive linguistics were able to perform as well in regard to aspect as an intermediate-level control group that received tense and aspect instruction in the traditional pedagogical sequence using traditional explanations. Importantly, in Lai’s study, the materials that were developed to explain the Chinese temporal system were specifically designed for L1 English participants. That they were indeed more effective for L1 English participants than L1 Korean students also in the study indicates SCOBAs’ great potential and indicates that considering students’ histories when approaching language instruction is important. What a SCOA is, how one is developed, and examples of studies in which SCOBAs were utilized are discussed in the next section.
1.7.1.1 Material mediation: Schema for the Orienting Basis of Action

The quality of instruction regarding the concept is essential in a CBI approach, and is typically carried out through a verbal-symbolic dimension and a concrete-material dimension (Lantolf, 2011). A verbal explanation of the concept and how it is used to guide one’s performance in practical activity constitutes the verbal-symbolic dimension. The concrete-material dimension is presented through a Schema for the Orienting Basis of Action (SCOBA), typically graphic representations of the concept to be internalized. SCOBAs are not simplistic or incomplete drawings/representations of the concept. Rather, SCOBAs should “systematize relevant knowledge in a holistic way” in order to “avoid rote memorization of purely verbal formulations of the knowledge” (Lantolf, 2011, p. 308). Purely verbal explanations frequently lead to incomplete learning. SCOBAs, on the other hand, represent conceptual knowledge that can be manipulated and employed in practical activity, even in the absence of the instructor.

The ability to deploy SCOBAs in practical activity represents a critical feature of their function in a CBI approach. As Lantolf & Thorne (2006) note, SCOBAs as materialization of complex, abstract knowledge provide “a way of assisting learners in making informed decisions to deploy this knowledge appropriately” (p. 310). SCOBAs, then, are not merely graphic representations of abstract knowledge, but developed specifically to be utilized in pedagogically useful activities. For this reason, Negueruela (2003) notes that SCOBAs can appear complex almost to the point of incomprehensibility to an observer outside of the classroom. It is inside the classroom, however, in learning activity that SCOBAs are readily understood and appropriated.

In order for the SCOBAs developed for use to be fully appreciated, I describe briefly here SCOBAs developed for three CBI studies. As will become clear, the SCOBAs described in this section were developed by the teacher-researchers in those studies based on a foundation of
research representing the best available knowledge of the concept and the SCOBAs presented the relevant concept systematically. Because the concepts in the studies discussed in this section most closely align with the concepts at hand in the present study, I have selected three studies where the concept of instruction was not a grammatical in nature. Most of the early L2 CBI studies focused on grammatical concept. The interested reader can consult studies where the work of other researchers that have found CBI to be beneficial for learners of English (e.g., Infante, 2016; Kim, 2013; Lee, 2012), French (e.g., Buescher, 2015; Van Compernolle, 2011), Spanish (e.g., Negueruela, 2003; Yáñez-Pietro, 2008), and Chinese (e.g., Lai, 2012; Zhang, 2014). This project joins Hartig (2014) in utilizing CBI in the realm of legal literacy.

In the past several years, however, studies have begun to demonstrate that CBI as an instructional program can be successful with L2 learners even when studying non-grammatical concepts (Kim, 2013 and Buescher, 2015) or when used with L2 learners in a content classroom (Hartig and the present study). As Hartig (2014), like the present study, utilized CBI in the instruction of international LL.M. students, that study will be discussed in the context of legal education in the next chapter. While each of the studies discussed in this section also contained other innovative aspects, I focus here on the SCOBAs used in those studies in order to point out that 1) the development of SCOBAs is grounded in research that explains the concept in focus and 2) the implementation of SCOBAs in CBI requires that students use SCOBAs in activity in order to develop systematic understanding of the concept.

Van Compernolle (2011) taught thought CBI concepts of L2 French pragmatics notoriously difficult for learners of French. Specifically, the CBI intervention presented to learners sociopragmatic concepts related to the choice between French second-person pronouns (tu/vous), first-person plural pronouns (on/nous), and negation (ne... pas/ ... pas). These sociopragmatic
concepts were selected because students largely receive “rule of thumb” instruction that leads to incomplete understanding of how to use the forms in communicative activity. Thus, without immersion experience, learners typically do not develop understanding of variation related to these forms. The goal of the study, then, was to “map conceptual meanings onto forms” (van Compernolle, 2012, p. 32).

Five SCOBAs were developed based on Silverstein’s (2003) orders of indexicality. This knowledge about indexicality was presented to learners in the form of pictures. As I cannot reproduce the SCOBAs here, I describe one SCOBA so that the reader might understand 1) how a complex sociopragmatic concept can be materialized for use in learning activity and 2) how instructors can design learning activities in which learners engage with SCOBAs. The SCOBAs were presented to learners as sets of “concept cards” (van Compernolle, 2012, p. 65) which contained pictures intended to illustrate the conceptual meanings under study. For example, the first SCOBA taught the concept of self-presentation by juxtaposing two sets of pictures of two individuals intended to teach learners about “potential indexical claims” (van Compernolle, 2011) invoked in selecting one form over another. The first set, labeled “T-shirt and jeans,” comprised a relatively young-looking man and woman, each wearing a T-shirt and jeans, and was intended to “suggest such potential meanings as youthfulness, informality, coolness” (van Compernolle, 2012, p. 68). The second set depicted an older-looking man and woman, each wearing a suit and tie, and was intended to suggest “conservatism, professionalism, formality” (van Compernolle, 2012, p. 68). The other SCOBAs similarly “translated” the concepts under study “into pedagogically functional categories” (Lantolf & Poehner, 2014, p. 84) and represented these categories through pictures on concept cards.
In a novel approach to L2 instruction, Kim (2013) deployed CBI in a program she designed to teach L2 English speakers to identify and interpret sarcasm in English, an aspect of language learning which does not receive much pedagogical or theoretical attention but nevertheless, as documented in Kim’s study, can be a source of frustration for learners. In all, Kim designed eight SCOBAs to assist learners in detecting sarcasm in English – three SCOBAs which illustrated abstract features of sarcasm and five which depicted bodily movements and facial expressions associated with sarcasm. For example, the third SCOBA featured a series of faces and glossed for students the features of facial expression that indexed sarcasm (Kim, 2013, p. 56). The expressions on that SCOBA included: “downward pull & tightening of the jaw; fake smile, not involving the eyes; deadpan; sneer, raised lip corner(s)/upper lip curl; contempt, unilateral or bilateral corner tighten and raise/upper lip curl” (Kim, 2013, p. 56). The teacher-researcher additionally discussed sample video excerpts with students so that they could practice detecting sarcasm as listeners. Students then received pictorial representation of the concepts via the SCOBAs, verbal explanation, and dynamic interaction with the SCOBAs through the video clips prior to their being asked to engage in dialogic activity with the concept under study.

A third innovative L2 CBI study which involved a concept other than a grammatical one is Buescher’s (2015) investigation of learner development of L2 French narrative literacy. To teach narrative literacy in L2 French, Buescher developed SCOBAs and tasks related to three constituent literacy concepts – foundation (based on Cole, 1996), organization (based on Hudson, 2007; Mandler, 1987; Graesser, Goldung, & Long, 1996), genre (based on Byrnes et al, 2010; Halliday & Hasan, 1989). The SCOBA related to the second concept, organization, was both material and materialized. Buescher adapted Hudson’s (2007) use of Mandler’s story grammar, which is “a framework for understanding how hierarchical relationships are structured
in narratives” (Buescher, 2015, p. 47). Story grammar explicates the constituent parts and hierarchical relationships in a narrative. Buescher provided the participants with a materialized representation of the structure of a story, where constituent parts were represented by boxes of varying size and color. The materialized SCOBA “built down” in that the “Story” block was largest and at the top. The components of a story, “setting” and at least one “episode” sat one level below “story” to indicate a story is comprised of a setting and at least one episode. In turn an episode is comprised of a “beginning,” “development,” and an “ending,” so directly beneath “episode” were these boxes. In the material form of the SCOBA, Buescher provided participants with Cuisenaire rods corresponding to the story elements (setting, episode, development, etc.) so that students could physically manipulate the rods when engaged in the activity of reading French narratives.

An additional, and innovative, aspect of the Buescher (2015) study will be discussed because of its influence on the present study. Buescher additionally developed a division-of-labor pedagogy (DOLP), based on the work of Cole (1995), in which she parceled out responsibility for various aspects of accurately interpreting a narrative to different participants. Buescher synthesized other research in order to develop this innovative approach, including Gal’perin’s notions of communicated thinking and dialogic thinking (Haenen, 2001), the notion of collectives and their ability to transcend the capabilities of the individual (Petrovsky, 1985), and research on collaborative verbalizations in L2 learning (Swain, 2000).

Based on V-SCT principles, over time students were to assume increased responsibility for the reading task as they mastered each role. In the DOLP, Buescher developed ‘roles’ corresponding to each concept, dividing each concept into four roles. Initially, a learner would be responsible for a single role, and the roles would be rotated through the learners until each
student had read in all four roles. The DOLP additionally rotated through each of the concepts, so that each of the roles were completed for one concept prior to addressing subsequent concepts. As students “were ready” for additional responsibility in the reading activity, they were distributed two roles in a concept at a time, followed by all four roles for one concept, and finally all four roles for all three concepts.

In discussing briefly these three previous L2 CBI studies, I hope to make several things clear. SCOBAs are developed, typically by teacher-researchers, by relying on a foundation of the best available, systematic knowledge of the content being studied. This knowledge is not adopted wholesale, however. Rather, the teacher-researchers translated that knowledge into pedagogically useful categories. SCOBAs representing scientific concepts, then, “are to be accurate and complete representations of knowledge”, but they must also represent this knowledge in a way that assists “learners in making informed decisions to deploy this knowledge appropriately” (Lantolf & Thorne, 2006, p. 310). Second, although most of the SCOBAs in the studies discussed here contain some language, it has been found that SCOBAs are “more effective when verbal language is kept to a minimum” (Lantolf & Poehner, 2014, p. 64). Third, SCOBAs should be developed that learners as they “deploy the concept in a broad array of concrete goal-directed activities” (Lantolf & Poehner, 2014, p. 65). Finally, as each of these studies demonstrates, it is possible to successfully approach L2 CBI through concepts beyond a fixed set of grammatical concepts. Each of these aspects of the development and use of SCOBAs affected the design of the SCOBAs used in this study.

1.7.2 Dynamic assessment: Social mediation in developmental education

Dynamic assessment (DA) represents a second area of teaching-research developed from Vygotsky’s theory of psychology. DA is grounded in Vygotsky’s concept of the Zone of
Proximal Development (ZPD), discussed below, and attempts to both understand and guide learner development. Work in DA emphasizes “the dialectic integration of assessment with teaching through teacher-learner interactions during which mediation is negotiated for learners to optimally contribute to activities and for mediators to gain insights into learner abilities necessary to guide their efforts to move development forward” (Lantolf & Poehner, 2014, pp. 170-1). As DA is a dialectic integration of teaching and assessment, the locus of attention is not only on what learners demonstrate they are capable of autonomously (as in assessment), but also on the quality and quantity of support they require to improve performance. Essentially, DA and concept of the ZPD argue that a full picture of an individual’s capabilities requires looking at not only what that individual is capable of doing on their own (independent performance), but also what that individual is capable of achieving with assistance from someone else (Lantolf & Thorne, 2006).

A distinction is often made between ‘interactionist’ and ‘interventionist’ approaches to DA. These orientations to DA differ in “the intended outcomes they wish to obtain” (Poehner, 2008, p. 34). Interventionist DA tends to take a more formal approach, with mediational steps developed a priori, and is typically interested in assessing a learner’s potential for future development. This study adopts the alternative approach to DA, where psychometric concerns associated with testing are abandoned “in order to help learners realize their potential” (Poehner, 2008, p. 34). In interactionist DA, step-wise assistance is not developed a priori; mediation is negotiated with the individual or group of learners and “continually adjusted in accordance with the learner’s responsivity” (Feuerstein, Rand, & Hoffman, 1979, p. 102). Thus, in this approach “instruction takes center stage and psychometric measurement is backgrounded if not removed from the stage completely” (Poehner & Lantolf, 2010, p. 318). Due to the focus on online
responsivity from the learner, interactionist DA provides a teacher-researcher with an incredible amount of valuable information about how to best attune mediation.

An additional aspect of DA which makes it ideal for instruction and work with the LL.M. students discussed here is that it involves a “handing over” of responsibility for regulation of the shared performance. Initially the teacher takes primary responsibility, but gradually passes increased responsibility to the learner (Karpov & Gindis, 2000). Put another, particularly eloquent way, Feuerstein, Rand, and Hoffman (1979) write that if we abandon traditional concepts of examiner-examinee in favor of teacher-student roles, as in DA, “it is through this shift in roles that we find both the examiner and the examinee bowed over the same task, engaged in a common quest for mastery of the material” (p. 102).

Of primary concern in DA is the establishment of and mediation within a learner’s or set of learners’ ZPD(s). In a DA session, the teacher-researcher, or mediator, engages with the learner(s) in practical activity. By definition, the educational activity of interest in DA is one which the learner has yet to develop mastery of. The mediator, then, is interested in the amount of mediation and type of mediation required by the learner to develop such mastery. The metaphorical ‘zone’ established when the learner responds to mediation, is the zone of proximal development, discussed below.

1.7.2.1 The zone of proximal development

The zone of proximal development is perhaps the theoretical construct of Vygotsky’s referenced most frequently in psychological and educational literature. Vygotsky (1987) first wrote about the ZPD while discussing the limited nature of the information provided by standardized intelligence testing. Vygotsky proposed an alternative, one which provides insight not only into those abilities which have already developed, but those that are in the process of
developing, suggesting that the zone of proximal development is “the distance between the actual developmental level as determined by independent problem solving and the level of potential development as determined through problem solving under adult guidance or in collaboration with more capable peers” (Vygotsky, 1978, p. 86). The ZPD, then, provides a fuller accounting of the development of an individual than measurements which only consider what a learner is capable of performing alone.

Viewing educational activity as the creation of ZPDs, at the level of the individual and the collective, can radically alter one’s approach to education. Education-as-ZPD-creation affects not only how but “where” one teaches. Vygotsky (1998) captured the importance of considering developing abilities, when he analogized a psychologist to a gardener:

A genuine diagnosis of development must be able to catch not only concluded cycles of development, not only the fruits, but also those processes that are in the period of maturation. Like a gardener who in appraising species for yield would proceed incorrectly if he considered only the ripe fruit in the orchard and did not know how to evaluate the trees that had not yet produced more mature fruit, the psychology who is limited to ascertaining what has matured, leaving what is maturing aside, will never be able to obtain any kind of true and complete representation of the internal state of the whole development. (“The Problem of Age”


Considering educational activity in the ZPD, then, would indicate that the most “fruitful” target of instruction are those abilities which are “ripening.”

Two final considerations regarding the ZPD have bearing on the preset study. When engaged in ZPD activity, a mediator is not interested in where a student has been (actual
development, “mature fruit”), but where that student is going (future development, that which is “ripening”). ZPD activity attempts to understand what that future is and guide the learner’s development toward it. Second, in ZPD activity, to treat individuals fairly, they must be treated differently. From a V-SCT perspective, the goal of education is to move learners maximally forward. Not all learners will end up in the same place, but each should be afforded every opportunity to develop as fully as possible. V-SCT additionally understands that individuals will develop differently. It follows, then, that in ZPD activity, individuals must receive different, individually-attuned, mediation.

1.8 U.S. Legal Reading and Reasoning Through V-SCT

For the purposes of reading, analyzing, and writing legal texts, the idea that the human mind is mediated through the psychological tools of our culture is crucial because the international law students, like Yue, the student quoted at the outset of the chapter, have internalized as members of another culture the psychological tools of that culture, including its language as their most powerful mediating tool. Additionally, and this is critical when considering international Masters of Law students in the U.S. legal education context, these students have also internalized what it means to reason like a lawyer in their home legal systems, which I refer to as legal languacultures, an idea more thoroughly explored in Chapter 2.

The present study was carried out in order to provoke and describe the development of case reading in praxis and analogical reasoning in common law analysis in international students enrolled in a pre-Masters of Law (LL.M.) program at a U.S. law school. Studying U.S. common law is a cognitive challenge of particular interest because not only are these students overwhelmingly non-native speakers of English, but they have already studied law in their home countries, almost always in countries which utilize a different legal system. Kozulin (2005) notes
that where there are “multicultural classrooms,” there will be a “copresence of different systems of psychological tools and educational integration” (p. 16). This study accounts for that copresence by attempting to make visible, and available for use as psychological tools, the reasoning of legal languacultures—both the legal languaculture(s) students have already internalized and the legal languaculture under study.

As discussed in this chapter, SCT is a theory of psychology that understands the human mind to be mediated and that the source(s) of development is to be found in the social world. Approaches to educational activity (обучение) grounded in V-SCT principles are concerned with instruction properly organized through scientific concepts, and the tools and mediation employed by educators in promoting student development. As such, V-SCT is well situated as a pedagogical approach in legal education because it requires that educators account for the history of students, while also providing high-quality conceptual instruction and individually-attuned mediation; V-SCT additionally affords legal education unique insight into development of “reading and reasoning like a lawyer” as this is an approach which connects thinking and language, a connection, which, as will become clear in subsequent chapters, is one that should be of particular interest to legal educators and researchers of legal discourse. As will become clear in the discussion of legal education and the positioning of international students in LL.M. programs in the United States (Chapter 2), a V-SCT approach to pedagogy and research (Chapter 3) provides illuminating access to the process of learning to read (Chapter 4) and reason (Chapter 5) in a new legal languaculture. Chapter 6 explores the developmental trajectories of three students in learning to read and reason for common law analysis in response to the CBI program. Chapter 7 concludes by discussing the findings of the dissertation, exploring implications for legal education and L2 V-SCT approaches involving content classrooms.
Chapter 2 Legal Education

“Quite simply, law school seeks to help you become a legal thinker, one who is largely self-taught” (Christensen, 2010, p. 12)

2.1 Introduction

In her book for law students, Leah Christensen tells her audience that law school will teach you to become a legal thinker, but a legal thinker who is “largely self-taught.” (2010, p. 12). In an educational enterprise that demands that the student largely teaches him or herself, much of the curriculum may remain ‘invisible’ and may have serious ramifications for those students not fortunate enough to navigate what may be expected but not explicitly taught. The ‘hidden curriculum’ has been identified as problematic for domestic students of color or born into lower socio-economic status backgrounds (Evensen & Pratt, 2012). I argue that this hidden curriculum may also impact how and what international law students who come from educational systems with a different ethos may learn while studying at law schools in the United States.

This chapter explores legal education in the context of the increased presence of multilingual, international students in law schools in the United States. Masters of Law (LL.M.) programs are introduced and contextualized as a globalizing force in U.S. legal education. Then, a description of U.S. common law and the home legal systems of LL.M. students is presented so that the reader will be able to appreciate the difficult task confronting LL.M. students – already experts in one way of legal reasoning and attempting to learn another. Legal pedagogy and legal reading are then explored so that the reader can understand the opportunity for change and the
opportunity LL.M. students present legal educators to reconsider pedagogical approaches. The chapter concludes by examining what constitutes contemporary LL.M. pedagogy and how an alternative approach, grounded in Vygotskian sociocultural theory, offers a radically different option.

### 2.2 International students in U.S. Law Schools

Law schools, like other academic units in U.S. higher education, are becoming increasingly globalized. Reasons for increased international student presence in U.S. law schools may be attributed to “a myriad of changes in the politics and economics of national and international relations, among them the growth of transnational investments; the relaxation of national borders to international markets and entrepreneurs; new treaties and trade agreements; law firm mergers; and the movement of U.S. firms abroad and foreign lawyers to U.S. firms” or, more cynically, to fill seats left empty as J.D. enrollments dwindle (Lazarus-Black & Globokar, 2015, p. 7). The cynical view is not without merit, however. The model for international student admissions in law schools has historically been one of no financial aid. That is, international students have historically paid full price for their studies at U.S. law schools, thus generating substantial revenue for law schools (Silver, 2013). As Silver (2013) notes, “[t]he growth of these graduate programs for international law graduates has brought schools at least three benefits: (i) a new source of tuition income that is (ii) de-linked from the complication of US News, and (iii) a basis for the schools to claim some connection to the forces of globalization” (pp. 227-8).

Silver is pointing out that because programs for international law students are not linked to US News ratings in the same way that J.D. outcomes are, law schools are able to benefit from the

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1 *Juris doctor,* here referring to the traditional three-year program of study pursued by domestic students training to be lawyers
tuition international students bring to the law school while additionally benefitting from the perception that legal education is becoming more “globalized.” As will be discussed below, however, this globalization may be mere perception, without devoting sufficient thought or investment to the education of this population of students.

International law students are typically admitted into one year Masters of Law (LL.M.) programs designed for foreign-educated lawyers. LL.M. programs have been experiencing a dramatic increase in popularity over the past two decades. The years between 1998 to 2008 saw a 50% increase in LL.M. enrollment resulting in the establishment of some 179 programs dedicated to this student population by the end of 2008 (Lazarus-Black & Globokar, 2015). Additionally, confounding the issue is the fact that the American Bar Association (ABA), the entity which accredits law schools, does not officially track or accredit LL.M. programs. Consequently, information regarding the exact number of LL.M. programs operating today, what their admissions standards and graduation rates are, how many students pass the bar exam, and what the quality of the curriculum is are not easily accessible. This lack of transparency and numbers has led scholars like Carole Silver to use the percentage of foreign-born bar examinees to roughly gauge the increased presence of international students in U.S. law schools. The percentage of international bar examinees increased from 2.2% of the total in 1996 to 7.1% in 2011 (Silver, 2013, p. 540). While these percentages clearly suggest a significantly increased presence of internationally-educated lawyers in U.S. law schools, relatively few studies detail any aspect of their experience as U.S. law students (Lazarus-Black & Globokar, 2015).

The lack of studies related to LL.M. student learning or experience in U.S. law schools may indeed be traceable back, at least in part, to the fact that the ABA does not monitor or accredit LL.M. programs the way that it does J.D. programs. In fact, the only criterion the ABA
uses when reviewing a proposal by a law school to initiate a non-J.D. program is whether the program “would have an adverse impact on the law school’s ability to maintain its accreditation for the JD program. If no adverse impact is indicated, the ABA ‘acquiesces’ in the law school’s decision to offer the non-JD program and degree”\(^2\). LL.M. programs are ‘cash cows’ for law schools because, due at least in part to this lack of oversight, they can be run with few to no new faculty hires and little to no curriculum development (Silver, 2013). Many law schools also restrict the kind of courses LL.M. students may enroll in, frequently excluding “international graduate students,” as the websites so frequently refer to them, from first-year courses (Silver, 2012); the very labeling of LL.M. students as *international graduate students* and not as *law students* identifies them as ‘other’ from the very beginning. As will be discussed later in this chapter, the first-year J.D. curriculum occupies a special place in legal education and to exclude LL.M. students from this learning environment may not just marginalize them socially but may have serious implications for what and how LL.M. students learn in their year of study in the U.S.

The story that available information about LL.M. programs does tell is that an increasing number of law schools in the United States are admitting more international students. These law schools find themselves, for the first time, in the position of competing for international students not only with each other but with law schools abroad (Silver, 2013). This affects not only the financial relationship of LL.M. students with the university, but potentially changes, for perhaps all but the most elite law schools, the type of student who is admitted. As increased numbers of law schools are competing for more international students, law schools are likely to find themselves grappling with the needs of multilingual students in new ways because as they cast a

\(^2\)http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d.html
wider net and reach deeper into the pool of applicants, law schools increasingly admit students who they then ask to perform at a level that their language proficiency may not permit. Table 2.1 outlines the required TOEFL iBT and IELTS scores for admission to a small number of LL.M. programs at U.S. law schools.3

Table 2.1. LL.M. Admissions TOEFL and IELTS Minimum Scores

<table>
<thead>
<tr>
<th>Law School</th>
<th>Ranking</th>
<th>TOEFL iBT</th>
<th>IELTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harvard</td>
<td>2</td>
<td>100 (25 each section)</td>
<td>Not accepted</td>
</tr>
<tr>
<td>Georgetown</td>
<td>14</td>
<td>100 (25 each section)</td>
<td>7.5 (7.0 each section)</td>
</tr>
<tr>
<td>Minnesota</td>
<td>22</td>
<td>79-80</td>
<td>6.5</td>
</tr>
<tr>
<td>Indiana</td>
<td>25</td>
<td>87</td>
<td>7.0</td>
</tr>
<tr>
<td>Ohio State</td>
<td>30</td>
<td>80</td>
<td>6.5</td>
</tr>
<tr>
<td>Case Western Reserve</td>
<td>57</td>
<td>Required but not posted publically</td>
<td>Required but not posted publically</td>
</tr>
<tr>
<td>Georgia State University</td>
<td></td>
<td>90</td>
<td>6.5</td>
</tr>
<tr>
<td>St. John’s University</td>
<td>74</td>
<td>100</td>
<td>7.0</td>
</tr>
<tr>
<td>Penn State</td>
<td>86</td>
<td>80</td>
<td>6.5</td>
</tr>
<tr>
<td>Michigan State</td>
<td>100</td>
<td>90</td>
<td>7.0</td>
</tr>
</tbody>
</table>

A general trend in the elite law schools having higher TOEFL and IELTS requirements (100 for Harvard and Georgetown) is noticeable in this table, but all of the schools listed here outside the top 20 (except for St. Johns) have similar language proficiency requirements – 79-90 TOEFL

3 The chart is organized by US News rankings purely for purposes of organization and because these rankings are taken very seriously by law schools. LL.M. programs are not officially ranked or accredited by the ABA; therefore the US News ranking does not necessarily reflect the quality of teaching or learning in any of the LL.M. programs.
and 6.5-7.0 IELTS. All of these scores indicate the minimum language test score posted publicly for prospective students on the websites for each of these law schools. There is no way to determine the fidelity to posted proficiency minimums in actual admissions practice, given that several of the websites for the schools acknowledge that they will accept students with lower language scores under some conditions. According to their websites, law schools seem to offer summer start options for these students, perhaps suggesting that the language cut-off scores are something of a moving target. At least three of the law schools in Table 2.1, Georgetown University, Michigan State University, and Pennsylvania State University, have additionally developed either two-year LL.M. programs or one-year language-focused pre-LL.M. study.

Again, since these programs are not officially monitored by any governing body, their curricula, objectives, and instructors may vary widely. For example, the Georgetown Law website states that, “[a]ll classes in both years of the program, including the Legal English classes, are taught at Georgetown Law by Georgetown Law faculty, all of whom either have a Ph.D. in Linguistics, an American J.D., or both.” While Georgetown Law’s two-year program is well-established and staffed by faculty holding PhD and/or JD, the staffing model for other programs, such as Penn State Law’s pre-LL.M. program is such that graduate students in applied linguistics or TESOL are employed to tutor pre-LL.M. and LL.M. students in “legal English.” By raising the issue of staffing, I do not assume that teaching, in particular language teaching, is inherently better or worse in any one staffing model. Rather, how law schools hire instructors for their pre-LL.M. and LL.M. programs might indicate programmatic objectives or what they intend for their international students to learn.

4 http://www.law.georgetown.edu/academics/academic-programs/graduate-programs/degree-programs/two-year/index.cfm
The above discussion, and the lack of systematic attention to legal education by applied linguists suggest that questions of appropriate LL.M. pedagogy and ethical admissions practices are not being discussed very broadly. In my view, discussion of appropriate LL.M. pedagogy needs to take account not only of the multilingual status of many LL.M. students, but also of the fact that LL.M. students have been educated in a legal system that differs from American Common Law. The profound cognitive undertaking involved in attempting to learn in and about one legal system while already having become an expert in another is something that has not been extensively studied in the literature. Before turning to my proposal for how a more integrated approach to LL.M. pedagogy can take account of the status of LL.Ms. as expert legal thinkers as well as their proficiency in a second language (i.e., English), it is necessary to outline briefly the basics of the various home legal systems of the majority of LL.M. students enrolled in U.S. law schools.

2.3 Legal Systems as Languacultures

While a thoroughly contrastive analysis of the different legal systems is beyond the scope of the present project, a brief discussion of the legal systems from which the student-participants emerge is necessary. My experience working with lawyers educated in civil or Shari’a law strongly suggests that the first legal languaculture (Agar, 1994) of these students matters when discussing the texts and assignments they encounter in U.S. legal education. ‘Languaculture’ is an attempt by Agar (1994) to reunite language and culture and to understand them as indivisible. Through languaculture, Agar reminds us that “whenever you hear the word language or the word culture, you might wonder about the missing half” (1994, p. 60). In short, languaculture is an acknowledgement that language use, how humans do language, is more than ‘just’ lexis and syntax. The way humans use language, the choices to shape meaning lexis and syntax is always
shaped by past and local knowledge. In terms of a legal languaculture, then, I argue that knowledge of the different sources of law, how to interpret the sources of law, and how they interact as well as rhetorical preferences of members of the macro languaculture affect what it means to ‘think like a lawyer’ in the various legal systems and legal languacultures. This should be taken into consideration when teaching international LL.M. law students because learning how to interpret U.S. common law texts and write for U.S. common law readers requires complex interplay of understanding the legal concepts and how to use language to shape the discourse in a meaningful (and acceptable) way for the reader.

According to Agar (1994), a rich point is made visible when two languacultures come into contact and differences between mine and yours are apparent. Through rich metaphor, Agar describes rich points as different interpretations of what is expected, or possible, in the world:

When two languacultures come into contact, yours and theirs, the most interesting problems, the ones that attract your attention, are the vertical cliffs. These cliffs are difficult because — on one side of the barrier or another, or perhaps on both sides — the problematic bit of language is puttered thickly into far-reaching networks of association and many situations of use. When one grabs such a piece of language, the putty is so think and so spread out that it’s almost impossible to lift the piece of language out. (pp. 99-100)

Rich points are where languaculture action is, where the most pronounced and interesting differences are apparent. While rich points may make penetration of the target languaculture difficult, arguably, this is where careful consideration of explicit instruction can make a crucial impact.
To date there has been little in-depth empirical investigation into the experience of international LL.M. students regarding their experience of learning how to reason in a second legal culture (Lazarus-Black & Globokar, 2015). For example, questions of if and how transfer or interference might occur when learning common law reasoning while already knowing how to function as a civil or Shari’a law reasoner. None of these systems is, of course, monolithic, and it may be more helpful to think of “families” of legal systems rather than a hard-and-fast rule as to what a civil, common, or Shari’a legal system is. It must be remembered, however, that as legal systems rely on different sources of law, they invariably integrate different patterns of legal thought.

2.3.1 U.S. common law

In their English for Specific Purposes (ESP) book for LL.M. students, Lee, Hall, and Barone (2010) introduce students to common law by informing them that “[l]aw students and lawyers from non-Anglo-American countries will learn that Anglo-American law is ‘case law’ or ‘judge-made’ law” (2010, p. 11). The United States uses a common-law approach that generally uses both statutes and precedent cases to reach legal decisions. Generally, a common-law system uses the theory of stare decisis, which according to Black’s Law Dictionary⁵ means “[t]o stand by decided cases; to uphold precedents; to maintain former adjudications”. Essentially this means that in a common-law system, judges have the authority to create law through their adjudication. Cases in the same jurisdiction at a lower level must then follow that decision as a rule of law. In the United States, where, for many areas of law both statutes and case law exist, lawyers must learn to interpret and synthesize both statutory and case law when analyzing problems. Often, the case law involves interpreting what is meant by a particular statute. The

⁵http://thelawdictionary.org/stare-decisis/
status of cases, or case law, in the United States is such that Lee, Hall, and Barone write that American attorneys are educated to recognize that they have not thoroughly researched a legal problem if they have not searched for case law. In fact, “[w]ithout locating and reading the cases that explain the application of the statute or constitutional provision, [U.S. attorneys] have not even begun their research” (Lee, Hall, & Barone, 2010, p. 11). Learning to think like an Anglo-American common law lawyer, then, involves learning to interpret both statutes and case law and learning how to distill from both sources of law a rule of law that allows one to reasonably predict what that rule of law may mean for future cases. “Facts”, or how legal reasoners construct stories of human conflict into recognizable legal categories, are indispensable to the functioning of the common-law system.

2.3.2 Civil law

In contrast, civil law systems rely exclusively on statutes as a source of law. The statutes, or legal code, are long and complex because they represent an attempt to account for all factors and situations that could possibly be subject to regulation under the statute. Thus, when a civil law attorney analyzes a legal problem, she looks to the legal code and analyzes whether or not the fact pattern at hand satisfies the elements of the statute.

Other, secondary sources of law, such as scholarly interpretations of the law or even reports of judicial decisions, do exist, but in a civil law system the code is the primary source of law. In a civil law system, then, the court is simply an interpreter of legislative statutes. This stands in contrast to the common-law system where decisions of the court become a source of primary law. While, as explained above, in common law legal theory, judges are acknowledged as competent to create and change law through their rulings, “civilian law historically has started from a position that judges are not empowered to create and change the law enacted by the
legislature but rather are to read and apply the existing law to new cases” (Murray, 2011, p. 140). Given this quintessential difference in the respective legal cultures, it is not surprising that moving from one legal system to another entails a profound cognitive switch that begins to make itself felt from the outset of LL.M. education as the international students are expected to read, discuss, and write about cases that require reasoning appropriate to common law.

2.3.3 Islamic law

The few articles on LL.M. students that do exist have yet to seriously reflect that a significant, and increasing, proportion of international law students come not from civil but shari’a, or Islamic, legal systems. Shari’a law presents a slightly more complex cognitive issue for international LL.M. students as it is rooted in religious texts and thus is acknowledged as a salient component of culture. The primary source of shari’a law is the Koran. Legally trained persons in an Islamic law jurisdiction must first look to the Koran when analyzing a legal problem. If the Koran does not provide a clear answer to the problem at hand, the Sunna, a scholarly interpretation of the Koran and the Islamic law it hands down, is to be consulted. If the Sunna is not sufficient for analyzing the problem, Ijma is a lawyer’s next step for insight into the legal matter. The Ijma is scholarly consensus to what the law surrounding a particular issue is. Finally, if these sources do not resolve the issue, qiya, or a form of analogical reasoning, is to be

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6 Anyone vaguely familiar with U.S. politics may wonder, then, why politicians are often heard decrying ‘activist judges’ who ‘create law’. Without painting either common or civil law with too broad a brush, a bit of clarification is in order. It may be more helpful to think of common law judges as interpreting vague language in statutes as common law is based on the idea that judges have specialized legal training and analytical thinking skills which enable them to apply legal principles to existing statutes in order to clarify the existing statutes. This interpretation then becomes law for future cases in that it instructs future courts in how they are to interpret the (often vague or poorly written) language of statutes. Civil Law codes, on the other hand are extensive, well thought out, comprehensive, and often come with legislature-approved guides for interpretation. They have lengthy definitions sections, which leave little room for interpreting the meaning. In those systems, the legislators are the specialists, not the jurists. In the Murray quote, one might replace “law” with “code” and maintain the accuracy of the sentence. It would be more difficult to do this with the common law because judges can in fact create “law”, or entire new legal rules or causes of action, in the absence of any existing statutes, but judges also must interpret codified law in the form of statutes where they exist.
used. In using *qiya* to determine how a particular legal issue should be resolved, one looks to how similar legal issues have been adjudicated and uses that outcome as a basis for recommending a particular form of adjudication in the instant case. For example, Lippman, McConville, & Yerushalmi (1988) point out that “some jurists have inflicted the penalty of stoning for the crime of sodomy, reasoning that sodomy is similar to the offense of adultery and therefore should be punished by the same penalty the *Koran* requires for adultery” (p. 32).

In Islamic law, analogical reasoning can be explicitly called upon to analyze a legal problem. It enters the picture almost as a last resort, after all other legal sources that might shed light on a legal problem have been consulted. *Qiya* is also, according to Lippman et al (1998), a secondary rather than a primary source of law; the *Koran* and *Sunna* are of primary importance, while *Ijma*’ and *qiya* have secondary status. The focus with *qiya* also has more to do with discovering similarities between legal concepts (e.g., sodomy and adultery) rather than similarities or differences among stories of human conflict that invoke the same legal concept (e.g., forcible rape). The following section will explore the primacy of analogical reasoning in a common-law system because it can be considered a *rich point*, or a point of entry for examining differences in the various legal languacultures.

2.4 Analogical Reasoning

Analogical reasoning is “the most familiar form of legal reasoning” in U.S. Common Law and “dominates the first year of law school” (Sunstein, 1993, p. 741). It may, however, be misunderstood from a cognitive and pedagogical perspective. As conventionally treated in the first-year curriculum, analogical reasoning involves examining precedent cases for facts which make a client situation similar to, or different from, the precedent case in order to predict an outcome for a client. In fact, it is so central to the LL.M. Legal Writing course at the law school
where this study was carried out that the course syllabus explicitly establishes as an objective that students will work on “[a]nalogizing to, or distinguishing your client's case from, case precedent.”

What becomes difficult, however, is the reasoning and categorization that goes into the “analogizing” and “distinguishing” and how to make this explicit and accessible for students, particularly international LL.M. students working in a second language and a legal culture that diverges from their own. Consider, for example, the definition of analogical reasoning presented in a textbook previously used in the Legal Writing course. It informs students that “[w]hen an earlier case’s facts appear analogous to your client’s situation, your goal is to evaluate how the factual analogies might dictate the outcome in your client’s situation” (Wellford Slocum, 2011, p. 137). But how exactly is one to determine that the facts “appear analogous” in a meaningful way or how should one “evaluate the factual analogies?” This determination is crucial because culturally imbued understandings of the world will affect the types of analogies reasoners will endeavor to make and find convincing.

In common law, it is also important not just that analogies are made from one case to another, but that the analogies must be guided by, and related to, how the previous court ruled. That is, the analogies have to be central in some way to the legal categories invoked by the story of human conflict. Learning how to analogize like a common-law reasoner entails learning how to make these analogies in legally meaningful ways, not simply making fact-to-fact comparisons because the stories of human conflict have prima facie similarities. Unfortunately, analogical reasoning is not often explicitly taught in this way. In fact, the presentation of analogical reasoning often reinforces superficial analogies. Table 2.2 contains definitions and presentations of analogical reasoning in popular legal writing textbooks. These textbooks are written for a
presumably domestic J.D. audience, not LL.M. students; few legal writing texts exist specifically for LL.M. students. All emphases are mine.

Table 2-2
Definitions of analogical reasoning in legal writing textbooks

<table>
<thead>
<tr>
<th>Selected presentations of analogical reasoning in Legal Reasoning and Writing textbooks</th>
</tr>
</thead>
<tbody>
<tr>
<td>• “Analogical reasoning is another major form of legal reasoning. The <strong>most common variety of analogical reasoning justifies a result by making direct factual comparisons between the facts of prior cases and the facts of the client’s situation.</strong> The comparison can demonstrate factual similarities (leading to a similar result) or factual differences (leading to a different result). A comparison that points out similarities asserts, “<strong>X is the answer because the facts of this case are just like the facts of A v. B, and X was the result there.</strong>” Comparing cases to point out similarities is often called ‘analogizing cases.’” (Edwards, 2007, p. 56)</td>
</tr>
<tr>
<td>• “The process of <strong>using inductive reasoning to predict the outcome of a specific case by comparing it to other cases is one of analogy</strong>” (Calleros, 2006, p. 128)</td>
</tr>
<tr>
<td>• “An analogous case is one that is similar in some way to the situation being analyzed. In traditional U.S. legal reasoning, <strong>use analogous cases to support the stare decisis rationale that similar situations should be treated similarly. A case may be analogous because of the reasoning, policy, holding, facts, or any other aspect of the case relevant to your client’s situation. Be sure to select it for the aspects that compare mostly strongly to your situation</strong>” (Ray &amp; Ramsfield, 1987, p. 15)</td>
</tr>
<tr>
<td>• “Very often, you will also use analogical reasoning to try to link your case to other similar cases in which the outcome was favorable (or to distinguish your case where the outcome was unfavorable). <strong>If the court agrees that the cases are similar and that there are no legally significant differences, the court should handle the present case in the same way to produce the same result as in the prior cases</strong>” (Murray &amp; DeSanctis, 2009, p. 21)</td>
</tr>
</tbody>
</table>

The presentation of analogical reasoning in most textbooks are merely descriptive; the definitions never go beyond informing students what analogical reasoning is (e.g., **using inductive reasoning to predict the outcome of a specific case**) or how it may persuade the court (e.g., **If the court agrees that the cases are similar and that there are no legally significant**
differences, the court should handle the present case in the same way to produce the same result as in the prior cases). The presentations do not, however, convey a conceptual understanding of analogical reasoning that students can use as a cognitive tool for constructing their own analogies. There is no discussion of what legally significant differences might be. In fact, we even observe in the presentation of analogical reasoning here exactly the understanding of the process that cognitive legal theorists have criticized as being superficial: \textit{X is the answer because the facts of this case are just like the facts of A v. B, and X was the result there.}

2.4.1 Analogical reasoning and cognitive legal studies

While analogical reasoning is generally understood to be important in common law, disagreements abound as to what, exactly, it is, and if (not how) it should be taught. As Winter (2001) points out, “[m]ost of what lawyers call reasoning by analogy is analogy in the colloquial sense of similarity of resemblance. Typically, it takes the form of an argument that case B is sufficiently like case A to warrant the same legal treatment” (p. 223). This understanding of reasoning by analogy in a legal setting is, however, insufficient because few legal educators or legal scholars can reliably account for what constitutes “sufficiently like.”

For pedagogical purposes, it is preferable to approach analogical reasoning with a conceptual definition than with a “colloquial sense of similarity”. A conceptual definition will better allow for explicit instruction and foster students’ abilities to use analogical reasoning as a tool for engaging with future cases. Taking a cognitive legal studies approach that builds on the important findings of Lakoff and Johnson (2003), Winter defines an analogy as, “a conceptual mapping (whether of attributes or relations) that highlights connections that are otherwise not well established in our conceptual system” (2001, p. 237). The mapping process is the same cognitive process as metaphor; that is, mapping what is known about one (source) domain onto
an unknown (target) domain so that one may understand more about the target domain. Importantly, though, analogies do not just compare things because “[e]verything may be like everything else in an infinite number of ways, but analogy consists in a mapping that characterizes a conceptual relation between domains initially understood as separate” (Winter, 2001, p. 229).

For common law legal analysis, then, analogical reasoning is a process whereby a precedent case, or set of precedent cases, constitutes the source domain because legal reasoners know the outcome (how judicial decision makers ruled and why) of these cases and are using how the court previously ruled on those sets of circumstances in order to make predictions about the outcome of a particular set of facts (as is often the case in law school discussions), make an argument for a particular outcome (as in briefs addressing the court), or make a legal decision (as in the case of judges in judicial decision making).

As legal reasoners are simultaneously legally trained professionals and laypersons with an embodied mind shaped by the culture in which they grew up, Winter (2001) has suggested that a cognitive legal studies approach based on important findings from cognitive science may offer useful insights for understanding indeterminacy of legal rules, how facts are categorized, and how persuasive (or not) a legal reasoner is likely to find an analogy. In the law, determinacy and indeterminacy conventionally refer to the extent to which a given rule of law is hard and fast or predictably governs the next set of facts that are encountered.

Critical legal studies scholars often criticize more traditional scholars for their adherence to legal rules because, to the critical theorists, indeterminacy in the law proves that “anything goes” and decisions really come down to mere fancy or activism or bias on the part of judges (Winter, 2001). Winter’s (2001) account, however, argues that a cognitive account can more
accurately and convincingly explain apparent indeterminacies in the law. Specifically, Winter demonstrates how legal rules, reasoning by analogy, and innovation in the law are more reliably explained and predicted by a cognitive account of the law. For international LL.M. students, for whom analogical reasoning either works differently from common law or is not required by their home legal systems, this explanation may prove more useful because it necessarily takes into account the cultural understandings and embodied nature of these cognitive processes.

Legal analogical reasoning as a scientific concept requires understanding legal cases and their facts through legal concepts, rather than based simply on any similarities of differences one perceives. For example, the similarities of a loaded gun, a Presa Canario dog on a leash, and a hypodermic needle used by a drug addict to inject heroin are not well established in our mind. That is, in everyday thinking, the similarities are not immediately obvious and available for analogical reasoning because the objects largely do not physically resemble each other, functionally do not serve the same purpose, and likely have not been connected by our perceptual systems before. The ability to make connections between the three objects, however, is exactly the sort of analogy that is invoked when employing legal analogical reasoning as a scientific concept. Analogical reasoning for common law analysis is not similarity of narrative stories. It is a mapping of novel similarity, similarities not immediately obvious in our conceptual system, but necessary because of the way precedent works in the common-law system, because legal cases are not “stories of human conflict,” but rather reflections of legal categories (Mertz, 2007). In the case of the loaded gun, the large-breed dogs, and the needles used by a drug addict, it is important to understand that a court previously held that holding a gun you know has one bullet in it to your friend’s side and pulling the trigger three times is so recklessly dangerous that it implies malice and that a court has previously ruled that a woman whose large breed dogs had
previously attacked or threatened people should have been aware that her inability to control the
dogs represented a conscious disregard for human life. Understanding the legal concepts of
depraved heart murder and implied malice as regards the gun and the dogs allows us to see how
these might actually be used in analogical reasoning when we have to figure out what to do with
a woman who is running a dirty needle exchange for drug addicts. It is important to understand
and analogize the implied malice in the situations, not the narrative structure. That is the
difference between analogical reasoning as an everyday concept and analogical reasoning as an
academic concept for U.S. legal education purposes.

2.4.2 Learning to analogize as a common-law thinker

While little work has been done on the process of learning to reason in one legal system after
having already internalized another, some legal scholars appear to believe this to be a relatively
straightforward task. Fletcher & Sheppard (2005) write in their comparative law book:

If you have already been trained in one legal system, you probably have had experience with
reading a statute, working with cases, analyzing the facts of a legal problem, and then
applying the law to the problem. These are universal legal skills. If you already possess these
skills in, say, German law or Korean law, you can learn American law efficiently without
repeating all the basic tasks that first-year law students must learn in order to “think like a
lawyer.” You already know how to think like a lawyer in your home country. You know
English well enough to read this book and participate in class discussion. You need only
learn how American lawyers think. (pp. 3-4)

Beyond the curious bifurcation of skills and thinking, it is interesting that Fletcher and Sheppard
appear to view legal “skills” as largely universal and the “thinking” is all that is necessary to
attempt to learn. While it may be true that internationally trained lawyers have already presumably learned in their home legal language culture to do many of the things Fletcher and Sheppard label “basic tasks that first-year law students must learn” (2005, p. 3), the question of the ease or difficulty with which many of the international LL.M. students “learn to think like a common-law lawyer” is a question to be asked and answered empirically.

A handful of studies do shed some light on the process lawyers educated in one legal system experience in attempting to learn how to read and reason as a common-law attorney, but more accounts are certainly needed. Participants in Hartig’s (2014) study struggled with extracting relevant factual information from precedent cases in order to analogize to the case of a hypothetical client. In fact, at least one focal student tried to circumvent the need to reason by analogy at all. The student, from a civil law background, persisted in trying to find statutes on which to base her legal argument even when the legal problem she was working with did not involve statutory law. Consequently, the student, avoided case law and analogical reasoning to make her argument, and instead applied a statute to the facts of the problem at hand as called for in a civil law system.

Abbuhl (2005) investigated the effect of feedback from linguist tutors on LL.M. inter-office memo-writing development and found, similar to Hartig, that the students struggled to transition from civil law reasoning to common law analogical reasoning grounded in precedent cases. At times the students relied on “common sense” analogies rather than the type of common law analogical reasoning, suggesting that at some level they understood analogical reasoning was required perhaps because they had been told they needed to use it, but they were not yet using it in accordance with what is required in common-law practice. Recall the presentation of analogical reasoning from legal writing textbooks discussed above. Definitions that merely
instruct case B is sufficiently like case A to warrant the same legal treatment may exacerbate how difficult it is to learn to analogize like a common-law attorney because this presentation leads to common sense, or in Winter’s terminology merely attributional, analogies rather than analogies of attribution and relation that common law readers and reasoners will find most compelling.

The difficulties LL.M. students exhibited in the two studies just mentioned may be important components of the developmental process or they may be avoidable by presenting analogical reasoning more conceptually in instruction. These two studies highlight students’ struggles with common law analogical reasoning. To my knowledge no research has set out to not only document the process of learning to function within the common-law system after already learning a different legal system but, crucially, to provide explicit instruction and mediation intended to promote development of their reading and analogical reasoning ability. Case reading is a logical entry point for analogical reasoning instruction and mediation because case law is critical to common law and appellate opinions are the backbone of legal education within the American legal system.

2.5 U.S. Law School Pedagogy and Legal Reading

Minnis (1994) outlines four tasks as necessary for success in U. S. law schools: reading and briefing judicial opinions; analyzing opinions in classroom dialogue; analyzing hypothetical stories in legal memoranda; and analyzing hypothetical stories in law school examinations (p. 349). While the first task Minnis outlines is explicitly concerned with reading, the other three implicate reading in that they presume students have comprehended the texts in particular ways
in order to engage in the classroom dialogue and analysis of hypothetical stories in memoranda and examinations.

Especially in the first year of law school, students read, analyze, and discuss many judicial opinions, presented in a pedagogical approach called the case-method, where students read judicial opinions before class and then engage in some version of a Socratic dialogue with the law professor in order to understand the legal concepts at play in the cases. By some estimates, for each class session of each course, students may be expected to read up to one hundred pages of text (Northcott, 2009, p. 181), which, for a student enrolled in five courses that meet twice weekly, translates to upwards of one thousand pages of material per week.

The rationale for the case method is that the appellate opinion, the legal case, exemplifies the reasoning process in U.S. common law. Typically, the appellate or judicial opinion first provides a narration of the story of human conflict, called the facts in law school and legal discourse. The facts are typically followed by a statement of the legal issue(s) and applicable legal rule(s). Next follows a discussion of the rationale for the court’s decision—an exposition of the reasoning the court used to reach the ruling. Case law and analogical reasoning are prominent in the rationale section.

The Socratic dialogue privileges attention to procedural or legally significant facts over narrative details that lay people naturally attend to and how students “learn to interpret stories of conflict in legal terms” (Mertz, 2000, p. 94). Legal reading, then, involves learning how to read a case in order to weigh and select the most relevant facts for analysis and legal categorization. It entails reading cases not as stories of human conflict, but rather as instantiations of legal categories (Mertz, 2007). Development in this process may be complicated enough for a legal novice working in their native language and culture, but for international law students who
already have a fully internalized legal *languaculture* (Agar, 1994), this process is undoubtedly more complicated and thus requires more explicit instruction in how culture is evident in the linguistic and discursive elements of the texts they are engaging with.

Despite the fact that the importance of reading in law school has been voiced in various venues, from preparatory books and course books (e.g., Christensen, 2007; McKinney, 2012; Schwartz, 2005) to scholarly discussions of the state of legal education (e.g., Dewitz, 1997; Fajans & Falk, 1993; Feltovitz, Spiro, Coulson, Myers-Kelon, 1995; Stratman, 1990), empirical studies investigating legal reading are exceedingly rare. In fact, to my knowledge only eight empirical studies of legal reading exist in the literature (Christensen 2007; Evensen, Stratman, Oates, & Zappe, 2008; Deegan, 1995; Lundeberg, 1987; Oates, 1997; Stratman, 2002, 2004), despite repeated calls for research in this area (e.g., Fajans & Falk, 1993; Stratman, 1990).

Generally, legal reading studies fall into one of two categories -- "strategies studies" or "reading comprehension studies." The strategies studies largely use think aloud protocols in order to describe the reading process and reading strategies of two groups in order to compare how they approach legal texts, usually those that entail judicial opinions. The groups being compared are typically expert and novice legal readers (Lundeberg, 1987) and "less successful” and “more successful” student legal readers, where success is defined by law school GPA (Christensen, 2007; Deegan, 1995; Oates, 1997). In the strategies studies, the more proficient and less proficient reading groups have been observed using different strategies to understand and interpret the legal texts. For example, more proficient readers take more time at the beginning of the reading process to orient themselves to the context, know the issue and the holding, read the facts quite closely (Lundeberg, 1987), and engage at a different level with the text by asking problematizing questions of it (Deegan, 1995). In Deegan’s (1995) study, less proficient readers
both did not use the problematizing strategies as frequently or effectively as the more proficient students, many of the less proficient students were also observed using the ‘default strategies’ such as paraphrasing and ‘rhetorical strategies’ such as connecting something in the text with prior knowledge ineffectively, often without being aware of their misunderstanding.

However, the studies are descriptive of what some legal readers do in their first language (L1); they do not necessarily shed light on the key finding of the second set of reading studies—the "reading comprehension studies"—that law students are generally not observed developing their reading and reasoning skills, particularly when confronted with multi-case, indeterminate, problems. Additionally, although in the Lundeberg (1987) study a second, pedagogical, study was included which attempted to teach the strategies of the expert readers to beginning law students. The strategies studies do not necessarily help legal educators guide students from less successful to more successful legal case reading.

A third group of reading studies moves beyond the strategies and explores how legal reading and legal reasoning are intertwined. Stratman (2002) sought to integrate legal reading and legal problem-solving studies. Since then, the work of other studies in this area has been affected by the move to integration of the two processes. Specifically, the studies largely focus on how the role assigned to a legal reader affects the reasoning process (Stratman, 2002), and how the relative determinacy or indeterminacy of a legal rule, or the extent to which future legal readers of an opinion must reckon with caveats, fuzzy boundaries, or uncertainty in interpreting a rule when reading an opinion, affects reading comprehension and reasoning (Stratman, 2004; Evensen et al., 2008). This research has in turn also inspired the work of Herring and Lynch (2012a, 2012b), who transferred the constructs of these studies from the research laboratory to
the classroom in order to assess both the validity of the constructs themselves as well as the development of their students.

Evensen et al., (2008) developed an assessment of law students’ reading comprehension for classroom formative assessment to measure empirically “information-processing constructs comprising case reading and reasoning skills” (p. 2). The research team first administered to 161 first-year law students from 5 law schools the assessment instrument comprised of multiple-choice questions based on a set of readings. The results indicated that students were best able to handle single-case, determinate questions but that they struggled most with multi-case indeterminate test items. After development of an assessment of equivalent difficulty, the research team tested the new instrument both with incoming first-year law students and with the same set of law students from the previous iteration in their third year of law school. On the second assessment, the team found that by the third year of study the students were not able to comprehend significantly better the semantic indeterminacies in cases, demonstrating that the students had failed to develop the constructs measured by the test.

The finding that the law students had apparently not improved in the reading comprehension constructs measured by the test from the first to the third year of law school, in part inspired Herring and Lynch (2012a) to conduct an intervention study that attempted to teach first-year law students legal reasoning skills – specifically cross-case/hypothetical reasoning skills, similar to the cross-case indeterminate skills tested by Evensen et al. Herring and Lynch (2012a) utilized a pre-test, treatment, post-test design with the tests paralleling those developed by Evensen et al. (2008) in order to ensure construct validity. Herring and Lynch’s results were similar to both Evensen et al (2008) and Ashley’s (1990) findings that there was no significant learning detected by their instruments. Based on these results, Herring and Lynch (2012a)
concluded that “the results across studies call for the development of teaching approaches other than the traditional case-dialogue method and for the continued assessment of learning gains” (p. 115). In a follow up study, Herring and Lynch (2012b) integrated an additional instructional tool in the form of formative feedback on an essay related to a pre-test administered to students early in the semester. At mid-semester, students wrote an essay explaining why the multiple-choice responses to several questions from the pre-test were wrong. The students then received formative feedback on their essay. In this study, Herring and Lynch indeed reported that students developed from the pre-test to the post-test and concluded that

the introduction of a specific set of instructional interventions (i.e., group case reading on a social media website; group reasoning related to a multiple-choice question on a social media website; and a short writing assignment followed by formative feedback) to supplement the traditional case dialogue method of law teaching produces positive learning gains. (p. 31)

The study suggests, then, that when one sets out intentionally to supplement the case method with additional, explicit teaching, students are able to develop their legal reading and reasoning capacities.

When taken as a whole, with the exception of Herring and Lynch (2012b), the legal reading and reasoning studies show that students do not show significant learning gains in their reading and reasoning abilities in the first six weeks of law school (Herring & Lynch, 2012a), the first semester of law school (Ashley, Lynch, Pinkwart, & Aleven, 2008), from the second to the third semester (Evensen et al, 2008) or from the first to the third years (Evensen et al, 2008). However, as just explained, when instructional approaches designed specifically to address reasoning skills were implemented, students were found to develop these skills (Herring &
Lynch, 2012b). The finding should clearly be alarming for legal educators as this encompasses the entirety of law school. The calls for further development and assessment of the constructs as well as further examination of pedagogical approaches therefore seem justified.

Each of the existing studies of legal reading focus on domestic J.D. students (presumably) reading in their L1; to my knowledge no study exists in the literature which examines the reading of international LL.M. students. This invites the opportunity for both descriptive and intervention studies because no one has yet described the experience and learning process of lawyers educated in different legal systems when they encounter American case law in an L2, and no one has reported on a study which explicitly set out to promote the development of L2 reading and reasoning abilities. Hartig’s (2014) dissertation began to break ground in this area by focusing on LL.M. literacy -- that is both LL.M. student’s reading for writing and their writing of inter-office memoranda in a legal writing course.

2.6 LL.M. Pedagogy

LL.M. programs are often designed in such a way that curriculum or pedagogical approaches used for J.D. education is simply transported into an LL.M. classroom, with the possible addition of some sort of “language focus” (Hoffman, 2011). The pedagogical value of importing methods that work with first-language speakers and legal novices into a classroom comprised of second-language speakers who are experts in one legal system and novices in another is questionable at best. In fact, Hoffman (2011) expresses surprise by what he found to be the greatest barrier his LL.M. students faced:

Although, at first, it seemed that their being non-native speakers of English was the most salient feature of this group of students, it became clear to me that their unfamiliarity with
the English language was much less problematic than their unfamiliarity with our federal common law legal system and the conventions of U.S. Legal Discourse. (p. 2)

If Hoffman’s account is an accurate reflection of the situation, the “J.D. methods + (vague) ‘language component’ = LL.M. pedagogy” approach may be applying pedagogical approaches to a student population without full consideration of the efficacy or appropriateness of those methods.

In fact, in the field of legal literacy in English as a second language, much discussion in the pedagogical literature has focused on the problematic nature of the tension between legal content and language learning (Bhatia, 2002; Bruce, 2002; Howe, 1993; Northcott, 2008; Swales & Bhatia, 1983). When Candlin, Bhatia, and Jensen (2002) exhaustively reviewed available legal writing texts, they found them largely unsuitable for English for Academic Legal purposes because, in part, many texts dealt only superficially with language learning, did not attempt to coherently link various genres in written legal discourse, or were merely descriptive in nature (i.e., told students authoritatively what good writing was). Fourteen years later, little has changed in available legal writing texts and LL.M. pedagogy.

Howe (1993) cautioned that “if we stray into the territory of legal concepts, then we are on lawyers’ land and must beware” (p. 152). While the point that professional expertise is to be respected is well taken, a crisp bifurcation of ‘legal concepts’ and ‘language’ is difficult, however, because the law is language. As Hartig (2016) points out tense choice and definite or indefinite article usage in legal discourse are discipline-specific and linguistic choice imbues the discourse with particular meaning, specifically, whether case-specific facts or broader legal concepts are foregrounded or blended. In the case of tense choice, where expert legal writers interpreted the use of present tense constructions to refer to specific events in the past, Hartig
(2016) argues “[t]he use of the present tense here does not represent ordinary historical present narration, but rather a use of discipline-specific framing to present specific past events in terms of a generally applicable legal definition” (p. 73). Instruction for international LL.M. students should take account of this discipline-specific framing. Too sharp a distinction between “language instruction” on the one hand and “legal instruction” on the other, runs the risk of failing to help learners understand the rationale behind particular linguistic choices and how these choices fit into legal argumentation.

Hartig (2014) proposed that it may be more useful for legal educators and ESP practitioners to think about ‘language’ and ‘legal content’ in terms of discourse-structuring and content-specific concepts. According to Hartig (2014), discourse-structuring concepts are those which are so central to the discourse of the law that in order to understand any legal genre one must understand how these concepts are made manifest in legal texts (p. 386). Discourse-structuring concepts function as threshold concepts, “ordering knowledge within the discipline and shaping the use of language in disciplinary contexts” (Hartig, 2014, p. 386). Discourse-structuring concepts also recur regardless of doctrinal content and, as Hartig argued, may be concepts in the law which language educators are actually able to teach through the lens of how they manifest themselves linguistically. Precedent, *stare decicis*, and analogical reasoning are all examples of discourse-structuring concepts. These discourse-structuring concepts stand in contrast to content-specific concepts such as *mens rea* or negligence, which should be the purview of legal educators.

While useful in terms of thinking about how legal concepts are linguistically manifested, discourse-structuring and content-specific concepts still dichotomize to a certain extent ‘language’ and ‘content’. I propose that thinking instead about legal *languacultures* and the rich
points, such as *stare decisis* and analogical reasoning, made salient when international LL.M. students encounter a new languaculture, U.S. Common Law, may be a useful way to present legal concepts and language as necessarily intertwined. This approach to LL.M. education, where common law and linguistic concepts are presented as a coherent whole rather than as two separate components, may be advantageous because it allows one to better understand the concepts which underlie legal thinking. The teaching of these concepts, then, allows legal educators (both “content” and “language”) to transcend many of the problems in legal writing texts pointed out by Candlin et al. (2002) – namely that it avoids teaching content and surface linguistic features in isolation and it allows instruction in concepts which are transferable from one legal writing genre to another. The next chapter will also discuss how Vygotskian concept-based instruction taking analogical reasoning as the main concept of instruction is uniquely positioned to provide properly organized instruction for international LL.M. students.
Chapter 3 Methodology

“The goal of research is not only to explain the world, but to transform it” (Negueruela, 2003, p. 35)

3.1 Introduction

The available literature on LL.M. pedagogy demonstrates that approaches to teaching and researching the learning of international LL.M. students fails to present a systematic, conceptual understanding of U.S. common law and additionally may not afford students opportunities for engagement with legal concepts and U.S. legal genres with mediation from a more expert other. Therefore, this study was developed to provide such conceptual and social mediation to international pre-LL.M. students. In order to develop and implement the curriculum, TR relied on the ideas of Piotr Gal’perin on properly organized instruction, an important Russian psychologist heavily influenced by the theory proposed by L.S. Vygotsky. This chapter first describes the institutional context in which the study was carried out, including a description of the pre-LL.M. program, the course in which the data was collected, and information about the students who participated in the study. Next, the data sources and analytical techniques used in responding to each research question are outlined. Finally, the instructional program, including discussion of development and implementation of the pedagogical materials is explicated.

As already discussed, legal education does not appear to be successfully providing LL.M. students with appropriately-attuned instruction and educational professionals working with international LL.M. students (ESP and legal education practitioners alike) do not have sufficient research-informed material to guide the development of curricula for international students. Some research is available on international students learning to write the inter-office memorandum in Legal Writing classes, thanks to studies such as Abbuhl (2005) and Hartig (2014), but far less is known about the process of students learning common law reading and
reasoning in substantive law courses. As such, this study documents the process of learning to read legal opinions (RQ1) and employ analogical reasoning through knowledge about the law gained through those opinions (RQ2) while simultaneously provoking development of that process through a CBI curriculum attuned to the learning needs and trajectories of international pre-LL.M. students (RQ3). Specifically, the study responds to the following research questions:

1. What rich points do international pre-LL.M. students encounter when they engage in Case Reading in Praxis?
2. How do international pre-LL.M. students develop Analogical Reasoning in Praxis?
3. To what extent does a Concept Based Instruction (CBI) promote case reading and common law reasoning development in international pre-LL.M. students?

3.2 Institutional Context: The Pre-LL.M. Program

The study was carried out in an intact course in the first semester of a pre-LL.M. program designed for students with lower English language proficiency than required for the one-year LL.M. program, as determined by TOEFL or IELT scores. The purpose of the program is to “assist students in developing reading comprehension skills, case briefing skills, legal analysis, and synthesis skills in the U.S. common law system, increased proficiency in legal English, basic research and citation skills and exam-writing skills” (Mid-Atlantic Law School website). In order to promote student development in these areas, the instructional team of the pre-LL.M. program comprises both instructors with legal training and instructors with English for Academic Purposes training. Students enroll in four courses each of the two semesters of the program. In each semester, students take one legal methods and analysis course, one ESL course, one substantive law course, and one course designed as a “companion” to the substantive law course.

The present project was carried out in this fourth course (‘Companion Course’) in the first

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7 “Pre-LL.M. One-year Certificate Program.” Note that all of the criteria for the pre-LL.M. program is the same as that for the LL.M. program except for language proficiency, as indicated by a TOEFL or IELT score, indicating that a primary focus of the pre-LL.M. program is language development.
semester of the program. The Companion Course was co-taught by a legal writing professor (LW) and a language specialist, in this case the teacher-researcher (TR). The rationale for the Companion Course was that much of the pedagogical and research literature on LL.M. students focuses exclusively on LL.M. Legal Writing courses, to the exclusion of doctrinal courses those students encounter in the U.S. law school. In order to support students’ socialization into law school expectations and practices, the Companion Course, designed by LW and TR, utilized the content of the substantive law course, selecting focal cases for analysis, with the goal of promoting development of English for academic legal purposes generally and common law analysis specifically.

### 3.2.1 The Companion Course

The Companion Course represents a unique instructional setting, which, to my knowledge, does not exist in any other pre-LL.M. or LL.M. program in an American law school. Each semester, the Companion Course was paired with one first-year substantive law course and the pre-LL.M. students enroll both in that course and the Companion Course. Through this pairing, the pre-LL.M. students attended the substantive law class with J.D. students, but are the only students enrolled in the Companion Course. The substantive law course was taught by a professor experienced in teaching that course and who presented the material to the J.D. and pre-LL.M. students as she typically did, and generally taught according to the case method, which provides the material for the curriculum, and the Socratic method, which structures the delivery of the professor’s lesson. In the first semester, the substantive law course with which the Companion Course was paired was Criminal Law (PSLFY 910); in the second semester, the
Companion Course was paired with Constitutional Law (PSLFY 903).\(^8\) Criminal Law and Constitutional Law are both traditional, required first-year J.D. courses typically taught through the case method and Socratic method described in Chapter 2.

TR’s was involved in both the Companion Course and Criminal Law course, but was far more actively involved in the former than she was the latter. TR developed the Companion Course curriculum with LW, providing insight into language-focused lessons pre-LL.M. students would benefit from when encountering the Criminal Law material. TR additionally developed the CBI curriculum implemented in the Companion Course. Although she had no teaching responsibilities in the Criminal Law course – as explained above, the Criminal Law course was taught by the Criminal Law Professor as she would normally deliver it, with no modifications made due to the presence of international pre-LL.M. students – TR read all assigned material, attended, and took notes during the Criminal Law course. Doing so allowed her to better understand the discussions that take place in a first-year law classroom and enabled her to transfer any relevant discussions, vocabulary items, or hypotheticals from the Criminal Law Course into the Companion Course for further explication.

### 3.3 Participants

Six students enrolled in the Companion Course and each agreed to participate in the research project. Three students were from Saudi Arabia, two from China, and one from Thailand. Consequently, three students were educated in Islamic law system, and three were prepared in the civil law tradition. Table 3-1 outlines the demographic information of the participants, including

\(^8\) Given the nature and complexities of Constitutional Law, and given that the project represents an initial attempt at providing instruction that promotes development of the analogical reasoning needed to function in the American common law system, the dissertation reports solely on the first semester, when the Companion Course paired with Criminal Law.
their assigned pseudonyms, home country, first language, home legal system, and experience practicing law in their home country, as reported in their beginning-of-semester questionnaires. Additional discussion and thick description (Geertz, 1973) of the instructional context and student participants will be given as relevant in the subsequent data analysis chapters.

Table 3-1
Demographic information of student-participants.

<table>
<thead>
<tr>
<th>Name</th>
<th>Home Country (L1)</th>
<th>Home Legal System</th>
<th>Legal Practice Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fazi</td>
<td>Saudi Arabia (Arabic)</td>
<td>Islamic</td>
<td>Yes, 3 years</td>
</tr>
<tr>
<td>Hoobi</td>
<td>Saudi Arabia (Arabic)</td>
<td>Islamic</td>
<td>No</td>
</tr>
<tr>
<td>Jun</td>
<td>China (Chinese)</td>
<td>Civil</td>
<td>Yes, 1 year</td>
</tr>
<tr>
<td>Omar</td>
<td>Saudi Arabia (Arabic)</td>
<td>Islamic</td>
<td>Yes, 5 months</td>
</tr>
<tr>
<td>Pim</td>
<td>Thailand (Thai)</td>
<td>Civil</td>
<td>Yes, 7 years</td>
</tr>
<tr>
<td>Yue</td>
<td>China (Chinese)</td>
<td>Civil</td>
<td>No, internships only</td>
</tr>
</tbody>
</table>

3.4 The Instructional Program

While the dissertation comprised a large component of the instructional activities in the companion course, not all instruction and activities in the Companion Course directly related to the CBI approach of this dissertation. Table 3-2 outlines the research design and the instructional activities designed for implementation in the Companion Course related to the dissertation in each week throughout the semester. The focal case in these instructional activities were all cases to be discussed in the Criminal Law course with which the Companion Course was paired; focal case selection will be discussed later in the chapter.

Table 3-2
CBI Curriculum in Companion Course

<table>
<thead>
<tr>
<th>Week</th>
<th>Focal case (legal concept)</th>
<th>CBI Instructional Program</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><em>State v. Sophophone</em> (felony murder)</td>
<td>IRB consent form</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Pre-semester questionnaire</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Civil and Islamic law SCOBAs</td>
</tr>
<tr>
<td>No.</td>
<td>Case and Hypo(s)</td>
<td>Instructional Activity</td>
</tr>
<tr>
<td>-----</td>
<td>------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>2</td>
<td>Teaching Hypo (home legal system)</td>
<td>Teaching Hypo (home legal system)</td>
</tr>
<tr>
<td>3</td>
<td><em>Commonwealth v. Koczwar</em> (strict liability)</td>
<td>Analogical reasoning SCOBA Reading roles</td>
</tr>
<tr>
<td>4</td>
<td>Hypo 1 (<em>Koczwar</em>)</td>
<td>Hypo 1 (<em>Koczwar</em>)</td>
</tr>
<tr>
<td>5</td>
<td><em>Commonwealth v. Malone</em> (depraved heart murder)</td>
<td>Analogical reasoning SCOBA competition Hypo 1 individual meetings Language learner RR</td>
</tr>
<tr>
<td>6</td>
<td></td>
<td>Law student RR</td>
</tr>
<tr>
<td>7</td>
<td></td>
<td>Legal problem solver RR Hypo 2 (<em>Malone</em>)</td>
</tr>
<tr>
<td>8</td>
<td><em>United States v. Jackson</em> (attempt)</td>
<td>Language learner RR Hypo 2 individual meetings</td>
</tr>
<tr>
<td>9</td>
<td></td>
<td>Law student RR Hypo 3 (Criminal Law Mid-term)</td>
</tr>
<tr>
<td>10</td>
<td></td>
<td>Legal problem RR Class mapping activity (RR) Hypo 3 individual meetings (optional)</td>
</tr>
<tr>
<td>11</td>
<td><em>State v. Norman</em> (imminent danger, self-defense)</td>
<td>Language learner RR <em>Jackson</em> analogy workshop</td>
</tr>
<tr>
<td>12</td>
<td></td>
<td>Law student RR</td>
</tr>
<tr>
<td>13</td>
<td></td>
<td>Legal problem solver RR Hypo 4 (<em>Norman</em>)</td>
</tr>
<tr>
<td>14</td>
<td></td>
<td>Hypo 4 individual meetings Post-semester questionnaire</td>
</tr>
</tbody>
</table>

As Table 3-2 illustrates, the instructional activities were largely organized by focal cases and implemented through the CBI curriculum, as described in subsequent sections of this chapter.

### 3.5 Data Sources and Analysis

Data collection was carried out during the Fall 2015 semester. This section explains the data collection and analysis methods.
3.5.1 Sources of data

3.5.1.1 Questionnaires

Students completed a pre-semester questionnaire and a post-semester questionnaire (see Appendix A). The pre-semester questionnaire elicited questions about students’ experience with language learning and their legal training and practice of law. Students were asked to describe their understanding of both their home legal reasoning process and their understanding of legal reasoning in the American common law system. The post-semester questionnaire also elicited the students’ understanding of legal reasoning in both their home and the American systems. The post-semester questionnaire additional contained questions related to case reading and students’ learning in the course. The pre- and post-semester questionnaires were utilized in the analysis of research questions one and three.

3.5.1.2 Video and audio recordings

All class sessions of the Companion Course and small group and individual meetings with TR were video recorded and transcribed using Inqscribe. Audio recordings were also used as back-up in the case of malfunction with the video recordings. The video recordings and the accompanying transcripts were used to identify and trace emergent themes regarding the research questions about case reading (RQ1) and analogical reasoning (RQ2) as well as students’ development in common law legal reading and reasoning (RQ3).

3.5.1.3 IRAC essays

The common practice in legal education of grading doctrinal law courses on the basis of a single essay examination, particularly for foundational first-year courses such as criminal law, was discussed in Chapter 2. Unfortunately, many “law students are never taught how to demonstrate their legal knowledge in an exam scenario” (Strong & Desnoyer, 2016, p. 3). Consequently, the instructors for
the Companion Course felt it was important to include multiple opportunities for the students to write in this genre with the goal of mastery. Different methodologies and organizing structures exist for approaching the law school essay exam, but the most common method is IRAC, with IRAC standing for the major sections of the analysis – Issue, Rule, Application, Conclusion. Completing the Reading Role Cycle with an IRAC essay written individually was crucial to both documenting and promoting the students’ reading and reasoning for common law analysis capabilities.

In an IRAC essay, a writer is expected to first identify a legal issue (I) implicated by the instant fact pattern introduced by a hypo. This step requires the ability to read the fact pattern in the hypo through the lens of the legal concepts and legal categories covered in the law course—categories which frequently require a different reading of the fact pattern than would be likely in a layperson’s approach. Typically, this section of an essay consists of a single statement or question; but identifying the appropriate issue is critical to the remainder of the essay. Based on the legal issue raised by the fact pattern, a writer must next lay out the appropriate legal rules for the reader, in this case, the law professor. Critically, every rule which is used in the subsequent application section must be stated in the rule section. In the application section, a writer analyzes what the stated rules mean for the outcome of the given fact pattern. The conclusion then ‘logically’ follows from the analysis and a student-writer states the most likely outcome of the case (e.g., the defendant is likely to be found guilty of depraved heart murder)

During the first semester of the pre-LL.M. program, each student wrote four IRAC essays individually as well as one IRAC essay with an assigned semester-long reading partner. The IRAC essays were analyzed in order to describe the process of developing analogical reasoning (RQ2).

Table 3-3
Summary of data sources for each research question

<table>
<thead>
<tr>
<th>Research Question</th>
<th>Research Question Topic</th>
<th>Data sources</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Reading for Common Law Analysis Purposes</td>
<td>Questionnaires, Student verbalizations in class and meetings, Reading Role tasks</td>
</tr>
<tr>
<td>2</td>
<td>Analogical Reasoning for Common Law Analysis Purposes</td>
<td>IRAC essays</td>
</tr>
<tr>
<td>3</td>
<td>CBI Program and Pre-LL.M. student development as common law reasoners</td>
<td>Pre-semester, post-semester questionnaires, Student verbalizations in class and meetings with TR, Reading role tasks, IRAC essays</td>
</tr>
</tbody>
</table>

Preliminary analysis pertaining to each research question was shared with fellow researchers familiar with the project and with sociocultural psychology. The researchers discussed with me the extent to which they agreed with what I saw in the data, offered critiques, alternative views, and informed the analysis of the data. I then selected interactions representative of the most salient themes (those that could tell the most interesting story, even those that were the most surprising/illuminating) for further explication in the dissertation. When questions of legal content or law arose, the data selections were shared with LW so that her understanding of the particular selection, as a legally trained person, would enlighten the data analysis.

3.5.2 Data Analysis

3.5.2.1 RQ1 data analysis

Chapter 4 presents analysis of the data in response to Research Question 1, focused on how the students adapted to Case Reading in Praxis (CRP). As discussed, the study was carried out from the premise that reading legal texts, particularly reading case law, is a primary difference between the
common-law system and the legal systems of international law students; additionally, no study has explicitly examined L2 legal reading despite recognition of reading as the most important “skill” to legal education in the U.S. (Northcott, 2009). Thus, in order to respond to RQ1, student responses to reading legal texts in English were analyzed for rich points. As discussed in Chapter 2, rich points are contact points of difference that arise and are salient when members of different languacultures interact. Since the positioning of the judicial opinion in the common law system is a key difference between this and other legal systems the students have already been trained in, when students encounter the need to engage with case law and other legal texts necessary for analyzing a legal problem, the system-bound nature of the language in those texts presents potential rich points, which when identified present aspects of the legal languaculture ‘ripe’ for instruction and for understanding U.S. common law. Transcripts of the instructional conversations TR engaged in with the students were analyzed for potential rich points, identified through the extended nature of the conversation, quality of the questions or utterances of the students, and, frequently, TR’s use of multiple mediation strategies in order to promote student comprehension. These identified rich points were categorized according to what appeared to be the most salient aspect of each using the following coding categories: layperson concepts, doctrinal concepts, case law’s relation to other sources of law, and case law as instantiation of legal categories.

3.5.2.2 RQ2 data analysis

Analysis of students’ development of analogical reasoning, research question two, entailed, almost exclusively, analysis of the IRAC essays in order to address the students’ development in autonomous written performance; on occasion verbalizations during classroom or small-group meetings were also considered in order to elucidate development of analogical reasoning. The analysis was carried out in multiple phases. First, a modified obligatory occasion analysis was conducted to
determine whether or not analogical reasoning was present in the essay. Obligatory occasion analyses investigate the accuracy of learner language through comparison of learner forms to target language norms (Ellis & Barkhuizen, 2005, p. 81). Typically, these studies analyze the use of morphemes (e.g., present progressive –ing in English), in contexts where target language norms would necessitate their use. Rather than investigate morpheme use in learner language, this study investigated students’ use of analogical reasoning in a context where target discourse community norms necessitate its use. Thus, in the modified obligatory occasion analysis employed in this study, the presence of any analogical reasoning, at this stage regardless of how target-like the analogy was, was compared to the number of occasions which would have necessitated the use of analogical reasoning. This first round of analysis is necessary because it offers the broadest insight into the extent to which these pre-LL.M. students attempted to use analogical reasoning at all. Indeed, Hartig (2014) found in her study of LL.M. students learning to write using precedent that one of her focal students did extensive research and arduously attempted to find a statute to analyze a problem that would obviate her need to analyze a client problem using precedent cases.

After the first round of analysis, the analogies were then coded according to a priori analysis, utilizing a definition of sound legal analogical reasoning developed from the theoretical work of Winter (2001) and the practical activity of working with LL.M. students to develop their writing for English for Academic Legal Purposes. In order to be sound legal analogical reasoning, an analogy must 1) demonstrate that the legal concept or category is the impetus for making the analogy; 2) utilize a relevant precedent case fact; 3) compare the precedent case fact to an instant case fact; and 4) convey the relationship between precedent and instant case facts through ‘signal language’. By signal language, I refer to sentence structure and word choice that explicitly mark that an analogy is being made. Rather than use extensive metalanguage with the students, I used the term ‘signal language’ to
highlight the meaning conveyed through their linguistic choices in making analogies.

The student-produced analogies were then coded according to the requisite components of the definition of *sound legal analogical reasoning*. For, example, in the category *parallel analogy*, the analogy was written without signal language and therefore there is no explicit linguistic connection between the legal concept, the precedent case fact, and the instant case fact. These analytical categories are not necessarily mutually exclusive, but merely instructive in what the students are doing. An analogy might, for instance, neither contain signal language nor rely on legally significant facts – rendering it simultaneously *superficial* and *parallel* – and therefore it would suffer from the defects of both categories.

### 3.5.2.3 RQ3 data analysis

The rich points identified in RCLAP (Chapter 4) and the developmental trajectories and types of analogies identified in ARCLP (Chapter 5) were used to select student case studies for further analysis in responding to the third research question and how the students interacted with the CBI program to develop reading and reasoning for common law analysis. The cases of Jun, Omar, and Yue were selected and are representative of the three developmental trajectories identified in Chapter 5 – presence of analogical reasoning consistently until *sound legal analogical reasoning* produced in autonomous writing, inconsistent presence of analogical reasoning, no analogical reasoning throughout the semester. In order to trace these students’ development stories their pre- and post-semester questionnaires, verbalizations in class and individual meetings, submitted during the Companion Course, and IRAC essays were analyzed in order to identify how students engaged with the conceptual and social mediation offered by the CBI program. As a V-SCT perspective recognizes that development is revolutionary and non-linear, particular analytic focus was paid to verbalizations and
writing where a student’s understandings of common law reading and analysis appeared to be in crisis and thus ripe for mediation. Vygotsky (1978) writes, explaining the dialectical nature of the V-SCT perspective of development:

Our concept of development implies a rejection of the frequently held view that cognitive development results from gradual accumulation of separate changes. We believe that child development is a complex dialectical process characterized by periodicity, unevenness in the development of different functions, metamorphosis or qualitative transformations of one form into another, intertwining of external and internal factors, and adaptive processes which overcome impediments that the child encounters … To the naive mind, revolution and evolution seem incompatible and historic development continues only so long as it follows a straight line. Where upheavals occur, where the historical fabric is ruptured, the naïve mind sees only catastrophe, gaps, and discontinuity. … Scientific thoughts, on the contrary, sees revolution and evolution as two forms of development that are mutually related and mutually presuppose each other, Leaps in the child’s development are seen by the scientific mind as no more than a moment in the general line of development. (p. 73)

Thus, these moments of ‘upheaval’ are of particular interest in a V-SCT account of development and, in the present study, the focal students’ engagement with the CBI program was analyzed for presence of such moments of upheaval. The genesis of these upheavals, how the student engaged the social and/or conceptual mediation, and any ultimate development in reading and reasoning for common law purposes were then considered; wherever possible, interpretation of upheavals and development is triangulated through multiple data sources, such as multiple interactions in close succession or through a written artifact and an oral interaction.

3.6 Development of instructional materials: SCOBAs representing each legal system
The curriculum developed for the Companion Course and this study was grounded in V-SCT principles, specifically the phases of properly organized instruction, in Concept Based Instruction (CBI), as outlined by Gal’perin. Crucial to CBI is the first phase, the orienting basis of mental action phases, where students are introduced to the concept, “because it presents learners with as complete a picture as possible of the relevant concept that learners can appropriate to guide mental action in a particular domain” (Lantolf & Poehner, 2014, p. 64). According to Gal’perin purely verbal accounts are potentially insufficient for explanation of concepts in instruction, as verbal accounts tend to be sequential and generally tempt students to memorize without understanding rather than internalize the concept for use as a psychological tool (Lantolf & Poehner, 2014, p. 64). Therefore, in a CBI approach, materializations or materialized representations of the relevant concepts are typically used to present the concept, as discussed in the introduction. Here, the materialized representation in the form of Schema of a Complete Orienting Basis of Action (SCOBA) of four concepts – civil law, Islamic law, common law, and analogical reasoning were developed for use as teaching-learning aids in the Companion Course. The development, and sequencing, of SCOBA presentation in the Instructional Program is further described below.

In order to develop the SCOBAs for civil and Islamic law, TR read introductory materials in Legal Writing textbooks which discussed the differences between the legal systems, as well as scholarly interpretations of those legal systems. After developing a first version of the SCOBA for civil and Sharia law systems, these versions were discussed with advanced LL.M. and SJ.D. students at Mid-Atlantic Law School with expertise in those systems. Revisions were made to the SCOBAs to reflect those students’ comments. The common law SCOBA was discussed with a professor of law at Mid-Atlantic Law School who teaches substantive law courses with which the Companion Course had previously paired. As with the other SCOBAs, a final version of the common law
SCOBA was developed to account for his comments. While each SCOBA was designed after reading scholarly interpretations of each legal system and consulting advanced international LL.M. students who had practiced law in civil or Islamic law jurisdictions, it is important to point out that V-SCT requires that the conceptual material presented to students represented the best available understanding of the concept. A V-SCT scholar-practitioner should be committed to the idea of praxis as discussed in Chapter 1, and therefore, should more complete or systematic understanding of the concept become available or should the material/ized representations prove ineffective in engaging students in educational activity, the conceptual mediation should accordingly be revised.

TR designed the SCOBAs following engagement with research available in English discussing each of the legal systems and discussion with LL.M. students trained in each system. This research led TR to understand legal systems as comprised of various commonalities; therefore, the SCOBA of each legal system contains ‘story of human conflict,’ ‘legal code,’ and ‘(predicted) outcome’ categories. TR understood, generally, the process of legal reasoning to be set into motion by stories of human conflict (Mertz, 2007), which legal practitioners seek to resolve through consultation of sources of law. Given the story of human conflict, again the genesis of any legal problem, attorneys will consult with the various authorities in their respective legal systems; the sources of law, texts that legal problem-solvers consult, differ in each legal system and therefore the various legal sources are represented in each respective SCOBA for each system. The task of a legal problem-solver, as a person socialized into patterns of legal reasoning with the sources of law, is understood in these SCOBAs to be to grapple with the story of human conflict, given the legal sources and modes of reasoning in her legal system in order to arrive at an outcome for a given problem.
3.6.1 SCOBAs representative of each legal system

The SCOBAs developed by TR for use introducing Companion Course students to the legal thinking of each legal system are discussed in this section. In a subsequent section, how they were discussed with students and implemented in the CBI curriculum will be shared. In this class session, the respective civil and Shari’a law SCOBAs (see Figures 3-1 and 3-2) were each presented.

As discussed in chapter two, in civil law, the primary source of law is the legal code (statutes). To reflect this, the relevant SCOBA contains the ‘narrative facts’ or ‘story of human conflict’ box, which leads an attorney to consult the ‘legal code’ in order to deduce from the legal code what the outcome for the issue at hand is most likely to be.

Development of an Islamic law SCOBA presented a more challenge. According to Lippman, McConville, and Yerushalmi (1988), there is a hierarchy of sources which a lawyer must consult when analyzing a legal problem. As explained in Chapter 2, these sources are the Koran; the Sunna, a scholarly interpretation of the legal principles derived from the Koran; Ijma, or scholarly consensus
as to what the law is; and qiya, or analogical reasoning. Since the hierarchy of sources is different for Islamic law than the other systems, the Islamic-law SCOBA was developed and presented differently. In the hierarchy of legal sources, once a legal authority has provided sufficient guidance for a lawyer to reach an outcome, the other sources do not have to be consulted. Said differently, sources lower down the hierarchy are only consulted if previous, more authoritative, sources have not provided sufficient resolution. Therefore, for some legal problems, the Koran might provide sufficient guidance and no further legal authorities need be consulted. Alternatively, for some legal problems, one, more, or all of the legal sources might need to be consulted in order to achieve sufficient resolution.

Due to the complexity of the interaction of legal sources in Islamic law, the SCOBA was presented to students differently than were the civil or common law SCOBAs. Instead of a single materialization, the Islamic-law SCOBA was presented to students through a series of Keynote slides representing the progressive consultation of legal sources. The first slide resembled the civil law SCOBA in that it contained the story of human conflict, a single legal source (the Koran), and an outcome box. The second contained these same components, but the additional source to be consulted, the Sunna prior to an outcome box. The third version of the Islamic-law SCOBA contained the addition of the Ijma prior to an outcome box, and the fourth, qiya. The Islamic-law SCOBA thus reflected that once a legal source has provided sufficient guidance in the analysis of a legal problem, an outcome could be achieved and further sources need not be consulted, but if legal authorities did not provide an answer to the legal question, further sources of law would need to be consulted.
The common law SCOBA (Figure 3-3) was developed from TR’s reading of U.S. legal education literature and in consultation with legal educators. As with the other legal system SCOBA, the common law SCOBA contains a “story of human conflict” box, which is the initiator
of the analysis process. Arrows of increased darkness are intended to help guide students through engagement with the SCOBA. Based on the story of human conflict, a common-law reasoner must consult relevant sources of law; typically, the first source of law consulted is the ‘legal code’ (statutes). Some areas of law may not have a relevant statute, however, so the dashed arrow indicates that it is possible to bypass the ‘legal code’ in common law analysis, but only if there is no relevant statute. Consultation of the legal code leads a common-law reasoner to case law next, in order to further interpret what the legal code means for the given dispute. In fact, the case law should additionally aid the reasoned in determining what are the relevant facts of the ‘story of human conflict.’ For this reason, the arrows of the SCOBA return from the ‘case law’ box to the ‘story of human conflict box,’ where the ‘legally significant facts’ are selected based on legal principles determined from reading the case law. Only at this point is a common law reasoned prepared to engage in analogical reasoning, which is represented by the double-ended arrow between the ‘legally significant facts’ and ‘case law’ boxes. The result of analogical reasoning is a ‘(predicted) outcome’ for the case being analyzed.
As a SCOBA is ultimately a tool intended not only to guide student performance in carrying out meaningful activity but also to aid their internalization of the concept, the common law SCOBA was used in class discussions and analysis of hypothetical problems throughout the semester in order to provide students mediation in practical-activity utilizing the SCOBA. Thus, the common law SCOBA was printed onto a large poster board so that while discussing hypotheticals, the course instructors could fill in each box with key information and facts. In this manner, the Companion Course instructors utilized the SCOBA in practical activity (legal problem analysis) in order to promote students’ internalization of common law reasoning. Each student additionally received a color copy of the common law SCOBA for their own use in reading cases and analyzing hypotheticals.

The analogical reasoning SCOBA (FIGURE 3-4) represented the crucial point of instruction for the CBI program. The SCOBA was developed in response to the need for more systematic and explicit presentation of analogical reasoning in U.S. legal education (e.g., Hartung & George, 2009; Whalen-Bridge, 2008). It was developed based on research about analogical reasoning as cognitive mappings from a known domain (precedent case) to an unknown domain (hypo or client case) in cognitive legal studies of Winter (2001) and an understanding of legal
cases legal stories representative of legal categories or relationships. Importantly, as SCOBAs are graphic or otherwise materialized representations of concepts rather than verbal accounts, the analogical reasoning SCOA models common-law analogical reasoning through the use of pictures. The analogical reasoning SCOA took the form of picture ‘stories’ comprised of five different clip art pictures that represented a ‘client problem’ and one to three ‘precedent case’ stories comprised of two clip art problems. Approaching analogical reasoning in this way reinforces the concept of abstracting relationships (legal principles) from stories (here, pictures) and making connections not immediately apparent in our conceptual systems, thereby reconstituting how we view specific facts (Winter, 2001).

![Figure 3-4. Analogical reasoning SCOA](image)

3.6.2 Implementation of the SCOBAs in the instructional program

Guided by the CBI phases of orienting students to the activity and presenting the materializations of the concept to be studied, TR introduced the SCOBAs to the Companion Course
in the first two weeks of the course. The discussions of the SCOBAs were staggered so that each received thorough discussion and the students were able to engage in practical activity with each SCOA before a new instructional activity was introduced. In the first week of the course, the home legal systems were presented to, and discussed with, the students so that the reasoning system in which they had already achieved expert ability might become visible to them and in turn enable them to better understand the similarities and differences between this and the common-law system. In the second and third weeks, then, the common law and analogical reasoning SCOBAs were introduced.

TR presented the SCOBAs to the students as a representation of her understanding of how the legal systems fundamentally are organized. Following the presentation of the SCOBAs, students who were educated in that legal system were given the opportunity to discuss with the course instructors and their classmates how accurately they felt the SCOBA represented how they understood either civil or Shari’a legal problem solving to operate. Students who were not educated in Shari’a or civil law were also offered the opportunity to ask questions about the other legal system.

Following discussion of the home-legal-system SCOBAs, students received instruction in reading hypothetical problems (commonly referred to as hypos) and were given the Teaching Hypo to analyze. Hypos are a common pedagogical tool in U.S. legal education and constitute an important aspect of the Socratic method. Typically, hypos are counterfactual variations of the facts of an actual case, usually intended to test a student’s ability to apply a legal rule or to test the limits of a legal rule. In form, hypos can be as short as a professor in class changing one fact of the case being discussed, or as extended as an entire fact pattern written as a law exam question. In the Companion Course, the SCOBA boxes relevant to the hypos were the “Story of human conflict” boxes in each legal system and the “Legally significant facts” in the common law SCOBA. In the analogical reasoning SCOBA, a hypo would be analogous to the “Client case” pictures. Thus, in the
Companion Course and this study, hypos were employed to promote students’ ability to apply the law (primarily case law) to a hypothetical legal dispute (the hypo). The development of hypos for this study will be discussed in a later section.

Students were asked to read, analyze, and predict an outcome for this hypo as legal reasoners in their home systems. The purpose of this activity was to externalize and make visible to the students the system for legal reasoning they had already internalized prior to enrolling in the Companion Course and pre-LL.M. program. Analyzing the Teaching Hypo using their home legal reasoning also served the dual purpose of introducing the students to the hypothetical problem as a common pedagogical tool in U.S. legal education. Hypos are utilized extensively in U.S. legal education and are intended to serve such pedagogical purposes as testing the limits of a legal rule or assessing a student’s ability to apply a legal rule to a given set of facts (hypothetical legal dispute). Exposing the Companion Course students to the hypo as a pedagogical tool afforded them the opportunity to engage with one of the premier tools legal educators employ in training students to think like an American-trained lawyer.

After reasoning with the Teaching Hypo as they would analyze the dispute in their home legal systems, students were introduced to the common law SCOBA (Figure 4-3). As with the SCOBAs of the civil and Islamic legal systems, the common-law SCOBA was introduced by TR. As with the introduction of the other SCOBAs, students were then allowed class time to ask questions of TR and LW regarding the SCOBA and its representation of common law reasoning.

In the same class session that the common law SCOBA was introduced, TR also introduced the concept of case reading in U.S. legal education, using *State v. Sophophone* (2001) as an illustrative example. The case was selected from the assigned readings in the criminal law course and was a case the students would encounter later in the semester. TR guided the students in
collaborative reading of *State v. Sophophone*. Then, LW modeled for the students her process for analyzing the Teaching Hypo using the case as precedent and the SCOBA to demonstrate her process.

In the third week of the course, TR presented the analogical reasoning SCOBA (Figure 4-5) to the students in order to bring analogical reasoning, its function, and its operation in the common-law system into sharper focus as the core concept of the CBI Instructional Program. She engaged the students in a series of analogical reasoning picture problems where the students were asked to first identify relationships between the pictures in the precedent case facts. For example, in Figure 4-5, one of the precedent cases features a firefighter and a valve on a water pipe. One potential relationship students could identify is that the firefighter needs to use the valve in order to create a barrier for protection (water). After identifying a potential relationship between the precedent case facts, students then were instructed to select the two client case facts most relevant given that relationship. In the case of the *use-in-order-to-create-a-barrier-for-protection* relationship between the Precedent Case 1 facts, the two most relevant client case facts would be the plumber and the hard hat because the plumber uses the hard hat in order to create a barrier for protection in the course of doing his job. Approaching analogical reasoning in this way reinforces the concept of abstracting relationships (legal principles) from stories (here, pictures) and making connections not immediately apparent in our conceptual systems, thereby reconstituting how we view specific facts (Winter, 2001).

The analogical reasoning SCOBA led students through a series of three such problems of increasing subtlety in the relationship between the ‘case facts’. In the final problem, students were required to create their own precedent case. They were instructed to choose a picture of any two objects or actions as long as they could articulate a relationship between the two pictures in their
precedent case that could additionally be found in two of the client-case pictures. Classmates then were tasked with ‘solving’ the picture problem. In order to understand the extent to which students understood how analogical reasoning operates in the Common-Law system after working through the picture problems, students were assigned as homework the task of creating their own picture problem. Following the structure of the picture problems in the SCOBAs, students were required to have five client case facts and two precedent cases of two pictures each. In the following class, a tournament-style competition was held where students worked through each other’s analogical reasoning picture problems, voted in each round for whose problem they thought best represented the concept, and explained why they voted as they did.

3.7 Adjusting the Instructional Program: The Reading Role Cycle

By the start of the third week of the semester, each of the SCOBAs and relevant concepts had been introduced to the students. The CBI instructional program had been designed so that for the remainder of the semester, students and Companion Course instructors would discuss selected cases from the criminal law syllabus and the instructors would periodically assign hypothetical questions for students to respond to in the form of IRAC essays, to be followed with individual debriefing sessions the next week. Early in the semester, however, it became apparent that additional mediation would be necessary in order to work through the focal cases. Thus, the Reading Role Cycle (RRC), inspired by Buescher’s (2015) division-of-labor pedagogy, as discussed in the first chapter, was adopted to provide this mediation, whereby requisite tasks necessary to comprehend a legal case were parceled out to small groups of students so that each student could contribute to the collective’s understanding of the Focal Cases. Through this process, the class read and analyzed the case collectively. During a RRC, no single student was individually responsible for carrying out the task of interpreting the focal case. The imposed distribution of tasks through the RRC allowed
students to devote energy and attention to carrying out only the assigned tasks. Thus, over time, students were able to develop control over multiple and complex aspects of case reading over time.

Although data analysis in the subsequent chapters is largely organized through the structure imposed by the RRC, the RRC itself is not the focus of analysis. When the Focal Cases, and other relevant cases are introduced in the data analysis, a citation to the case in the casebook will be included in a footnote. All hypotheses will be included in appendices.

3.7.1 Description of the reading roles

Although not a component of the original instructional design, the RRC was developed and integrated when it became clear that the task of reading case law was overwhelming for this cohort of students. TR and LW determined that it would be more beneficial to divide the responsibility for individual cases among the students so that each student was contributing a critical component to the understanding of a focal case and that no one student was responsible for interpreting a single focal case on his or her own.

TR identified three different ‘roles’ (summarized in Table 3-4) pre-LL.M. students must control in order to understand case law in a U.S. law school. Not only are these students L2 users of English, but they had each been identified as requiring an additional year of intensive study before matriculating in the one-year LL.M. program, so the role of language learner was critical to the students’ understanding of a given case. As language learners, students must understand how the discourse is structured, the grammatically complex sentences in judicial opinions, and the difficult, often technical, vocabulary. In a sense, the language learner role was developed in order to promote an understanding of the referential meaning (Mertz, 2007) or “stage-one” decoding understanding (Fajans & Falk, 1993) of the Focal Case. While each of these authors describes stage-one meaning as insufficient for understanding a case, linguistic access to the text is a
prerequisite for developing a legal interpretation of a judicial opinion.

Table 3-4
Reading Role Descriptions

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<th>Reading Role</th>
<th>Description</th>
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| Language Learner     | As a language learner, some of the words, sentence structures, and organizational patterns of a legal case will be new to you, but crucial for understanding the case. As you read the case, focus only on your role as a language learner.  
  • What words do you need to look up?  
  • Are there any sentences you find confusing? Note these sentences. How can you figure out what they mean?  
  • How is the case organized? What order, generally, is the information in? What questions do you have about this organization? |
| Law Student          | As a law student, you will read many (many, many) cases. You will need to be able to read these cases to understand 1) how to “think like a lawyer” and 2) what the law in a given area (e.g., felony murder) is. As you read this case, focus on your role as a law student.  
  • Where is this case in the casebook? What can its location in the textbook tell you about what you are supposed to learn from it? What can you learn about this case from the notes and explanatory text in the casebook before you read it?  
  • What do you think class discussion about this case will focus on? |
| Legal Problem Solver | In the common law, legal problem solvers read case law to help them analyze legal problems and predict outcomes for those problems. Cases are primary law. As you read this case, focus on solving the hypothetical problem sent to you using the case as binding precedent. Think about:  
  • What facts does the court rely on to reach its conclusion? How are these facts similar to or different from the facts in the hypo?  
  • What is the rule of law that comes out of the case? What does this rule mean for the analysis in the hypo? |

These students were also law students and if they were to participate in the U.S. legal classroom, where judicial opinions are used as a pedagogical tool, they must develop the ability to engage in
certain activities with the text. The law student reading role, therefore, built upon the foundation laid by the language learner reading role and guided students in abstracting a legal rule from a case, writing a case brief to prepare for class, understanding a legal principle in light of a given case, and including relevant information about a case in a course outline in order to prepare for a final exam.

Crucially, the students in the pre-LL.M. program were also legal problem solvers; this was a part of their identity in their home legal systems and they were developing the capacity to reason as Common Law legal problem solvers. Thus, in order to intentionally promote this development, the legal problem solver was also a role built into focal case discussions so that the CBI instructional program could be carried out.

TR designed the RRC so that students who read the focal case in each role would present to their classmates one portion of the necessary tasks necessary to read a case with sufficient depth to engage in classroom discussion and in legal analysis activity using an understanding of the legal concept as discussed in that case. Thus, once a week one group of students would read the focal case and complete a series of tasks necessary to understanding a case from that role. The tasks (summarized in Table 3-4) were understood to be progressive in that the tasks presented one week laid a necessary foundational understanding for students to who were presenting the following week. The Language Learner reading role, then, focused students on activities it would be necessary for them to carry out because of their status as English language learners – increased attention to vocabulary, paraphrasing of complex sentences, and a summary of the story of human conflict discussed in that case. The Law Student reading role was understood to build on the knowledge presented by the Language Learners and complete tasks necessary for successful study as a law student—writing a case brief, writing a rule statement from the case, and predicting questions the Criminal Law professor might ask when the case was discussed in class. After two previous passes
at the focal case, which explicated new and difficult vocabulary, key and complex passages, a rule statement, and rationale, the Legal Problem Solver role required students to collaboratively produce analysis of a hypo relying on the focal case as precedent.

Table 3-5. Reading Role Tasks

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<tr>
<th>Reading role</th>
<th>Tasks to complete and present to classmates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Language Learner</td>
<td>Summary of the story of the case (“the Hollywood movie version”)</td>
</tr>
<tr>
<td></td>
<td>Vocabulary to know to understand the case (add to Glossary)</td>
</tr>
<tr>
<td></td>
<td>Confusing sentences or sections &amp; what they mean</td>
</tr>
<tr>
<td>Law Student</td>
<td>Case brief</td>
</tr>
<tr>
<td></td>
<td>Questions you predict Prof. [of criminal law course] will ask about this case and how you would answer those questions</td>
</tr>
<tr>
<td></td>
<td>Summary of what you would add to your course outline regarding this case</td>
</tr>
<tr>
<td>Legal Problem Solver</td>
<td>IRAC response to hypothetical</td>
</tr>
</tbody>
</table>

Students were to read the focal case, collaboratively respond to the prompts for the reading role, and submit those responses to the TR by the Sunday prior to their Tuesday presentation. In this way, TR would have time to review the tasks prior to meeting with the students. On Monday, TR met with the students to discuss their reading of the case and the responses they had prepared for their Tuesday presentation, with the expectation that students would make any necessary changes or revisions to the presentation prior to the following day’s presentation.

3.7.2 Selection of focal cases

In order to integrate the content of the substantive law course into the RRC, focal cases were selected from the assigned reading schedule of the criminal law professor’s syllabus at three-week intervals. Three-week intervals were selected so that the Companion Course could spend one full class period per week discussing the assigned task of each reading role before the case was discussed in the criminal law course. Focal Case selections were made based on a preference for 1) cases that were the sole exemplar of a given legal concept in the case book and 2) cases that the TR
had previously encountered in teaching a version of the companion course with a different criminal law professor the previous year. For example, Focal Case 4, *State v. Norman*, is the only *imminent danger* self-defense case in the casebook and TR had previously read the case. Cases that were the sole exemplar of a legal concept were preferred as Focal Cases so that the Companion Course instructors could guide students in writing an understanding of, and rule for, the Focal Case that would be usable on the Criminal Law exam without having to synthesize rules from multiple cases; the students would also develop a deep understanding of the facts and how the case might be used in analogical reasoning when analyzing a hypo, thus rendering the Focal Case more useful to them on an exam. Similarly, TR selected cases she had previously encountered because she had already developed an understanding of what these cases taught about the relevant legal concepts and therefore would be able to more confidently mediate students in the various reading role tasks related to the case.

### 3.7.3 The reading role cycle

In total, one RRC lasted four weeks and was determined in consultation with the substantive law course schedule. TR established the RRC by selecting Focal Cases on the substantive law syllabus that were scheduled to be discussed in three week intervals. Following case selection, TR worked backwards from the date the focal case was scheduled to be discussed in the criminal law course in order to establish the RRC schedule. An RRC initiated two weeks before the Focal Case was discussed in the criminal law class; during this week, the student team assigned to be Language Learners for that cycle would present on the tasks for the Language Learner role. The following week, the student group assigned to be Law Students read and presented on the case in that role. Finally, on the day the case was scheduled to be discussed in the Criminal Law class, the team assigned to be Legal Problem Solvers presented analysis of a hypo to their classmates. Before a
Focal Case was discussed in the Criminal Law class, then, the Companion Course students had taken three passes at the text, from three different perspectives. Importantly, though, each of these perspectives represented ways the students would actually have to approach the text in order to function both as law students in the U.S. and as common law legal-problem-solvers.

To complete the Reading Role Cycle, in the Companion Course class session immediately subsequent to the day the Legal Problem Solvers presented their hypo analysis, the students responded to another hypo, under exam conditions, which required them to use, as binding precedent, the Focal Case that had been discussed for the three previous weeks.

The pre-LL.M. students in the Companion Course received instruction in the IRAC essay genre prior to completion of the first Reading Role Cycle. This instruction included discussion from the LW as to the content expectations from the legal reader about the kind of information each section should contain and instruction from TR as to common language issues in each section (e.g., extensive use of the present tense and modal verbs in the rule section). The following week, each of the students had a ‘debriefing’ meeting with TR to discuss their essay in terms of issues such as the use of the focal case as precedent, organization of the IRAC essay, and language issues at the sentence and word level. The goal of this session was to allow students an opportunity for individualized mediation and to verbalize their understanding of the focal case, common law analysis, and the IRAC essay genre, as called for by CBI principles. While generally referring to the study as a CBI, TR grounded her mediation in these individual meetings in terms of interactionist DA (see, e.g., Lantolf & Poehner, 2004) principles. For TR, this meant that she engaged the students in working toward understanding of the hypo and precedent cases and how to employ the latter in analysis of the former.

The hypos the students responded to were drafted by TR in consultation with LW. First, TR
identified actually adjudicated cases where one of the primary cases relied on as precedent was the Reading Role Focal Case (e.g., *Commonwealth v. Malone* for the depraved heart murder case). This provided a baseline fact pattern that had actually been used in common law reasoning from which to initially draft a hypothetical. Typically, TR and LW additionally manipulated the facts so that it would be possible to make arguments for both sides. For example, the pair added facts to Hypo 2 (Appendix D), related to Focal Case 2, about the defendant in that hypo hiding behind a pillar waiting for the eventual victim so that students would have additional facts from which to analyze for *malice*.

### 3.7.4 Reading role team assignments

Since there were three identified reading roles and six students in the course, each student was assigned a reading role partner for the duration of the semester. TR paired students in groups that were heterogeneous with regard to their home legal system and L1. Although utilizing more homogenous grouping would have promoted different interactions among the student pairs, in this case, the heterogeneous groupings were used because of TR’s belief that having students with varying backgrounds in terms of home legal system and L1 would increase the likelihood they would construe the legal text or task differently, thus making different potential interpretations more visible to the students and TR, allowing for more discussion and mediation.

### 3.8 Conclusion

This chapter has outlined the CBI instructional program and the sources of data used to address each of the three research questions. The next three chapters address each research question in turn. Chapter 4 responds to Research Question 1 and explores the process of these pre-LL.M. students developing Reading for Common Law Analysis capabilities; the chapter analyzes the
process in terms of rich points elucidated through the students’ reading and writing about reading U.S. common law texts. Chapter 5 responds to Research Question 2 and explores how analogical reasoning for common law purposes manifested itself with these pre-LL.M. students. The chapter identifies three different developmental trajectories of analogical reasoning for common law purposes in the students’ written analyses of legal problems and addresses the various kinds of analogies employed in the students’ writing. Chapter 6 responds to Research Question 3 through a case study of three pre-LL.M. students, examining their engagement with the CBI program and development of common law reasoning.
Chapter 4 Case Reading in Praxis

"If you wish to be a lawyer, attach no consequence to the place you are in, or the person you are with; but get books, sit down anywhere, and go to reading for yourself. That will make a lawyer of you quicker than any other way." – Abraham Lincoln

4.1 Introduction

With all respect due to Abraham Lincoln, this oft-repeated quote attributed to him massively oversimplifies the process of learning to read legal texts as a U.S. legal reasoner would. Lincoln is clearly correct, however, in identifying the centrality of reading to legal thought. This chapter addresses the development of legal reading for common law analysis for pre-LL.M. students, trained as they were in other legal languacultures which rely on different sources of law and reason about those sources differently when engaged in legal problem analysis. The process certainly involved mediation from other people and sources other than legal books. Ultimately, the chapter indicates that not only was linguistic access to the referential meaning of the texts difficult for students, but what they were expected to learn from these cases and how to incorporate precedent cases into their understanding of legal reasoning remained a challenge for some students for the entirety of the first semester of their program.

4.2 Analysis

Analysis in this chapter is divided into two parts. The first component of the analysis draws on students’ written responses to a reading questionnaire in the second week of the semester and a post-semester questionnaire. The second section of data analysis addresses the process of learning to read legal cases through analysis of instructional conversations between

TR and the students. The instructional conversations were analyzed for insight they provide into the process of learning to read legal cases in order to employ in analysis of a legal problem the understanding afforded a legal reader about the law through the reading of that case. The rich points were coded into the categories of: *doctrinal concept*, *case law as source of law*, *case law as instantiation of legal concept*, *layperson concept*. These rich points are further explicated below as they illuminate how legal languaculture differences were made obvious to TR and the students through instructional conversation. While in the focus on rich points often leads to analysis of what may appear to be “student struggles,” this should not be interpreted to mean that students were unsuccessful readers. Rather, analysis of rich points illuminates differences in legal languacultures that require additional, active work on the part of learners to properly interpret the target legal languaculture. Additionally, analysis of rich points reminds experts that what may appear ‘basic’ to them is actually replete with rich points for experts-in-training.

4.3 Case Reading in Praxis

While analysis of case reading may be approached from multiple vantage points – such as reading for referential meaning of the text, reading to prepare for class discussion, reading to write a case brief – the analysis presented here focuses on reading for the activity of legal problem analysis. International LL.M. students face a double-pronged challenge. The judicial opinion figures prominently in the pedagogy of law school and is also a key distinguishing feature of the common law as compared to the Islamic and civil law systems. This study investigates the latter rather than the former. Understanding how pre-LL.M. and LL.M. students would interpret case law in order to prepare for class discussion in the U.S. legal education setting is, of course, also important. This study, however, approached the legal systems as legal languacultures and takes the position that in order to fully understand an entity or process, it
must be examined in the process of development. Therefore, this study investigates the process of students developing the ability to read cases for legal analysis. That is, engaging the students in legal problem solving utilizing case law and providing mediation to support their ability to do so from the beginning affords teachers and researchers of legal reading a *genetic* understanding of the developmental process. As Vygotsky writes,

> To encompass in research the process of a given thing’s development in all its phases and changes – from birth to death – fundamentally means to discover its nature, its essence, for ‘it is only in movement that a body shows what it is.’ Thus, the historical study of behavior is not an auxiliary aspect of theoretical study, but rather forms its very base. (Vygotsky, 1978, p. 65)

Thus, this study examines not only the obvious beginning and endpoints of students’ initial orientations to case reading, but also traces the actual shift in understanding between. While analysis in subsequent chapters will foreground other aspects of developing the ability to engage in common law analysis, such as analogical reasoning, the separation is for purposes of clarity discussion rather than viewing the processes as separate.

I refer to the process that the students were developing mastery in as Case Reading in Praxis (CRP). This term is intended to capture the fact that the process of learning to expertly read case law entails distilling both what the law is and applying it to legal disputes at hand. Put another way, praxis embodies an appropriate way to understand this process as it is the connection of scientific knowledge (legal concept knowledge) with practical activity (application of that knowledge to an actual legal dispute).

From a V-SCT perspective, *praxis* is understood to be the dialectical unity of theory and practice. The lack of a theory-practice connection is lamented by legal educators working with
international LL.M. students. Whalen-Bridge (2008) notes the research-pedagogical gap, pointing out that “[a]t present despite some references to comparative teaching methodology, there is no substantial body of pedagogy dealing with comparative legal skills” (2008, p. 365) instructors can refer to when teaching students a second legal language. Whalen-Bridge specifies further that those texts that do address differences do so in a cursory way, similar to the presentation of analogical reasoning discussed in the chapter on legal education, in that “many texts geared toward teaching common law analysis to international students introduce the different characteristics of the common law and civil law systems and do not go into the specific differences in reasoning patterns that the student must confront and reconcile” (Whalen-Bridge, 2008, pp. 366). That is, pedagogy and research in this context are not yet mutually informative. Insights from scholarly work on comparative law have yet to substantially and systematically inform LL.M. pedagogy and insights into how and what international LL.M. students learn of common law has yet to inform research on comparative law. I propose then, that approaching CRP as the connection of the scientific knowledge of legal concepts to the application of such knowledge to legal problems offers insight into the theory-practice gap. Analysis of the rich points the students in this study encountered while engaged in this activity afford legal educators and researchers both theoretically-rich insights into legal reasoning development and fill the practical, pedagogical gap noted by Whalen-Bridge (2008).

Although the issue of pedagogy and how it affects the development of case reading and legal analysis requires further attention by researchers and teachers alike, some research has begun to discuss issues of language, learning, and pedagogy in the L1 law school classroom. Mertz (2007) has already addressed what she refers to as the “textual-legal framework” that the combination of Socratic method and case method imparts in the legal classroom, in the first-year
courses in particular. Mertz writes about how in the Socratic classroom particular aspects of legal cases are privileged over others, and that in the Socratic classroom, professors can be observed:

… using the structure of Socratic questioning to highlight pragmatic aspects of legal texts, in particular, the ways that the texts become authoritative through the invocation of legal contexts. The text itself is highlighted here, rather than the story (reversing the common understanding of texts as mere vehicles for telling the story). Read in this light, these legal cases could be viewed as telling quite distinctly legal kinds of stories: tales of prior legal decisions at various levels (which are this metalevel stories that reflect on the storytelling itself). Mertz (2007, p. 57)

Thus, in the legal classroom, where a primary pedagogical tool is the judicial opinion, instructional conversations focus on promoting student understanding of cases not as stories of human conflict to be read through moral or social lenses, but as legal stories representative of legal categories. According to Mertz, imperative to learning to “read like a lawyer” is reading judicial opinions through the legal categories. Indeed, professors during Socratic dialogue employ uptake strategies that focus the student on procedural and doctrinal concepts that break the student of their moral or social reading of a case. Mertz, of course, carried out her study in 1L classrooms comprised, presumably, of almost exclusively J.D. students learning their first legal language culture, and her study was a major breakthrough in understanding how the combination of the Socratic method and case method socialized students into reading judicial opinions as instantiations of legal categories rather than as stories of human conflict.

Understanding the development of case reading in pre-LL.M. students as CRP extends this line of work, however, through promoting and documenting how these students learned not only to
read legal cases as instantiations of legal categories but then also to apply that knowledge to a legal dispute in practical activity.

In order to fully appreciate the shift in student understanding of, and approach to, legal reading in the U.S. legal educational setting, the chapter first presents students’ early- and post-semester orientations to reading legal texts in English. This analysis reveals that students initially, and strongly, associated reading with vocabulary, but by the end of the semester understood legal cases to be instructive both in what the law is and how legal analysis is carried out. In order to understand the developmental process that led to students’ different perception of legal reading from the beginning to the end of the semester, the remainder of the chapter considers rich points in the students’ CRP.

### 4.4 Students’ Initial Orientation to Legal Reading

During the second week of class, students were asked to report how long the reading assignment for criminal law took them, and what was their approach to reading the assigned materials. The assignment comprised ten pages, discussing *actus reus* and *omissions*, and included two redacted cases as well as excerpts from a law review article, sections of the model penal code, a newspaper report of a legal case, and additional case descriptions, notes, and questions. This reading assignment was typical in that the casebook included redacted cases, excerpts of law review articles, and extensive use of case notes and discussion, but it was also atypical in that it was one-half to one-third the length of the typical reading assignment in the criminal law course. The students’ responses to the reading questionnaire are shared in Table 4-1.

Table 4-1.

Students’ reported early-semesterto reading
<table>
<thead>
<tr>
<th>Student</th>
<th>Time to read</th>
<th>Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fazi</td>
<td>5-6 hours</td>
<td>I usually start reading by skimming, so I did today. Then, I start reading with concentration. I read by following the order of the assignment. I always find difficulties to understand some important terms, which lead me to read again, sometimes 3 times.</td>
</tr>
<tr>
<td>Hoobi</td>
<td>I try to read it twice and focus more in the part it is difficult for me</td>
<td>I read first time and underline the word that I could not understand. After I finished I tried to search the meaning and read the assigned material again.</td>
</tr>
<tr>
<td>Jun</td>
<td>5 hours in 147-156 2 hours in 141-145</td>
<td>1) I read these materials (for example: jones vs United States) more than one time. Some paragraphs are hard to understand and some have lots of new words to me, and these are parts of the material I have to read more than one time. 2) I separately read these materials cause they are too long and I have to summarized important information</td>
</tr>
<tr>
<td>Omar</td>
<td>Usually take me 1 to 2 hour to understand this because the new vocabulary</td>
<td>I read everything and while reading I put a line under the new word. Yes [I read from the first page of the assigned material to the last page straight through]</td>
</tr>
<tr>
<td>Pim</td>
<td>5-6 hours (two days)</td>
<td>1) Read follow outline in schedule 2) I read as skimming everything once time. I try to read the first page of the assigned material to the last page straight through and hi light new vocab with important sentence.</td>
</tr>
<tr>
<td>Yue</td>
<td>8-10 hours</td>
<td>First, I will just find out the meaning of difficult words. Then, I will read everything once. If I can not get their meaning, I will read the most difficult parts again. But, actually, I often can not understand the most difficult parts again. But, actually, I often am not understand them, even though I know the meaning of each words.</td>
</tr>
</tbody>
</table>

The approach to reading reported by the students in the beginning of the semester is not surprisingly quite general; the strategies are general L2 reading strategies and not specific to legal reading. Several students referred to strategies such as reading the assigned material multiple times (Fazi, Hoobi, Jun). Vocabulary was mentioned by all of the students in some way, although only Yue and Hoobi reported attempting to look up the new vocabulary and returning to the text in order to incorporate their understanding of the new lexical items in context. Notably, the students’ process and reported reading strategies indicated that they quite strongly related reading in English with understanding the meaning of vocabulary, particularly learning new words.
Only Yue indicated an awareness that her reading process may still leave her with gaps in understanding; although Yue did focus on word meaning in writing about her approach to the criminal law reading assignment, she additionally wrote “But, actually, I often am not understand them, even though I know the meaning of each words” (Yue reading questionnaire 8/27/2015). The awareness indicated by Yue actually echoes something that Mertz argues, pointing out that “even were all the technical vocabulary to be transformed somehow into more accessible language the meaning for which lawyers read the text would remain elusive to those reading for referential content” (1996, p. 236). In the early stages of the semester, then, the students appeared to approach the text as if the referential meaning, to use Mertz’s terminology, or “stage-one” meaning, to use Fajan and Falk’s (1998) terminology, would provide them with the necessary understanding of the text. In order to engage with these texts as a common-law reasoner, however, comprehension of the text only at the level of referential meaning is necessary but insufficient to either participate in class or use the case in common law analysis, the focus of the present study.

Not only are judicial opinions dense and potentially difficult to decipher, but casebooks, and how one is expected to learn the law through engagement with them, can be bewildering for any new law student. In fact, Yue indicated such confusion on the reading worksheet. In response to a question about what questions she would ask the criminal law professor about the reading assignment, Yue wrote: “After reading cases and the notes, I don’t know what information I can learn from them. Do I just needs to analyse them? What can I learn from these specific interesting cases?” (Yue reading questionnaire 8/27/2015). While it is perhaps not unexpected that L2 English students would report such reading strategies and confusion about what they were expected to learn from their casebook so early in the semester, the fact that these
questions occurring after case reading instruction and subsequent examples will indicate that for some students, sustained mediation is necessary in order to fully understand cultural assumptions implicit in the casebook and Socratic dialogue.

The time the students reported spending on the reading assignment also varied greatly, with Omar reporting spending as little as one to two hours to Yue reporting spending eight to ten hours on the reading assignment. On average, the students appeared to spend about five to six hours on this thirteen-page assignment; for the reader who has not spent much time reading casebooks and case law, five to six hours reading thirteen pages might appear excessive. Although self-reported time spent on the assignment does not necessarily grant insight into student comprehension of the materials, the information was useful for the instructors at that point in the semester. As the purpose of the Companion Course was to develop English language proficiency and socialize students into the culture of U.S. law schools, understanding the time students spent on the reading assignments afforded the instructors insight into who might potentially require additional support. For example, Omar reporting that he spent as little as one hour on the reading assignment caused concern, particularly when coupled with the fact that he also reported the least sophisticated reading process. While it is possible that reading quickly and encountering few difficulties while doing so would indicate mastery over the activity of reading in a particular genre, the TR and LW thought it highly unlikely that this would be the case when students, who had been identified as needing this additional year of study prior to matriculation in the LL.M. program, would have such mastery over the new genre of judicial opinions in just the second week of the course. Indeed, as will be explicated in chapter six, Omar likely reported spending only an hour on the reading assignment because the task of reading the assigned cases was initially overwhelming. Conversely, Yue investing eight to ten hours in reading the
assignment may have indicated that, while difficult for her, the criminal law reading assignment was close enough to her ZPD that she invested extra time in an attempt to make more sense of the content. That is, in this instance, the time invested might be an indication of understanding, where time spent indicates engagement with the material because meaning is being made with the text.

Association of reading with vocabulary on the part of the students rather than viewing it as a reasoning activity is illustrated even more forcefully in Table 4-2. When asked to report on the questionnaire any difficulties or confusion when reading the criminal law assignment, each student again referred to vocabulary in some manner.

<table>
<thead>
<tr>
<th>Student</th>
<th>Difficulties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fazi</td>
<td>Honestly, I enjoy reading so much. However, when I started reading legal books, I find understanding some words or guessing the meaning is quite hard.</td>
</tr>
<tr>
<td>Hoobi</td>
<td>New words + new information and legal system</td>
</tr>
</tbody>
</table>
| Jun     | 1) Some of the word are hard to understand even I go to find them on Dictionary.  
2) Distraction from other things when having a long time reading  
3) I understand the most of the material but I have a bit confusion |
| Omar    | The new word |
| Pim     | (When reading) 1) Vocab + technical wording, terms of legal  
(When listening) 2) I don’t know + understand when JD students spoke fast and not loud voice, I can’t hear and can’t catch it. |
| Yue     | 1) Legal liability  
2) How to analyse the difficult sentence |

As with the questions about the process of reading the assigned material, the students’ responses about how difficulties they encountered while reading indicated that the students closely associated reading with vocabulary. Both Omar and Pim only referred to vocabulary as a difficulty in reading the material. As will be further explicated when Omar’s development is considered in greater detail in chapter six, Omar and Pim entered the pre-LL.M. program with
the lowest language proficiency, as measured in TOEFL and IELTS scores, of the cohort; their language proficiency, then, may account for the focus of these students on the vocabulary as new and unfamiliar lexical items on any given page was likely quite overwhelming.

While other students did refer to vocabulary in documenting challenges in reading the assignment, some of their responses demonstrated a nascent understanding that referential meaning, which may be difficult to grasp in its own right, is just a threshold phase in understanding a legal case. In their responses, Fazi (“…when I started reading legal books, I find understanding some words or guessing the meaning is quite hard”) and Jun (“I understand most of the material, but I have a bit confusion”) echo Yun’s comment, discussed previously, regarding understanding the definition of a word, but not the meaning of a passage. Hoobi and Yue’s responses indicated even more developed understandings that difficulties encountered might be due to more than vocabulary or study environment. Yue referred to both the concept discussed in the material (legal liability) and a language issue above the word-level, albeit at the sentence-level – “how to analyse the difficult sentence”. Only Hoobi indicated that “new information and legal system” caused her any difficulty in comprehending the text, suggesting, perhaps, that Hoobi was already developing an understanding that the text itself might represent the legal linguaculture in a way that initially presented her with comprehension difficulties.

4.5 Students’ Post-Semester Orientations to Legal Reading

By the end of the semester, students reported much different orientations to reading texts in the U.S. legal education context and for U.S. common law analysis purposes. When asked about their reading practices on a post-semester questionnaire, students connect reading legal texts with legal analysis and law school assumptions far more than with comprehension of
individual lexical items, as they had previously. Using their more sophisticated way of discussing the role of cases in the companion course and criminal law classrooms, the students demonstrated a meta-awareness of the judicial opinion in legal education and common law reasoning. While not all students developed to the point where their autonomous reading of case law allowed them complete access to either the criminal law classroom discussion or the ability to use a given case for analytical purposes, the more nuanced ways of discussing legal texts suggest that some students developed a new understanding of CRP that they were able to verbalize. While the questions about reading on the post-semester questionnaire were more specific than the questions on the initial reading questionnaire, it still would have been possible for students to respond in a way that foregrounded general reading strategies, such as new vocabulary. For example, Table 4-3 reports student answers to the question: “How, if at all, did the Reading Roles help you develop your understanding of 1) case reading and 2) criminal law?”

Students could have focused their responses to this question on new vocabulary, as they had in the more general reading process and reading difficulty questions on the reading questionnaire. That they did not represents an altered understanding of case reading.

<table>
<thead>
<tr>
<th>Student</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fazi</td>
<td>The most important advantage was kind a tool of pushing to following up and gaining a step-forward. Moreover, the assignment itself requires very careful reading. So, for this kind of requirement, we could develop our reading skill, and our knowledge of Criminal Law.</td>
</tr>
</tbody>
</table>
| Hoobi   | - I think the most important are law student and legal solver  
        - It was help a lot to discuss the case before the class of criminal law |
| Jun     | 1) I need to read the case then I can understand the context. So the Reading Roles improve my speed and understanding of the case.  
        2) When I did the Reading role, I also know what the cases say and some way to solve the issue. |
| Pim     | I think it helped me to develop thinking as the legal system. I learned how to read for getting outcome by key words or phrases key in context. I gained a lot of knowledge |
of criminal law as a law student and how to apply the precedent cases and focus on solving the hypo case for analysis reasoning.

| Yun | 1) It requires me reading in different characters so I can learn more and understand the case in different ways.  
2) It helps me think more about argue in both sides. Then I learnt how to use legal facts apply to rules.  
3) It also let me find the way to read a case and find out the rational then make it into rules. |

*Note: Omar did not submit a post-semester questionnaire.*

Absent in the students’ responses to the reading-roles-related question on the post-semester questionnaire is reference to vocabulary that mirror the students’ early responses. Largely, the students here focused on the reading roles as a process, particularly in terms of preparing for the Criminal Law class (Fazi, Hoobi) and, importantly, for CRP (Jun, Pim, Yue). Fazi appeared to appreciate the reading role framework for the course because of the structure it imposed not only on the Companion Course but on the students’ preparation for the criminal law class, as he wrote about the Reading Roles as a “tool of pushing to following up and gaining a step forward”.

Jun, Pim, and Yue each wrote about the process of reading case law and what it afforded them in legal analysis. Jun wrote that “I need to read the case then I can understand the context” and that the reading roles helped him to understand the cases; the focus on *case in context* was absent in Jun’s earlier answers related to case reading, indicating that he now understands context as important in reading case law. Pim also wrote that the reading roles helped her to “develop thinking as legal system,” highlighting a developing understanding of the nexus of case reading and reasoning in the U.S. common law system. These responses indicate development in CRP as they demonstrate an understanding that a legal case is more than a collection of vocabulary items strung together, but rather has meaning for a particular context and is representative of a way of thinking in and about a legal system.
That student understanding of case reading changed during the semester is interesting, but, from a V-SCT perspective, it is the genesis of change which reveals the essence of the process. The remainder of the chapter focuses on rich points encountered throughout the semester as the students’ understanding of CRP shifted from the focus on vocabulary observed early in the semester to a more contextualized, activity-oriented understanding of reading as observed later in the semester.

4.6 Integrating CRP into Students’ Legal Languaculture Repertoire

4.6.1 Doctrinal concepts as rich points

When an individual trained in one legal languaculture undertakes learning a second legal languaculture, perhaps unsurprisingly, one place where salient differences occur is in the legal concept itself. Here, the substantive law course was criminal law, an area of law which can be found in all legal systems. Each student in the Companion Course reported having been trained in her particular criminal law system. A few had even practiced or had internships involved in criminal law in their respective systems. The students, then, already have internalized, presumably, conceptual knowledge about criminal law, or how their legal system categorizes and punishes bad acts. When the students engaged with criminal law in the Companion Course, then, the cultural nature of doctrinal concepts was revealed. For example, the Teaching Hypo and relevant precedent case, *State v. Sophophone* (2001), used to introduce hypo and case reading, illuminated this cultural nature. The Teaching Hypo involved the doctrinal concept *felony murder*, which essentially holds that if a death occurs during the commission of a felony, the felon(s) can be held responsible for homicide, a doctrinal concept apparently unique to U.S.
Doctrinal concepts as rich points were revealed in such instances, when differences in how and what legal systems punished were made obvious to the Companion Course instructors and students.

Before being introduced to common law analysis, students read a fact pattern and engaged in class discussion about how that fact pattern would be resolved in their home legal systems. Each student analyzed the problem using a defendant other than the ones identified in the hypo and in fact indicated that in their legal languages it would not be possible for the defendants listed in the hypo to be found responsible for the death, as it would in the American legal system.

In the Teaching Hypo, several teenage boys break into the home of a neighbor of one of the boys during the middle of the day, believing he is not home. Unfortunately, the homeowner is home, is startled by one of the teenagers, grabs a gun and shoots at the floor, intending to scare the boys, but a bullet hits and kills one of the perpetrators. The “call of the question” instructed the students:

You are the Indiana prosecutor assigned to this case. Which of the defendants (Jose, Blake, Levi, and Sharp) will you be able to win a conviction for felony murder in the death of Danzele? Explain using the cases provided and please use IRAC structure in your response. (Teaching Hypo, available in Appendix B)

The hypo, then, clearly stated that the teenage boys were the defendants and that felony murder was the relevant doctrinal concept from the perspective of the writer of the hypo. Although it would have been reasonable for them to do so, none of the students asked what felony or felony

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10 In fact, a footnote in the felony murder unit of the case book indicates that felony murder was abolished in 1957 in England, where it originated, but that countries such as France and Germany appear never to have had such a legal category (Saltzburg, Diamond, Kinports, Morawetz, & Little, 2009, p. 328). This would indicate, then, the cultural nature of legal categories.
murder meant. Several students, however, reported consulting a dictionary for the meaning of felony (but not felony murder). This suggests that students likely interpreted the two words separately, believing they understood what murder but not felony meant. Attempting to comprehend felony murder through the combination of the definitions of the two words would indeed lead to an inaccurate understanding of the legal category.

In order to discuss analysis of the Teaching Hypo in the students’ home legal systems, TR divided the class into two groups—civil and Islamic law. Excerpt 1 occurred during this small-group discussion; in this excerpt, Pim, Jun, and Yue, each from civil law countries, are observed discussing their analysis of the first hypothetical. When TR approached the group, they were discussing how this case would play out in their home legal systems. Although TR had instructed them to discuss this case using their first legal language, she was surprised that the group was discussing the homeowner rather than the teenage boys as the defendant. The shift in defendants also meant that the students were discussing a new legal concept, self-defense rather than felony murder.

Excerpt 1
Week 2
[00:26:09.08]

1   PI: is is self-defense or no?
2   YU: mm no
3   TR: but is th is the question that it's self-defense?
4   PI: ah the question is (3)
5   YU: I think it's (inaudible) because he's over
6   PI: defendant can
7   YU: over the
8   PI: able to be conviction for felony murder. I think
9   TR: so in your home system it would be, who would be on
10   trial
11   YU: both of them (.) both of them
12   TR: so, by both of them you mean scott the homeowner and
13   the teenagers
14   YU: yes
PI: yes
TR: ok, so what this question was asking you to analyze
though was if these teenagers could be on trial for the
death of danzel
YU: no no
TR: no, so in china no
YU: no i think just the owner because he shoot the guys he
wants to try to make himself like self-defense.
actually he was self-defense but i think it's over over
the because he was the victims break into their into
his house but they are not violent they not
PI: guilty
YU: they hadn't hurt the owner so i think in china if you
want to make yourself like self-defense you should be
faced with the same how do you say
JU: [inaudible]
YU: violence the same violence violence if the safe like
the do the violence to the owner so the owner can do
the same violence
LK: so the force has to be equal level

In line 1, Pim asked her groupmates if they thought the homicide was self-defense,
indicating that she believed the homeowner who grabbed the gun would or should be held
responsible for the death of one of the teenagers. TR, apparently confused by the discussion of
self-defense, oriented the students back to the instructions at the end of the hypo, the “call of the
question”, which stated that the defendants in this case were the teenagers who had broken into
the home, not the homeowner. While Pim searched the hypo for the language of the instructions,
Yue told TR how she would analyze the problem; although Yue appeared to disagree with Pim
as to whether the killing was self-defense, she appeared to agree with Pim that the homeowner
was, or should be, the defendant.

TR attempted to engage all three students in the same conversation and clarify her
understanding of their analysis by asking who, in their home legal system, would be on trial, to
which Yue responded “both of them.” Yue apparently believed the teenagers would stand trial
for some crime, but not for the death of their co-burglar, because when TR clarified that the
question instructed students to analyze whether or not the teenagers could be convicted in the
death of their friend (shot by the homeowner), Yue responded “no”. She then further explained a
rule of law related to use of force in defense of oneself in China.

Arguably, this occasion is an example of the students’ assumption that the hypo would
represent their existing knowledge about criminal law, or their use of top-down processing to
comprehend task. Pim did after all have to return to the hypo to look for what it actually asked
students to analyze and TR repeated to the group that the question instructed them to consider the
teenagers, not the homeowner, as potentially responsible for the death of their fellow burglar.
The students here, though, were tasked with analyzing how the problem would be addressed in
their home legal system; it appeared never to have occurred to them that the burglars could be
held responsible for a co-felon’s death during the burglary. Even after the interaction with TR,
where she explicitly pointed them to the call of the question, the students did not appear to
consider that a possibility. Excerpt 1, then, is likely a case of a confluence of bottom-up
processing (the students did not carefully read the hypo) combined with top-down compensation
(the students were instructed to discuss the problem as they would have in their home legal
systems and therefore read the problem through their own cultural frames, which did not include
felony murder).

Doctrinal concepts representing rich points to a learner would presumably be unique to
students who have training in another legal system and can both assist and impede learning of
U.S. common law doctrinal concepts. In the case of felony murder, when discussed in
conjunction with the representative precedent case *State v. Sophophone* (2001), the students
appeared to find this doctrinal concept difficult to understand, which made felony murder salient
as a rich point. In other instances, however, the students were observed using their prior
understanding of doctrinal concepts as a useful psychological tool that could be called upon to compare with the U.S. common law version of the concept. The students all had internalized systematic concepts like homicide, although their various legal systems might divide this legal concept into different types and numbers of categories than does U.S. common law. In some discussions of homicide, then, the students seemed satisfied to understand the legal category as expressed in U.S. common law, but to comment “in my country we do it this way.” In such a case, the previously internalized legal languaculture and doctrinal concepts operated as a useful tool rather than a cultural rich point to be overcome. Some doctrinal concepts, however, such as felony murder described in Excerpt 1, proved more difficult, suggesting that some doctrinal concepts might be more to one culture and thus more difficult to work through, a richer rich point, as it were. Prior legal concepts, then, can provide useful insight into the legal languaculture being learned, either because the rich points that arise make visible unanticipated aspects of that culture or because those prior legal concepts provide a useful comparison through which to understand the second legal languaculture.

4.6.2 Case law as rich point

The interpretation of case law presented quite possibly the richest of rich points, in multiple ways. Not only were students confronted with the necessity of understanding the complex text itself, but they also needed to be able to develop the ability to engage in dialogue about the case in class and deploy understanding of the law grounded in the case in legal problem solving. The issue of the role of case law in legal analysis proved a salient rich point from the first day of class, for all students, and through the entire semester, for at least some students. The next several examples represent questions asked frequently in both class
discussions and small group or individual meetings; these questions represent the students processing the experience of common law and U.S. legal education through their prior experience as lawyers and law students.

*An important rich point: Case law as a source of law*

Students were introduced to case law as a critical text in both U.S. legal education and U.S. common law reasoning in the first week of class. Reading case law was introduced by TR and embedded in presentation of the common law SCOBA; TR additionally focused instruction of case reading using lecture materials developed for LL.M. students generally that drew on Lundeberg’s (1987) reading strategies for case reading. In Excerpt1, an interaction between Fazi and TR on the day the common law SCOBA and case reading were introduced to the class, Fazi asked a series of questions representative of questions about case law asked by each student at various points in the semester. The nature of these questions might appear basic to a legal professional, but when understood through *rich points* for students who have already been educated in another legal system, the questions reveal that integration of case law and analogical reasoning into the students’ written analyses is not a straightforward task.

**Excerpt 2**

**Week 2**

[00:21:25.23]

1. FA: another question because i am a little bit confused
2. about criminal law
3. TR: mm hm
4. FA: because i understand as i understood from professor ah
5. ah [CRIMINAL LAW PROFESSOR] [CRIMINAL LAW PROFESSOR]
6. TR: [CRIMINAL LAW PROFESSOR] yeah
7. FA: [CRIMINAL LAW PROFESSOR] uh that criminal law used to
8. be a common law where where ah judge can make laws
9. right but now criminal law ah constitutionally i mean
10. judge in the united states constitutionally are in ah
11. prohibited to to make laws right and they have to
12. follow the statutes
13. LW: if there is a statute yeah
In this example, Fazi asked a question about the relationship between statutes and cases while TR was explaining the common law SCOBA, indicating confusion about how statutes and cases work together in U.S. common law. As he put it, “judges in the United States are constitutionally prohibited to make laws and must follow statutes” (lines 7-12). LW, the adjunct legal writing professor, interjected “if there is a statute” (line 13), reminding students that while in general most areas of law in the United States do have statutes, but this is not necessarily always the case. Fazi’s question indicated that, at least in this initial introduction to hierarchy of legal sources and patterns of legal reasoning in U.S. common law, he perceived the sources of law as distinct rather than working in concert, as he asked “which I must follow the code or the previous case or facts” (lines 19-20, emphasis mine).

Of course, TR was attempting to discuss with the students precisely this issue related to the common law SCOBA – that U.S. common law requires a synthesis of sources of law, which frequently involves interpreting through case law the meaning or scope of specific language in a given statute. For these students, understanding the relationship between case law and other sources of law was a complicated issue to first comprehend and then gain control over. While Fazi’s question in Excerpt 2 occurred in the second week of class when case law was initially introduced, similar questions were asked by each student multiple times throughout the semester, indicating a need to return to the conceptual understanding of the role of case law in the U.S. common law system.
Pim demonstrated just such a need in Excerpt 3, which occurred during her first IRAC essay debriefing with TR, in week four. In this interaction, Pim, demonstrated the ability to verbalize that she would “look for the rule” of the precedent case. When TR asked conceptual questions related to case law or for Pim to apply knowledge from the precedent case to the hypo, Pim was unable to do so. Her understanding of the role of cases in common law appeared, then, to manifest pure verbalism rather than true, conceptual understanding.

By way of background, Pim represents an interesting case as she had previously participated twice in summer programs for international law students at Mid-Atlantic Law School; the summer programs focused, in part, on legal analysis skills taught in LL.M. Legal Writing at Mid-Atlantic Law School. In fact, in her pre-semester questionnaire, Pim responded to the question about her understanding of U.S. legal reasoning by drawing a chart that replicated the analysis method taught in that program, which led TR to believe she had developed a fair understanding of CRP. Pim was the most experienced practicing lawyer in the cohort; she reported working in litigation as counsel for a bank, specializing in contracts and bankruptcy, and also held a corporate job for one year, offering legal advice as in-house counsel. Perhaps this extensive practice experience accounts, at least in part, for why, in Excerpt 2, Pim demonstrated reliance on familiar civil law patterns of reasoning and did not initially demonstrate her understanding of why case law is important in the U.S. common law system.

At the outset of the interaction, TR asked Pim why she would look to the purpose of a statute when analyzing a strict liability problem. The preferred response she sought was that the rule from the relevant precedent case, Commonwealth v. Koczwar (1959), states that a public
health or safety purpose of the statute is important when analyzing for strict liability.\textsuperscript{11} Pim’s response in lines 3-6, however, by referring only to the statute (‘pennsylvania cigarette act’) and the facts of the hypo, is a response that might be anticipated from a civil law lawyer. For the remainder of this example, the duration of which was approximately five minutes, TR attempted to elicit from Pim that it is \textit{Commonwealth v. Koczwar} (1959), the precedent case, that provides that insight into strict liability.

\textbf{Excerpt 3}  
\textbf{Week 4}  
\textbf{[00:19:09.19]}  
1 TR: so how do we know that we look at the purpose of the statute (.) when we analyze for strict liability how do we know that  
2 PI: ahm because i saw the pennsylvania cigarette act first and then i i saw the facts ah i i i i read the rule of the pennsylvania cigarette tax act and applied with the facts that is the yeah  
3 TR: that's your process  
4 PI: yeah process  
5 TR: yeah  
6 PI: and then i i i i try to find rule in the case koczwar  
7 TR: mm hmm (.) and so how do you use the rule from koczwar  
8 PI: i think ah koczwar is like a strict liability even you don't know you cannot excuse you have to responsible because it's the strict liability  
9 TR: and how do we know it's strict liability  
10 PI: without mens rea  
11 TR: how  
12 PI: you have to ah you have to responsible for the act  
13 TR: and how do we know there's no mens rea in the crime  
14 PI: mm (2) how do we know because the the mens rea is like (2) ah something thinking  
15 TR: mm hmm  
16 PI: but ah and then you do something wrong and you have to responsible for the act but this case ah even you didn't do do something bad without mens rea but you have to responsible

\textsuperscript{11} \textit{Strict liability} is a legal concept in U.S. common law whereby one can be held responsible for a criminal infraction even in the absence of any intent to commit a crime. This category of crime represents an exception to the rule that some level of \textit{mens rea}, or the guilty mind element, must be satisfied in order to be found liable for the commission of a crime.
because it's the strict liability is a problem in the public

TR: okay
PI: yeah
TR: so i'm how (.) do we know how do you know when you're dealing with a strict liability problem
PI: mm
TR: is there anything that gives you a guide
PI: yeah
TR: to figuring out whether or not this crime is strict liability and you only have to prove the act no mens rea (2)
PI: mmm (3) how i know this is the strict liability right
TR: mm hmm
PI: mm because the the products is the have something the strict rules to ah to said the pennsylvania cigarette tax act to ah prevent by you have to stamps

TR: is there anything that tells you that this is important to look at to see if a strict liability or not
PI: yeah i think that i think the law even in my country the law they will have the purpose of the the statute said why we have to write this law to to strict liability yeah
TR: okay so you're in your country you could look at some sort of um consideration
TR: consideration
PI: yeah
TR: considerations
PI: yes
TR: or regulations
PI: yeah
TR: something that would tell you how to interpret the statute
PI: yes
TR: do we have anything in this country that would tell us how to look at the statute and whether or not the purpose of the statute is important to analyze when we're thinking about strict liability is there other source that we can look at to see
PI: mm (4)
TR: what else would you look at besides just the statute (1) to analyze this problem
PI: ahm the kind of products
TR: and how do you know you look at the kind of products
108 PI: because it's too much five five thousand
109 TR: but that but five but more than five thousand
110 PI: yeah
111 TR: doesn't tell you about the kind of product (.) how do
112 you know that the kind of product is important what did
113 you read that told you the kind of product was
114 important you read it before you read this problem
115 PI: ahm i think the cigarette is the is dangerous and
116 harmful to health of of people
117 TR: mr tommy truckdriver doesn't care that you think it's
118 dangerous
119 PI: ((laughs))
120 TR: mr tommy truckdriver cares
121 PI: money
122 both: ((laugh))
123 TR: mr tommy truckdriver cares that you know that Koczwara
124 the case tells you the the purpose of the statute is
125 important to analyze
126 PI: yes (.) he (1) he didn't know (1) until they have
127 something the stamps to put on the box yeah
128 TR: but it's strict liability that doesn't matter right
129 PI: mm
130 TR: so how do we how do we know to look at things like the
131 purpose how do we know to look at
132 PI: the products
133 LK: the products how do we know that (2)
134 PI: mm
135 TR: ((taps finger on book three times))
136 PI: the case
137 TR: the case tells us
138 both: ((laugh))

Several times Pim did seem to understand that this is what TR was requesting, and she
even offered in line 10 “and then I try to find rule in the case Koczwara.” TR took up this
response and asked Pim “so how do you use the rule from Koczwara” (line 12). It is worth
pointing out here that several of TR’s questions in this sequence may have been confusing as
phrased or TR could have altered the quality or type of mediation in a way that either elicited the
information she was requesting or led to more fruitful ZPD activity. For example, TR could have
followed up Pim’s statement about finding the rule from the precedent case by asking her what
she understood the rule to be, not how she would apply the rule. This IRAC essay debriefing was
the first individual session with each student for TR, so in interactions such as Excerpt 3, she can be observed probing the student’s ZPD-in-activity in order to attune her mediation, but she is also observed developing as a mediator for CRP.

Nevertheless, TR asked Pim how she would use or apply the rule from the precedent case and Pim’s response, stating a conclusion that *Koczwar* is about strict liability and “even you don’t know you cannot excuse you have to responsible because it’s the strict liability” (lines 14-15), told TR more about what Pim understood about the case – it’s about strict liability – than what the rule from the case was or how to apply it to the hypo. Therefore, TR asked again “and how do we know it’s strict liability” (line 16). This question might appear confusing, but TR wanted to uncover what Pim understood about rules from legal cases in general and specifically what the rule in this case was. Pim responded, however, with a partial definition of strict liability, “without *mens rea*” (line 17). While Pim demonstrated more use of technical terminology, as in line 17, at this point in the semester than did some of her classmates, her responses often provided more general or definitional information than the question TR was attempting to ask. This is notable because Pim’s understanding of the definitions of such terminology was often disconnected from an ability to deploy the concept in practical activity. That is, while Pim could discuss the legal concepts, she struggled to develop control over common law analysis.

TR and Pim continued their interaction, with TR asking questions that were a variant on “how do you know” and Pim offering responses that include the definitions of technical terms or demonstrated an understanding on some level of what *Commonwealth v. Koczwa* had articulated about strict liability (e.g., that strict liability might apply in instances where an inherently dangerous product was involved), but not the information TR sought. Eventually, in line 80, TR’s mediation brought the conversation back to sources of law, which is what TR
wanted to discuss, specifically cases as a source of law. Pim responded to this question by referring to her home legal system, saying “I think the law even in my country the law they will have the purpose of the statute said why we have to write this law” (lines 82-84). Pim’s reference to her home legal system allowed TR to draw on Pim’s knowledge of legal sources in the U.S. legal system, asking in lines 98-102 if there is a source of law which one could look to in order to understand a statute. Pim paused for four seconds, so TR rephrased, “what else would you look at besides just the statute to analyze the problem.” Despite having verbalized to TR in line 10 that she would look for the rule from the case after looking to the statute, Pim did not appear to understand that TR was asking her questions related to case law. She responded, again, with a specific example from the precedent case “the kind of products” (line 106). When TR asked again “how do you know you look at the kind of products?” which could be interpreted to be part of the rule from Commonwealth v. Koczwar (1959), Pim responded with the quantity of products.

Pim appeared, then, unstable in her understanding of the meta-structure of U.S. common law reasoning and how to integrate the various sources of law into her discussion and analysis of a legal problem. When TR asked probing questions related to how do you know a particular component of the analysis is important, Pim responded either by explaining the structure of her home legal system or by offering a factoid from the precedent case. She appeared to understand that the answers she was providing were not the answers sought by TR, as every time TR repeated what was essentially a request for the same information, Pim offered a new fact she remembered about the precedent case: e.g., “I think Koczwar is like a strict liability even you don’t know you cannot excuse you have to responsible” (lines 13-14); “because the products … have something the strict rules … said the Pennsylvania cigarette tax act” (lines 43-45); “because
it’s too much… five thousand” (line 108). Pim’s responses indicated that TR was thus far unable to establish a ZPD within which to mediate Pim’s understanding of the legal analysis activity. The activity did appear to be quite close to Pim’s ZPD, however, as her varied responses indicated an awareness that she was not providing TR with preferred responses.

Given her response patterns and her reasoning, it is not a stretch to conclude that Pim was exhibiting verbalism rather than real understanding. On the surface, the information she provided about cases in general (e.g., that cases are used in legal analysis, indicated on Pim’s pre-semester questionnaire) and this case in particular might have pointed to understanding of CRP. Attempts by TR to engage her in deeper discussion of the precedent case and its use in analysis of the hypo, however, revealed Pim’s shaky understanding of case law’s position in the common-law system. As she explicitly referenced several times in this interaction, she also relied on the texts she would read and reason with in her home legal system to structure her approach to analyzing this legal problem. Although from this interaction she appeared to have failed to fully understand her reliance on more familiar forms of legal reasoning and why they are insufficient in the new legal lenguaculture; for this reason, case law appears to be a rich point for Pim. She demonstrated some understanding of case reading in common law in that she was able to index that she knew she was supposed to use a case in some way or look to a case for a rule. However, when questioned specifically about her legal analysis, Pim was unable to identify that the reason particular facts or analysis were significant was because those facts or arguments were highlighted as crucial for analysis in the case. That is, although Pim is able to verbalize information about or from a case, at this point in the semester she has yet to demonstrate ability to connect that understanding to a concrete legal dispute and thus is still developing control over CRP.
Likewise, Pim and Omar demonstrated much later in the semester, in week ten, that they still required additional mediation in how case law and other types of law, such as statutes, work in concert in the common-law system. Pim and Omar served as Legal Problem Solvers (LPS) for the third Reading Role cycle. The focal case in that cycle was United States v. Jackson (1977), a case which centered on whether or not defendants’ actions constituted a substantial step and therefore defendants could be found guilty of attempted burglary. The interaction below (Excerpt 4) began with a question from TR about the dyad’s presentation of their analysis of the LPS hypo. TR initiated this exchange because, in their presentation, Pim and Omar had relied exclusively on the Model Penal Code (MPC)\textsuperscript{12} for the rule section and the case for the analogical reasoning in the application section. That the pair stated one rule but applied a different rule indicated that Pim and Omar were not yet incorporating case law into their understanding of what constitutes a legal rule. Although Pim and Omar had demonstrated an understanding of United States v. Jackson (1977) and attempt in their presentation, the sources of law from which they drew for the rule section and application section did not constitute a cohesive analysis, indicating these students were still developing conceptual understanding of legal cases as sources of law.

\begin{verbatim}
Excerpt 4
Week 10
[00:42:55.21]
1  TR: i wanna push you a little further on how you're using
2      jackson
3  PI: uhh
4  TR: so why do we why do we use precedent cases to compare
5     to a problem that we're trying to solve
\end{verbatim}

\textsuperscript{12} The Model Penal Code (MPC) is an idealized statutory system, developed by the American Law Institute in an attempt to encourage states to update and standardize their criminal statutes. The Criminal Law course involved study of how both the MPC and common law categorized the legal concepts and crimes being studied.
PI: be- because we want to
OM: this
PI: know what is the line of substantial step
TR: and how do we know that the substantial step is the
test
PI: ah because the judge decide and have a clue to tell us
what is the line to become a crime to commit a crime
TR: so you get the substantial step test the rule from the
jackson case right
PI: yes
OM: yes
LW: but you got all of your rules in your IRAC
TR: from where
LW: from the Model Penal Code
OM: yes
TR: so how are you bringing it in in the application if
it's not in the rule
OM: ah yes what i did here ah i wrote ah ah attempt bur
glary and united states versus jackson case but when i
did the application i look to the jackson case

TR initiated the exchange by asking a general question about why precedent cases are
utilized in the common-law system; Pim’s initial response indicated an understanding both of the
case at hand, United States v. Jackson (1977), and what, specifically that case could provide in
response to the legal issue – that United States v. Jackson (1977) provides a legal rule as to what
a substantial step is. Her response demonstrated from the interaction with TR discussed in
Excerpt 3, where Pim was unable to verbalize what the precedent case in that problem added to
an understanding of the legal concept. Conversely, in Excerpt 4, Pim identified immediately a
crucial insight into what constitutes the rule for attempt that is learned by reading this case.

While Pim’s response did demonstrate development in understanding how cases operate
in U.S. common law, she still appeared at this point in the semester unable to fully appreciate
how statutory and case law interact in common law analysis. That is, Pim was able to verbalize a
fairly accurate representation of case law and how it operates in the U.S. common law system,
but this broke down in performance and she reverted to more comfortable patterns of reasoning,
namely, for her, rule-based reasoning. She appeared to understand that case law provides relevant information ("what is line of substantial step"), but not that cases themselves are part of the rule, as the analysis Pim and Omar presented included only rules from the Model Penal Code, and then used *United States v. Jackson* (1977) only for analogical reasoning in the application section.

Using Pim’s focus on the substantial step, TR asked more explicitly, “and how do we know that the substantial step is the test” (lines 9-10). Again, Pim appropriately responded by mentioning how the judge’s decision can “have a clue to tell us what is the line to become a crime” (lines 11-12). TR again appeared to accept Pim’s verbalization about what case law affords a common-law reasoner, and now could ask the question she was really after: “so you get the substantial step test the rule from the Jackson case right” (lines 13-14). TR made the terminological leap for Pim and Omar – that the “clue” was the “substantial step test” which was a “rule” – but the dyad appeared to accept this understanding as they both affirm that the substantial step test in their analysis emerged from their understanding of *United States v. Jackson* (1977).

In this example, TR’s questioning was initially quite broad, framing questions in terms of case law in general and, as Pim provided responses, became more closely tied to the analysis the students had just presented. At this point, neither appeared to have connected TR’s questions about case law and rules to their analysis, but LW had intuited TR’s question and asked the students about the source of law they used to write their rule section. TR and LW actually spoke over each other to some extent in this section; TR asked a slightly more open-ended question ("from where", leaving the students to provide the source of law), while LW provided them with the source of law ("from the Model Penal Code"). Pim and Omar still did not appear to
understand that the line of questioning they were receiving on this point indicated that there was a disconnect between the rule and application sections as they both nodded and responded “yes,” agreeing that their rule section was written exclusively from the Model Penal Code. TR continued her question then, attempting to lead Pim and Omar to recognize that cases are not just used for analogical reasoning but they provide rules; that is, the rules derived from reading the cases drive the analogical reasoning.

Omar’s response to the instructors’ even more explicit questions indicated that he still understood statutory law and case law as separate entities. Indeed, he stated that he wrote the rule section using the Model Penal Code and “looked to” the precedent case while writing the application section. As a result, the discourse he and Pim produced is not cohesive or accurate common law analysis in that they stated one rule from one source of law in the rule section of their IRAC essay and applied a different but unstated rule from a different source of law in the application section, although Omar and Pim do not seem to realize this. A more accurate analysis would have synthesized the statute and rule from United States v. Jackson (1977) and then used that synthesized rule in the application section. That Omar and Pim neither produce this type of analysis nor appear to understand despite the instructors’ questioning that their rule and application sections were not cohesively written indicates that, at that point in the semester, Omar and Pim did not perceive legal cases to be a source of legal rules which could be applied to legal problems at hand.

It should be noted that the Criminal Law course likely affected how students viewed the relationship of different sources of law. Omar and Pim both appeared in their writing and presentation of the hypo analysis to view the MPC as a source of law with the focal case relevant only for analogical reasoning in the application section; analogical reasoning will be discussed in
the next chapter, but it would also appear that Omar and Pim fail to understand, in a systematic way, the purpose of analogical reasoning in U.S. common law. In the Criminal Law course, the professor introduced each unit with a juxtaposition of MPC rules and common law rules. The MPC rule, of course, introduced a rule as developed in a text that attempted to standardize criminal codes nationwide; to my knowledge, no U.S. jurisdiction has fully adopted the MPC. Additionally, the common-law rules discussed in the criminal law class presented the rules as they had historically developed and been understood “at common law”, not necessarily the rules as developed or represented in the specific cases included in the casebook. In general, the rules presented and instruction valued *rule-based, deductive reasoning* over *analogical reasoning*, particularly analogical reasoning as presented in the Companion Course as critical to U.S., common law. The Companion Course students, then, may have understandably been confused about the position of case law as one source of primary law in the U.S. legal system and confused as to why one form of legal reasoning appeared to be privileged in one class while a different form was privileged in another class.

I do not raise this issue to criticize the criminal law course, but rather to point out how pedagogical approaches affect what and how students learn. The pedagogy in this particular instance appeared to foster compartmentalization of the MPC and common law on the part of these students, leading them to believe they did not need to develop the ability to extract rules from cases and engage in analogical reasoning.

*Legal cases as instantiations of legal concepts as rich points*

The fact that legal cases represent specific legal concepts proved to be an additional rich point. In both U.S. legal education and in CRP, judicial opinions are instructive on a limited set of legal categories; as Mertz (2007) argues, a major pedagogical objective of law school is to
produce readers who read cases as representative of legal categories rather than through moral or social justice lenses. Linking cases with the appropriate legal categories or concepts as time proved a challenge for these students, however, as discussed in the next several examples, beginning with Excerpt 5.

Excerpt 5
Week 5
[00:29:42.12]
1  TR: so if we know for first degree murder you need
2       premeditation
3  OM:  mm hm
4  TR: then we know if that's the first thing we mention
5       in our rule section in our A section we're going
6       to talk about premeditation and this problem do
7       you see any examples of premeditation or facts
8       that support premeditation in this problem
9  OM: yes like ah as you we mention now knoller case
10  TR: is there do they talk about premeditation in the
11    knoller case
12  OM: ah no
13  TR: do you what were the cases where we talked about
14    premeditation
15  OM: who grab the gun from behind him and kill his wife

In this example, Omar produced a case-concept mismatch, a frequent occurrence in the data. TR asked a question related to a doctrinal concept, *premeditation*, and Omar responded by introducing for discussion and analysis a case which was representative of another doctrinal concept. In this instance, TR had asked about a legal concept related to first-degree murder, and the case that Omar suggested, *People v. Knoller* (2007), is an example of an unintentional homicide, a case of depraved heart murder. To his credit, when TR asked if “they talk about premeditation in the Knoller case,” (lines 10-11) immediately, Omar understood he had identified a concept-case mismatch. Although he could not recall the name of a case where premeditation was a relevant legal category, Omar provided a succinct factual explanation of a case
that allowed TR to understand the first-degree murder case Omar referenced so that they could discuss premeditation in terms of that case.

Similarly, in Excerpt 6, Hoobi initially introduced a self-defense case related to reasonable belief to justify her argument that imminent danger was present in one case but not in another. While relying on multiple cases in constructing an argument is an effective strategy, TR objected to using “the subway case” in a discussion about imminent danger because it had been used in the criminal law course to teach a different factor of self-defense.

Excerpt 6
Week 13
[00:11:57.19]

1   HO: it's not self-defense (1) ah because we use the subway case we can said this is imminent dangerous but with
2   norman case (2) it's not
3   TR: (1) was the subway case about imminent danger though
4   HO: i think yeah (1) it's they considered it as self-defense
5   TR: they considered it was self-defense right but my
6   reading of the subway case was we were reading it more
7   as an example of the first element
8   HO: ahh reasonable belief

When TR questioned Hoobi on her use of this case in bolstering her argument about imminent danger (“was the subway case about imminent danger though” line 4), she responded by saying “they considered it as self-defense” (line 4). This response appeared to indicate that Hoobi was associating the cases with the entire crime and not with specific elements of the crime, as the casebook is organized to teach. TR, then, acknowledged to Hoobi that the case was considered self-defense, but clarified that she understood “the subway case” to be “an example of the first element” (lines 7-9). Hoobi clearly understood the course material on self-defense quite well as after TR offered “the first element,” Hoobi immediately identified that element: “ahh reasonable belief.”
While both of these interactions are rather short and resolution was relatively easy to achieve, they do point to the fact that in practical activity, the students were tasked with a lot – sifting through doctrinal concepts, legal-system concepts, language concepts – and on occasion would produce a case-concept mismatch, indicating that they were still developing control over the case content and case-concept connection. The learners needed to be referred multiple times to the fact that the cases are representative of specific legal categories and can only be used in analysis of legal stories which invoke those same categories. In Chapter 6, Excerpt 10, Jun and TR engage in a far more extended conversation about a case-concept mismatch; in that instance, understanding the case under discussion through the legal category it represented a more difficult challenge for Jun.

4.6.3 Lay person concepts as rich points

In addition to doctrinal concepts and case law as a structural concept in the law, rich points also became salient for the students in terms of the lay person internalized cognitive models through which they experience the world. Excerpt 7, similar to Excerpt 1 where the students analyzed as a defendant a hypo character that TR had not intended to be a defendant, involves a bottom-up reading issue where the student compensated with top-down processing. Unlike Excerpt 1, however, in Excerpt 7, Jun appeared to compensate with frames from his understanding of the world as a lay person rather than his legal languaculture frames. Jun’s imposition of his ordinary cultural frames on the legal problem may be due to the fact that the legal problem additionally involved a doctrinal rich point.

In writing IRAC essay 1, Jun used the intended precedent case, Commonwealth v. Koczvara (1959) to inform his analysis of the hypo, as instructed. He used the case in an
unintended manner, however, and analyzed the hypo as a *vicarious liability*\textsuperscript{13} rather than as a *strict liability*\textsuperscript{14} problem. Unlike in the case-concept mismatch described above, the precedent case *Commonwealth v. Koczwara* discussed both *vicarious* and *strict liability*, but the hypo was written specifically to elicit only a strict liability analysis.

In his IRAC essay, though, Jun appeared to analyze vicarious rather than strict liability as he relied on the story structure of the employee-employer relationship, present in *Commonwealth v. Koczwara* but not the hypo, with the employer ultimately being the liable party. Although the employer-employee relationship is a salient aspect of *Commonwealth v. Koczwara*, particularly if the case is read as a story of human conflict rather than as an instantiation of legal categories, the vicarious liability mapping is problematic because the hypo was written deliberately so that Tommy Truckdriver, the defendant, was the only character and was intended to be understood as an independent contractor who would not have an employer for the employer-employee mapping. Jun’s application section of the first IRAC essay, then, although appropriate in the sense that case-based reasoning is required by common law, was nevertheless inappropriate because it indicated a misreading of the hypo, leading to selection of the inappropriate legal concept for analogical reasoning.

As Jun had written that he believed Joey’s Gas Station, as Tommy Truckdriver’s employer, should be held responsible for violation of the statute in the hypo, in the debriefing session, TR asked Jun why he believed that Tommy was an employee of Joey’s Gas Station. When he could not point to specific language in the hypo (because no such indication was given in the text), Jun offered several different explanations: that “on the surface” he is not the

\textsuperscript{13} Black’s Law Dictionary defines *vicarious liability* as “Obligation rising from a parties [sic] relationship with each other. Also known as vicarious responsibility.”

\textsuperscript{14} Black’s Law Dictionary does not appear to have a definition of *strict liability*, but was discussed in the criminal law class as a special kind of crime, a category for which there is no criminal intent or *mens rea* element.
employee, but “in actual” practice, he is an employee; that he believed he needed “more special
details” in the hypo. In the last few minutes of the debriefing session, however, Jun verbalized
another, and compelling, explanation for his analysis of the hypo, in response to a wrap-up
maneuver by TR. She had just summarized the discussion, pointing out to Jun that the discussion
and analysis had led to the opposite outcome of his original analysis.

Excerpt 7
Week 5
[01:02:25.10]
1    TR: do you think there's any way you could still try to
2        argue that he can't be convicted
3    JU: oh i also think the case from the china
4    TR: okay
5    JU: so um mm in china the the truck owner whenever he own
6        or not it just ah he just wealth to the truck owner ah
7        he must he must um work in some work in some company
8    TR: yeah so so there's a difference um between here and in
9        china in he would always be working for some sort of
10       company so it would always be vicarious liability the
11       company would be responsible

Jun responded in line 3 by seemingly drawing on his own cultural internalized cognitive models
and describing his understanding that to whether or not a delivery person owns the truck s/he
uses, that delivery person will always work for some company. While Tommy working for some
company is not precluded by the way the hypo is written, the hypo was also not written in order
for construal of Tommy to be an employee of Joey’s Gas Station. It seems, then, that Jun’s top-
down processing, that is his real-world knowledge of delivery person employment, affected how
he read and analyzed the hypo. Although Jun appeared to understand that Tommy’s owning the
truck he used for deliveries was an important fact, as he wrote “althought\(^\text{15}\) he own the truck” in
his IRAC, when confronted with a fact he did not fully understand, Jun relied on his

\[^{15}\text{Jun wrote althought in his essay. As discussed in the methodology chapter, I have chosen to represent students’ utterances and writing as they were produced in order to accurately present their development stories.}\]
understanding of how the world operates when interpreting the hypo. That is, since in China it does not appear that a delivery person would ever be an independent contractor in the way intended by the hypo, Jun did not have an internalized cognitive model for this type of work that he could employ in understanding that the most appropriate mapping of *Commonwealth v. Koczwara* to the Tommy Truckdriver hypo was strict rather than vicarious liability.

The first IRAC essay and Jun’s interaction in the debriefing session indicated that a reliance on L1 internalized cognitive models through top-down processing regulated his reading for legal analysis; where his top-down understandings of the world conflicted with the text and cultural frames in U.S. culture, Jun ultimately misinterpreted the texts when attempting to engage in legal analysis which, in this case, led him to produce the kinds of analogies that in Chapter 5 are discussed as *superficial analogies*. In this case, the layperson cultural rich point also led to Jun analyzing the wrong legal concept. CRP, then, greatly impacts analogical reasoning for common law purposes.

4.7 Conclusion

This chapter addressed both changes in the students’ verbalizations about reading legal texts changed from the beginning to the end of the semester and salient themes in students’ learning how to appropriately interpret legal texts in a new legal languaculture. While the first half of the chapter demonstrated that the students wrote about the activity of reading legal texts in substantially different ways at the end as compared to the beginning of the semester, their interactions with the texts throughout the semester demonstrated that their understanding of case law in the U.S. legal system required continued and, at times extensive, mediation.

The students’ pre-semester and post-semester descriptions of reading legal texts in English indicated a shift from a “general ESL” strategies to a more sophisticated understanding
of reading legal texts in English for legal analysis purposes. While I do not intend to disparage ESL or EAP courses by referring to “general ESL” approach to reading, it seems clear that that at the beginning of the semester the students approached reading as an encounter with academic discourse in English in a manner which their prior experience may have socialized them to do – through words and sentences. Of course, “words and sentences” are important but initially the students appeared to associate legal reading with only vocabulary and difficult sentences, rather than with the complex, socially constructed, “legal-textual framework” (Mertz, 2007) required by U.S. common law study and legal analysis. As Lantolf and Poehner (2014) point out, development does not have to be considered solely in terms of autonomous performance, but also through verbalization of their understanding of a concept. While students’ understanding of reading was quite general at the beginning of the semester by the end of the semester, they reported in more sophisticated ways what the purpose of a legal case and legal reading in the U.S. common law and in U.S. legal education were. In a sense, the students had transformed from “general ESL” students into law students.

Learning CRP is not straightforward for anyone, much less for those students who are learning U.S. common law as a second legal lenguaculture. For the students, considered in the present study, the journey to mastery of CRP involved engagement with the ways in which their already internalized legal lenguacultures diverged from the U.S. common law in terms of doctrinal concepts in addition to structural differences. As expected, legal cases were a powerful rich point as all students wrestled with the role of the case in their legal reasoning initially, and some students continued to struggle with how to deal with cases through to the end of the semester. Recurrent mediation was required for students to connect legal cases with legal categories they represented as well as how to use the case-concept connection to inform legal
analysis. The examples presented illustrated these issues even for the Reading Role Focal Cases, which the companion course spent three weeks discussing. Even when students demonstrated understanding of a legal case in terms of being able to recite the narrative story of the case along with important legal concepts in the case, the process of integrating the case into their legal reasoning in a meaningful way remained elusive, a theme which will recur in Chapters 5 and 6.
Chapter 5 Analogical Reasoning in Common Law Analysis

"Much valorized, often criticized, reasoning by analogy is in fact little understood" (Winter, 2001, p. 223)

5.1 Pre-LL.M. Student Development of Analogical Reasoning in Praxis

Recall from the discussion of civil, Islamic, and common law in chapters two and three, that the positioning of analogical reasoning in a common-law legal system is understood to be an absolutely crucial difference from the civil and Islamic legal systems in which the international pre-LL.M. students were educated. As law school pedagogy either does not typically address analogical reasoning explicitly, or, when analogical reasoning is taught explicitly, the explanations are overly reductive, this dissertation follows a cognitive account of analogical reasoning in order to provide an explicit and systematic account of the development of analogical reasoning in common law analysis. Consequently, analogy is understood to be “a conceptual mapping (whether of attributes or relations) that highlights connections that are otherwise not well established in our conceptual system” (Winter, 2001, p. 237). The purpose of this chapter is to explore the kinds of analogies and strategies these internationally-trained lawyers attempted to use when confronted with the need to reason by analogy in the common-law system. As was the case in Chapter 4, however, while acknowledging that reading (Research Question 1) and analogical reasoning (Research Question 2) are closely intertwined, for analytical purposes, I will attempt to analyze the processes separately here.

5.2 Analysis of the Data

In order to describe the development of analogical reasoning, how analogical reasoning was deployed in the students’ IRAC essays was analyzed through multiple approaches. The initial round of analysis involved a modified obligatory occasion analysis (Ellis & Barkhuizen, 2005) to first determine the extent to which students attempted to use analogical
reasoning at all. I conducted the modified obligatory occasion analysis because to my knowledge, there is no literature that describes how international LL.M. students adjust to the need to reason by analogy when they encounter case law in the U.S. legal education context (see, e.g., Lazarus-Black & Globokar, 2015; Silver, 2012). While studies have reported some findings that students engaged in extensive work in order to bypass the need to reason analogically (Hartig, 2014) or relied on ‘common sense’ arguments in constructing their analogies (Abbuuhl, 2005), those studies did so in the context of examining other phenomena in LL.M. students’ learning to write inter-office memoranda in a Legal Writing, where analogical reasoning is typically, if superficially, addressed. I decided, then, that in order to fully document students’ development of analogical reasoning in common law analysis that I could not assume analogical reasoning would always be deployed. Rather, I needed to first determine the extent to which analogical reasoning was present in the student writing before turning to analysis of the quality of the analogies produced.

The second phase of analysis entailed analyzing the quality of the analogies students did produce by comparing the student-produced analogies to a conceptual definition of analogical reasoning. I used a conceptual definition of *sound legal analogical reasoning* in analysis of the analogies in order to determine the extent to which the students’ analogies 1) demonstrated that they were thinking through the relevant legal concept; 2) utilized a relevant precedent case fact; 3) compared the precedent case fact to an instant case fact; and 4) conveyed the relationship between precedent and instant case facts through ‘signal language’. *Signal language* refers to language, lexical items or argumentative sentence structures, that explicitly mark for the reader that an analogy is being made and what the nature of the analogy is.
Winter (2001, p. 251) noted that there can exist a “substantial gap” between the soundness and the persuasiveness of an analogy; soundness is judged according to the strength of the mappings, while persuasiveness is a function of “the degree to which it accords with our understanding (or otherwise helps to make sense) of our world”. As I do not hold a J.D., and do not presume to understand the world or legal categories in the same way as a legal reader with a J.D. would, I propose that ESP practitioners can teach sound analogies, or how to engage with legal texts in order to make relational mappings. Persuasive analogies, or the extent to which the mappings affirm the worldview of a legal reader are perhaps best left to legal educators with formal legal education. The possibility may also exist that persuasive analogies are not able to be directly taught and must be developed over time as a novice lawyer develops into an expert lawyer.

This chapter shares the results of that data analysis. A discussion of the results of the modified obligatory occasion analysis is followed by discussion of the results of the a priori analysis of conceptual understanding. The chapter concludes by considering the implications of this analysis.

5.3 Presence of Analogical Reasoning in Students’ Written Analysis

The goal of the initial analysis was not to examine the soundness of student-produced analogies; rather, I determined it was first necessary to ascertain whether or not the students attempted to deploy analogical reasoning using precedent cases as required by common law. Fifteen of the twenty-four IRAC essays contained an attempt at analogical reasoning. In writing their IRAC essays, then, the students attempted analogical reasoning far more often than not, indicating their serious engagement with the need to reason by analogy. The IRAC essays which lacked analogical reasoning were 1) incomplete and indicated that uncertainty on the part of the
student about what the write in the Application section of the essay, 2) indicative of the student’s belief that they lacked sufficient information to fully analyze the hypo 3) representative of more familiar patterns of legal thinking for the students. These essays will be considered in the subsequent section.

The initial obligatory occasion analysis revealed various student trajectories during the reasoning process. For some students (Yue, Hoobi) analogical reasoning was present in each IRAC essay that they produced. Other students (Fazi, Jun, Pim) failed to use analogical reasoning in at least one IRAC essay, but did employ it in other essays. One student, Omar, did not exhibit a single instance of analogical reasoning in any of his IRAC essays throughout the semester. Omar’s development is considered in the next chapter and reasons for why he failed to use analogical reasoning will be analyzed. Analysis of the presence or absence of analogical reasoning in the IRAC essays demonstrates that the developmental paths the followed respectively were different. Even an analysis of the presence or absence of analogical reasoning, and not the quality of the analogies used, reveals that development is non-linear, as half of the students used analogical reasoning in their IRAC essays in an uneven manner.

Considering the quality of analogies in addition to the absence or presence of analogical reasoning adds further nuance to the understanding of student development. Table 5-1 presents the results of the obligatory occasion analysis, with the additional analysis of whether or not the analogies used in an essay were sound legal analogies. This analysis reveals that by the end of the semester, three of the students (Hoobi, Jun, and Yue) produced sound analogies in their writing. Based on this obligatory occasion analysis, at least three developmental trajectories related to analogical reasoning emerged. Although these three students had used analogical reasoning in their previous essays, it is not until the fourth essay of the semester that their writing
exhibited appropriate use of analogical reasoning. Hoobi and Yue’s developmental path appears in this table to be similar, as each student attempted analogical reasoning in each of the IRAC essays, with Hoobi producing sound legal analogies in the third and fourth IRAC essays and Yue doing so in the fourth essay.

Table 5-1.
Presence of analogical reasoning in IRAC essays

<table>
<thead>
<tr>
<th>Student</th>
<th>IRAC 1</th>
<th>IRAC 2</th>
<th>IRAC 3</th>
<th>IRAC 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fazi</td>
<td>- *</td>
<td>+</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Hoobi</td>
<td>+</td>
<td>+</td>
<td>++</td>
<td>++</td>
</tr>
<tr>
<td>Jun</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>++</td>
</tr>
<tr>
<td>Omar</td>
<td>- *</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Pim</td>
<td>+</td>
<td>-</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>YL</td>
<td>+</td>
<td>+</td>
<td>+</td>
<td>++</td>
</tr>
</tbody>
</table>

Note: - = no analogical reasoning; + = attempted use of analogical reasoning; ++ = sound analogical reasoning; * = essay did not contain an Application section

A second developmental path revealed in Table 5-1 is one of uneven use of analogical reasoning. Fazi, Jun, and Pim each used analogical reasoning in several IRAC essays, but not in at least one essay. Of the students who exhibit this developmental path, only Jun produced sound analogies in any IRAC essay. The third developmental trajectory revealed is that of Omar, who did not use analogical reasoning in any IRAC essay.

Of course, the mere presence or absence of case-based reasoning does not imply soundness or persuasiveness of the analogies. First, those IRAC essays where analogical reasoning was not employed will considered. Then, the remainder of the chapter will consider the soundness of the analogies; persuasive analogies will be considered in the conclusion of the chapter.

5.5 Absence of Analogical Reasoning in Students’ Written Analysis
Before turning to analysis of the types of analogies produced by the students, I will consider briefly those essays where analogical reasoning was not used at all. Although much of the Companion Course focused on the use of analogical reasoning in the common law, when students were given a concrete problem to analyze, they, understandably, did not always exhibit sufficient control over analogical reasoning to use it in problem-solving activity. This was the case in nine of the twenty-four IRAC essays. Indeed, for each IRAC essay iteration, at least one of the six students failed to deploy analogical reasoning.

Students in this study wrote the IRAC essays under general law-school exam conditions, where students were allowed one seventy-five-minute class period to respond to a hypo in an IRAC essay. With the exception of IRAC essay three, as discussed later in this chapter, students were not to access their Criminal Law book, course notes, a dictionary, or any other aids during the writing of the IRAC essays. Following conventions at Mid-Atlantic Law School, students were provided with examination booklets in which to write their responses, scratch paper, and ear plugs.16 TR and LW chose to structure the essay writing in this manner so that students would be prepared for the exam conditions they would encounter in the Criminal Law course and other substantive law courses they would take as LL.M. students.

The first IRAC essay Fazi and Omar each submitted contained only an Issue and Rule section and not an Application or Conclusion. Analysis of the writing on Omar’s scratch paper submitted with his IRAC essay suggests that he may have written only the first two sections of

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16 The ear plugs are provided for students for whom the typing of other students in an examination hall might prove distracting. At Mid-Atlantic Law School, as is the case with many law schools, students are given the option of downloading exam software and typing their exams. In prior iterations of the Companion Course, however, students felt they were faster writers than typers and, therefore, chose to write by hand their exams. While I do not know whether the students in this cohort chose to write or type their Criminal Law exam, the preference by students in prior Companion Courses for writing was the reason to have students write these essays by hand.
the essay because he was unsure of what to write in the third and fourth sections. The scratch paper contained notes on what he presumably planned to include in the Issue, Rule, and Application sections, but not the Conclusion section. Analysis of what he planned to include in his application section does not indicate he would have used analogical reasoning even if he had had time to write that section. On his scratch paper, he wrote: “I think after we analiz the facts and we have seen that Penn Law that said every packet of cigarette must be (A.1) Also the law said if someone who shall possess more than 5000 cigarettes shall be guilty of a misdemeanor and” (Omar IRAC essay 1 scratch paper). It should be noted the Omar utilized the scratch paper for its intended purpose – to rehearse, plan, and organize his analysis. That Omar wrote in elliptical and incomplete phrases on the scratch paper, but these writings were not transferred to the exam book itself indicates that Omar struggled to form his analysis rather than merely ran out of time.

MS appeared to use private writing on his scratch paper in an attempt to organize his mental activity in order to analyze the problem. Adults turn to private writing, as they turn to private speech, when tasks are cognitively demanding and use language to regulate their behavior in the task. DiCamilla and Lantolf (1994) state that “Writers, like speakers, utilize their linguistic systems to do more than just express themselves to, or communicate with, social others. They also use their language, in the form of private writing, to organize and direct strategic mental processes” (p. 365). The facts Omar selected as important did not lead him to a good application of the law to those facts. Rather, he restates these facts, perhaps in an attempt to better understand them by producing them in an external form: “Penn Law that said every pack of cigarette much be (A.1), someone who possess more than 5000 cigarettes shall be guilty of a misdemeanor and”. His use of private writing mirrors that noted by Frawley & Lantolf (1985)
who point out that self-directed speech is often elliptical and incomplete. Arguably, Omar did complete the first sentence on his scratch paper, presuming (A.1) has a psychological meaning to Omar not evident to a reader. The second sentence, however, appears to be abandoned following the conjunction and. While it is possible that Omar was running out of time and abandoned his note taking in order to have something written on the exam itself, it is also possible that this activity was beyond Omar’s ZPD at this point in the semester and he was incapable, in independent performance, of supplying the application clause that would naturally follow the and. Given that the phrases written on the scratch paper are restatements of hypo facts and these phrases are incomplete, it seems likely that writing on the scratch paper constituted an attempt by Omar to externalize his thinking in order to gain control over the activity he was engaged in, a key function of private writing.

Although they knew they were supposed to use analogical reasoning based on precedent cases, students reported either not having sufficient information from the hypos or not thinking the precedent cases and hypo were similar enough to warrant analogical reasoning. Hypos in the U.S. legal education setting are written with indeterminacy or ambiguity in mind. That is, the expectation is that, given the legal rule and the facts of a hypo, students should manipulate the facts and make inferences in order to apply the rule to the facts and predict a conclusion.

In Excerpt 1, although she has used some case-based reasoning in her application section, Hoobi wrote in her conclusion that she did not think she had enough information to confidently make a prediction.

Excerpt 1

I think the facts not enough to decide whether he should convicted with first or second degree murder but because he did not have purpose (!!) it would convicted with second degree murder.

(Hoobi IRAC essay 2)
In the conclusion, Hoobi indicated that she realized there is a distinction between first-degree and second-degree murder that is related to the mens rea element when she wrote “but because he did not have purpose (!!) it would convicted with second degree murder.” She had already indicated to the reader (i.e., the course instructors in this instance) that she did not think she had enough information (facts) to properly conclude her analysis. Although in IRAC 2 Hoobi did use analogical reasoning in the application section, her analogies were superficial, as will be discussed later in the chapter. This likely indicates that she did not use analogical reasoning with genuine understanding but was, instead, deployed it because she understood it to be compulsory.

Jun also questioned the quantity and quality of information provided by the hypos early in the semester, stating, for example, in his debriefing meeting for IRAC 1 “I think I should have more special details about the case” (Jun IRAC 1 Debriefing 9/12/2015). At this early point in the semester, Jun, and other students who made similar remarks about wanting “more special details” did not appear to fully understand or were not capable of manipulation and stretching of facts expected in this context.

A third explanation for an absence of analogical reasoning appears to be that the students reverted to the familiar forms of legal reasoning under the stress of autonomous performance under exam conditions. Thus, the student would rely on analysis of legal concepts or statutes, but would not use case law. PP, who had practiced law for seven years in Thailand, a civil law country, frequently produced Application sections of this sort. Pim’s Application sections largely restated the facts of the hypo, tying in relevant legal concepts when necessary. For example, in one portion of her IRAC 2, Pim wrote:

Excerpt 2

Vinny and other friends went to the Bar. Vinny had several beers and was distributing more campaign flyers. Billy saw Vinny distributing the flyers at the bar. It make Billy
angry and did something wrong to Vinny. His act of Billy is malice and depraved
heart/extreme indifference of murder because it started to hurt Vinny first. (Pim IRAC
essay 2)

Embedded in the retelling of the hypo are relevant legal concepts; one of these, depraved
heart/extreme indifference, indeed comes from the Focal Case Commonwealth v. Malone. As an
experienced attorney, Pim understood the importance of connecting legal concepts and rules to
the facts of the problem she is analyzing. She was even observed in this case using a legal
concept developed in common law, depraved heart murder. In this application section, though, it
is applied via the same deductive process one would use with a statute in a civil law analysis.
The analogy of the sort Pim produced above is closely related to the rule-based reasoning of
students in the absence of analogical reasoning.

Students did not employ analogical reasoning in their analysis of legal problems for three
reasons: 1) they had not yet developed sufficient understanding of how to carry out analysis of
the legal problem to know how to write the IRAC essay in its complete form; 2) they believed
they did not have information to analyze the legal problem; 3) they reverted to more comfortable
and familiar forms of legal reasoning when confronted with a cognitively difficult task. After the
first iteration of the IRAC essay and individual debriefing session, no student again exhibited the
first reason for not employing analogical reasoning. This suggests that for these students at least,
the first reason analogical reasoning was not employed could be resolved with some individual
mediation and additional practice. As for the second reason, believing there were not enough
facts to use in their analysis, this type of comment from students also disappeared relatively early
in the semester, suggesting that students quickly adapted to the idea that they were expected to
manipulate each fact they were given in a hypo. The third reason, reverting to familiar forms of
reasoning, proved to be a more difficult for this cohort of students of overcome, and was an issue that required extensive mediation throughout the semester.

5.4 Types of Analogies Employed in Development of Analogical Reasoning

In a second analysis phase, the analogies that students did write in their IRAC essays were compared to the definition of sound legal analogy. To write a sound legal analogy, a writer must 1) demonstrate that the analysis is grounded in the relevant legal concept; 2) utilize a relevant precedent case fact; 3) compare the precedent case fact to an instant case fact; and 4) convey the relationship between precedent and instant case facts through ‘signal language’. In this phase, I identified five types of analogy: rule-based reasoning, parallel analogy, superficial analogy, sound analogy, and ironic analogy. Rule-based reasoning, parallel analogies, and superficial analogies each lack at least one of the criteria for a sound legal analogy. For example, parallel analogies contain both precedent case fact and instant case fact, but lack language signaling to the reader the relationship between the facts.

I discuss in this section first the three types of analogy that are not sound legal analogies, followed by sound legal analogies, and finally, ironic analogies, or the ability to produce analogies that argue both sides of the dispute. Although I discuss the three types of analogy that lack at least one of the definitional criterion for a sound analogy prior to sound and ironic analogies, the organization should not be interpreted as stages of development that all students will pass through in developing analogical reasoning. Rather, each of these analogy types was produced by some of the students as they developed control over analogical reasoning in common law analysis.
5.4.1 Rule-based reasoning

Rule-based reasoning is very similar to the application sections which did not contain analogical reasoning, but rather, a more familiar form of legal reasoning for the essay writer. Although discussed in the section on analogies, rule-based reasoning is distinct from analogical reasoning and was coded in the obligatory occasion analysis as a lack of analogical reasoning. When writing using rule-based reasoning, a student relied on more familiar forms of legal reasoning, reasoning from legal rules, but would supply for the reader the name of a case. It is for this reason, the inclusion of case names, that I have included rule-based reasoning in this section. For some students, rule-based reasoning with the use of the name of a precedent case indicated development of an awareness of the need to reason by analogy through cases in common law.

Despite referring to legal cases by name, these analogies always lacked precedent case facts. Rather, when students employed this type of reasoning, they would state a legal rule or principle and explain how that principle applied to the facts of the hypo. Even when the rule would be labeled as coming from a particular case (e.g., *Commonwealth v. Malone*), the application of the rule was written in a way that did not require understanding of the important facts or legal significance of the case. As such, the cognitive process is the same as the process used when analyzing and applying a statute. Note, for example, that in Excerpt 3, it is possible to replace “Malone’s case” with reference to a statute (e.g., “§7-31 of the Nebraska Criminal Code”, a statute referred to in the IRAC 3 hypo) and neither the sentence nor the analysis would be changed. In rule-based reasoning, then, a writer is not using what is learned about a legal concept by reading a case in order to apply it to the instant case.

Excerpt 3
In terms of applying Malone’s case we can see that there are meet across the factors of gross recklessness and no intent to harm or kill (no malice). Gross recklessness in this case when Piaget used to exchange between 150 and 200 needles and kept exchanging. Therefore, the propability of causing harm to people raised. However, the fact that there was no motive for this homicide or even harm someone does not exculpate the accused. (Fazi IRAC essay 3)

Excerpt 3 is from Fazi’s third IRAC essay. Although Fazi did refer to the case (“In terms of applying Malone’s case”), this is not analogical reasoning in the true sense of predicting an outcome for an instant case given the mapping of key facts and legal outcome of the previous case(s). Fazi indeed used important legal concepts from Malone – *gross recklessness*, the question of malice, the question of intent to harm or intent to kill – but these concepts were only referred to rather than discussed. A more appropriate deployment of analogical reasoning would have been to state a rule related to *gross recklessness* in the Rule section and apply that rule via an analogy to *Commonwealth v. Malone* (e.g., pulling the trigger of the gun three times while playing Russian Poker as an act of gross recklessness). Additionally, this analysis simply stated that some application of *Commonwealth v. Malone* was being used; there was no workable legal rule stated in the application section or explained in the rule section.

In Excerpt 4, Omar employed rule-based reasoning, but not in his application section; this reference to cases was given in what can be considered the conclusion of Omar’s IRAC 3. Although not separated into its own section, the last sentence in Excerpt 4 is indeed the final sentence of Omar’s IRAC 3 and therefore presumably his conclusion.

Excerpt 4

Also, if the small ruckus between Norman mother and Piaget not enough to make Piget confused, Piget must be careful when she exchange the needles and she must know where she put the dirty needles. As we see in *Commonwealth v. Welansky* case and Commonwealth v. Feinberg case I think we should convict Piget with negligen homicid (5 years). (Omar IRAC essay 3)
In Excerpt 4, Omar provided a hypo case fact (“a small ruckus between Norman mother and Piaget”), followed by a strongly asserted conclusion (“Piget must be careful when she exchange the needles and she must know where she put the dirty needles”). Then he referred to Commonwealth v. Welansky and Commonwealth v. Feinberg, two involuntary manslaughter cases, where the level of mens rea would be criminal negligence or recklessness. Omar appeared to be using the facts of the small ruckus and the need for Piaget to be careful when she exchanged the needles to make the case for criminal negligence. Just as in Excerpt 3 with Fazi above, though, Omar did not refer to facts or legal insights coming out of the cases he referred to that would help analyze or predict an outcome for the Piaget hypo. Again, were the case names here to be interchanged with a reference to statutes, it would not alter the sentence or the analysis.

Omar’s use of rule-based reasoning referring to cases, in Excerpt 4, is also indicative of development, but for Omar this is because it was the first time in written performance he demonstrated awareness that case law creates legal rules to be followed by subsequent cases. As the students were observed to be struggling to recall relevant information from the cases in IRACs 1 and 2, the companion course instructors allowed them access to course notes and the casebook while writing IRAC 3. It is likely no coincidence, then, that this was the first time Omar referred to case law. This issue will be explored in greater detail when addressing Omar’s development in chapter 7, but when Omar was required to perform under exam conditions, he did not produce essays that indicated recall of relevant rules and facts from the cases that had been studied in the criminal law or companion courses. When allowed access to the casebook, his class notes, and a dictionary as a tool, however, Omar appeared to have employed those tools his advantage, writing a much stronger essay.
Given that the first rule he stated in the rule section relates to negligent homicide and he concluded with reference to *Commonwealth v. Welansky* and *Commonwealth v. Feinberg*, Omar appeared to believe this hypo was a case of negligent homicide. Since he was allowed access to tools to aid his performance, Omar was able to shape his written analysis, based on the level of homicide he believed to be represented in the hypo and his knowledge that common law analysis requires case law. While not yet incorporating analogical reasoning in that use of case law, Omar demonstrated development in his acknowledgement of case law and it appears that access to a cultural artifact mediated his performance to allow him to refer to case law.

In this section, I have discussed rule-based reasoning as an attempt at analogical reasoning that is lacking legally significant precedent case facts, and therefore, is not analogical reasoning because it is not mapping legal significance from a known domain (precedent case) to an unknown domain (hypo). It should be pointed out, however, that for both Fazi and Omar, the rule-based reasoning did in fact represent a form of development. Each of these examples comes from IRAC 3, written in Week 8 of the semester. Fazi, for instance, had not written an application section in IRAC 1 and had employed in IRAC 2 superficial analogies of the sort discussed below. In the second essay, his analysis relied heavily on the facts of the precedent case, to the exclusion of connecting relevant facts to the legal concept. Fazi’s writing in Excerpt 3 was the inverse of his analysis in IRAC essay 2: he relied heavily on the legal concepts present to the exclusion of important precedent case facts. He did appear, then, to be reshaping his analysis in the IRAC essays on the basis of the mediation he received. While he may have over-corrected in IRAC essay 3, and is still working to gain control of the critical link between
significant precedent case facts and the legal concepts they represent, Fazi’s writing indicated a de-stabilized understanding of legal reasoning and responsivity to the instruction.

In addition, Fazi exhibited development in other parts of the IRAC genre even if the analogical reasoning lagged behind. For the first time in his essays, in IRAC 3, Fazi produced several complete rules and addressed each rule in the application section. Although there was no analogical reasoning involved in the analysis, Fazi had thus shaped the discourse to more closely align with reader expectations, if not yet having made the cognitive adjustment to think through the cases in analyzing legal problems. Fazi may not have demonstrated development of analogical reasoning for common law purposes in his autonomous written performance yet, but his third IRAC essay indicated development of attunement to U.S. legal reader expectations.

5.6 Parallel analogies

I understand the next two types of analogy, parallel and superficial analogies to be attempted but incomplete analogical reasoning, employed by students as they developed control over the need to reason by analogy in the common law. By parallel analogy, I mean an analogy where students presented facts related to the precedent case, then presented facts related to the hypo without explicitly connecting the two for the reader. They did not use analogy in which the facts from the case and the precedent were integrated into a single well-reasoned analysis. The two cases were seemingly laid side by side in the essay for the reader to appreciate; why the reader should appreciate the comparison was not explicitly discussed. That is, in this type of analogy both signal language indicating the relationship between the facts and explanation of the legal significance of the analogy were missing. This kind of analogy may indicate recognition
that the use of precedent is necessary, but the student was not yet using analogical reasoning as the structuring concept for the analysis nor fully integrating it into the discourse.

Excerpt 5, from Hoobi’s first IRAC essay, is a quintessential example of a parallel analogy. Here, Hoobi displayed her analogy by quite literally placing precedent case (“Koczwara”) facts and outcome next to hypo (“Tommy) facts and outcome. In her IRAC essay she drew the chart given in Excerpt 5 in her bluebook.

In Excerpt 5, the reader can infer that Hoobi may have produced a reasonable analysis of the legal concept she was analyzing. Whereas most of the students analyzed the hypo based on superficial mappings of the employee-employer relationship in *Koczwara*, Hoobi here appears to focus on the more appropriate strict liability analysis. The chart seems to be structured such that the reader sees two relevant facts for “Koczwara” and two analogous facts for “Tommy” before the conclusion. In its briefest, broadest form, this performs the function of analogical reasoning; given the legal rule from the precedent case, one would set out the relevant facts, analogize them to hypo facts, and reason to a conclusion.

**Excerpt5**

<table>
<thead>
<tr>
<th>Koczwara</th>
<th>Tommy</th>
</tr>
</thead>
<tbody>
<tr>
<td>own bar with license to sell wines charges 3 months in jail and $500</td>
<td>He own truck which he uses delivering cigarettes and he is truck driver</td>
</tr>
<tr>
<td>He is responsible for his employee and his act under law</td>
<td>?</td>
</tr>
<tr>
<td></td>
<td>he is responsbel for his act under the law</td>
</tr>
</tbody>
</table>

The two facts Hoobi first placed in the chart are, for *Koczwara*, “own bar with license to sell wines”, and, for Tommy, “He own truck which he uses delivering cigarettes and he is truck driver”. She appeared to be mapping *owner of object (and therefore responsible)* to *owner of*
object (and therefore responsible). Based on this apparent mapping, Hoobi appeared to appropriately analogize Mr. Koczwara to Tommy, not Mr. Koczwara’s employee to Tommy or Tommy’s employer (a person not mentioned in the hypo) to Mr. Koczwara as several other students did for this IRAC essay.

The second row of facts in Hoobi’s chart is more difficult to interpret. For Koczwara Hoobi wrote “charges 3 months in jail and $500.” Due to the abbreviated use of language, it is unclear if Hoobi intended this as a legal fact, as the defendant in Koczwara was indeed charged with violation of a statute that called for a three-month jail sentence and $500 fine, or if Hoobi was using the Koczwara fact as an outcome of the Commonwealth v. Koczwara case. A trial court found Koczwara guilty and imposed the fine and imprisonment, but the appellate court upheld only the fine and struck down the imprisonment. On its face, it seems Hoobi used the fact as a fact, indicated through the use of charge and the subsequent conclusory statement “He is responsible for his employee and his act under the law.” If this was the case, however, it is unclear why Hoobi indicated the charge for Tommy in the hypo with a question mark. One possible explanation is that Hoobi did not infer from the way the hypo is written that Tommy had been charged with violating the statute in the hypo, which would call for the fine. Or, Hoobi might in this case have used the chart as a form of private writing to regulate and control her analysis of the hypo. In this case, Hoobi’s chart incorporates language reduced to a few simple clauses, with each ‘cell’ in her chart providing new information, lending the chart the appearance of private writing.

In this sort of ‘parallel’ analogy where the facts are merely laid side by side the reader is left to infer what the analogy actually is, and what it means for the analysis of the hypo. That is,
although the analysis may be clear to the student, as written in an analogy like Excerpt 5, it is not clear to a reader.

Importantly, the application section of Hoobi’s first IRAC essay was the only section written in this abbreviated, chart form. The issue, rule, and conclusion sections were all written in prose; since the application section is where the real analysis is demonstrated, this task may have been so demanding for Hoobi that she used the chart to both regulate her own understanding of the analysis and to demonstrate this to her readers, the companion course instructors.

Hoobi’s analysis in Excerpt 5 takes on additional meaning when the private writing on her scratch paper is also considered, as it appears her private writing altered her analysis of the hypo. In her other private writing, she wrote *His employee were selling the wine for the teenagers without parent under Koczwara and He was driving his truck with 5001 cigarettes* (emphasis in Hoobi’s writing) under Tommy. The referents of the pronouns seem clear from context as “his” is written directly below “Koczwara” and “He” is written directly below Tommy. What this private writing seems to have indicated to Hoobi is that the employer-employee relationship in *Commonwealth v. Koczwara* was the wrong concept to map onto the Tommy hypo. *His* is underlined three times on Hoobi’s scratch paper, indicating that this was a point of emphasis for her. When Hoobi produced the actual application section in her IRAC essay, then, the relevant fact from *Commonwealth v. Koczwara* changed from “His employee selling the wine for teenagers without parent to own bar with license to sell wine,” a fact that is much more relevant to the analysis of the Tommy Truckdriver hypo using *Commonwealth v. Koczwara* as precedent. The first private writing, then, appears to have externalized and triggered for Hoobi that the first line of analysis she had intended to use was not an appropriate analogy.
Hoobi appears to have also used private writing in the application section of the IRAC essay itself, but she changed crucial facts in her analysis based on the initial instance of private writing.

The analogies written by Jun in his first IRAC essay, Excerpt 6, are also examples of parallel analogies that rely on the reader, rather than the analogy, to make the connection between the two cases.

The precedent case referred to in Jun’s essay is *Commonwealth v. Koczwara* (1959). The casebook in the Criminal Law class uses *Commonwealth v. Koczwara* to illustrate two legal concepts – vicarious and strict liability – in order to teach that “[a]lthough the general rule… is that some level of mens rea [the ‘guilty mind’ element of a crime] is required for criminal offenses, there are exceptions” (Saltzburg et al, 2009, p. 231). *Strict liability* is any criminal offense for which there is no *mens rea*, or intent element, typically a very low-level offense. *Vicarious liability*, on the other hand, involves holding one party responsible for the actions of another, even if that party was not present for, or intended, the bad act, usually because the responsible party was somehow “in charge of” the acting party. *Commonwealth v. Koczwara* (1959) addresses both strict and vicarious liability in determining whether a bar owner could be held responsible when his employee sold alcohol to minors. TR specifically wrote the hypo accompanying this precedent case to elicit a strict rather than a vicarious liability analysis. Several of the students, including Jun, analyzed the hypo for vicarious liability, however.

Excerpt 6

Compare with the Koczwara case, Koczwara has license selling alcohol drinks, his employee sold alcohol drinks to minors who are not accompanied with their parents or any supervisor. His employee also allowed the minors to frequent the tavern two times who are not accompanied with their parents or supervisors. the justice finally decided to fine Koczwara 500$ since he violate the Federal Liquor Act. In instant case, Tommy is only a employee of Joey’s Gas Station, he has no license to sell the cigarettes. Althought
Tommy is owner of a Truck and he is responsible for delivering cigarettes to Gas Station these action didn’t have to acquire a license. Tommy’s whole action was arranged by his employer, the owner of the Gas Station. (Jun IRAC essay 1)

Jun listed several facts from the Koczwara case: “Koczwara has license selling alcohol drinks, his employee sold alcohol drinks to minors who are not accompanied with their parents or any supervisor. His employee also allow the minors to frequent the tavern two times who are not accompanied with their parents or supervisors”. Next Jun indicated the procedural outcome of the case (what the judge actually ruled should happen to Mr. Koczwara): “the justice finally decided to find Koczwara 500$ since he violate the Federal Liquor Act.” This is a statement of the outcome for Mr. Koczwara only; it tells the reader only that Mr. Koczwara was fined and that the judge decided Mr. Koczwara had violated the Federal Liquor Act. What is missing, and what is crucial to analogical reasoning is how the judge reached that outcome. Jun failed to include in his text an indication of the court’s rationale for ruling as it did in Mr. Koczwara’s case.

From the manner in which Jun presented the facts of the Koczwara case in his IRAC 1 essay, it is ambiguous as to whether Jun would analyze the Tommy Truckdriver case for vicarious, or strict, liability. We can assume he would likely opt for vicarious liability because he discussed the fact that it was Mr. Koczwara’s employee, not Mr. Koczwara, who sold the alcohol and allowed the minors to be in the tavern. Jun also stated that “Tommy’s whole action was arranged by his employee”, indicating that he likely analyzed the case for vicarious liability. Crucially, though, in this sort of parallel analogy, Jun did not make the analogies explicit for the reader through signal language; moreover, the legal concept and significance of that concept for the hypo is not foregrounded in the application section. In fact, as the parallel analogy was written in this case, the reader is left to infer what the legal concept or rule even is.
Students wrote parallel analogies, where there is an absence of both signal language and legal significance, only the first IRAC essay. After the first IRAC essay, the students appear to have learned that analogies must be explicitly marked linguistically so that the reader understands the relationship between the precedent and instant cases. In subsequent analogies, signal language marking the relationship between the precedent and hypo facts was used. The legal significance, which is, of course, the most critical component of the analogy, appeared only in Hoobi’s, Jun’s, and Yue’s final IRAC essay and did not appear at all in Fazi’s, Omar’s, or Pim’s essays. This suggests that the legal significance, although the heart of the analogy, is the most cognitively demanding aspect of the IRAC essays for the students and, for this cohort of students at least, it was the final component of appropriate analogical reasoning to appear in their independent, unmediated, performance.

5.7 Superficial analogies

While students were still developing the ability to use legal significance as the foundation of their analogies, they relied on superficial analogies in their writing. That is, the analogies were driven by considering the two texts – the precedent case and the hypo case – as two narratives were being compared and not two stories of human conflict which would invoke similar legal concepts. When using analogical reasoning as a scientific concept in the common-law context, “[v]ast differences in the cultural meaning of particular kinds of actions or items are elided and translated into a common legal language; a defective coffee urn, mislabeled poison, a loaded gun, and defective hair wash become analogous as ‘inherently dangerous’ objects” (Mertz, 2007, p. 64). That is, while in the everyday world objects may not be analogous, in the reading of legal texts and construction of precedent-based analogies, the objects indeed become analogous through the doctrinal category of ‘inherently dangerous objects’. What is ‘inherently dangerous’
in a story of human conflict is what makes the defective coffee urn, mislabeled poison, loaded gun, and defective hair wash analogous. In the analogies that follow, the students have constructed analogies that focus on the stories or narratives, not the legal concepts in a layering of legal texts.

Excerpt 7 is the IRAC essay Yue and Fazi submitted as their Legal Problem Solver analysis of a hypothetical sent to them for the *Malone* Reading Role Cycle. They indicated to LK in their pre-presentation meeting and after their presentation in the companion course that although they met to discuss the hypo, each brought his or her own analysis to the meeting. As a pair, they chose to present only one analysis to the class and chose Yue’s; this analogy, then, although discussed with a classmate, primarily reflects Yue’s independent analysis of the hypo using *Malone* as precedent.

Excerpt 7

In Malone’s case, he also played a game with his friend, but the difference is that the “Russian poker” is a dangerous game. However, in our hypo case, we can not found any danger from the game self. So that, we can not find that Gray had any gross recklessness when they were playing card game. (Yue & Fazi LPS IRAC)

The hypo Yue and Fazi (Appendix G) responded to in Excerpt 7 dealt with a poker game between friends during which an argument broke out. The argument ended with one of the poker players going out to his truck and grabbing a gun; the gun ‘goes off’ and one of the friends uninvolved in the argument was shot and killed. Here, Yue and Fazi created a superficial analogy by focusing on the nature of the games in each case. They compared the *game* in each story of human conflict – Russian poker as *dangerous* and poker as not *any danger from the game self*. I characterize the analogy as superficial because it relied on the cases as stories, not as instantiations of legal concepts. In the analysis, the more accurate approach would have been to identify that the court in *Commonwealth v. Malone* determined that Malone was *recklessly*
dangerous when he held a gun to his friend’s side and pulled the trigger three times; since he knew there was a bullet in the gun he should have known that pulling the trigger three times would likely result in the death or serious injury of his friend. Starting from the recklessly dangerous concept and act, then, a more appropriate analogy to make in this case would have been when the defendant in the hypo went to his truck to grab a gun. Although in the everyday world Russian poker and poker might seem analogous because they are both ‘games,’ when using Commonwealth v. Malone as precedent to analyze this hypo, the game analogy is not legally significant because it does not analyze the objects through the legal concept, gross recklessness. Just as Mertz (2007) pointed out disparate objects such as a mislabeled poison and a defective coffee urn are analogous in the law as ‘inherently dangerous’ objects, so, too, playing Russian poker and grabbing a gun analogous actions through the legal concept gross recklessness because they each represented when someone committed an act that brought danger into the situation.

It is worth noting here that what the Malone court called ‘Russian poker’ is more commonly referred to as Russian roulette. This superficial analogy might then be an instance of reading ability and cultural frames affecting the students’ comprehension of the precedent case and hypo, leading them to make these superficial analogies. In any case, though, in order to use analogical reasoning for common law purposes it is crucial that one begins with the legal concept and how a court ruled regarding that concept in the legal story one is using as precedent. The

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17 ‘Russian roulette’ is likely the more familiar term to L1 speakers of English. The authors of the casebook apparently did not believe American J.D. students would be misled by the court calling the game ‘Russian poker.’ Although they retained in the redacted portion of the case printed in the casebook a footnote explaining how Russian poker is ‘played,’ they do not provide clarification or explanation of the term. In fact, in a “Notes and Questions” section immediately following the case in the book, the authors introduce “Other Russian Roulette Cases” (Saltzburg et al, 2009, p. 306).
word *poker* in both the precedent case and hypo may have misled students to think that the narratives were more similar than they truly were.

Hoobi’s analogies in Excerpt 8, also written in response to a hypo developed for *Commonwealth v. Malone* are also superficial analogies as in her analysis Hoobi focused on the status of the friendship, desire to play a game, and awareness of danger related to a game. The hypo Hoobi analyzed for this essay was the one assigned to all students, as opposed to the LPS hypo analyzed by Yue and Fazi above. This hypo involved two brewery workers who fight over captainship of a brewery baseball teams and one worker, Vinny Victim, dies as a result of the injuries sustained in the fight with the other worker, Billy Boxer.

While the analogies Hoobi wrote in this essay are analyzed as superficial due to their reliance of everyday rather than legal understandings of malice, her writing also demonstrates that Hoobi was developing the ability to make sound analogies.

Excerpt 8

~Unlike in Malone case the defend and the victim were friends and they do not have any problems between them, in Billy case they were worked together and were playing on the baseball game, it is important to know that because they are (Billy + Vinny) not friends and might be problems of malice between them.

~Unlike in Malone case the defend just want to play game with his friend and does not have the intent to kill but in Billy’s case the defend was threatening the victim twice. … It is important to know that because the defend has the intent to cause serious bodily harm to the victim even if he was not intent to kill him.

~Like Malone’s case the defend should be aware of the dangerous of playing that game. In this case the defend must know that he intent to cause harm of some one even if he did not intent to kill. It is important because if he aware for the result and intent to kill it would be first degree murder. (Hoobi IRAC essay 2)

In Excerpt 8, Hoobi’s focus was similar to the analogies made by Fazi and Yue in Excerpt 7. Hoobi first distinguished Malone and the Billy Boxer hypo based on the idea of ‘being friends’ or ‘having problems between’ the defendant and the decedent. For Hoobi ‘being friends’ and having or not having problems seemed to be related to *malice*. Malice is an
appropriate legal concept in this exercise, because malice is a crucial concept when considering homicide. In fact, a key quote from the Malone case is, “At common law, the ‘grand criterion’ which ‘distinguished murder from other killing’ was malice on the part of the killer and this malice was not necessarily ‘malevolent to the deceased particularly’ but ‘any evil design in general’” (Commonwealth v. Malone, qtd. in Saltzburg, Diamon, Kinports, Morawetz, & Little, 2009, p. 306). Hoobi’s use of malice, however, is superficial in that it relies on an everyday understanding of malice (bad feelings) rather than malice as a scientific concept in criminal law. According to Black’s Law, “[i]n its legal sense, this word does not simply mean ill will against a person but signifies a wrongful act done intentionally, without just cause or excuse”\(^\text{18}\). Hoobi, then, with her focus on ‘being friends’ and ‘having problems between them’ focused on using malice as an everyday concept, not a legal concept to create analogies. While Hoobi’s analogy was tied to, or referring to, a legal concept (malice), demonstrating development towards using analogical reasoning as a scientific concept in common law thinking, her reasoning reflects an everyday rather than an academic understanding of the legal concept.

The second and third analogies Hoobi generated both reference ‘the game’ as Yue and Fazi did in Excerpt 7. Again, while Hoobi failed to connect this to intent, which would have been an appropriate and relevant legal concept, the fact selection reveals a reliance on the precedent case and hypo as narratives and not instantiations of legal concepts. Hoobi was clearly demonstrating a burgeoning ability to making sound analogies, however. Notice that the first two comparisons to Commonwealth v. Malone distinguished the Billy Boxer hypo on the basis of intent or malice. The outcome in Commonwealth v. Malone was depraved heart murder, a type of second-degree murder. Making a distinguishing argument, then, is arguing that the hypo is

\(^{18}\) [http://thelawdictionary.org/malice/](http://thelawdictionary.org/malice/)
unlike the precedent and therefore the outcome should be 1) a higher level of homicide, first degree murder; or 2) a lower level of homicide, such as manslaughter. The distinguishing analogies that Hoobi produced lead logically and coherently to her outcome – “It is important because it he aware for the result and intent to kill it would be first degree murder” (Hoobi IRAC 2). Implicit in her unlike arguments is that she argued that Billy Boxer is more dangerous and more culpable than Mr. Malone, who was friends with his victim and “they did not have any problems between them” and Mr. Malone “just want to play game with his friend.” Despite those facts, he was still held culpable to a second-degree murder standard; although she did not explicitly state this, Hoobi argued that for each of those facts, Billy Boxer should have a higher standard of culpability. The fact selection and definition of malice Hoobi relied on in making her argument may be superficial and indicative of everyday rather than legal understandings; nevertheless, Hoobi clearly demonstrated that she was developing understanding of analogical reasoning in the common law analytical framework. She quite cleverly distinguished the hypo from the precedent case in order to make the argument that the case at hand was such that the defendant should be more culpable than the defendant in the precedent case.

The analogies discussed in this section characterized as superficial due to the reliance on narrative rather than legally significant facts in the writer’s analysis. That is, the student focused on similarities or differences in the stories of human conflict when writing the analogies rather than the cases as instantiations of legal concepts. Although the analogies were characterized as superficial, it is important to acknowledge that students could demonstrate a developing ability to control analogical reasoning and still produce a superficial analogy. Analogical reasoning entails careful fact selection through understanding cases as instantiations of legal concepts. As students developed the ability to select facts for analogies through this legal-analytical framework, and
subsequently convey their analysis through the language of analogical reasoning, they ultimately produced *sound* legal analogies. Sound legal analogies, a demonstration of the legal thinking which the CBI curriculum sought to promote, are discussed in the next section.

### 5.4.4 Sound analogies

A ‘sound’ analogy demonstrates the use of analogical reasoning as a scientific concept for common law reasoning. By this, I mean that a student when writing the analogy deployed the legal concept in the precedent case (e.g., imminent danger in *Norman* or gross recklessness or implied malice in *Malone*) as the reason for selecting crucial facts and for analogizing in the first place. In a sound analogy, then, a student compared the crucial precedent case fact to an analogous, crucial hypo case fact and, importantly, explained what the legal significance of the analogy was (i.e., what does this fact mean in terms of outcome for the hypo case). As mentioned previously, however, only Hoobi, Jun, and Yue achieved these kinds of analogies in their writing (independent performance).

Although only the written, independent performance is considered in this chapter, to understand the development of analogical reasoning, it is crucial that both Hoobi and Yue produced sound legal analogical reasoning in discussion with TR prior to its appearance in their writing. From a V-SCT perspective, development can be demonstrated not only in independent performance, but in interaction with others, and the quality and quantity of mediation required by a student, or by the explanation of a concept a student is able to produce. The small group and individual meetings with TR, where the instructional focus was on providing mediation attuned to the student(s) present were incredibly powerful instructional tools for this reason. In those sessions, through mediation, TR simultaneously promoted and revealed student understanding and abilities. This topic will be explored in chapter six, where Yue’s development in common
law reasoning in response to the concept-based instruction is addressed. This section considers the soundness of the students’ analogies, but at the same time acknowledges that the ability to reason by analogy relying on legal concepts appeared in their oral interactions first.

Excerpt 9, from Hoobi’s third IRAC essay, is the first example of a sound legal analogy written by a student in this study. In Excerpt 9, Hoobi established with a heading that she planned to analogize to *Commonwealth v. Feinburg*. Following the number one, Hoobi provided for the reader both a precedent case fact (“It was established that [defendant] had knowledge that some of his customers were drinking alcohol from the stern” [Sterno]) a hypo case fact (“From this case the defendant had knowledge that would a lot of addicts who had braved sub-zero temperatures waiting to exchange needles because she did not charge for her services and that might have some confusion because she work by herself”). Notice that for each of these cases, Hoobi linked the defendant’s level of intent (“had knowledge”) regarding the defendant’s actions in relation to a vulnerable population. Hoobi then presented the outcome for *Commonwealth v. Feinberg* after the number two (“defendant was aware or should have been aware that Sterno was toxic if consumed”) and mapped that outcome to the hypo case (“In this case [defendant] should have been aware that one of the dirty needles might have been turned in the clean one when the ruckus happened”). When presenting analysis that reveals her legal conclusion, Hoobi again mapped the same *mens rea* language (“should have been aware”) from precedent case to hypo. Although for a U.S. legal reader, it would have been more acceptable to alert the reader to the relevant legal concept (“should have been aware”, “negligent homicide”) prior to the analogies and reference to specific facts from the precedent and hypo cases, Hoobi had nevertheless developed in her reasoning to the extent that her analogies were explicitly tied to the relevant legal concept.
Like Commonwealth v. Feinberg:
1. It was established that [defendant] had knowledge that some of his customers were drinking alcohol from the stern. From this case the defendant had knowledge that would be a lot of addicts who had braved sub-zero temperatures waiting to exchange needles because she did not charge for her services and that might have some confusion because she work by herself.
2. Like Feinberg case [defendant] was aware or should have been aware that Strno was toxic if consumed. In this case the [defendant] should have been aware that one of the dirty needles might have been turned in the clean one when the ruckus happened. (Hoobi IRAC essay 3)

Hoobi employed sound analogical reasoning in this excerpt, but the language indicated that she may have been engaged in private writing to regulate her thinking in order to produce the analogy. The pronoun and referent use in Excerpt 9 is indicative of private rather than social writing. First, Hoobi did indicate that she intended to analogize to Commonwealth v. Feinberg by using “Like Commonwealth v. Feinberg” as a heading, but then her use of the passive “It was established” creates some ambiguity for the reader. Commonwealth v. Feinberg must be psychologically foregrounded for Hoobi because, although she introduced Commonwealth v. Feinberg via a heading, no other reference to that case was used in her writing. In fact, if an analogy began with the phrase “Like Commonwealth v. Feinberg”, the reader would expect the next clause to relate to the case being analogized to Feinberg, not a clause about Feinberg itself. Typically, using a phrase such as “like Commonwealth v. Feinberg” would be used to reference information already given to the reader as an explanation of the rule or facts of the case would likely have been stated in the rule section or earlier in the application section. In this sense “like Commonwealth v. Feinberg” is an anaphoric reference in that such a phrase assumes shared knowledge between the reader and writer. In this case, however, Hoobi did not appear to employ signal language in this manner and she had not previously stated information about Feinberg for
the reader. In private writing, such anaphoric links need not be made overt since psychologically the writer understands the connections.

In the second sentence under number one, Hoobi’s “From this case” is also ambiguous as to referent. A reader familiar with both Feinberg and the Piaget hypo should be able to deduce after reading the sentence that this case refers to the hypo, but the shift is abrupt for the reader and use of the deictic this indicates that for Hoobi the hypo became the psychological predicate; in her essay writing she failed to help the reader make the shift from precedent to hypo. Referents were further confused by the fact that in each sentence Hoobi referred to the defendant in each case only using the delta symbol, a common practice in this law school at least to refer to the defendant in a given case.

What is important here, however, is that Hoobi used what was learned about the level of mens rea from one case, the “should have been aware” that she assigned to both the defendant in Feinberg and Piaget, the defendant in the hypo, and mapped it on to the hypo case. In this way, a shopkeeper who allows customers to buy Sterno even though he knows they are alcoholics who imbibe it for its alcohol content is comparable to a woman running a needle exchange program for drug addicts. Excerpt 9, then, is a sound analogy because it relates two dissimilar actions in the everyday world through the relevant legal concept.

Hoobi’s conclusion to this IRAC essay complicated an understanding of her development of analogical reasoning as the conclusion indicates that the legal concepts themselves, the content of the criminal law course, were still something Hoobi was working to sort out and gain control over. Hoobi concluded, “I think the D convicted with involuntary manslaughter second-degree murder.” Murder and manslaughter, of whatever degree, are two different types of homicide. Hoobi’s conclusion appears to conflate the two and reveals that she may still have
thought that involuntary manslaughter and second-degree murder are the same category of homicide. It is important to remember, though, that the focus of this chapter is the student’s analogical reasoning as a scientific concept in common law reasoning. While Hoobi was still attempting to develop control over the content, the levels and categories of homicide, she was able to exhibit some development in using analogical reasoning for common law purposes.

In IRAC essay 3, Hoobi also referred to multiple other cases:

*Some jurisdictions require that there be proof that an actor was aware of the risk to be convicted of involuntary manslaughter* (e.g., Wisconsin S.Ct. in Bussard). So, in this case the defendant should have been aware of the result of her conduct, even it was not her fault but she should aware of the result. After referring to Feinberg, Hoobi also notes *In other jurisdictions, it need not matter that the actor necessarily know there was a risk attached, only that a reasonable person would have been aware of the risk for example* (Massachusetts S.Ct. in Welansky).

These are not cases that are integrated via sound analogical reasoning, and some of her reference to the case law (e.g., the references to Busard and Welansky) would actually be more appropriate for the rule section, which indicates that Hoobi continued to struggle with some of the organizational and linguistic aspects of the discourse. Nevertheless, Hoobi succeeded in showing through her autonomous written performance that she understood the role of analogical reasoning in the common law. As was noted with Omar’s IRAC 3 above, for this particular IRAC the students were allowed to access their notes and the casebook. That is, they were given additional tools to use while analyzing and writing. As was observed with Omar above, access to the casebook appears to have enabled Hoobi to supplement what she was capable of doing independently in a way that improved the quality of the analysis and analogies. Hoobi integrated
more cases into her IRAC 3 than any other IRAC essay; again, as was the case with Omar, IRAC 3 was also the only essay where Hoobi used cases other than the Reading Role Focal cases for analogical reasoning.

Both Jun and Yue also developed to the point where they used sound analogies in their autonomous written performance; their writing and analogies will be explored in chapters six and seven.

5.4.5 Ironic analogies

A major goal of law school is to lead students to ‘see both sides’ of a legal situation and be able to select facts to argue for an outcome desired by either party. By ironic analogy, I refer to a student’s ability to use the same set of facts from a hypo and construct sound analogies for either party to the dispute. Following Egan’s (1998) discussion of ironic understanding as the most developed form of human thinking yet developed, ironic analogies refer to a legal thinker’s ability to transcend what her own perspective may be in order to analyze a legal problem. Ironic analogies refer to the legal thinker’s ability to transcend her own perspective in order to analyze a legal problem. I do not, then, refer to irony as a type of humor, but rather a way of thinking. As Egan notes, “[t]he fluent ironist can slip from perspective to perspective” (Egan, 1998, p. 145). In a hallmark of good legal reasoning is the ability to anticipate the opposing party’s perspective, their argument, in order to pre-emptively rebut it. As such, an important goal of the Companion Course is to promote the students’ ability to argue both sides of a case.

In the current cohort, Yue and Hoobi both demonstrated the ability to produce analogies for both sides by the end of the semester, although for each, this ability was just beginning to emerge. In Yue’s case, as will be discussed in chapter 6, the ability to produce appropriate analogies was restricted to oral interaction only by the end of the first semester of the pre-LL.M.
program. In Excerpt 11 below, Hoobi was beginning to make both prosecution and defense arguments in her written performance.

Excerpt 11:

<table>
<thead>
<tr>
<th>Prscutor</th>
<th>Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under common law the defendant was not act with the meaning of use deadly force as self-defense.</td>
<td>[1] Honestly and reasonably believe S.D. is necessary. I could argue that in time when she shoot the victim there was not any reason to make him reasonable and honestly believe that S.D is necessary. --we could argue that he was not threat him before that he will shoot [Defendant] if he see him again because the [Defendant] said before “he would shoot him if he ever saw him drive through his mother’s yard again”</td>
</tr>
<tr>
<td>[1] Honestly and reasonably believe because Vick was holding something that looked like a gun from after. Also, he threat me before by saying “don’t be here when I get back”.</td>
<td>[1] He was honestly and reasonable believe because Vick was holding something that looked like a gun from after. Also, he threat me before by saying “don’t be here when I get back”.</td>
</tr>
<tr>
<td>[2] – Imminent danger: in that time when [Defendant] shoot the victim there was not any imminent danger that make him feel S.D. is necessary because if we look at the way that the victim got the gunshot was “to his back”. So, he was not face the [Defendant] at that time and was not use any act that make the [Defendant] shoot him. The victim was not at the [Defendant]’s mother’s hous at the time of the shoot and he did not have agun that the [Defendant] could argue that it was an imminent danger. Like Norman case, the victim was sleeping when his wife shoot him in the back of his head. Useing what happened in the time before he sleep does not improve imminent danger.</td>
<td>[2] I think in this point the defendant argument is weak. He could argue that what happened before in the haircut shop make him feel that he is in imminent danger because the victim hitting him first four or five times. So he had several cuts to his lip and forehead.</td>
</tr>
<tr>
<td>[3] Unlawful bodily harm. Even if we look at what happened before we could argue that in the time of the shoot the victim did not use any unlawful bodly harm that could make the [Defendant] act in self-defense. He just was standing by his car in the barber shop parking lot and holding a cordless drill. He got the gunshot wound “to his back” So, he was not face the</td>
<td>I think there is no enough facts that the [Defendant can argue that the victim use unlawful body harm in the time of the shoot.</td>
</tr>
</tbody>
</table>
[Defendant] with any unlawful body harm at that time.

Hoobi IRAC essay 4

In Excerpt 11 Hoobi again created a chart to outline her analysis in the application section of the IRAC essay. The chart in IRAC essay 4 is much more sophisticated and complete than was the chart in Hoobi’s first IRAC essay. She organized the analysis around the elements of the legal concept being considered, self-defense; she included arguments for both prosecution and defense; and she included analogical reasoning for some of the elements. In this chart, then, I see clear indication of HA’s ability to deploy analogical reasoning in analysis. She demonstrates this by organizing her argument around elements of the legal concept, including arguments for both sides, and making her analogical reasoning more explicit.

Although the chart is organized to make both prosecution and defense arguments, Hoobi only deployed analogical reasoning for the Reading Role Focal Case, State v. Norman, and in this case only for the prosecution. Self-defense, as taught in the Criminal Law course, comprises six elements and individual cases in the casebook teach students about each element respectively. State v. Norman focuses on the second element of self-defense, imminent danger. In the previous chapter, this issue was also discussed in relation to Hoobi, when, in a Legal Problem Solver presentation, she attempted to use a case (People v. Goetz) that was about reasonable belief to make an imminent danger analogy. In her analysis chart in Excerpt 11, Hoobi again used a precedent case inaccurately. While State v. Norman is instructive on imminent danger, Hoobi deploys it for use in analogical each element of self-defense, despite the fact that the case did not address the other elements of self-defense.

This indicates that Hoobi was beginning to use and manipulate facts to make an argument for ‘both’ sides, but when the additional layer of thinking through a precedent case using
analogical reasoning was added, Hoobi was still not able to exhibit full control over synthesizing all of the material required to answer a question such as contained in this hypo. In fact, Hoobi applied unevenly her use of both the chart and the ironic analogies to the elements of self-defense. For three elements, she completed her analysis via the chart and included arguments for both the prosecution and defense. For the final two elements of self-defense, although written in full sentences, Hoobi included only a prosecution argument. Although the development of Hoobi during the criminal law semester was impressive and she showed signs of reasoning and making analogies for both sides in a legal case, her use of the chart and limited analysis for some of the elements indicates that her ability to use analogical reasoning was still in the process of developing.

5.5 Discussion

As the analysis in this chapter made clear, not all students used analogical reasoning nor did their respective development follow the same pathway. At least three developmental trajectories were identified within this student cohort: 1) those who used a form of case-based reasoning from the first IRAC essay and continued to steadily develop towards more sound analogical reasoning throughout the semester (Hoobi, Yue); 2) those whose use of analogical reasoning was more ‘uneven’ or ‘destabilized’ throughout the semester, in that there was some alternation in IRAC essays where they used and failed to use analogical reasoning in their written performance (Fazi, Jun, Pim); 3) and the student who did not use analogical reasoning at any point in his written IRAC essays throughout the semester (Omar).

However, the mere presence of analogical reasoning in each of Hoobi and Yue’s IRAC essays does not mean their development was strictly linear or straightforward, however. As will be explicated in the case of Yue in chapter 6, even what looks like linear progress takes tenacity
and occasional confusion and setbacks—a clear example documenting Vygotsky’s contention that development is not monotonic and smooth but revolutionary, uneven and can even be retrograde on occasion. This chapter also demonstrated that development to sound analogies in Yue and Hoobi’s writing required time, mediation, and multiple opportunities to analyze legal problems using analogical reasoning. Not until the fourth IRAC essay did either produce analogies that were analyzed as sound in that they mapped relevant relations from the precedent case to the hypo in terms of the legal concept.

The analogical reasoning of Fazi, Jun, and Pim, in all its ‘unevenness’ or state of ‘destabilization’ should also be considered development. In fact, a V-SCT understanding of development holds that development is not monotonic or linear in nature. Rather, it is replete with upheavals, regressions, twists, and pauses. The uneven performance in the essays of Fazi, Jun, and Pim demonstrated that they were developing; they were engaged in the instructional program, and although they did not always use analogical reasoning, this was sometimes for understandable reasons. In the case of Jun, as will be explored in greater detail in Chapter 6, he was able to verbalize in the debriefing session related to his second IRAC essay that he knew he should use analogical reasoning and in fact wanted to, but he 1) couldn’t remember relevant case names and 2) thought that the cases we had read to that point in the semester were different from the hypo case. This is a common refrain from the students while learning how to use analogical reasoning as a scientific concept for common law reasoning – but these cases are different, why do they treat them as similar. Recall the example from Mertz (2007), that in the context of case law and a legal concept like ‘inherently dangerous,’ items as disparate in everyday life as a defective coffee urn and mislabeled poison, and can and do become analogous through legal reasoning. This is conceptually difficult for students who 1) are already educated in a legal
system which does not rely on analogical reasoning through precedent cases in this way 2) are language learners working to develop greater control over English generally, and 3) are also laypersons from languacultures with different internalized cognitive models, such that categories are different.

Finally, in the case of a student like Omar, much of the CBI program was beyond his ZPD and he was not observed using analogical reasoning in any of his IRAC essays during this criminal law semester. This does not mean Omar did not develop, however. His story of development will be explored in greater detail in chapter 6, but suffice to say for now, Omar did develop during the semester analyzed in this dissertation. Omar started mentioning cases through rule-based reasoning in the conclusion sections of his IRAC essays by the end of the semester and he also began to recognize when he failed to comprehend a case or the relevant instruction. He went from “when I read I understand everything” (Omar, LL meeting, week 5) to audio recording meetings with the TR so he could listen to them at home; also as the semester progressed Omar developed the confidence to express his lack of understanding: “I don’t understand. Please say it again” as the semester progressed. While awareness such as this might be more closely aligned to his ‘general English’ proficiency per se than with common law analogical reasoning for common law purposes, this shift in disposition and strategies indicates that the gap between the instruction and his ZPD was closing.

The developmental trajectories and types of analogies discussed in this chapter should not be interpreted 1) as the only kinds of analogies students make on the journey to full control over analogical reasoning in the common-law system and 2) to be developmental stages all learners must pass through in learning to reason by analogy in the common law. Students do not, and indeed in this study did not, all progress from a ‘no analogy’ stage to a ‘rule-based analogy’
stage to a ‘parallel analogy’ stage and so on. For example, Yue never wrote rule-based analogies; she started with parallel analogies. Jun used parallel analogies in the first IRAC essay and no analogical reasoning in the second IRAC essay. These kinds of analogies are not stages of development that all students move through in a linear fashion. From a V-SCT perspective, the differential and uneven developmental trajectories is expected as students have different backgrounds in terms of first legal languaculture education and practice, English language proficiency, motivation, and career goals. This chapter does importantly discuss possible developmental trajectories in learning how to use analogical reasoning as a common-law reasoner after already knowing how to reason in another legal system.

It is also important to note that the categories of analogies were not developed a priori. The analysis was a form of a priori analysis in that it involved a theoretical concept of what comprised an appropriate analogy given the definition of analogical reasoning in the common law legal system, the given focal cases, and the assigned hypos. It was not known or formally hypothesized what kind of analogies or trajectories pre-LL.M. students would likely to learning analogical reasoning in this new legal system, however. Although this is a hypothetical supposition on its own, a taxonomy of the sort developed here may well have influenced the type of mediation given to students throughout the semester of instruction investigated here.

Students were more sensitive to instruction related to some categories of analogies than others. For example, the parallel analogies only appeared in the first IRAC essay of the semester for any of the students. Additional, analogical-reasoning-and-language-focused instruction appears to have been successful in provoking students to signal analogies in their language. Although not the focus of this chapter, it should be pointed out that when students used signal language, it is not always done in a target-like manner (e.g., an analogy such as “Unlike in
Malone case the defend just want to play game with his friend and does not have the intent to kill but in Billy’s case the defend was threating the victim twice” (Hoobi, IRAC 2). While the analogy does contain language that could be considered not target-like, for the present study it was more critical to observe that analogical reasoning for common law purposes was developing and how that reasoning was developing in response to interaction with the social and material mediation of the CBI program.

Private writing, the genre and effect on the data and student development

Analysis of the application sections in the IRAC essays revealed that the students employed private writing to self-regulate in the activity of analysis and writing. The genre selection, namely the law-school-exam essay, may have affected how extensively private writing was observed in the data. Being asked to use this new form of legal reasoning in legal problem solving is cognitively difficult in its own right, but students were asked to also read the hypo and write their IRAC essay in a single, 75-minute class session. It would not be surprising, then, that this resulted in extensive use of private writing as the task was sufficiently cognitively demanding that students needed to regulate their activity and write for themselves in order to write for the instructor.

As evidenced in a student like Hoobi, however, private writing in the IRAC essays helped promote her development throughout the semester. Private writing on the scratch paper of the first IRAC essay actually helped her see that the original analogy she wanted to make was a superficial one, and she changed her analysis when generating the essay itself. Hoobi’s use of charts as a form of private writing in IRAC essays 1 and 4 also emerged at critical times in her development – the first IRAC essay where she is asked to produce case-based legal analysis for the first time, and the final essay where her ability to analyze the same problem for both sides
was just beginning to emerge in autonomous written performance. DiCamilla and Lantolf (1994) remind us that from a V-SCT perspective, “linguistic behavior cannot be characterized simply as right or wrong, but can only be made sense of when we observe it in relation to the task which a given individual is attempting to carry out” (DiCamilla & Lantolf, 1994, p. 366). In the case of these students and the analogies in their IRAC essays, then, this analysis has focused on the activity the students are engaged in – integrating a new form of legal reasoning, analogical reasoning, in analysis of a legal problem under time constraints and in a second language. Rather than seek to characterize the students’ language as target-like or non-target-like, the analysis has attempted to index the types of analogies and trajectories of development when students engage in a task that was cognitively difficult.

*Access to tools while writing IRAC essays*

Another key theme with implications for teaching LL.M. students to emerge from this analysis was how qualitatively different IRAC essay 3 was for the entire cohort. Recall that IRAC 3 was the essay in which students were allowed access to their class notes and casebook. This was the only IRAC essay where all students at least referred to other cases. IRAC essay 3 was also the only essay in which students referred to cases other than the Reading Roles cases, indicating that when given additional tools work with, the students were capable of producing much more sophisticated and better written essays. What this finding may indicate is that students want to refer to other cases but do not remember enough about them under exam conditions to be able to use them intelligently. That is, these students appeared to use the mediation the casebook afforded them intelligently and appropriately but because of their lack of familiarity with the legal reasoning genre they most likely were unable to function independently without the support of an external artifact represented by the casebook.
When the students were not allowed access to other tools, the only analogical reasoning they employed in their essays utilized the Reading Role Focal Cases. Apparently, then, the extended discussion of those cases afforded students enough comprehension of those texts to enable them to use them in analogical reasoning for common law purposes. As seen in Chapter 4 and will be seen in Chapter 6, students regularly mentioned other cases as candidates for analogical reasoning in their IRAC essay debriefing sessions; they did not, then, appear to be relying solely on Focal Cases out of any desire to please the teacher. The Focal Cases appear to have been the only cases they were able to appropriate for use in autonomous performance when denied access to tools to aid their reasoning and writing.

Clearly, there are implications for the single-exam evaluation approach and the nature of the information that can possibly be obtained through evaluating LL.M. student performance based on a single exam. Testing the students on a single exam at the end of the semester without access to cultural artifacts such as course notes, a course outline, legal texts, or even a dictionary clearly does not allow students to demonstrate all that has developed and may still be in the process of developing, or “ripening” to use Vygotsky’s (1987) terminology. Poehner (2008) criticized this isolated, autonomous performance approach to testing when he pointed out that what are generally thought to be good teaching practices, such as helping students when they encounter problems, are proscribed during assessment activities. Similarly, many of the constraints imposed during assessment (e.g., isolating learners from one another, removing cultural artifacts such as calculators, computers and dictionaries, and imposing time limits, etc.) are very unusual in non-assessment contexts and antithetical to learning. (p. 34).
I suspect that a client would have trepidations if her lawyer were required to analyze her legal problem and apply relevant legal principles and cases in a timed-essay situation and without access to cultural knowledge or tools other than what is ‘in’ the lawyer’s ‘head.’ Yet, this is how we evaluate students’ learning of legal content and development as legal reasoning.

As contrasting what students were capable of writing on IRAC essays 3 and 4 demonstrates, only part of what students know and are capable of can be observed by through assessment based on a single, timed essay exam at the end of a semester. Through access to the cultural artifacts for the third IRAC essay, the students were able to demonstrate more accurately what they were capable of. That is, the students were able to demonstrate their case-based analogical reasoning when they had access to the various cases read throughout the semester. Not only did they refer to more, and quite appropriate cases, the students were also able to use more precise terminology when they had access to relevant legal education texts.

Access to cultural artifacts is not a one-size-fits-all solution, however, as the Companion Course instructors discovered during the spring constitutional law course when the students were provided with access to the casebook and class notes when writing one of the IRAC essays. Students spent so much time re-reading the relevant constitutional provisions and cases that they did not leave sufficient time to actually write their IRAC essays. This was no doubt due to the unique and complex nature of American constitutional law and the complicated topics and judicial opinions dealt with in that class. What I am pointing out, however, is that the activity needs to be appropriately and reasonably within a student’s ZPD for access to a cultural tool to offer any useful assistance. In terms of Dynamic Assessment (see Poehner, 2007), the students had difficulties recontextualizing the capacity they developed in the criminal law class to reason in accordance with common law analogical reasoning to the more complex world of
constitutional law. This was most likely not because they failed to understand how analogical reasoning functions in a common-law system, but because determining the relevant analogies in precedent cases in more complex in constitutional than in criminal law.

5.6 Conclusion

This chapter has examined how the extent to which a cohort of pre-LL.M. students employed analogical reasoning for common law purposes in their independent writing and examined what the type of analogies they produced might tell us about the process of learning common law analysis as a second legal languaculture. The chapter considered what constitutes sound legal analogical reasoning and the developmental trajectories of the students in developing the ability to produce sound analogies under timed-essay conditions. Private writing and access to cultural tools emerged from the data analysis as important themes affecting student development, with important implications for LL.M. education.

Not all students developed in the same way, however. Half of the cohort produced sound analogies in their autonomous written performance by the end of the semester, while the other half did not. Chapter 6 elucidates the story of development of one student representative of each developmental trajectory identified in this chapter. This analysis provides additional insight into why some students were observing writing sound legal analogies, while others did not develop to that point during the duration of the study.
Chapter 6 Student Development in Common Law Analysis: The Cases of Yue, Jun, and Omar Data

“...we find both the examiner and the examinee bowed over the same task, engaged in a common quest for mastery of the material” (Feuerstein, Rand, & Hoffman, 1979, p. 102).

6.1 Introduction

In order to understand in greater depth student engagement with the CBI curriculum, three student cases, corresponding to the different developmental trajectories discussed in chapter five, were selected to respond to research question three. These cases were selected because each student followed a different developmental trajectory when undertaking the task of learning a second legal language/culture. The different trajectories are intended to illuminate possible paths of development in response to this undertaking and the CBI pedagogy, rather than provide a categorical account of how all students respond to this type of intervention.

After selecting the cases of Yue, Jun, and Omar, I analyzed their IRAC essays as well as transcripts of their interactions in class discussions, reading role group meetings, and individual IRAC debriefing sessions in order to identify salient themes related to their interaction with the CBI program and their developmental trajectory. After identifying the salient themes for each student, the essays and transcripts were re-analyzed in light of those themes and representative excerpts were selected in order to explicate the student’s development. Other sources of data, such as pre-semester and post-semester questionnaires and tasks submitted in conjunction with the Reading Role activities are also incorporated in the analysis in order to provide a more nuanced account of that student’s development of common law thinking.

6.2 The Case of Yue

I selected Yue for analysis because she performed at the top of the class throughout the
semester and was among the first students to demonstrate conceptual understanding of analogical reasoning in common law analysis. As discussed in the previous chapter, Yue did employ analogical reasoning in some form in all of her IRAC essays, which may indicate that the CBI program was appropriately constructing a ZPD for her. The mere presence of analogical reasoning, as discussed in Chapter 5, does not indicate target-like analogical reasoning and common law discourse, however. The analysis of Yue’s development will trace her use of common law thinking through her interactions with the CBI instruction, interactions with the companion course instructors, and IRAC writings, a developmental trajectory which ultimately left Yue at a point where she was using analogical reasoning as a scientific concept to engage in legal analysis both orally and in written performance.

6.2.1 Yue

Yue is a Chinese woman in her mid-twenties who enrolled in the pre-LL.M. program directly from her undergraduate studies of law. During her degree program in China, Yue completed two internships in Chinese civil law, one in the criminal law context, and one in commercial law. In a pre-semester questionnaire, Yue responded that she was pursuing the LL.M. degree because: “I want to learn more about common law system. Because, after this program, I would like to be a lawyer who can deal with foreign related matters.” Yue, then, stated that she does intend to return to China to practice law, but it is not inconsequential that she explicitly stated she is interested in learning about the common law in order to be able to “deal with foreign related matters,” which presumably means working with English-speaking clients or legal issues which might involve common law. The future Yue envisioned for herself, then, intersected with the CBI curriculum; the instructional program was designed to teach students what it means to reason in a different legal system, one where sources of law and reasoning
processes are different from students’ home legal systems. Since Yue envisioned a future for herself where knowledge of U.S. common law is relevant, she likely saw the relevance in the CBI program, with its focus on judicial opinions as a crucial text in common law and analogical reasoning as a critical cognitive tool for analyzing legal problems. This is not an insignificant point as the student who imagines a future where what she learned during her LL.M. studies is relevant is likely engaged in a different activity than a student for whom an LL.M. degree is a stepping stone to a different law degree (e.g., the SJD, an academic doctorate of legal studies) or a job in her home country that doesn’t require interface with English-speaking clients or common law.

6.2.2 Yue’s engagement with CBI curriculum and development of common law reasoning

The analysis of Yue’s development will center primarily on her interaction with TR in both the classroom and individual meeting setting. Where relevant, excerpts of her IRAC essays also inform the analysis. I have chosen to focus primarily on telling the story of Yue through her interaction with TR’s mediation because this appeared to be a fundamental component of her development in the companion course. My analysis of Yue’s development in common law thinking is focused, then, on how she engaged with the social mediation offered by the CBI curriculum.

In order to understand what students thought about both their home legal systems and the U.S. common law system, to establish their pre-understanding (Miller, 2011) of legal reasoning, the students were given a pre-semester questionnaire which asked them: “Please describe what you know about the thinking or reasoning process you would use to solve a legal problem in the American common law system. (Use words, drawing, or whatever will help you express the process).” Excerpt 1 is how Yue expressed her understanding of the U.S. common law system.
All emphases added are mine.

Excerpt 1

I use to watch the US TV drama. I think the legal process in criminal is that counselors try to argue with procurators to make the judge believe that their client is not guilty or reduce the level of guilt. (1) bring out pleading (2) asking for some motions (3) doing some investigate to found the truth or evidence (4) doing some investigate to found the truth or evidence good for your cliente (4) defend for client on the court (5) find out similar case. Which benefit your client. (Yue pre-semester questionnaire)

Excerpt 1 demonstrates that at the beginning of the semester, Yue had an everyday understanding of how legal reasoning works in the U.S. common law system. She even indicated that her understanding of the legal process, which she situated in the criminal courtroom, is based on her viewing of U.S. television shows, which give, by definition, a dramatized version of the legal system. Her understanding of U.S. common law was also very text-based, as she wrote that she thought that in the U.S. attorneys “(1) bring out pleading (2) ask for some motions.” Yue demonstrated, then, an awareness of the kinds of texts lawyers produce when practicing law, even if this response did not indicate her understanding of how or why these texts might be produced. Interestingly, Yue did indicate that a lawyer should “find out similar case,” but in this writing she did not give any indication of what she understood cases to be or how lawyers should use ‘similar cases’ in their legal reasoning or advocacy. From this data, it is not possible to determine whether Yue’s understanding of what a “similar case” is and how a similar case should be used is grounded in her understanding of how “cases” function in the civil law system or whether she has picked up on reference to case law in U.S. procedural dramas. In either case however, Yue’s representation of her understanding of U.S. legal reasoning revealed an everyday understanding of common law reasoning.

From this baseline, everyday understanding of common law reasoning, I turn to consideration of Yue’s interaction with TR as mediator and the CBI program in order to
understand her development in common law analogical reasoning throughout the semester.

Yue’s engagement with the social mediation offered by TR is illustrated in Excerpts 2, 3, and 4, below, which all occurred on the same day. Excerpt 2 and 3 took place in the Companion Course, while Excerpt 4 occurred in an individual meeting Yue had with TR. The three excerpts each involve the central question of the role of *intent* in common law analysis. In the class session where Excerpts 2 and 3 occurred, TR led the students in a mapping exercise related to the hypo analysis Yue and Fazi had submitted as Legal Problem Solvers (LPS) for the focal case *Commonwealth v. Malone* (available in Appendix G). The analysis submitted by Yue and Fazi relied on superficial rather than legally relevant analogies, as discussed in the previous chapter. Thus, the pedagogical intent of the mapping activity was to revisit the argument made in the LPS presentation and to materialize the analogies so that they were *visible* to the students, so that they might understand why these are not the most relevant analogies to use in common law reasoning.

Yue and Fazi grounded the analogies in their analysis in similarities and differences in the precedent case and hypo as stories of human conflict rather than legal stories. Consequently, the analogies made were not legally relevant for analyzing the hypothetical. The superficial analogies in Fazi and Yue’s analysis focused on comparing the ‘games’ present in both cases, agreement or non-agreement to play these games and the friendship status of defendant and victim; the analysis was not related to the dangerous actions of the defendants that would indicate *gross recklessness*, the legal concept relevant to *Commonwealth v. Malone*. At the outset of Excerpt 2, TR had just asked the class which analogies the LPSs focused on in their presentation the previous class.

Excerpt 2

1  YU: i think this fact makes um
In lines 1-7, Yue stated she thought two cases were distinguishable in that in "Commonwealth v. Malone" the defendant and victim agreed with each other, both knew the rules of the game, and didn’t care about the dangerous nature of the game. While this characterization of the facts of the case is somewhat infelicitous in that it created facts not discussed in the case, as mediator, TR chose to orient Yue’s attention to her reading of the hypo rather than her reading of the precedent case, and asked if she was sure that the argument in the Gary Gunowner hypo was about the game. When Yue hesitated, TR asked, more pointedly, in lines 10-15, why the rules of the game were relevant in the analysis of the two cases, a question which offered Yue the opportunity to further explain her insight into the two cases.
Crucially, TR’s question about why the rules of the game were significant to analysis of the legal problem elicited from Yue a response which revealed as much about her understanding of analogical reasoning as it revealed about Yue’s understanding of the cases being discussed. When questioned about the relevance of the rules of the game, Yue verbalized that she actually found *Commonwealth v. Malone* and the Gary Gunowner hypo to be “very different case” and that “I kind of don’t think we should use the rule from Malone” (lines 18-20). Yue’s response provided insight as to why a student might generate superficial analogies when responding to a hypo. Yue likely believed the precedent case and hypo to be quite different because she understood them as stories of human conflict, rather than specifically legal stories. She and her partner, Fazi, however, understood that they needed to deploy analogical reasoning in common-law analysis, so they searched for whatever similarities they could find between the precedent and hypo cases. The creation of the friendship, rules of the game, and danger of the game analysis categories, then, is likely a manifestation of a superficial understanding of analogical reasoning as a concept.

While TR could have addressed this conceptual understanding, she instead responded by informing the class that the Gary Gunowner hypo was actually developed from a real case that had actually relied *Commonwealth v. Malone* as binding precedent. TR could have mediated Yue’s utterance differently, but her statement did have the effect of demonstrating to the students that in the common law, using precedent cases for analogical reasoning does not always mean the stories of human conflict appear similar in the everyday sense of analogizing narratives. It is unknowable how the instructional conversation may have differed had TR used a different mediational approach, but it is knowable that Yue was not satisfied with the response that the Gary Gunowner case had been a real case that had relied *Commonwealth v. Malone* in the
analysis of the court.

Unsurprisingly, the explanation of the Gary Gunowner hypo as a real case that actually relied on *Commonwealth v. Malone* in its reasoning was insufficient to afford Yue a better understanding of why the rule from *Commonwealth v. Malone* should be applied to the hypo.

The class discussion had continued for approximately five minutes before Yue again pursued the issue of using *Commonwealth v. Malone* as binding precedent. She further clarified, in the excerpt below, why she saw the two cases as different and questioned the focus on *intent* in the class discussion.

**Excerpt 3**

```
1  YU: Can I ask a question (.). ahm (.). cuz i think if we want
2       compare two case not just compare the intent or the
3       thinking i think should also should focus on facts um
4       so reason i don’t treat two case very similar because i
5       think some facts is not ah (inaudible) between the two
6       case so if um we want to if we want to punish this guy
7       if we just focus on intent as (well) recklessly I think
8       it will not enough so can you give me the reason the
9       (1) why we treat these two case the fact something some
10      similar fact
11  TR: so what you’re kind of circling around is an important
12      question so you are comparing facts right comparing
13      facts related to these important legal concepts so we
14      know that in Malone they said that even though he
15      didn’t actually have any intent to kill his friend ahm
16      of of (.). putting a gun to somebody’s side and
17      shooting (.). pulling the trigger three times was so
18      grossly reckless that he should be held responsible
19  YU: oh:
20  PI: yeah
21  TR: so we know something about gross recklessness and the
22      kind of action that a court is going to say okay gross
23      recklessness
24  YU: so that that means what what the Gary did he bring out
25      the gun is actually the same dangerous like
26  TR: yes
27  YU: Malone
```
Yue was understandably dissatisfied TR’s explanation to her earlier verbalization about thinking that Commonwealth v. Malone and Gary Gunowner were so different as to render Commonwealth v. Malone not useful as precedent for Gary Gunowner; in lines 1-8, Yue verbalized her understanding: “if we want [to] compare two cases … i think should also focus on facts” and the reason she doesn’t “treat two case very similar” is because “if we want to punish this guy if we just focus on intent … i think it will not enough.” She then very pointedly asked “so can you give me the reason … why we treat these two case the fact something some similar fact.” Importantly, Yue indicated that it was not just that she saw the cases themselves as different, but wondered why the class discussion was focusing on intent, to, in her mind, the exclusion of the actual actions of the defendant. Her question, then, was articulated in a way that was related to both conceptual understanding of analogical reasoning, but also related to how legal concepts are taught in U.S. legal education.

As the class had been focusing on analyzing a legal problem, TR responded to Yue’s question in a way that highlighted the analogical reasoning, explaining that the factual comparisons one should be making are always connected to the legal concepts under study before summarizing the outcome of the case and connecting the legal concept to the legally significant facts in that case. Yue’s understanding of the explanation is indicated in line 19 by an elongated “oh,” so TR further explained, “so we know something about gross recklessness and the kind of action that a court is going to say okay, gross recklessness.” This clarification of analogical reasoning and use of precedent in the U.S. common law system prompted Yue to identify the appropriate fact from the Gary Gunowner hypo for analogizing to Commonwealth v. Malone, when she said in lines 24-25: “so that that means what what the Gary did he bring out the gun is actually the same dangerous like Malone.” Yue, then, through a series of interactions
with TR, altered her understanding of the important facts to select for analogical reasoning.

At this point, TR accepted the identification of the appropriate fact and reiterated for the class that analogical reasoning is “fact to fact comparisons always guided by” the legal concept. Although Yue at this point had a shifted understanding of the legally significant facts from the hypo, there was no indication in these in-class interactions whether Yue’s conceptual understanding analogical reasoning in common law analysis may or may not have similarly been altered.

In fact, Yue’s understanding of precedent cases and analogical reasoning in common law analysis had been destabilized by the class discussion (Excerpts 2 and 3); this destabilization meant that she had lingering questions about the focus of the classroom discussion when she met with TR for an individual debriefing session of her second IRAC essay later on the same day as the previous two examples. Yue seized this meeting as an opportunity to discuss with TR her understanding of how to reason by analogy in the common-law system. At the outset of the debriefing session, Yue told TR that she found the Billy Boxer hypo (a hypo involving a brawl over captainship of a brewery’s company baseball team, found in Appendix D) to be more like Commonwealth v. Malone than the Gary Gunowner hypo discussed previously, so the dyad discussed further the conversation from class regarding the Gary Gunowner hypo. In her meeting with TR, Yue conveyed why she had been confused about the focus on intent during the class discussion and how she used her training in Chinese civil law reasoning to help her understand U.S. common-law reasoning. In discussing with Yue analogical reasoning in the common-law system and subsequently the inclusion of cases in casebooks in U.S. legal education, TR mediates the mediation in order to elucidate for Yue why she had focused the class discussion on intent.
Excerpt 4

1  YU: because every time i want to i just want to comparing
2    facts um i think we cannot punish people because what
3    they thought or just because he has malice or has
4    intention or not we should mm because in my country we
5    usually ah first we think about what what did this
6    defendant really did and ahm and then we find out the
7    intention so we need both of these things to com convict
8    him convict the the the defendants so
9  TR: and you think that's not true here
10 YU: mm it's true here but mm sometimes mm ah i i can't find
11    find the way to find out ehm for example this in Malone's
12    case ah this morning I think ah I thought you just focus
13    on intention or just focus on the malice not mm not focus
14    on what did the defendant actually do so sometimes i its
15    makes me confused so
16 TR: mm hmm well (4) isn't there because all of these cases
17    they're about the intention they're about the mens rea
18 YU: yes yes
19 TR: all of these homicide cases
20 YU: mm
21 TR: (2) because (.) how do we figure out what the different
22    levels of homicide have to do how do we figure out the
23    different levels of homicide are
24 YU: ahh (2) yes it's because of different mens rea
25 TR: yeah yeah
26 YU: yeah
27 TR: so yes you have to prove that they did the act
28 YU: mm hmm
29 TR: that caused the death but the cases that they put in the
30    case book are testing the mens rea are teaching us
31    something about the mens rea that's required for that
32    level of of homicide
33 YU: so usually we can um use the fact that is what is the
34    defendant actually did to find out what is his mens rea
35    is that and then we can use this result to ah find out
36    the suitable crime

Yue explained first, in lines 1-8, her belief that “we cannot punish people because what
they thought or just because he has malice or has intention” and further justified her position by explaining that in her country, China, both the actions and intent of a defendant need to be considered in order to convict a defendant of a crime. This verbalization afforded TR important insight into Yue’s understanding of the hypo analysis and also that Yue was very actively using her understanding of Chinese criminal law to mediate her learning in the U.S. legal education system. It seems that due to the somewhat artificial way both the Criminal Law and the Companion Courses constructed hypo analysis, in that it is largely focused on mens rea or the guilty mind element, at the expense of the actus reus or the voluntary act element, Yue has construed common law legal analysis as only focused on the intent or level of mens rea. As she conveyed to TR, this was problematic for her, as this is not how she perceived legal reasoning to operate in China; in fact, that is also not how the legal system operates in the United States, but due to U.S. legal education’s focus on using judicial opinions as teaching tools, this appeared to be Yue’s understanding of U.S. common law reasoning. Importantly, though, Yue oriented to the task of analyzing a legal problem as someone who is already a legal problem solver and it is for this reason that the focus on intent, and only intent in her understanding, was problematic for her.

As Yue had vocalized using her background as a civil law lawyer to mediate her learning of the U.S. common law system, TR questioned her comparison, by asking, in line 9, “and you think that’s not true here.” Yue struggled to verbalize her understanding of the common-law system in lines 10-15, but replied that she did think “it’s true here”, but indicated that she was not quite sure how to proceed in her analysis, when she said, “I can’t find the way to find out.” Yue then focused specifically on the class discussion of Commonwealth v. Malone and questioned TR’s focus on intent and malice in the class, because she thought that in analysis of a legal problem, the actions of a defendant should also be considered.
Given the four-second pause in line 16, TR appeared to struggle initially to choose how to mediate Yue’s question. It should be noted that TR’s understanding of the common-law system is heavily mediated by U.S. legal education’s use of the judicial opinion as a teaching tool. She understood the homicide unit in Criminal Law to differentiate the levels of homicide by the various levels of mens rea discussed in the cases in the casebook. Therefore, TR re-focused the conversation from legal analysis per se to cases in the law school setting. In lines 16-17, then, TR verbalized to Yue, “because all of these cases they’re about the intention they’re about the mens rea”. Yue’s “yes yes” in line 18 indicated agreement with this assertion, so TR continued, again with some pauses, as she appeared to think about how best to mediate the conceptual difficulties Yue was verbalizing. TR returned to how the organization of the criminal law casebook and asked, “how do we figure out the different levels of homicide”. By responding “yes it’s because of different mens rea,” Yue indicated a level of understanding that the different categories of homicide being taught in the criminal law and companion courses relate to levels of mens rea. In this manner, then, TR’s social mediation is observed supporting, or providing additional mediation for, the mediation the casebook is intended to provide.

After Yue accepted that the levels of homicide relate to mens rea, TR attempted to link her legal reasoning question to how casebooks in law school are organized to teach about homicide by first acknowledging Yue’s belief that actions also matter (“so yes you have to prove that they did the act that caused the death”), but then contrasted this acknowledgement by clarifying that “the cases that they put in the case book are testing the mens rea are teaching us something about the mens rea that’s required for that level of of homicide” (lines 29-31). This mediation appeared to illuminate for Yue why a class discussion would focus on intent, and she next verbalized a new understanding of how to analyze a hypo problem in the U.S. law school
context, by using facts in the hypo to “find out what is his mens rea … and then we can use this result to find out the suitable crime.”

Yue’s verbalization, then, of her confusion related to the relationship between actus reus and mens rea in the common-law system, as mediated through her understanding of Chinese civil law, afforded TR insight to mediation that would be appropriate for pushing Yue to understand how U.S. legal education uses cases in instruction. Through this interaction, across several instructional conversations in class and the individual meeting, Yue and TR shifted from a discussion of two specific cases being different according to Yue’s understanding of analogical reasoning to a more nuanced insight of how Yue was using her own experience with Chinese law to mediate her understanding of U.S. common law reasoning through her experience as a lawyer. When her use of her first legal language as a psychological tool created some confusion for her, likely due in part to the artificial nature of hypo analysis, TR mediated the mediation offered by the casebook as a learning tool in U.S. legal education, thus allowing Yue to comprehend a larger picture of how actus reus and mens rea are both important in U.S. common law, but in this particular instance, the course was attempting to teach the distinctions in different types of homicide through distinctions of mens rea.

Three weeks later, Yue demonstrated new and nuanced understanding of abstracting legal principles from a case and integrating the rule from a case in analysis of a hypo through analogical reasoning. As many of the students were still struggling with case reading and analogical reasoning, the Companion Course instructors decided that for the third Reading Role Focal Case of the semester students would not be required to independently write an IRAC essay. Instead, in the class session scheduled for students to write IRAC essays, TR led the
students in a group hypo analysis, using *United States v. Jackson*, the third focal case, as precedent.

Both the hypo and the precedent case dealt with the crime of *attempt*. The issue in *United States v. Jackson* hinged on whether or not the defendants’ actions had constituted a *substantial step* toward committing a robbery when the defendants had, on multiple days reconnoitered a bank selected for a robbery, gathered ‘tools’ for robbing the bank, and obscured the license plate on their car prior to driving to an area near the location of the bank. Likewise, the hypo, available in Appendix I, asked students to consider whether or not a man had committed attempted robbery the crime of attempt when he told his mother he was going to rob a jewelry store, walked to the area where the jewelry store was, had a gun and hastily written note in his pocket, and was stopped by police on the street near the jewelry store.

During the class session where the hypo was analyzed, TR guided students in a close reading of the hypo. TR and the students then outlined on a whiteboard the relevant facts in both *United States v. Jackson* and the hypo, in order to use analogical reasoning in analysis of the problem. Finally, the students were then split into two groups in order to construct analogies reflecting an analysis that a *substantial step* either had or had not been made. Excerpts 5 and 6 occurred in the class session subsequent to the group analysis of the *Jackson* hypo. In order to

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19 In criminal law, and as the court outlines in *United v. Jackson*, attempt is a crime in and of itself if one crosses the ‘line’ from ‘mere preparation’ into a ‘substantial step’ in carrying out the crime. *Black’s Law Dictionary* defines attempt as “[a]n effort or endeavor to accomplish a crime, amounting to more than mere preparation or planning for it, and which, if not prevented, would have resulted in the full consummation of the act attempted, but which, in fact, does not bring to pass the party’s ultimate design” (http://thelawdictionary.org/attempt/).
lead a class discussion on analogical reasoning, both conceptually and how it is commonly expressed in legal writing, TR completed the analogies initiated by students during the group mapping exercise by adding signal language. Thus, the facts in the analogy in Excerpt 5 were selected by students during the group analysis, but TR wrote the actual analogy.

During a class activity discussing whether the analogies produced during the previous class were *sound legal analogies* based on *United States v. Jackson* as precedent, TR assigned Yue the analogy in Excerpt 5. TR assigned Yue this particular analogy as it was slightly more nuanced than the other analogies produced. The analogy in Excerpt 5 contains both relevant and irrelevant analogies and, based on prior performance, TR believed Yue would likely be capable teasing apart the relevant and irrelevant portions of the analogy.

Excerpt 5

> Whereas the defendants in Jackson had to use guns to rob a bank in order to overcome a bank’s security system, robbing a jewelry store does not require a gun. Therefore, it is inconsequential that Danny Defendant did not have a gun with him when he was arrested.

In Excerpt 5, the first half of the analogy is not a relevant distinction to make. Although the court in *United States v. Jackson* did consider that the defendants in that case had guns with them, the court did not focus on the extent to which guns are necessary when planning or attempting a bank robbery; this part of the analogy is, thus, irrelevant. Rather, the possession of guns demonstrated that the defendants in that case had transcended mere preparation and begun implementation of a plan to rob the bank. The second sentence of the analogy, however, is a useful fact in analyzing the hypo. In fact, the court in *United States v. Jackson* did focus on
whether the defendants had gathered the tools to carry out the robbery; the defendant’s possession of a gun, therefore, a usable fact and potentially consequential that Danny Defendant had a gun, a potential robbery tool in his jacket when he was arrested.

Indeed, Yue rejected the irrelevant portion of the analogy in Excerpt 5 and, in Excerpt 6, indicated that the rest of the analogy is possible to make following *United States v. Jackson*. Through her rejection of the irrelevant portion and acceptance of the relevant portion of the analogy, Yue demonstrated further development of conceptual understanding of analogical reasoning in the common-law system.

Excerpt 6

1 TR: okay so did we accept or reject this one yeah see this one (1)
2 YU: a part of this I accept but robbing uh jewelry store
do not require a gun I'm not sure this one is good
or not (.) this sentence this part of sentence I think
it we no need to compare the (. ) stores jewelry store
with the bank because uhh in Jackson's cla uh case the
court didn't pay attention on these(1) this kind of
things so I don't think it's that we need to com uh
compare (. ) a jewelry store (. ) with a bank (. ) but we
do need to compare um the gun (. ) yes he he said he will
have he has a gun but he didn't so uh I think because of
he he uhh he didn't has a didn't have a gun so mm this
situation can be uh can be used as uh as a defense (. )
argument (1)

In line 3, Yue indicated that she accepted part of the analogy as appropriate (“a part of this I accept”), but crucially indicated, if expressing it with some uncertainty, “but robbing uh jewelry store does not require a gun I’m not sure this one is good or not.” In addition to stating that part of the analogy is acceptable, Yue has appropriately identified the part of the analogy that is problematic. Indeed, as stated above, the court in *United States v. Jackson* did not analyze the
necessity of a gun or any other tool for committing a crime when analyzing for attempt. Although Yue seemed unsure of herself as indicated by her pauses and explicitly saying “I’m not sure this is good or not”, she did indeed demonstrate that she was relying on a conceptual understanding of legal analogical reasoning to reject the first half of the analogy by referring to the precedent case itself: “we no need to compare the stores jewelry store with the bank because in Jackson’s case the court didn’t pay attention on these.” Yue’s reference to United States v. Jackson in lines 7-10 indicated her conceptual understanding of what analogical reasoning means in the common-law system. In that utterance, that she understood the precedent case United States v. Jackson with sufficient depth to know what were the factors for the court in that case, and, crucially, that those factors have important ramifications for how she should approach analogical reasoning when analyzing a legal problem. Although in this excerpt Yue was not asked to engage in analogical reasoning, but rather to verbalize about the concept, that she arrived at an appropriate conclusion is indicative of development and conceptual understanding of analogical reasoning in the common law.

Equally important and indicative of Yue’s development is that she did not discard the entire analogy as irrelevant. Her utterance in lines 10-15 indicated that she understood United States v. Jackson to outline as a crucial factor the accumulation of tools as an indicator “mere planning” has crossed an invisible line into attempt. Yue explicitly and assertively stated “but we do need to compare the gun” (lines 10-11), which invoked the importance of the tools in analysis of attempt, indicating deep understanding and attention to the appropriate details of United States v. Jackson. This statement revealed an attention to case facts and arguments, reading comprehension, and understanding of common law analysis not observed earlier in the semester. Yue additionally understood that the absence of the gun, or not actually having accumulated the
tools, could be used as a defense argument, indicating that she understood the precedent case, hypo case, and legal concept enough to understand which facts will be crucial in making arguments for at least one side. While, to this point in the semester, Yue had not produced sound analogical reasoning in autonomous written performance, in Excerpt six, Yue demonstrated conceptual understanding of how analogical reasoning works in the common-law system.

By the time the course progressed through another reading role cycle, though, Yue demonstrated the ability produce sound legal analogical reasoning in her writing and, given enough time to think, produce verbally analogies for the opposing position. It should also be noted that Yue’s IRAC 4 also contained a very clever and interesting move that demonstrated her development in understanding the genre in terms of how the rule and application sections are intertwined; for this IRAC, Yue not only wrote different rules for the common law and Model Penal Code (MPC)\(^{21}\), but she found a different outcome for MPC and common law. While not necessarily an indicator of Yue’s analogical reasoning development per se, this use of common law and MPC rules in the IRAC essay indicated developing awareness of the connection between the language of the rule and its potential meaning for the problem at hand. Yue may still have been developing in terms of using the facts of a hypo to both analogize to and distinguish from a precedent case, but in IRAC 4, she also demonstrated a developing control over using precedent in analogical reasoning. In the debriefing session for IRAC essay 4, she also demonstrated the ability to produce ironic analogies in dialogue with a mediation, provided she was given enough time to think. In her writing and oral interaction, then, Yue demonstrated by the end of the semester that she understood the legal rules presented by different sources of law to the extent

\(^{21}\) MPC stands for Model Penal Code, a text written by the American Law Institute in an attempt to assist legislatures in updating and standardizing their criminal law codes. The MPC was taught alongside common law “rules” in the criminal law course the pre-LL.M. students were enrolled in.
that she applied them differently to the same fact pattern.

### 6.2.3 Discussion of Yue’s development

Analysis of Yue’s development demonstrated that Yue drew on multiple resources in her ability to internalize analogical reasoning in the common-law system and to develop the ability to self-regulate in doing so. Yue used the mediator as a resource (Excerpts 1-3) by asking questions related to her understanding of analogical reasoning as a legal concept during class and continuing to ask follow-up questions during an individual meeting. She also explained her confusion about common law reasoning through her understanding of civil law reasoning (Excerpt 3), demonstrating that she was drawing on her internalization of that legal system as a tool to compare and contrast her learning experience with. Yue’s agentive engagement with the social mediation offered by TR, through verbalizations of her reasoning process, afforded TR insight into Yue’s understanding of reading and reasoning for common law analysis; TR was thus able to offer Yue attuned mediation related to the underlying assumptions of U.S. legal education and how casebook organization related to the activity of the hypo analysis in order to push Yue to understand the importance of focusing on *intent* when reading the cases in this section of the casebook. At times, the object of Yue and TR’s discussion was mediation provided by legal education – such as the organization of casebooks, legal education’s pedagogical approach of teaching law through cases, or written feedback from the legal writing professor. Both of these cases required further mediation in order for Yue to fully interpret what it was those forms of mediation were meant to teach. That is, further mediation of the mediation was required for Yue to access the material as intended. By engaging in ZPD activity with Yue, then, TR was able to make these pedagogical tools of U.S. legal more accessible for Yue.
6.3 Case of Jun

JUN represents an interesting developmental trajectory, as that on the surface might appear to be uneven in terms of independent written performance. As discussed in Chapter 5, Jun was one of three students, half of the cohort, who wrote at least one IRAC essay without employing analogical reasoning. For Jun, although he attempted analogical reasoning in the first IRAC essay, he did not use it in the second essay. In the third IRAC essay, Jun again employed analogical reasoning, and in the fourth IRAC essay, Jun produced sound legal analogies. From a V-SCT perspective, this uneven progression is actually indicative of development as, what at times appears to be regression is actually indicative of destabilization of Jun’s pre-conceived notions of law and legal analysis. As the analysis will reveal, in Jun’s case, what appears to be uneven development of common law analysis is a result of his attempts to incorporate mediation from the CBI curriculum into his activity of analyzing legal problems.

6.3.1 Jun

Like Yue, Jun studied Chinese civil law; he held a Bachelor’s degree in law, and reported practicing corporate law for one year prior to enrolling in the pre-LL.M. program (Jun pre-semester questionnaire). He indicated that he was pursuing the LL.M. because: “I think law is very interesting. in the future I want to be a lawyer. I love American law. It also can improve much precious experiences” (JUN pre-semester questionnaire). As such, Jun’s stated purpose for pursuing the LL.M. degree indicated an interest in U.S. law, even if his statement does not explicitly connect his future as a lawyer with his current studies.

As a student, Jun was often quite quiet in class, rarely volunteering answers, but when called on, could nearly always offer a thoughtful contribution that pushed the classroom conversation forward. Jun also seemed capable of and enjoyed assisting other students with
language issues like discrete lexical questions. When other students expressed confusion about what a word meant, Jun was frequently the first student to offer a succinct and correct answer. For example, Hoobi asked what ‘shout’ meant during a Reading Roles meeting and before TR could respond, Jun supplied, ‘a loud talking’ (Week 13).

When Jun volunteered contributions to class, it was frequently in the form of questions which indicated active engagement with the class discussion and, quite often, a deep understanding of the material. In fact, his questions sometimes demonstrated quite sophisticated understanding and even introduced new and legally relevant wrinkles in hypos into the discussion. For example, during another group’s presentation of their Legal Problem Solver hypo analysis late in the semester, Jun asked a question (“what if someone did not participate in the planning but got in the car right before the drive to the burglary” Week 10) that demonstrated sophisticated engagement with the legal concept (attempt), altered one hypo fact in a potentially significant way, and led to an enriched conversation of the doctrinal concept under consideration.

### 6.3.2 Analysis of Jun’s engagement with CBI curriculum and common law analysis development

The following analysis traces Jun’s development as a common-law reasoner throughout the semester and concludes by sharing Jun’s post-semester understanding of common law reasoning, an understanding substantially different from his pre-semester understanding. As was the case with Yue, particular emphasis will be placed upon interactions and submitted work that demonstrate ‘disruptions’ in Jun’s understanding of common law reasoning. While the evidence for these disruptions occurred primarily in social mediation with Yue, in the case of JUN, disrupted understanding and subsequent development in common law reasoning was frequently evident in Jun’s interaction with and manipulation of material tools.
In the pre-semester questionnaire, Jun presented his understanding of both civil and common law reasoning through numbered lists. Interestingly, the steps in his lists for both Chinese and U.S. law were nearly identical, suggesting that, at the beginning of the semester, Jun may have understood the systems to be nearly synonymous. His representation of how he understood U.S. common law is presented in Excerpt 7.

Excerpt 7

Jun’s pre-semester understanding of common law analysis

1. *each case have some issue*

2. *lawyer should research the code and case to find the answer of issue*

3. *if these answers is beneficial to the client, lawyer will take advantage of them* (Jun pre-semester questionnaire)

In Jun’s representations of civilian and common law analysis, the first three ‘steps’ are the same, although for the Chinese civil law system, Jun did indicate that the use of cases “can only be a assist, not dependable,” (Jun pre-semester questionnaire) presumably by which Jun meant that previous cases can be used persuasively in bolstering one’s legal argument, but cases are not binding law. Jun did not include such a disclaimer in his common-law representation, suggesting that he may have had some understanding that cases have a different standing in legal reasoning in the common-law system.

Jun’s representation of the common-law system is, however, quite vague, representing an everyday understanding of legal reasoning in the U.S. common law system. Of course, it is true research of codes and cases is necessary in order to understand legal texts controlling on an issue. One need not have understanding of how legal readers engage in the research, reading, and reasoning process in order to understand this. A deeper, scientific understanding of common law
reasoning would address how legal problem solvers sift through legal texts and reason with them in order to reach an (not the) answer to a given legal problem.

Excerpt eight, below, occurred in the debriefing session for IRAC essay 2. Despite having employed analogical reasoning in his first IRAC essay, in the second, Jun did not refer to case law at all. His application section relied primarily on restating the facts of the hypo and at the end of each paragraph referring to a legal concept (e.g., “A reasonable person in this situation must be cool down”; “In this situation I think a reasonable person cannot provoke himself” (JUN, IRAC 2)). Since Jun had previously used analogical reasoning, the first issue TR opened the debriefing meeting by asking him why he did not use it in this essay.

Excerpt 8
Week 8
[00:01:35]
1 TR did you try to write this essay differently from how you wrote that one
2 JU (1) mm (14) i uh i want to try the difference but uh because uh in previous case i made the i made the comparison but uh in this case i didn't make some comparison
3 TR yeah so why did you choose not to make the comparisons in this case
4 JU uh (2) because i think uh it's different from the previous each previous case and i actually want to comparison but i don't know the case name exactly

After fourteen seconds of thinking time, Jun responded that he “want to try the difference” because for the previous IRAC essay he “made the comparison but in this case I didn’t make some comparison.” While it is not entirely clear what Jun meant by “try the difference”, TR responded to Jun’s acknowledgement that he used analogical reasoning in the first IRAC essay but not the second by asking why he chose not to use analogical reasoning in this particular essay. Jun’s response indicated two reasons – one a reasoning issue rooted in
understanding analogical reasoning in common law analysis, and one presumably a lexical retrieval issue, as Jun reported not being able to remember the name of a case he wanted to use.

Initially, TR addressed the “don’t know the case name exactly” issue and advised Jun in lines deleted here that he can “get around” not remembering a case name by referring to the most salient fact of the case (e.g., calling Commonwealth v. Malone “the Russian poker case”). While this may seem like a minor issue to address during a mediation session, particularly when he had simultaneously raised a conceptual question, subsequent interactions and writings indicated uptake of this strategy by Jun. Addressing the issue of case name recall, then, was actually useful for Jun as he was subsequently able to rely on this strategy in order to externalize analysis even if he could not recall a case name.

When TR and Jun returned to the pressing issue of analogical reasoning in the IRAC essay 2 debriefing session, Jun offered first-degree murder as a potential outcome for the defendant in the hypo, citing premeditation as a legal concept critical to analysis of the legal problem. Indeed, the conclusion of his IRAC essay indicated that Jun analyzed the hypo as one of first-degree murder “the defendant who know that he had been a professional heavyweight prizefighter, he still disregard it and blow the victim’s brain, cause the total injury and dead, he should be convicted of first degree murder” (Jun IRAC essay 2). This analysis will not address the veracity of analyzing this particular hypo as a first-degree murder case, particularly in conjunction with language of mens rea such as that used by Jun. Rather, the analysis of Jun and TR’s interaction will focus on how TR’s mediation forced Jun to be more precise in linking legal categories to precedent cases in his legal analysis.

In Excerpt 9, TR and Jun discuss the issue of premeditation in the hypo. Jun had identified Commonwealth v. Carroll as the first-degree murder case he remembered and wanted
to apply to the hypo. Excerpt 9 occurred just after TR and Jun established a shared understanding that this was a case where a man shot his wife in the head while she slept and that the court in that case reasoned that premeditation could be developed in the time it took the defendant to grab the gun from the windowsill and pull the trigger.

Excerpt 9
Week 8
[00:12:44]

1   TR   mm hm so if that's what we learn so if you think it's first degree murder and that's what we learn from Carroll that this man who killed his wife by picking up the gun from the windowsill and shooting his wife if that is enough time to develop this intent to kill what does that mean for our hypo what would you
2   JU   in in the hypo i think the boxer uh have the have the premeditation because he he has uh hiding behind pillar near the and waiting waiting the victims
3   TR   mm hmm
4   JU   and uh why he did this is mm from the previous times they made an argument about uh to vote the team captain
5   TR   mm hm
6   JU   and it’s the motive
7   TR   (2) okay so are you inferring that's a motive or does it say somewhere in the hypothetical that that is his motive
8   JU   mm (4) it say uh if he didn't (2)uh he told him to lay off passing out the and if he didn't Bill was going to send him home in ambulance uh in that sentence the boxer very angry about
9   TR   mm hm
10  JU   so i think it's great motive about killing
11  TR   so what is a motive then
12  JU   mm (1) the motive is uh he want to want to be vote team captain and the victim also want mm so he don't do don't let the victim uh to fly the to pass the flyer
13  TR   mm hmm so his motive is his wants Vinny out of the way so he can be voted team captain so this threat to him if you don't stop passing out the flyers i'm going to hurt you this threat to him is a way that you see the motive
14  JU   mm hm
In debriefing sessions early in the semester, TR frequently employed the mediational move observed in lines 1-6 – summarizing the immediately preceding conversation in order to return to analysis of the legal problem. As TR spent considerable time in the early sessions to mediate students’ identification and understanding of appropriate precedent cases, this mediational move was necessary so that the instructional conversation could return to the case at hand for analysis. The move serves the additional purpose of modeling the reasoning process for the student. In this example, TR connected for Jun each of the requisite components of analogical reasoning – the legal concept (here, first-degree murder); a case representative of the legal concept (*Commonwealth v. Carroll*); what is learned about the concept from that case, crucially with enough factual information from the case with which to develop analogies (“that this man who killed his wife by picking up the gun from the windowsill and shooting his wife” (lines 3-5)); and this understanding leads one to analogical reasoning (“what does that mean for our hypo” (line 6)). While in this excerpt, TR did not draw Jun’s attention to the fact that her question modeled common law analysis, in her more explicit mediation with Omar, discussion later in this chapter, TR does just that.

Jun’s response to TR’s summary and modeling question indicated that he was still developing an understanding of legal cases as instantiations of legal concepts, as he produced a case fact-concept mismatch. Jun did initially select an appropriate\(^\text{22}\) fact from the hypo (“he … hiding behind pillar … waiting the victims” (lines 8-9)) for analysis of premeditation. When Jun reasoned that “it’s the motive”, however, TR initiated a series of questions to indicate to Jun she

\(^{22}\) Again, in this analysis, I do not focus on the extent to which a legal reader would find the analogies constructed using these facts *persuasive*; by referring to the appropriateness of Jun’s fact selection and connecting the fact to the legal concept, I refer only to these acts being necessary in the construction of a *sound* analogy.
questioned his use of *motive* in that manner. To TR, Jun had, in his use of *motive*, produced a case-concept mismatch. A discussion of motive in relation to first-degree murder may seem perfectly acceptable to the reader who had not attended the same criminal law class as Jun and TR, because it is likely that lay people understand in an everyday manner that first-degree murder requires *motive*. While in practice, many legal analyses of first-degree murder likely do include discussion of *motive*, TR objected to Jun’s use of *motive* as a legal concept, because the precedent case under discussion did not address *motive*. Analysis of *motive* in this instance, then, would not be appropriately using analogical reasoning for common law purposes. Thus, TR inquired about the source of Jun’s understanding of motive in order to push Jun to understand precedent cases in the common law as instantiations of specific legal concepts and be precise in his linking of those legal concepts and cases.

In order to encourage Jun to understand his case-concept mismatch, TR first asked if it was stated anywhere in the hypo that Billy’s motive for killing Vinny was wanting to be the baseball team captain. By referring to facts from the hypo (“he told him to lay off passing out the and if he didn’t Bill was going to send him home in ambulance in that sentence the boxer very angry” (lines 19-22), Jun’s response indicated to TR that he inferred the motive from the hypo. TR then probed Jun’s understanding of motive in a different way, asking in line 25 “what is a motive then” in order to determine if Jun was being imprecise in his use of legal terminology or if he did not understand the difference between *motive* and *premeditation*. In response to TR’s request for a definition of a motive, Jun, however, restated what he believed the motive to be. In order to orient Jun to legal concepts explicitly discussed in the case being used for analogical reasoning, TR then employed more explicit mediation by asking if any of the cases discussed in Criminal Law or the Companion Course have discussed motive. Near the end of the interaction,
Jun accurately identified that none of the cases discussed in the Criminal Law and Companion Courses have addressed *motive*. He was, then, unable to articulate for TR the source for his belief that *motive* was relevant for analysis of the hypo. It is likely, then, that JUN produced this case-concept mismatch by relying on an everyday understanding of first-degree murder (i.e., motive is important in first-degree murder) while stressed during the activity of collaboratively re-analyzing the hypo with TR.

The previous two excerpts have demonstrated that through the second Reading Role Cycle and IRAC essay, Jun appeared to have destabilized understanding of analogical reasoning (Excerpt 8) and also still produced case-concept mismatches (Excerpt 9). Just two weeks after IRAC essay 2 was written, Jun wrote an application section in IRAC essay 3 that demonstrated considerable development on his part. In that application section, considered below (Excerpt 10), Jun exhibited emerging control over both analogical reasoning and connecting appropriate legal cases and legal concepts. While it is not possible to claim that the mediation from IRAC debriefing session 2 as discussed alone led to the development observed between IRAC 2 (written 10/01/15 and IRAC 3 (written 10/14/15), it must be one of the contributing factors to Jun’s continuing development.

The hypo for IRAC essay 3 was written by the Criminal Law Professor, who assigned an “optional” mid-term for the students in her course; it was optional in that the professor posted the hypo to the course management system, and discussed a sample answer in class, but did not require that students complete or submit an analysis to her prior to class. The Companion Course instructors required the companion course students to write the criminal law hypo in lieu of an IRAC essay for Reading Role Focal Case 3 so that the students could analyze a hypo written by
the Criminal Law Professor. As students would be receiving feedback from the criminal law professor both individually (in writing) and in class, debriefing meetings for the mid-term homicide hypo were optional. Jun was not a student who chose to meet with TR to discuss this particular IRAC essay and therefore analysis of any instructional conversation that would have occurred during a debriefing discussion is not available, but his IRAC essay alone did indicate evidence of analogical reasoning for common law purposes development.

Excerpt 10

~Piaget exchanged the clean needle to drug addicts, which is a good purpose, she didn’t want anyone to be infected with AIDS, instead she want to prevent drug addicts from cross infection. She had no intention to kill anyone. In Malone’s case, Malone and victim played Russia game which cause the death of victim. In commonwealth v. Carroll the defendant kill his wife by shot the head twice causing the death of victim, he has intention to kill and he finally be convicted to the first degree murder. A dirty needles, which has high possibility to cause someone to be infected with disease, was mixed in the clean needles by defendant. she must know this fact and just let everything continue. In Commonwealth v. Malone defendant highly knew that the gun could cause the death of person, and he still do that. In People v. Knoller, the dog owner who realized that her dog has great threat to other and she just unlock her dog swing outside the room. In this case, Piaget notice that the dirty needle is very dangerous, she just handed out another person who need a clean one, and the victim finally death from the disease which caused by the dirty needle.

~the dirty needle, like one bullet gun and dangerous dog, each of them are highly possible to take people’s life. Piaget, in her mind didn’t want anyone die, but her gross recklessness cause the victim’s death (JUN.Hypo3)

In the Application section of his IRAC essay (Excerpt 10), Jun first summarized key facts of the hypo (“Piaget exchanged the clean needle to drug addicts”) and introduced a conclusion as to the level of intent of the defendant in the hypo, Piaget (“She had no intention to kill anyone”). Next, Jun introduced a series of homicide cases, which presumably he intended to illuminate the level of Piaget’s culpability. In this section, Jun relied on three cases for his analysis—two depraved heart murder cases (Commonwealth v. Malone and State v. Knoller) and one first-
degree murder case (Commonwealth v. Carroll)\textsuperscript{24}. Jun introduced the cases through a customary prepositional phrase to reference cases (e.g., In Commonwealth v. Malone) and for each included critical, legally relevant facts. Jun treated Commonwealth v. Carroll differently than he did the other two precedent cases. In addition to the language signaling reference to a case and legally significant fact, for Commonwealth v. Carroll, he additionally indicated a conclusion as to mens rea (“he has intention to kill”), and the outcome of the case (“convicted to the first-degree murder”).

Although Jun did not explicitly analogize the hypo to Commonwealth v. Malone or distinguish it from Commonwealth v. Carroll, through signal language as discussed in Chapter 5, the arguments Jun was attempting to make by employing these cases can be inferred by examining the language he used to describe each case and comparing it to the rule statement Jun wrote. In order to distinguish Commonwealth v. Carroll from the hypo, he wrote that in the former the accused had “intention to kill” and in the latter the accused, Piaget, “had no intention to kill anyone”. Jun also appeared to signal that the hypo should have a similar outcome as Commonwealth v. Malone as he pointed out similarities in the facts – that the dirty needles in the hypo had “high possibility to cause someone to be infected with disease” and the defendant in Malone “highly knew that the gun could cause the death of person” and, significantly, that the defendants in both the hypo and Commonwealth v. Malone disregard the dangerous situations.

In this this IRAC essay, then, Jun demonstrated for the first time a developing ability to connect the language of key legal concepts, in this case language associated with the levels of mens rea that distinguish different categories of homicide, with relevant legal cases.

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\textsuperscript{24} Commonwealth v. Carroll was the first-degree murder case that Jun and TR discussed at length in the individual meeting for IRAC essay 2.
The language used to refer to the level of *mens rea* in each of the cases is significant not only because this language distinguishes the depraved heart murder cases from the first-degree murder case, but also because Jun accurately incorporated the *mens rea* language related to these cases into his analysis. Thus, IRAC essay 3 constituted evidence of development from the IRAC essay 2 debriefing session, where Jun and TR discussed linking precedent cases with the legal categories they invoke. In IRAC essay 3, Jun more appropriately connected conventional *mens rea* language with the cases he discussed. For example, “intention to kill” was one criterion in distinguishing first-degree murder from other types of homicide, as discussed in the criminal law class, and *Carroll*, the first-degree murder case, is the only case Jun ascribed intention to kill to the defendant. In referring to each of the other defendants, Jun employed different *mens rea* language, signaling a different level of culpability – “defendant *highly knew* that the gun could cause the death of a person and he still do that” (*Commonwealth v. Malone*); “the dog owner who *realized* that her dog has *great threat* to other and she just unlock her dog swing outside the room” (*People v. Knoller*); “she *must know* this fact, Piaget *notice* that the dirty needle is *very dangerous*” (Jun IRAC essay 3) (all emphases are mine). The language used in reference to Piaget’s culpability in Jun’s IRAC much more closely resembles his language in reference to the depraved heart murder cases, *Commonwealth v. Malone* and *People Knoller*, than the first-degree murder case, *Carroll*, signaling that he likely is analyzing the hypo as a depraved heart murder case. Jun’s language is target-like in that it reflects an appropriate concept-case mapping rather than representing exactly the forms a native speaker of English would choose. For example, it is unlikely a native speaker of English would write “defendant *highly knew*.” For the purposes of analyzing development of common law thinking, however, Jun’s use of this
language indicated awareness of and developing control over the ability to link legal cases to the legal concepts which they represented and make this connection clear to the reader.

That the third IRAC essay was the only open-book, open-note IRAC essay written during the criminal law semester is also of significance. Jun included, as did other students, more cases and wrote about these cases more accurately than in any of the other IRAC essays all semester. For example, in the rule section, Jun wrote depraved heart murder is “intentionally performing an act that result in the death of another person under circumstances manifesting an extreme indifferent to the value of human life” (Jun IRAC 3). This language is an incredibly close paraphrase of the definition of depraved heart murder stated in *State v. Johnson* (1986), an Alaska Supreme Court decision referred to in the criminal law book and discussed in criminal law class. As each of the students took advantage of the opportunity to use the criminal law and any class notes, the close alignment of Jun’s depraved heart murder rule and a depraved heart murder rule discussed in class suggests that the additional conceptual mediation afforded him through access to his notes and book allowed him to more successfully convey his analysis. As a point of comparison, the hypo for IRAC essay 4 asked a question which, similar to the hypo for IRAC essay 3, required explication of various legal categories and cases which were exemplars of each legal category. For that essay, although there were six elements relevant to the legal concept at hand, self-defense, and at least one case for each element, Jun utilized only one the Focal Case, *State v. Norman*, for analogical reasoning, even though that case addressed only one element of self-defense.

The final sentence of Jun’s application section for IRAC essay 3 also quite compelling demonstrates his development toward sound analogical reasoning. In this sentence, Jun distilled the precedent cases and hypo case to the most dangerous element in each — the dirty needle
(hypo), “one bullet gun” (Malone), and dangerous dog (Knoller). Jun analogized the dirty needle in the hypo to the dangerous item in each of the precedent cases through the use of *like* and explains that “each of them are highly possible to take people’s life” (Jun IRAC essay 3). Jun concluded the application section by explicitly invoking one of the *mens rea* terms discussed for depraved heart murder when he says “Piaget in her mind didn’t want anyone die, but her gross recklessness cause the victim’s death” (Jun IRAC essay 3, my emphasis). The ability to distill the precedent cases down to the defendant’s actions related to the knowledge of the danger in each case and acting anyway suggests a developing understanding of the use of analogical reasoning and precedent in the common-law system. At this point, Jun was capable of understanding how a dirty needle, a gun with one bullet, and a vicious dog can be similar in legally important ways and use these analogies to reason about the hypo at hand.

While Jun had not yet employed legally sound analogical reasoning in his writing, the application section of his IRAC demonstrated development from the second IRAC essay, where Jun had not mentioned case law at all. Not only did Jun raise multiple cases, as would be expected in an analysis of this sort, but he attempted to analyze how the hypo was similar to cases which were instantiations of one legal category, depraved heart murder, and how the hypo was dissimilar to a case which was an instantiation of a different legal category, first-degree murder. The consistency with which he used language to refer to the *mens rea* of the various defendants indicated not only that he understood the level of *mens rea* distinguished each level of homicide, but that this is how he should organize the discussion of the cases.

Three weeks after writing IRAC essay 3, as Legal Problem Solver (LPS) for the final Reading Role cycle of the semester, Jun submitted analysis of a hypo that demonstrated yet further development. For this Reading Role Cycle, TR instructed Jun and Hoobi, Jun’s partner,
to present the LPS hypo analysis to the class through an electronic version of the common law
SCOBA. They were sent a Microsoft Word file of the SCOBA and asked to type the relevant
information corresponding to each element into each box and present this electronic SCOBA to
the class in lieu of a PowerPoint or IRAC essay. In addition, each had been asked to present one
‘side’ of the analysis; TR requested that Jun present analysis of the hypo that indicated the
element *did not* exist, and therefore a self-defense argument would not be successful. Hoobi was
instructed to present the opposite argument, that there was imminent danger and that a self-
defense argument would likely be successful. Jun submitted a Microsoft Word document that
was two pages long and contained both arguments; the information in each box for both
SCOBAs was the same except for the “Legally Relevant Facts” for the hypo. In this box, Jun had
included different facts from the same hypo that he relied on for analogical reasoning in order to
reach the two different outcomes – yes or no imminent danger was present or not. Table 6-1
represents the facts Jun included in his SCOBA analysis.

Table 6-1.
Legally relevant facts for yes/no imminent danger

<table>
<thead>
<tr>
<th>“Yes” imminent danger</th>
<th><em>Norman</em> (no imminent danger)</th>
<th>“No” imminent danger</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decedent drunk a lot and also throw the beer bottle to the wall, almost hit Hopper’s head, He also make an argument with other people, in that situation, he may be very dangerous. Sally defendant realize the very seriously danger when she saw a very sick and dangerous men stand behind her even though he has not any weapon. So in this situation, it is a imminent</td>
<td>In Norman case. Decedent was sleeping when Norman defendant shot to his head three times. A sleep person, no matter how dangerous, has no imminent danger at that time. So Norman is not a self-defense.</td>
<td>When Sally defendant reentry the living room. Wesler decendent just stands right back to her. He is never possession with any weapon. It is clear that no explicit evidence prove that defendant was meeting very immediate serious danger.</td>
</tr>
</tbody>
</table>
The analysis that Jun submitted indicated even further development from the analysis he produced in IRAC essay three. In fact, Jun’s fact selection indicated development toward the ability to produce ironic analogies. As can be seen in Table 6.1, Jun drew upon different facts of the LPS hypo in order to reach both a “yes” and a “no” analysis. It appeared, then, that the conceptual mediation, in the form of the SCOBA, assisted Jun in organizing the relevant aspects of the analysis. This organization allowed Jun to produce facts for analogical reasoning that would lead to ironic analogies, the production of which are an ultimate goal of legal education. Although Jun had yet to produce sound analogical reasoning in his autonomous written performance, in the LPS presentation, through engagement with the SCOBA, Jun drew on relevant facts that would lead him to produce ironic analogies. Of course, organizing relevant facts into the boxes on the SCOBA in the way that Jun did, did not explicitly write out the analogical reasoning for the analysis; rather, the facts are displayed side by side in the document in a manner that demonstrated the facts Jun would use for analogical reasoning. That is, in the analysis of this hypo, Jun demonstrated he can do the reasoning for the analogies, but did not, at this point, produce sound legal analogies for a reader.

Interestingly, although the analysis that Jun produced for the LPS presentation demonstrated the ironic analogical reasoning, in his fourth IRAC essay, Jun produced sound analogical reasoning for the first time in autonomous written performance. The LPS presentation and fourth IRAC essay were written in response to different hypos, but related to the same legal concept (self-defense) and relied on the same precedent case. In the fourth IRAC essay, Jun did not produce the ironic analogical reasoning that he had in the LPS analysis. It would appear,
then, that access to additional mediation – materialized mediation in the SCOBA, social mediation through the pre-presentation meeting with TR and HOOBI, conceptual mediation through the course materials—afforded Jun the ability to demonstrate his emerging capabilities. When access to these additional tools was denied him, in the form of the IRAC essay written under exam conditions, Jun did not produce analysis as sophisticated as he produced for the LPS presentation. Of course, producing in IRAC essay 4 sound analogical reasoning for common law purposes for the first time in autonomous written performance demonstrated development for Jun. Crucially, though, although producing sound analogical reasoning in the fourth essay indeed demonstrated development, the autonomous written performance did not provide accurate information about the totality of Jun’s common law analysis capabilities.

6.3.3 Discussion of Jun’s development

Analysis of excerpts of Jun’s IRAC essays and debriefing sessions with TR revealed a quite different engagement with the CBI program and developmental trajectory than did Yue’s development. As Jun did not externalize to TR his questions and understanding as freely as Yue did, TR often had to ask him more explicitly for that information or to engage him with material rather than social mediation.

Jun initially demonstrated a vague understanding of the U.S. common law system, one that he appeared to believe was nearly synonymous with his home legal languaculture (Excerpt 7). Jun had produced parallel analogies in IRAC essay 1, but did not use analogical reasoning in IRAC essay 2. He explained to TR, however, this was a purposeful decision on his part; TR and Jun were then able to engage in ZPD activity where they collaboratively engaged in analogical reasoning for common law purposes (Excerpts 8 and 9). Jun then demonstrated development in his written autonomous performance in the subsequent IRAC essay, writing analogies that
employed *mens rea* language that corresponded to the doctrinal concepts which the precedent cases he employed were representative of, indicating development not only in analogical reasoning for common law purposes but in understanding the case-concept connection as well (Excerpt 10). Finally, Excerpt 11 explored Jun’s first demonstrated ability to produce *ironic analogies* when he reproduced the common law SCOBA with arguments for two different analyses of the same hypo. This excerpt illustrated the power of materialized conceptual mediation (the SCOBA) to assist a student in practical activity (analyzing a legal problem), allowing the student to demonstrate emerging capabilities.

### 6.4 Omar’s Story of Development

The story of Omar’s development is quite different from those of Jun and Yue. Omar was the only student in this cohort who did not use analogical reasoning of any kind in any of his independently-written IRAC essays. Unlike Yue and Jun, Omar did not complete the question related to U.S. common law reasoning on either the pre- or post-semester questionnaire. Thus, discussion of Omar’s story of development, then, will focus solely on his engagement with TR’s mediation and the writing in his IRAC essays. Analysis of Omar’s interactions with TR, in this section, demonstrates how Omar’s language proficiency affected TR’s mediation and his ability to engage with the CBI program, but additionally that in collaborative activity with TR, Omar was observed developing U.S. common law reasoning abilities.

#### 6.4.1 Omar

Omar is a Saudi Arabian male and trained, as all of the Saudi Arabian students reported, in both Islamic and civil law. In the pre-semester questionnaire, he reported his work experience as working “with law” for five months. Presumably by this he meant either an
internship or five months of practice before leaving for studies in the United States. Omar explained his purpose in pursuing an LL.M.: “First, I have chosen and LL.M. program to develop my education and to get into a PhD degree. I would like to be a professor at my city university” (Omar pre-semester questionnaire). As with the other cases, it is worthwhile to consider how Omar’s goal for obtaining an LL.M. affected the activity he perceived himself engaged in in the pre-LL.M. program, particularly as he was the only student who reported these academic aspirations on the pre-semester questionnaire. Based on his stated goals, the LL.M. appeared to be, for Omar, a necessary step in order to pursue a PhD\textsuperscript{25}, not an intellect pursuit in its own right. Omar did not indicate interest in understanding the U.S. common law system or improving his legal English, two major instructional objectives of the pre-LL.M. in order to prepare students for an LL.M. program. Although Omar’s interest in “developing his education,” as he phrased it, does not automatically preclude intellectual curiosity in patterns of U.S. common law reasoning, the academic path that Omar envisioned himself on may have been somewhat at odds with the instructional goals of the companion course. As Omar was intent on matriculating in an SJD program, which is more academic and theoretical than practice-oriented, he may have interpreted some of the instructional activities as unrelated to his goals as the Companion Course engaged students in as much problem-solving activity as possible to promote their development of common law analysis.

This discussion is not to say that Omar did not intend to work hard or was uninterested in his studies. Omar was clearly ambitious enough to aspire to be a professor and the schooling

\textsuperscript{25} Presumably by ‘PhD,’ Omar was referring to a Doctor of Juridical Sciences (SJD), legal education’s most advanced degree, a degree intended for aspiring legal scholars. It is legal education’s version of the research PhD in that the original research and a dissertation is required.
in front of him is daunting. Prior to enrolling in the pre-LL.M. program, Omar studied for one year in an intensive English program in California. Following the year of pre-LL.M. study, he would then have to enroll in an LL.M. program before being eligible to apply for an SJD program. Omar, then, had embarked on an academic path that required three years of study prior to beginning his intended program of study. By pointing out that Omar’s stated purpose and goal are to enroll in an SJD program rather than learn about U.S. common law for practice-related purposes, all I mean to suggest is that he may have imagined himself to be engaged in a different activity than the intervention was designed to engage students in.

Additionally, Omar’s language proficiency proved to be a major factor in his development of legal analysis for common law purposes. When Omar matriculated in the pre-LL.M. program, his most recent TOEFL score was a 66, the lowest standardized test score in the cohort. Whereas individual meetings with other students lasted between thirty and forty-five minutes, individual meetings to discuss Omar’s reading or writing nearly always lasted in excess of one hour because his language proficiency required careful, collaborative parsing of the text in order to understand vocabulary new to Omar and the dense, complex passages characteristic of judicial opinions. In interactions with Omar, TR often found necessary to mediate Omar’s understanding of the text at a level of decoding before it was possible to turn to development of legal reasoning for common law purposes.

6.4.1 Analysis of Omar’s engagement with CBI program and common law analysis development

In the early parts of the semester, as the excerpts discussed in this section will reveal, interactions between TR and Omar focused first on language and close reading of the legal texts as well as connecting legal categories to specific cases. The mediation provided to Omar by TR
needed to be attuned to his language proficiency and linguistic access to the texts prior to engaging with him on analogical reasoning for common law purposes. Examples later in the semester indicate, however, that eventually TR and Omar were able to engage in ZPD activity focused on analysis of the legal problems and that in this ZPD activity, Omar was able to demonstrate emerging common law reasoning abilities.

The interaction between Omar and TR in Excerpt 11 occurred during the debriefing session for the first IRAC essay and illustrates bottom-up reading capabilities inhibiting Omar’s comprehension of relevant information in the hypo. Specifically, in this example, TR and Omar spent approximately eight minutes discussing the punishment outlined by the statute included in the hypo. This statutory language was critical for analyzing the hypo using *Commonwealth v. Koczwara*, the Reading Role Focal case relevant to the hypo, because that case indicated that when analyzing a problem for *strict liability*, the relevant legal concept at issue here, one must analyze the language of the statute itself, and specifically, whether the punishment outlined by the statute indicates a fine, imprisonment, or both. The section of the hypo TR and Omar discuss in this excerpt stated that upon conviction for violation of the Cigarette Stamp Act, a person shall be sentenced to “a fine of not less than a thousand dollars ($1,000) nor more than five thousand dollars ($5,000) and costs of prosecution or in default thereof to suffer imprisonment for not more than ninety days” (Hypo 2, available in Appendix C). According to the hypo, then, one convicted of violation of the statute would only experience imprisonment if she were to default on the monetary components of the outlined punishment.

Thus, in Excerpt 11, TR and Omar examined the statute in the hypo to determine the type of punishment called for by the Pennsylvania Cigarette Tax Act. So that the reader may fully
appreciate the extent to which Omar appeared to be working at the outer limits of his reading proficiency, an extended excerpt of the dyad’s interaction is considered here. For ease of readability, it will be discussed in two parts, Excerpt 11a and 11b. At the outset of Excerpt 11a, TR initiated the discussion of the language of the statute in the hypo.

Excerpt 11a  
Week 5  
[00:04:51.21]

1 TR: so whats what is the punishment for violation of this statute  
2 OM: uh one thousand dollar fine  
3 TR: mm hm  
4 OM: ah i think mm one thousand not more than five thousand  
5 TR: m hm  
6 OM: just one thousand not more than five thousand  
7 TR: mm hm  
8 OM: ah also ah heres the statute mention just ninety day ((turns gaze to paper)) ninety days ah not more than ninety days in the jail  
9 TR: okay let's read that carefully okay so fine youre right one thousand to five thousand dollars and costs of prosecution or in default thereof to suffer imprisonment of not more than ninety days so what's this jail stuff if you violate the fine or if you violate the statute  
10 OM: yes  
11 TR: are you going to jail  
12 OM: yes

The interaction in Excerpt 11a indicated that Omar did not fully understand the punishment outlined in the statute. After TR inquired about the punishment the statute outlined, Omar first attempted to recall from memory, mentioning the upper and lower limits of the fine, before he oriented to the hypo itself, which was on the desk between him and TR. When he turned to the statute, however, the first language Omar appeared to orient to related to a term of imprisonment
not to exceed ninety days. Omar’s response in lines 10-12 did not accurately represent the language of the statute, so TR oriented the dyad back to the text, by suggesting in line 13 “okay let’s read that carefully” and then reading aloud for Omar the relevant portion of the statute. TR attempted in lines 13-18 to provide Omar not only with multiple opportunities to focus on reading the relevant portion of the text but also with multiple modes of input—visual and aural. In addition to reading the statute aloud, TR traced her finger along the sentence on the piece of paper. Although Omar was afforded this implicit mediation through multiple modes of input, when TR questioned again in line 20 if a person would go to jail upon conviction of violation of the statute, Omar still replied “yes”.

In lines deleted here, after a short pause, Omar indicated to TR a developing awareness of the necessity of support for his comprehension when he asked what prosecution meant. The dyad then discussed the definitions of both prosecution and imprisonment in the context of the statute, an interaction which lasted approximately four minutes. TR employed multiple mediational moves in order to both define the words in context but also to elicit information about Omar’s language proficiency and language learning strategies. In the case of prosecution, TR and Omar utilized comparative, top-down strategies of transferring Omar’s knowledge of criminal law in the Shari’a and common law contexts and a bottom-up strategy of using a dictionary definition to support the understanding of the word in context. For imprisonment, TR and Omar parsed the word into its constituent parts, affixes, and root word in order to define the term, but also for TR to understand better Omar’s language proficiency and language learning strategies. Following the discussion of these two words, crucial to the understanding of the punishment outlined in the statute, TR and Omar returned to the question of whether or not a person would be imprisoned for violation of the statute, in Excerpt 11b.
Again, when TR asked if a person would be imprisoned for violating the statute, Omar asserted that, yes, one would be subject to both the fine and the imprisonment. Taking a new mediational strategy in narrowing Omar’s degrees of freedom, TR asked Omar to specify the language that caused him to understand both the fine and imprisonment punishments. In line 25, Omar indicated that he understood the punishments to be connected by the coordinating conjunction and. Of course, the sentence does contain an and, but it conjoins the two monetary components.
of the punishment — the fine and the costs of prosecution. The two elements of the punishment TR and Omar were discussing are actually conjoined in the statute by an or, and therefore imprisonment would only become a punishment for violation of the statute if certain conditions were met, namely that one defaulted on the monetary components of the punishment, an understanding TR pushed Omar to see by asking him in line 26 what the and connected.

Omar, understandably, appeared not to understand the question, given both the two second pause and his response “uh same level”, so TR rephrased her question, asking Omar to vocalize which two punishments are connected by the and. At this point, Omar informed TR he did not understand, so she employs both verbal and non-verbal mediation. On the piece of paper with the hypo, TR physically covered the line that read “or in default thereof to suffer imprisonment for not more than ninety days” (Hypo 2) and asks Omar “could I end the sentence here?” (line 26). Omar appropriately indicated that yes, the sentence could end at that point, to which TR asked the follow-up question, “if I end the sentence right here … can you go to prison”. Again, Omar correctly indicated that no, one cannot be imprisoned if the statute were to end there. When TR pushed Omar to verbalize what would be the punishment if only the visible portion of the statute were the punishment, he accurately identifies the punishment as the fine and the cost of prosecution, indicating understanding of the earlier discussion of the term prosecution in this context.

Having established that thus far the punishment for violation of the statute is a fine and costs of prosecution, TR lifted her hand from the paper and asked “okay so now if I bring this back” (line 50). This multimodal mediation, both gestural and verbal, apparently promoted Omar’s ability to read and interpret the remainder of the statute, as he loudly exclaimed “or or here” (line 51) and “really I see and I don’t see or” (line 53). While this interaction was quite
extended, taking over seven minutes, it was important for several reasons. First, an understanding of whether or not the statute included imprisonment as a punishment was critical to analysis of the hypo. Second, as this interaction occurred during the first IRAC debriefing of the semester, TR felt compelled to probe Omar’s reading, language proficiency, and language support strategies so that she might gain insight into how to engage with Omar in ZPD activity throughout the semester. Not only was it crucial for TR to explore the quantity and quality of mediation required for Omar to comprehend the hypo, but Omar also gained important insight into the limits of his English reading ability and to plant the seed that perhaps his bottom-up reading needed more support for full access to the text; this awareness was important for OMAR, as he reported throughout the semester developing new language learning strategies to support his comprehension of course material.

Given his developing awareness of the language demands of the course material and Omar’s academic goals, Omar became quite focused on the criminal law exam. Not only were the companion course students aware that the IRAC essay genre as taught in the Companion Course was generally accepted as the genre of the law school exam, but they knew that their performance on that essay would be the sole criterion on which their criminal law grade would be based. Omar appeared particularly focused on the criminal law exam, as he inquired about it in some manner in each of his IRAC essay debriefings. While in Excerpt 12 below, Omar did not explicitly refer to the criminal law exam, TR oriented to his questions about analogical reasoning and the IRAC essay genre as representative of Omar’s questions about the criminal law exam.

26 Although one condition of the pre-LL.M. program was that the substantive law courses were audit only for pre-LL.M. students, the terms of admission to the LL.M. program dictated that professors of the substantive law courses would be consulted by the Admissions Committee. The criminal law exam did, then, have direct relevance to the pre-LL.M. students, despite their auditor status.
and law school expectations in general. In this example, TR and Omar discussed the second IRAC essay, written in response to Hypo 2 (Appendix D) and involving homicide. As with Excerpt 11, Excerpt 12 is quite extended and divided into two sections.

Excerpt 12a

Week 8

[00:11:00.22]

1 OM: yes how can i find the relationship if the dog case is not good for my ah the hypo case
2 TR: so
3 OM: how can make my ah argument if it's maybe one percent relationship but not that much to help my ah argument to support my argument
4 TR:(3) maybe you need to change your argument no ahm (2)
5 OM: because if you know we have until today in criminal law
6 TR: mm hm
7 OM: we have more than thirty cases
8 TR: mm hm
9 OM: not just ten twelve thirty
10 TR: mm hm mm hm
11 OM: and it is much cases to remember like the rules
12 TR: yeah but (2) unfortunately that's the expectation is that you can rem is that you can memorize and remember
13 OM: something these cases
14 TR: something from these cases and use them
15 OM: uh huh

In the first few lines of Excerpt 12a, Omar asked a potentially interesting question about analogical reasoning before relating his question to the criminal law exam, a question with the potential to lead to interesting ZPD work. Omar’s question appeared to be related to his conceptual understanding of analogical reasoning in common law analysis, testing the limits of how and why to apply one case to another. TR could have probed what Omar meant by this question or his “if it’s maybe one percent relationship” in lines 4-5, but she appeared to struggle in considering how to mediate this particular question, indicated by her three second pause
before responding “maybe you need to change your argument” (line 7) and two second pause after her utterance. This is perhaps unfortunate because what could have been an instructional conversation about analogical reasoning and how to use precedent cases in common law reasoning instead became a discussion again about the criminal law exam after Omar lamented that the volume of reading for criminal law “is much cases to remember” (line 15), as he had during the first debriefing meeting. TR responded to Omar by referencing assumptions of the U.S. law school classroom: “unfortunately that's the expectation … is that you can memorize and remember” (lines 16-18).

While TR apparently did not believe there was much she could do about the expectation that law students could master the amount of material covered in a semester, she did indicate to Omar that his question about analogical reasoning was relevant. In lines deleted here, TR reminded Omar of the importance of analogical reasoning and then proceeded to model analogical reasoning using the case first mentioned by Omar, “the dog bite case”, People v. Knoller. TR’s modeling as a mediational move in those lines was similar to the modeling move described in the section on Jun in that TR connected the key legal concept (mens rea language) to the precedent case (People v. Knoller), and further linked the legal concept and precedent case to the hypo. TR modeled for Omar key mens rea language from the case itself through “should have been aware” and used this key language to link to the hypo, saying “similarly Billy Boxer really should have been aware of how dangerous his punches were because he was a prizefighter”. TR placed special emphasis on similarly to not only signal to Omar that she was switching to the hypo case, but to model for him that signal language informs your interlocutor or reader exactly what is the relationship you are claiming exists between the two cases. While TR modeled the analogical reasoning, Omar signaled his apparent engagement and
understanding through backchanneling. When TR continued her modeling of analogical reasoning, connecting legal facts from the precedent case (“Knoller’s dogs were bred to be dangerous”) with legal analysis (“she should have known”), Omar responded with a longer and louder “uh huh” than his back-channels, indicating that this statement has helped him understand analogical reasoning in a way he had not previously. In fact, Omar connected TR’s modeling to what he had written in the IRAC essay, telling TR, in line 74, Excerpt 12b, “I mention that here”.

Excerpt 12b
74 OM: i mention that here  
75 TR: mm hmm  
76 OM: (3) here billy is boxer and he i ah has strong body  
77 TR: mm hm so you have done one of the three steps of  
78 what we just talked about  
79 OM: ahhh  
80 TR: so you have the billy should have been aware  
81 OM: yes  
82 TR: that his punches were dangerous  
83 OM: yes  
84 TR: kind of you have he is a boxer  
85 OM: yeah but this is what i mean he is strong and he  
86 should be aware he is strong maybe he will kill  
87 someone (.). yes  
88 TR: so when you're writing for an american you have to  
89 tell them exactly what you mean it's not enough just  
90 to say he's a boxer and he's strong you have to tell  
91 them why you think that's important

In line 76, Omar oriented TR to his IRAC essay, pointing out “here Billy is boxer and he … has strong body”. In fact, in the essay, Omar had written “Billy is boxer and has strong body,” meaning he included a potentially relevant fact from the hypo, but did not explicitly connect this case fact to a legal rule or precedent case fact to indicate to the reader why it was legally significant that Billy had been a boxer. TR returned to the modeling of analogical reasoning the dyad had just discussed, pointing out to Omar “so you have done one of the three steps of what we just talked about” (lines 77-78). She then attempted to connect for Omar his writing and the
‘steps’ of analogical reasoning she had just modeled. TR began to do this by saying “so you have
the billy should have been aware that his punches dangerous” (lines 80, 82). TR stopped herself,
though, when she realized what Omar had written was missing key language she was implicitly
ascribing to it: “kind of you have he is a boxer” (line 84). TR attempted to signal to Omar that
there is a difference between writing “he is a boxer” (as Omar actually wrote) and “he should
have been aware his punches were dangerous” (Omar’s intended meaning). Omar insisted,
however, “this is what I mean” (line 85), indicating a belief that his writing is informing the
reader more about his intended meaning than it actually is. TR, relying on work in legal
education by Thornton (2014) and Oates & Enquist (2009), who discuss language typologies as
more reader-responsible or writer-responsible, oriented to Omar’s belief about his writing as a
U.S. legal reader needs issue, telling Omar “it’s not enough just to say he’s a boxer and he’s
strong you have to tell them [American reader] why you think that’s important” (lines 89-91).

In the space of a few minutes, then, TR and Omar have ranged from questions related to
the reading load in law school, to how to deal with the amount of content covered in a course
when taking the exam, how to structure analogical reasoning in the application section, and
addressed Omar’s belief that he had accomplished analogical reasoning in his essay. During this
time, TR modeled analogical reasoning and used quite explicit mediation. While this approach
may perhaps be considered unfortunate because TR, as the mediator, did not appear to be
engaging in problem-solving with Omar, this is not a mediational strategy she employed often
with other students. As mediator, TR appeared to have decided that, at this point in the semester
(week 8), Omar’s language proficiency and novice writing required more straightforward,
explicit mediation. The mediation TR offered Omar, then, was attuned to what she perceived to
be his ZPD.
By week 15 and the debriefing meeting for the fourth IRAC essay, in fact, TR has returned to less explicit mediation with OMAR, and in Excerpt 13, the dyad collaboratively write a rule for the Reading Role Focal Case. In this example, TR is observed providing Omar the opportunity to take more responsibility for the activity than he had in previous essay debriefing sessions. In this excerpt, Omar demonstrated that in ZPD activity, he is capable of more common law analysis than his independent writing would indicate. At the outset of the example, TR is transitioning the dyad from their discussion of one element of the legal concept, self-defense, to the Reading Role Focal Case, *State v. Norman*, and the element it represents, *imminent danger*.

TR addressed writing rules from cases with Omar in this debriefing session because in the IRAC essay, for a rule, he had written: “In common law self-defense has six element: first, honestly and reasonable believed self-defense is necessary, imminent danger, bodily harm, aggroses, and retrat” (Omar IRAC essay 4). While Omar appropriately labeled many of the elements of self-defense, the rule as written is problematic because it merely listed the elements rather than defined them in a way that the elements constituted part of a legal rule that could be used to reason about the hypo. TR in this debriefing session, then, guided Omar through verbalizing his understanding of each element and cases related to each element in order to first write a rule for self-defense. Although the focus of the CBI curriculum is analogical reasoning in common law analysis, TR believed that Omar would benefit more from focused instruction on turning other parts of his IRAC essay, such as the rule section, into complete sentences than a focus on analogical reasoning. While this approach to mediation with Omar limits what is knowable about Omar’s analogical reasoning for common law purposes capabilities, TR’s attempt to attune her mediation to each student’s ZPD and engage the student in ZPD activity that would promote development can be observed through this approach. Additionally, Omar is
observed in Excerpt 13 as engaged in the actual activity with TR in a way absent from earlier examples. As TR handed over more responsibility of writing the rule statements to OMAR, he willingly took on that responsibility.

Excerpt 13
Week 14
[00:21:02.00]
1 TR: okay so now we have the important things that we learn about reasonable belief
2 OM: reasonable belief
3 TR: from goetz we have that its a subjective standard based on what the defendant actually thinks
4 OM: uh huh
5 TR: and we look at the defendants circumstances and physical attributes okay and so we could do that for norman too
6 OM: okay
7 TR: do you remember what we said about norman what we learned about imminent danger from norman
8 OM: yes we talk about (inaudible) uh we cannot uh
9 TR: mm hm
10 OM: imminent imminent danger for someone sleeping or he but she said something beside sleeping for
11 TR: mm hm yeah so passive right
12 OM: passive passive
13 TR: okay so if i say passive well then it can apply
14 OM: more
15 TR: to for more people
16 OM: yes yes
17 TR: right (. ) passive victim (writing) cannot
18 OM: be a danger for some anyone
19 TR: th ((stops writing lifts head))
20 OM: i think no or
21 TR: yeah
22 OM: be a danger or make a danger cannot make a danger
23 TR: how bout lets use um a more specific term um from
24 OM: oka--
36 TR: its not just make danger its make (.) so the so
37 the element is not the element's not just danger
38 OM: imminen uh imminent imminent danger imminent

In the opening lines of the example, TR summarized the discussion the dyad had just engaged in regarding the first element, *reasonable belief*, and key factors one can abstract from the relevant precedent case. This case, *People v. Goetz*, involves a different element of self-defense, *reasonable belief*, than the element of *imminent danger* discussed in the Reading Role focal case, *State v. Norman*. Rather than using technical terminology to ask Omar what the *rule* from *State v. Norman* is, TR instead asked “what do we learn about imminent danger from *Norman*.” Although obviously in the legal classroom a student must be prepared to respond to more technical questions, in this debriefing meeting, TR’s question packaged the information in a way that foregrounded what it is that judicial opinions add to legal education. Not only are students reading cases to learn *how* to read the law and reason in the law, but they are reading cases to discern what legal categories *are*. It is simultaneously content and process. Here, TR’s question foregrounded that *State v. Norman* is included in the casebook to teach students about what *imminent danger* is and by asking the question in the way she did, TR allowed Omar to verbalize what he learned about the case in a way that Omar produced language that could then be turned into a workable rule to apply to a hypo.

In fact, Omar responded to TR’s question about what is learned from *State v. Norman* with language specific to the case itself, referring to the sleeping victim in *State v. Norman*. Immediately, however, Omar accurately recalled a Companion Course discussion where the effect of changing the language in a rule statement from the *sleeping victim* to the *passive victim* was examined. Although Omar indicated he could not remember the word *passive* exactly, he recalled a crucial reason why the language change would be effective: “for include for future”
(19-20). In this manner, Omar indicated a developing understanding of writing rule statements from cases and how they should be written in such a way that they can be applied to other, future circumstances. Indeed, his utterances in Excerpt 12 indicate that Omar additionally understands that in the common law one should write rules from cases, an understanding absent in his writing and interactions with TR for much of the semester.

TR and Omar also discussed how the word choice passive is more expansive in that it allows for victims other than those who are sleeping; Omar indicated his understanding of this by completing TR’s “so if I say passive well then it can apply” with “more” (lines 23-24).

Apparently satisfied with the language, TR returned to the collaborative writing of the rule in line 27; Omar continued the rule “be a danger for some anyone” (line 28), an utterance TR indicated to Omar may not be the most appropriate language to use by stopping her writing and lifting her head. OMAR, apparently attuned to this subtle body language, questioned, in line 30, “I think or no”. Omar apparently believed TR was questioning his verb choice because he immediately suggested “be a danger or make a danger cannot make a danger.” TR was actually requesting more specific language related to the doctrinal concept. She indicated this to Omar by suggesting in lines 33-34 “how about let’s use a more specific term from the element”. In this example, then, Omar and TR engaged in collaborative writing of a rule statement where Omar was more able to draw on other sources of input, such as the Companion Course discussion, more accurately than previously in the study. He was also, in this example, observed to be capable of engaging in this collaborative writing with TR, although TR still supplied most of the technical terminology. Although Omar demonstrated development in that his language proficiency is now allowing his to engage in the activity differently, the ability to use technical terminology in activity, even mediated activity with TR did not appear to have yet emerged.
6.4.3 Discussion of Omar’s development

The discussion of Omar and analysis of his interactions with TR has explored both how his language proficiency affected his interaction with the CBI program and how TR attempted to attune her mediation in order to engage Omar in ZPD activity. Earlier in the semester, the dyad’s individual meetings were largely devoted to discussing referential meaning of legal cases and hypos, where Omar and TR engaged in an extended conversation devoted to whether or not the punishment outlined in the statute included a fine and imprisonment or not (Excerpt 11). This interaction was critical for both TR and Omar to understand how his language proficiency constrained his ability to engage with the texts and the CBI program.

In Excerpt 12, representative of Omar’s focus on the criminal law exam and tailoring his writing to the criminal law professor’s expectations, Omar initially asked a question about analogical reasoning, but this question led to a discussion of the reading load in U.S. legal education and genre conventions related to the law school essay exam. In that example, Omar additionally demonstrated, as a novice writer, that he believed his writing conveyed more of his intended meaning to a legal reader than it actually did. By later in the semester, TR appeared to have attuned more to Omar’s proficiency and capabilities and Omar and TR were observed in this example collaboratively writing a rule statement.

Due to the V-SCT principle that mediation be contingent on learner needs (e.g. Aljaafreh & Lantolf, 1994), TR engaged with Omar differently than she did Jun and Yue. TR believed Omar’s English language proficiency impeded his engagement with course texts to the extent that comprehension of those texts needed to be addressed prior to the legal analysis that comprised the heart of the CBI curriculum. Thus, considerable time was spent with Omar discussing referential meaning and ensuring that Omar understood the texts necessarily for legal
TR’s mediation also tended to be more explicit and multi-modal with Omar than with other students. For example, TR’s ‘modeling as mediation’ move was discussed in this chapter in exampled with both Jun and Omar. Only in the case of Omar, though, did TR draw explicit attention to the fact that she was modeling the process of analogical reasoning. Of course, TR did so because Omar appeared to understand her to be modeling the process when he told her that he had accomplished those moves. TR additionally deployed other modalities in her mediation with Omar, such as physically covering (thereby removing from sight) sections of the statute in the hypo (Excerpt 11) in mediating Omar’s understanding of what that sentence meant. TR’s mediation, then, is attuned with each learner’s needs, but also contingent on learner reciprocity (Poehner, 2008). Due to the dynamic quality of mediator-learner interactions, a mediator must be attuned to how learners respond to mediation and adjust accordingly. In the excerpts analyzed here, TR attempted to respond to Omar’s utterances in ways that addressed what she understood to be his most compelling learning needs at each point in the semester. For his part, Omar is observed engaging more agentively in subsequent interaction, taking on additional responsibility for the activity as the semester progressed. Despite the fact, then, that analysis of Omar’s development focuses less on analogical reasoning than perhaps analysis of the development of other students, Omar indeed demonstrated development in his orientation to common law analysis.

6.5 Chapter Conclusion

Discussion of Yue, Jun, and Omar’s developmental trajectories illustrated that each student was affected differently and at various points by issues in learning common law reasoning related to language development, cultural understandings and situations, and legal
system patterns of reasoning. That is, while inherently inseparable, the various components of 
*legal languaculture* (legal, and language, and culture) can be more or less foregrounded for a 
given student at a given time when engaged in common law analysis. So, too, can students 
develop in each of these aspects in different, or uneven ways. In fact, development from a V-
SCT perspective is understood, at the individual level, to be replete with such momentary 
plateaus and regressions.

While both Yue and Jun ultimately demonstrated the ability to interpret and reason with 
texts in U.S. common law, Omar demonstrated less development in case reading and analogical 
reasoning for common law analysis purposes than did other students in the cohort. He did, 
however, demonstrate development in other ways. For example, while for a student such as Yue, 
analysis for “both sides” in her IRAC essays appeared after demonstrating sound analogical 
reasoning, Omar included analysis for “both sides” in his writing before gaining control over 
sound analogical reasoning. If providing analysis and the same legal problem from multiple 
perspectives can be interpreted as an expectation of the culture of U.S. legal education, this is 
perfectly in keeping with Omar’s orientation to the expectations of the exam. It is possible, then 
for students to develop in terms of language, law school culture, legal analysis in the common 
law, and each of these components may develop differently than the other components at a given 
point in time. While this study set out to understand the process of learning a new legal 
languaculture, and focused primarily on the process of students engaging in the new way of legal 
reasoning, their development in other aspects should not be discredited.

Mediation is, of course, the cornerstone of V-SCT, and each of the students engaged with 
the mediation proffered by TR and the CBI curriculum differently. Yue’s engagement with the 
social mediation offered by TR appeared particularly important to her story of development. Jun,
however, appeared to benefit from the social mediation, but not to seek it out in the same way Yue did. For him, the activity of manipulating the materialized concept through hypo analysis with the SCOBA afforded him the opportunity to demonstrate development that neither autonomous performance nor dialogue with TR provided him. As for Omar, while initially he did not seek out the social mediation as Yue did, he remained an active, agentive participant in ZPD activity with TR and his contributions to those dialogues were qualitatively different from the beginning to the end of the semester.

Importantly, Yue appeared sensitive to her own ZPD. On some occasions (e.g., the class discussion of malice and intent in Excerpts 2 and 3), TR appeared not to provide mediation Yue was satisfied with or mediation that promoted development of Yue’s understanding of common law reading and reasoning. In those instances, Yue continued to ask questions until she received mediation she felt furthered her understanding. An important concept to consider in Yue’s story of development, then, is learner reciprocity. In explaining learner reciprocity, Poehner (2008) writes,

[w]hile the quality of mediation during ZPD interactions is crucial to understanding development, equally important are learners’ attempts to become more autonomous. That is, interpretation of learners’ abilities includes both the mediator’s moves during DA as well as learner’s contributions. (p. 35).

Yue’s sensitivity to her own development and how she engaged with the mediation offered by the CBI program and by the mediator appear to have been important components of her development in analogical reasoning for common law reasoning. This is particularly salient in excerpts one through three, where Yue and TR interacted multiple times on the same day, discussing her understanding of analogical reasoning and two different hypos in relation to
Commonwealth v. Malone. These interactions revealed that Yue was experiencing a crisis, which ultimately turned out to be a critical turning point in her development of analogical reasoning for U.S. common law purposes.

Analysis of those excerpts revealed that Yue, sensitive to her own development in common law reasoning, understood that her conceptual understanding of the way that the precedent case and the hypo related to each other in analysis of a legal problem were insufficient. Yue demonstrated agency and took control of her own development when she requested on multiple occasions on the same day that TR explain her focus on intent in analysis of the hypos. Yue was sensitive enough to her own development to continue asking for further mediation and to continue verbalizing her own understanding and confusion about analogical reasoning. These questions and verbalizations from Yue allowed TR to understand the conceptual difficulty she was experiencing and the psychological tools she was relying on to resolve her confusion. TR was then able to more appropriately mediate the mediation so that it could be of more use to Yue.

In fact, Yue’s agentive interaction with TR’s mediation revealed her use of civil law as a psychological tool in analyzing the hypo problems assigned in the Companion Course. Yue’s explanation of using her already internalized legal languaculture as a mediating tool was quite explicit in this interaction, but other students also referred to how analysis would be carried out in their legal systems, particularly when analysis in their legal system would have led to a different outcome than was being discussed as an outcome for the problem in common law analysis. Internationally-trained lawyers, then, rely on their already internalized legal languacultures as psychological tools when engaging with U.S. legal education and analyzing legal problems. That students would employ the first legal languaculture in the learning of a
second aligns with the V-SCT perspective that the first legal languaculture would be an important psychological tool. As demonstrated by Yue and TR’s interaction in Excerpt 3, however, students may at times need to first make visible that they are using their home legal system as a thinking tool and further mediation may be required in order for them to more effectively use their home legal languaculture for comparison with their experience in the U.S. legal education system. In Yue’s case, she was comparing legal problem analysis as a civil law lawyer to, presumably, analysis as a common-law lawyer. Given the somewhat artificial construction of legal problem analysis in U.S. legal education, however, Yue required additional mediation in order to understand legal problem analysis as a student of U.S. common law. Yue knew that in civil law she had to look at both act and intent, and was therefore confused about the focus on intent only in class; after TR reminded Yue of the structure of the casebook and the assumption that each case read for a substantive law course should teach us something about a specific legal concept, however, Yue indicated a more sound understanding of how her analogical reasoning in the IRAC essays should be framed by the legal concept relevant to the precedent case.

This chapter examined the development of three students in terms of studying one legal languaculture after already having internalized another legal languaculture in response to a CBI program. Each student’s story focused on the unique ‘upheavals’ of his or her own development; the cases of Yue, Jun, and Omar warn against essentializing the learning of a new legal languaculture as they interacted with the CBI program and demonstrated development in quite different ways, despite sharing a first legal languaculture and similar family backgrounds. Yue’s upheavals in understanding U.S. common law were visible in the way she interacted in class and vocalized her questions and understandings. For Yue, development in common law reasoning
typically appeared orally, in response to social mediation, prior to its emergence in autonomous performance. Yue verbalized an understanding of sound legal analogical reasoning and ironic analogies prior to writing either in her IRAC essays, indicating that she was a student who not only required by embraced the mediational space the CBI program afforded her to externalized her understanding, so that it might be made visible and therefore subject to scrutiny and reshaping by both Yue and the Companion Course instructors.

Jun’s upheavals, like development in reading and reasoning for common law purposes he demonstrated, typically manifested themselves first in his writing. It was through his autonomous performance that Jun made his thinking and development clear. Jun’s story also indicates the power of the mediational space and conceptual mediation. Although the fact that Jun employed analogical reasoning in his first but not his second IRAC essay may, on the surface, appear to be regression, when TR asked him about this in their debriefing session, Jun was able to verbalize his reason for not deploying analogical reasoning. This verbalization made his question of what to do when the cases did not appear similar visible to both TR and Jun and they were able to engage in fruitful discussion and collaborative analysis that employed analogical reasoning. Jun additionally conveyed ironic analogies for the first time not in oral interaction with the companion course instructors, but through activity with the common law SCOBA; engagement with the conceptual mediation, then, afforded Jun the space to organize and demonstrate his reasoning. The power of material and materialized tools should not be underestimated.

Given Omar’s proficiency in English when he matriculated, much of the CBI program as originally developed was outside his ZPD. Even with the mediation, reduced speed of the companion course, and divided reading roles, Omar may have initially been comprehending too little from the cases and from both the criminal law and companion courses for the CBI program
and mediation to be useful. At the beginning of the semester, Omar appeared unaware of this, as he frequently reported completely understanding the assigned texts. As the semester progressed, however, Omar demonstrated awareness and confident to express the limits of his own comprehension, an indicator itself of development. Toward the end of the first semester of the pre-LL.M. program and throughout the second semester, Omar would frequently tell TR in class and in meetings, “No I don’t understand. Can you repeat that?” He also began recording every individual and group meeting with TR so that he could listen to the recordings at home.\(^\text{27}\) The new strategy of audio recording all interactions and the clarification requests may indicate that TR’s mediation demonstrated to Omar the limits of his comprehension of the text, despite his claims to the contrary early in the semester. Although beyond the scope of deep analysis in this dissertation, it is worth pointing out that when Omar turned in his IRAC essays, the scratch paper was always filled with his attempts to spell various words, both general academic language and legal terminology. This likely took away from his writing time and also indicates his language proficiency issue.

As each story of development discussed in this chapter was unique, TR was also observed tailoring her mediation to the needs of each individual student. TR attempted, as a V-SCT approach would dictate, to attune her mediation so that she respected the students’ already developed capabilities and engaged the students in ZPD activity in order to make visible and promote their emerging capabilities. As such, her mediational approach with each student varied. With Omar, for example, TR’s approach relied on multimodal mediation – mediation through

\(^{27}\) I cannot speak to whether or not Omar ever actually listened to recordings and if they assisted him in any way but the implementation of this new strategy on the part of Omar indicated a form of development as he became increasingly aware of his language proficiency and the level of language proficiency required to engage with legal texts in English.
gesture, through manipulating the physical environment, through use of conceptual tools – far more than for the other students.

Most importantly, though, analysis of students’ writing and interactions with TR revealed that all of the students did develop in some aspect of reading and reasoning for U.S. common law purposes, if not specifically in the analogical reasoning for common law purposes the study was intended to provoke. In fact, given where the students started, their development in one semester is quite impressive. When students are provided with systematic, conceptual explanations, guided in practical activity which require them to employ the concepts understand, and are supported with mediation attuned to their own emerging capabilities, revolutionary transformation is quite possible in a single semester.
Chapter 7 Conclusion

“It turns out, of course, that law school is largely about analogy; law schools just fail to tell students that explicitly. And the reason law school is largely about analogy is because the common law – and the principle of precedent – is totally about analogy” (Spellman, 2004, p. 1190)

7.1 Introduction

This study documented international pre-LL.M. students learning to participate in a second legal language and culture and promoted their development in that participation through concept-based instruction grounded in principles of Vygotskian sociocultural theory. Specifically, the study investigated rich points that became salient when students encountered the need to use case law in their Case Reading in Praxis (CRP) and the process of internationally-trained lawyers developing Analogical Reasoning in Common Law Analysis in autonomous written performance of analysis of a legal problem. The concept-based instruction promoted students’ development of reading and reasoning in common law through systematic conceptual mediation, primarily in the form of SCOBAs, and social mediation, in the instructional conversations TR and LW engaged the students in. This study took the two-pronged approach, of describing the process of learning to read and reason in the common-law system while simultaneously using an innovative pedagogical approach in order to provide a genetic account of reading and reasoning in the common-law system for international LL.M. students. As such, the study addressed the following research questions:

1. What rich points do international pre-LL.M. students encounter when they engage in Case Reading in Praxis CRP?

2. How do international pre-LL.M. students develop Analogical Reasoning in Common Law Analysis?
3. To what extent does Concept Based Instruction (CBI) promote case reading and common law reasoning development in international pre-LL.M. students?

The responses to the research questions addressed respectively in Chapters 4, 5, and 6, combine to demonstrate that language is not the only factor international law students must confront when attempting to learn a second legal languaculture. Both lay person and legal system concepts also affected the students’ development of common law analysis. In Chapter 4, rich points arising when these students, already trained in a legal languaculture, encountered legal texts in CRP, were discussed as illuminating aspects of the process of developing second legal languaculture literacy that may require additional mediation in order for the students to gain full access to the texts. These rich points included contact points where doctrinal concepts, language concepts, layperson cultural concepts, concepts of the structure of a legal languaculture, required additional, focused mediation in order for the student to be able to fully engage in CRP. Chapter 5 discussed analogical reasoning in the students’ autonomous written performance. Three developmental trajectories were identified based on a modified obligatory occasion analysis: 1) students who consistently attempted analogical reasoning until they were able to carry out “sound” reasoning in their autonomous written performance; 2) students who inconsistently attempted analogical reasoning in their common-law analysis; 3) one student who did not attempt analogical reasoning in autonomous written analysis at any point in the semester of study. Chapter 5 additionally provided a genetic account of the development of sound legal analogical reasoning through the categorization and explication of the different types of analogies students wrote prior to employing sound and ultimately ironic analogical reasoning. The overwhelming majority of the analogies written by the students did not employ sound legal
analogical reasoning, confirming that this type of processing necessary for common law purposes was indeed a rich point worthy of additional instructional focus. Chapter 6 built on the insights of Chapters 4 and 5 by exploring in greater depth the cases of Yue, Jun, and Omar, including how each engaged with the conceptual and social mediation offered through the CBI program and how each developed as common law reasoners. These students were selected as representative cases because each represented unique developmental trajectories that offer insight into future research in English for Academic and for Legal Purposes.

7.2 Discussion

Although analogical reasoning is considered to be at the heart of common law, legal educators have pointed out that students generally receive little useful instruction in how to carry out analogical reasoning (e.g., Hartung & George, 2009). Likewise, some contend that there is “no other academic subject that requires such a radical induction to specialized language as ways of thought” as study of the law (Northcott, 2009, p. 166). Studies of legal reading, however, are scarce, and those that exist have returned disappointing results regarding law students’ development of reading skills for the duration of their law-school experience (see, e.g., Evensen et al, 2008). Additionally, these are studies addressing (presumably) L1 J.D. students studying law as novices to legal thought. Even less is known about the process of learning to interact in a second legal languaculture than a first. Thus, this study employed a CBI curriculum grounded in principles of Vygotskian sociocultural theory to describe this process, while simultaneously promoting it through learner-needs-attuned instruction.

Legal readers engage with judicial opinions in order to understand the legal categories invoked in the story of human conflict and, ultimately, to understand what the case at hand adds
to the principles or rule of law related to the relevant legal category. As Davies (1987) notes:

“[n]o case is cited at common law in order to give an account of its significance in its own historical context; cases are cited (as ‘informants’) as part of the legal relevant context in which the definitional question-and-answer of the present case must be understood – in other words, for their significance in the present context” (p. 424). That is, a case has no precedential value until it is recontextualized and used as precedent in the activity of analyzing a legal problem. It is the activity of Case Reading in Praxis itself that imbues potential precedent cases with their meaning.

Students were observed in this study developing from a “general ESL” orientation to the activity of reading to a more sophisticated, legal understanding of reading cases in order to reason. In this process, multiple rich points were made salient. These rich points required additional mediation from the Companion Course instructors, and ultimately led both students and instructors to a deeper understanding of U.S. common law. Importantly, these rich points were related not only to ‘language’ per se, but also cultural frames typical of lay persons, categories specific to legal languacultures, and orientation to the expectations of U.S. legal education.

A key finding of this study is that students required multiple opportunities to engage with case reading and sustained mediation in order to first understand the status of cases in U.S. common law and then to develop the ability to engage with those cases in their legal analysis. Students repeatedly asked questions throughout the semester about whether they should “follow” a statute or a case in their analysis, indicating that they required time to conceptualize that both statutes and cases contribute to legal rules. These questions from, and interactions with, this cohort of students points to a simple yet critical finding – international law students may require
both time and multiple mediation sessions in order to fully internalize how the sources of law function together.

The fact that cases are representative of specific legal concepts also proved to be a rich point that the Companion Course instructors also needed to disentangle. Law school is fundamentally about encouraging students to read legal texts through legal eyes (that is, through the procedural and doctrinal concepts as expert legal readers do). In that sense, LW and TR behaved somewhat similarly to the law professors in Mertz (2007), whose questioning and uptake patterns privileged student utterances related to procedural and doctrinal legal concepts. This study is different, however, in that the instructors, TR in particular, were far more explicit with the students about why certain responses were preferred or certain questions were asked. This study also followed closely a small number of students in order to trace in detail their development across the course of a semester. By the end of the semester, all students could verbalize the purpose and status of cases in U.S. common law, but most were still developing mastery over their implementation in actual problem-solving activity. From a V-SCT perspective, however, even those students who demonstrated a changed understanding of legal cases but had not yet developed full control over analysis had nevertheless developed. It bears repeating that the case-concept nexus may appear obvious to an expert legal reader, but the students demonstrated that, for them at the very least, it was a sticking point that required multiple mediation sessions to master.

When students struggled to fully interpret a case, they were often observed compensating for bottom-up reading deficiencies through top-down compensatory processing, relying on their understanding of criminal law from their home legal languaculture or on their real-world knowledge of situations. Languaculture rich points were often elucidated in such moments as the
top-down strategies sometimes led to unexpected or irrelevant lines of analysis. The unexpected analyses were often due to incomplete understanding of analogical reasoning, but also at times attributable to a mismatch in the student’s world knowledge and those of the companion course instructors and (presumably) other “general” readers in the U.S. legal setting. When confronting such an issue, the conceptual approach to common law reading and reasoning seems embodied in the CBI curriculum appears to offer a useful remedy. It is obviously unrealistic, for example, to teach every cultural assumption behind every case and hypo (e.g., the issue of the independent contractor in the first hypo, where Jun relied on top-down processing strategies which caused him to analyze the vicarious rather than strict liability issue as, according to him, this type of independent contractor relationship does not exist in China). The CBI curriculum provided students with systematic knowledge (and importantly, materializations of that knowledge) combined with needs-attuned mediation in order to address rich points. In fact, it is through the mediational space the curriculum afforded that TR and Jun were able to determine that Jun’s lack of a frame for independent contractor caused him to misinterpret the hypo. The new awareness was then deployable by Jun as he engaged in analysis of subsequent legal problems and by TR as she mediated other students throughout the semester.

The Companion Course instructors also needed to contend with a different type of rich point that became apparent during the study – that of differing understandings of teaching-learning activity between the one adopted in the Companion Course and that of legal education generally, and the Criminal Law course specifically. While the study, implemented in the Companion Course, sought to understand and promote common law analysis, in particular through analogical reasoning, the Criminal Law course focused almost exclusively on rule-based reasoning – primarily through statutory interpretation. In fact, when the students received
feedback from the Criminal Law professor on the third IRAC essay, they were told that it was unnecessary to refer to cases in their analysis and, in fact, the professor preferred essays that stated rules and applied them, without the issue or conclusion sections – so, rather than Issue Rule Application Conclusion (IRAC) essays, the professor requested Rule Application Rule Application Rule Application (RARARA). While this study investigated common law thinking, then, the Criminal Law course focused more on mastery of the content of Criminal Law, creating confusion for the students.

The IRAC genre, essentially the genre of the law school essay exam, was important to teach because, in general, students do not receive instruction in writing essays in law school (Fischl & Paul, 1999; Strong & Desnoyer, 2016). Particularly in the case of students working in their second legal languaculture, there is a need for explicit instruction in this type of pedagogical genre. There is a certain conflation of student identities in the IRAC genre, particularly for LL.M. students who have already practiced law in another legal system. The genre demands that students simultaneously perform as law students and legal problem solvers. For J.D. students, who aspire to develop into legal problem solvers, the dual-identity nature of exam-writing may not (or may, this is worth further study) create too much cognitive dissonance. For the students in this study, however, particularly those who had 1) previous extensive legal practice and 2) lower English language proficiency, the dual-identity nature of the genre proved difficult to navigate.

Although each student demonstrated development in their IRAC essays throughout the semester, it became clear that the selection of the IRAC genre was not unproblematic. Even when using the IRAC genre as a demonstration of legal analysis, the genre is also always a test, which is anxiety-provoking for some students. In a recent book for law students on “perfecting”
IRAC writing, Strong and Desnoyer (2016) share language revealing of legal education’s culture of the exam essay: “The ‘A’ step of your essay is where you explicitly discuss the relevance of your legal sources to your fact pattern. Remember you cannot win points unless you put your thoughts on paper; professors are not mind readers” (p. 77). In the world of legal education, then, the application section is not just about good analysis; it is about saying enough about the relevance of legal sources to the fact pattern of the exam question to ‘win points’. This blending of identities, of simultaneously being a legal problem solver and a law student, was a distraction for some of the students. The purpose of using IRAC essays in the study was to focus on development of legal analysis in writing. That experience in writing in this genre would assist students in their law school exams was an additional benefit of the IRAC-based method, but it was not the sole purpose. Understandably, however, some students oriented to IRAC-essay-writing as an exercise in “earning points” (in order to get a good grade), indicating a shared orientation to the exam with the Criminal Law course. In fact, Fazi and Omar commented on earning points in the criminal law exam, rather than developing as common-law reasoners, repeatedly in their individual meetings.

Obviously, the extent to which each of these types of rich point matters varies according to individual students at given points in time. Moreover, these aspects are not able to be fully disentangled as they are inherently interconnected. For example, in an excerpt not explicated here, the Companion Course instructors and students spent considerable time during a class session in Week 14 discussing whether or not, following State v. Norman, where an abused wife shot her sleeping husband, a drunk person could be considered a passive and therefore non-threatening victim. Students from civil law backgrounds indicated that they could understand the drunk person to be similar to the sleeping victim, while the Saudi Arabian students, not only
trained in Islamic law, but each devout Muslims, argued that a drunk person could only ever be dangerous. While, of course, intoxicated persons *can* be dangerous, the point of the exercise was to argue for the drunk person potentially being *like* the sleeping person, an argument the Islamic-law-trained students appeared unwilling to make. As the students did not reference sources of authority for their arguments, it is difficult to argue the extent to which they based their arguments on their experience with alcohol as laypersons in their home cultures, their training in their home legal languacultures, or, likely, both. While Hartig (2014) did report that students in her study trained in Islamic law appeared open to using precedent-based reasoning, perhaps because Islamic law does utilize a form of analogical reasoning, *qiya*, in instances like the discussion of the drunk-man-as-victim, the students’ openness to analogical reasoning was filtered through other cultural frames which appeared to supersede their legal training. The interaction of culture, language, and training in learning a second legal languaculture, is, then, nuanced, because different legal concepts may be affected by lay-person cultural frames and legal languaculture understandings.

As the data analysis clearly demonstrated, the students in this study each developed in some aspect of their ability to communicate in a new legal languaculture. Each student followed a unique developmental path according to her own level of development of understanding of her own legal system and English language proficiency. Additionally, for each student, the path of development was affected by TR’s ability to establish and engage in ZPD activity with that student. Establishment of a ZPD in activity with learners is critical for fully understanding emerging student abilities. The ZPD was originally defined by Vygotsky (1978) as “the distance between the actual developmental legal as determined by independent problem solving and the level of potential development as determined through problem solving under adult guidance or in
collaboration with more capable peers” (p. 86). The ZPD, then, is an activity which allows teacher-researchers access to emerging capabilities, thus providing them a more complete picture of the development of the learner. From a V-SCT perspective, properly organized instruction should aim to create ZPDs in order to understand and promote learner development.

In this study, TR took seriously that responsibility. With some students, however, TR required additional time and deployment of multiple mediational approaches before she was able to appropriately establish a ZPD for any given student. A primary factor inhibiting the establishment of a ZPD for some students was their language proficiency. While this study approached legal systems and discourse as legal languacultures, at times, it became clear that for some students issues of linguistic access to texts inhibited their ability to engage in legal analysis and the CBI curriculum. In fact, TR determined early in the semester that the complex task of reading cases would need to be temporarily and artificially simplified, through the Reading Role Cycle, in order to engage students in ZPD activity. For some students (e.g., Hoobi, Yue), this adaptation appeared successful in bringing the task nearer to her capabilities so that mediation was effective. For other students (e.g., Pim, Omar), it was absolutely critical that TR adapt the CBI program in order to establish a ZPD within which to mediate learner understanding of legal texts in English. Thus, while the study originated from the premise that pre-LL.M. and LL.M. students are not only or even primarily L2 users of English, their status as L2 users of English must be accounted for.

Although each student at times required explicit language-focused mediation, Omar and Pim in particular required additional mediation. For these two students, TR attended first to establishing a ZPD focused on linguistic access to the course material rather than engaging them in extensive discussion of analysis of the hypos. That TR struggled to establish a ZPD with Pim
and Omar within which to implement the analysis-based focus of the CBI program due to their language proficiency is not necessarily an argument for the establishment of firm language thresholds for a pre-LL.M. program, however. One student, Hoobi, who entered the pre-LL.M. program with a similar language proficiency profile to Omar and Pim, flourished under the instructional program, demonstrating development in common law reasoning among the earliest in this cohort. Hoobi utilized unique work-arounds to her language proficiency, such as employing charts to organize and present her analysis with minimal use of language. These charts nonetheless conveyed meaningful analysis, which ultimately demonstrated that she understood the legal principles which cases represented and that she understood analogical reasoning for common law purposes.

From a V-SCT perspective, development can be demonstrated in multiple ways. Students can demonstrate development in their individual performance, their verbalization about a concept, or their responsiveness to mediation. Multiple aspects of studying a second legal languaculture affected each student differently at various points in the semester. Students were affected by: language, lay-person frames, legal languaculture understandings, law school expectations. Each aspect influenced their success differently, and the students oriented to different components based on their histories and imagined futures. As such, students can and must be working to gain control over each element of the legal languaculture, which can often lead to uneven development in different aspects of their performance. For example, at times, the students were observed working to gain control over one aspect of discursive expectations in law school, such as the ability to analyze a single case from multiple perspectives. While they might demonstrate development in this aspect of their ability, it often meant that some other aspect, such as the legal thinking regressed or did not develop at that particular point in time.
While this study set out to examine development in terms of reading and reasoning in a new legal languaculture, yet students were observed developing aspects of the new legal languaculture not directly related to analogical reasoning. That student may have developed in other areas of common law analysis – writing complete and accurate rule statements, or understanding that ironic analysis is necessary, for example. This study endeavored to understand and promote development of one crucial component of students’ learning of a second legal languaculture– analogical reasoning from precedent cases – but it is one aspect of the entire activity system in which the students were engaged. An absolutely crucial one, for sure but nevertheless just one aspect. For some of the students, discourse structure and the reader-writer relationship may have been the most salient rich point and that may be why they developed more in some areas rather than others. Fazi, for example, spent more time and energy attempting to write complete rule statements than he appeared to spend engaging with analogical reasoning. Those other types of development are important and the interaction of these various aspects of learning a new legal languaculture – technical language, academic language, genre expectations, discourse structuring – is an area ripe for further exploration.

7.3 Implications

This study has important implications for understanding the development of common law reasoning and for pre-LL.M. and LL.M. programs. Importantly, the study demonstrates that curriculum designed specifically for internationally-trained lawyers, accounting for their knowledge and histories, allows the potential for such students to thrive in the U.S. law school context and develop in quite dramatic ways. The study additionally demonstrated, however, that even curricula designed specifically to account for student learning needs may require revision
when it proves inappropriate for the level of development of the students enrolled in a pre-LL.M. or LL.M. program.

Patterns of legal reasoning and case reading were presented to learners based on principles of Vygotskian sociocultural theory. As such, the curriculum was attuned to changing learner needs and presented the content to be learned as completely and systematically as possible. Even so, students required multiple mediation sessions in order to develop mastery over the status of cases in U.S. common law system and what are the constituent parts of cases. Additional discussion and more systematic presentation of case reading and focus on the canonical parts of legal genres (e.g., holdings, rules, rationale) is likely warranted, particularly for students in a pre-LL.M. program. Such additional focus earlier in students’ studies would likely foster greater transfer to cases encountered in other courses with deeper comprehension of legal concepts earlier.

Language proficiency does affect learning in a second legal language culture, but traditional measures of language proficiency used for admissions purposes (e.g., standardized test scores, previous language study) may prove inadequate in predicting success in legal studies, particularly when learners are supported with a curriculum designed to take account for their needs. For example, Pim and Hoobi studied in the same level of the same Intensive English Program yet performed very differently in the Companion Course. Whereas Hoobi flourished in the CBI program, and developed mechanisms to cope with limited language proficiency, Pim struggled in the class. Law schools should consider, then, the weight of language proficiency in both their admissions and evaluation practices and explore alternatives to traditional measures of language proficiency, such as the development of in-house language and reasoning assignments aligned with curricular objectives at a particular law school.
The findings of this study have clear implications for the assessment culture of legal education. To engage with doctrinal legal education culture is to engage with its testing culture. All indications are that the vast majority of doctrinal courses, particularly in the first year, are evaluated on the basis of a single exam. In this study, far more about the students’ comprehension of individual cases and ability to engage in common law reasoning was accessible when the students were allowed access to additional tools while writing an IRAC essay and when they engaged in ZPD activity during the debriefing meetings with TR. As Herring and Lynch (2012b) demonstrate, however, even modest adjustments to legal education’s testing and teaching culture can have produced significant results. In that study, one formative assessment instrument mid-semester led to statistically significant differences in student performance on a pre- and post-test. This is important because no other legal reading and reasoning study has reported such results.

That the students in the present study were able to demonstrate more sophisticated understanding of cases and legal analysis when afforded access to tools is likely true of law students as well. Law school might consider, then, assessment practices and how they align with pedagogical objectives. For international LL.M. students, at least, a form of Dynamic Assessment (see, e.g., Poehner, 2008) might provide the richest information about their legal reasoning abilities, but this option, of course, requires the time and expertise to implement such a procedure. Other options might be as simple as an exam question modeled on the performance test of the bar exam. For example, if doctrinal courses wanted to truly test reading, writing, and reasoning “like a lawyer”, one simple exam tweak may be to provide students with a small packet of materials related to a legal problem – hypo fact pattern, statute, precedent case or two, supplementary materials, etc. – and have students employ those materials in producing a written
legal analysis of the problem. By suggesting that students can provide a more complete picture of their true capabilities when allowed access to tools of some kind during assessments, I am not proposing a scenario that would allow unprepared students to succeed on law school exams. Rather, the argument I am making is that educators can uncover more accurately the quality of legal reasoning students are capable of if the students are allowed to operate in a way more closely aligned with how actual lawyers operate – access to sources of law, analysis, commentaries, social others.

The CBI curriculum utilized in this study assisted students in overcoming language proficiencies that might have otherwise made law school texts and discussions largely inaccessible to them. Thus, a CBI curriculum where both conceptual and social mediation are developed specifically to take account of students’ histories and learning needs can be quite powerful in promoting the development of ability to engage with second legal languaculture texts and analyses. An important implication, then, is that pedagogical approaches that focus both on what international law students know (their histories) and what students need to know (their futures) can powerfully promote student development. LL.M. programs, then, should consider formulating more curricula specifically for their LL.M. students, curricula that takes account of their prior legal training and research about what it means to function as a common-law reasoner. Importantly, though, this curriculum needs to be grounded in rich theoretical insights about the nature of development of language, and law. Thus, one of the most important implications of this study is that approaching legal education through praxis is beneficial to learners. Through engagement with explicit, systematic instruction that was rooted in theoretical knowledge about learning and legal systems, the learners in this study demonstrated impressive, although variabale, development over the course of a single semester.
Several times in the data analysis, I noted that TR struggled to respond to a student question or provided mediation that was not particularly beneficial to the learner’s development at that time. In those moments, TR was observed developing as a mediator. Just as the students were engaged in tasks that were occasionally overwhelming, so, too, was TR’s task complex. She had to account for complex and quite varied learner needs and attune individually to those needs online. As such, it was necessary that she consistently make quick decisions about which aspect of legal languaculture might be the source of a student misunderstanding – language, educational culture, legal concept, cultural concept, legal languaculture structure. As a mediator is supposed to be an expert other who is capable of guiding the learner in their development, instruction of internationally-trained lawyers demands special expertise, and a willingness to develop that expertise when it is not already available. The implications of this for teacher education are significant. In order to properly organize instruction for international law students, expert content knowledge (e.g., a J.D. or a PhD in applied linguistics) is insufficient; rather, *pedagogical content knowledge*, or the ability to translate that expert knowledge into pedagogically useful categories is essential.

7.4 Limitations

While this study has provided a necessary account of international LL.M. students’ learning of U.S. common law languaculture, it also has important limitations. Carrying out the study in an intact classroom led to many affordances, but also constraints. TR co-taught the Companion Course with LW, and the Companion Course was intended to ‘track’ the content of the Criminal Law course. It was not possible, therefore, to remain focused on one case or topic until the learners had achieved mastery. For some learners, a reduced pace would likely have been beneficial and that the current study did not do so in this iteration was a limitation.
An additional drawback to conducting the study with an intact class is that TR did not design the reading and analysis activities such these activities were carried out in the presence of the course instructors. Students read and analyzed texts largely in whatever study context they preferred and submitted tasks to TR, meaning that important information about their approach to the tasks and any private speech or private writing was unavailable for analysis. This structure also caused TR to be unavailable to students for mediation while the students carried out reading and analytical activities, mediation which may have been quite useful to them. Future studies should consider either assigning analysis tasks where students record themselves reading or carrying out the analysis and submit that recording, as Negueruela (2003) did, or consider collaboratively reading and analyzing texts with students until they have achieved sufficient mastery that the presence of the teacher-researcher is no longer necessary.

The data as collected in this study did not capture rich data regarding students’ first legal languaculture training, their practice experience, and how, if at all, they used their first legal languaculture to assist their understanding of U.S. common law. Further exploration of the extent to which they relied on certain structural and doctrinal concepts in the first legal languaculture to inform their understanding of the second legal languaculture is necessary. While the study did utilize a pre-semester and post-semester questionnaire regarding home-country legal system, language learning experience, and the student’s understanding of U.S. common law reasoning process these questionnaires provided only quite general information and richer data is necessary in order to fully understand how a first legal languaculture affects the learning of a second. In this study, such issues only became more fully visible when a student such as Yue, for whom verbalization appeared to be an important component of the developmental process, engaged in languaging with TR her understanding of her home legal system and salient differences with
U.S. common law. As such, information about when and how students used the first legal languaculture as a psychological tool and how it either afforded them deeper understanding or impeded their learning of common law reasoning is limited. In future studies, this type of information could be elicited either through an interview, by a mediator more explicitly asking students questions about they understood both their first legal languaculture and the second legal languaculture or by intentionally using hypos which made rich points or cultural differences salient.

Relatedly, the study only minimally utilized and captured ways in which students’ first legal languaculture, an incredibly powerful psychological tool, mediated the development of these pre-LL.M. students. Students in this study were not encouraged to employ their L1 or first legal languaculture in discussing their understanding of focal cases or analysis of hypos. From a V-SCT perspective, this limits the students’ access to very powerful mediation. Additionally, limited is deep insight into how a first legal languaculture might both aid and constrain the learning of a second legal languaculture. While analysis in this study demonstrated that students indeed did rely on their prior legal study while engaging with U.S. legal education, more systematic study of how students use the first legal languaculture as a psychological tool is necessary.

The data analysis did not include any evaluations of acceptability by raters trained in U.S. common law; thus far, all analysis was carried out by TR, in periodic consultation with LW. During the criminal law semester, LW did not provide evaluation of the students’ IRAC essays so even formative assessment was unavailable for analysis of student development. To further bolster claims of student development of common law analysis, evaluation of the students’ performance should also be considered. Ratings of the accuracy of students’ common law
analysis will additionally grant insight into what legal readers value in the U.S. common law legal languaculture.

7.5 Directions for Further Study

Despite, and sometimes because of, these limitations, this study has raised important questions for further investigation. For one thing, the effect of legal training and practice on the learning of a new legal languaculture warrants further exploration. Although not explored extensively in the present study, the fact that Pim had practiced law for seven years affected her learning of U.S. common law. The other students, who had practiced law in their home legal systems for one year or less did not appear to be as affected by their legal training as was Pim. This may be a reflection of what Agar calls psychological *ruts*, or grooves that develop in one’s thinking due to languaculture practices to the extent that language and legal practices that have became so ingrained it is as if they metaphorically create grooved ‘ruts’ in the road of our mind that make it difficult to perceive the world and use language and reasoning differently. While one civil law attorney studying in the U.S. hypothesized that students trained in a European civil law tradition but who had not practiced would find learning U.S. common law through the pedagogy of U.S. legal education more difficult than an attorney who had practiced, it is also plausible that the reverse is true. Indeed, it remains a question for further investigation how the type and duration of legal practice affects an internationally-trained lawyer’s learning of U.S. common law. Additionally, it is likely not the same for all legal languacultures.

Additional work remains to be done in developing and integrating CBI curriculum for international LL.M. students. At least one of Negueruela’s (2008) principles for implementing a concept-based approach to instruction was not explored in this dissertation, and therefore remains to be explored in further LL.M. program development and research. Negueruela (2008)
argues that in a CBI approach, categories of meaning must be connected to other categories of meaning, that is a curricular articulation of meaning. This study employed a CBI curriculum through one concept, analogical reasoning. Although analogical reasoning represents the critical difference between the legal systems of internationally-trained lawyers and the U.S. common law, and is thus a discourse-structuring concept (Hartig, 2014), further research is necessary to link the necessary discourse-structuring concepts (e.g., *stare decisis* and analogical reasoning) meaningfully and coherently. This will require further research into legal discourse and the students’ home legal systems.

In taking a CBI approach to developmental education, an educator commits to systematic organization and presentation of the best available knowledge, not necessarily perfect understanding of the concepts. As such, the educator committed to CBI needs to embrace praxis and adapt pedagogical materials such as SCOBAs when it becomes obvious that it is necessary to do so. In this case, further research into legal traditions, such as the Chinese legal system, are necessary to refine the SCOBAs for further implementation. In developing the civil law SCOBA, I relied primarily on textbooks for LL.M. students to inform my understanding of a civil law tradition, rather than legal scholarship. This may have resulted in oversimplification of civil law, and crucially, to interpret the Chinese legal system as a canonical civil law system, when in fact it may not be (Fletcher & Sheppard, 2005).

An important future direction is to revise the SCOBAs before reusing them. Although the Islamic law students reported satisfaction with how the Islamic law SCOBA captured the process of legal reasoning in the Saudi Arabian legal system, the civil law students did not believe the civil law SCOBA reflected their legal thinking. Further research of the different legal systems and refinement of the SCOBAs is therefore necessary. CBI demands systematic organization and
presentation of the best available knowledge. Future studies with SCOBAs representative of legal systems should also promote more frequent practical activity with SCOBAs. The students in this study would likely have benefitted from using the common law SCOBA in legal analysis earlier in the study than was done here.

While this study has documented the process of pre-LL.M. students learning common law and indicated rich points these students encountered, further work remains to be done in this area. As Agar (1994) points out, “[t]he rich points in a languaculture you encounter are relative to the one you brought with you” (p. 100). Thus, the rich points discussed in the study were not the same for all students and may not be identical to rich points salient for future LL.M. students, especially if these students come from different languacultures. Further research, then can document further rich points internationally-trained lawyers encounter while studying at U.S. law schools such that typologies of legal systems could be developed. Such typologies would be theoretically insightful for comparative law researchers and practitioners as well as pedagogically useful for educators of LL.M. students.

This study documented the process of learning a second legal languaculture, and, to my knowledge, is among the first to do so. Each of the students in this study, and the majority of students I have encountered in working with LL.M. students over the past few years, reported an intent to return to their home countries to practice law or pursue an academic career. To my knowledge, however, no study has explored how mastery a second legal system might (or might not) affect the way one practices and reasons in one’s home legal system. It appears that outside of anecdotal student career trajectories reported by individual law schools, nothing is known about the lives and careers of LL.M. students upon return to their home legal systems. Such a study would grant further insight into the psychological status of legal languacultures and might
additionally offer LL.M. programs useful insight into how such programs might most effectively be structured.

More study of the pre-LL.M. and LL.M. student experience and learning in substantive law courses is necessary. Beyond Silver’s (2012) survey of internationally-trained lawyers after completion of an LL.M. program, little is known about LL.M. participation patterns and learning in substantive law courses. From a V-SCT perspective, this is problematic, given the understanding in V-SCT of the importance of verbalization in the learning/development process.

The experience of international LL.M. students in substantive law courses deserves further attention. Several issues are worth considering. First, listening comprehension was a notable issue for the students, and the Socratic method largely assumes that students can learn vicariously through the professor’s interaction with other students. The assumption of vicarious learning is an untested one, particularly as related to international LL.M. students. Additionally, how and what students learn in substantive law courses is worthy of study. Silver (2013) has pointed out that at least some international LL.M.s desire the Socratic classroom as a learning experience, but to my knowledge no research exists on how students engage in that classroom, if they are allowed to participate in that classroom, how such participation might influence their learning. For example, in the two years that I worked as a companion course instructor, I sat in on classes with two different doctrinal professors. Both took the approach that LL.M. students could volunteer to participate in class, but neither professor ever cold-called LL.M. students as they did with J.D. students. In this particular semester, in my field notes of the criminal law classroom, I noted the Companion Course students volunteering an answer or asking a question only three times. Although law schools are rightfully concerned with the activity of preparing future attorneys for U.S. practice, considerable learning opportunities for J.D. and LL.M.
None of the students in this cohort reported wanting to practice in the United States, and only one student reported the desire to represent international clients in legal practice in her home country. Yet, LL.M. programs appear to teach international LL.M. programs as if they have the same professional goals as domestic J.D. students—to practice law in the United States. For example, at Mid-Atlantic Law School, where this study was carried out, LL.M. Legal Writing was the only required full-semester course for LL.M. candidates, and that course differed from J.D. Legal Writing only in that it was comprised entirely of LL.M. students and applied linguists offered periodic language lessons and individualized tutoring. It is worth considering, then, how instructional approaches employed by LL.M. programs and the student’s academic and professional goals are aligned.

This study made important inroads in developing an understanding of how internationally-trained lawyers develop the ability to carry out common law analysis through substantive law rather than Legal Writing. Importantly, it also focused on reading-in-activity rather than inter-office memoranda produced for a Legal Writing course, and therefore extends the field’s understanding of pre-LL.M. and LL.M. learning in U.S. legal education context. More work remains to be done, however, in understanding the experience and learning of internationally-trained lawyers in the various situations in which these students find themselves in U.S. law schools.

Each of the learners exhibited individual developmental trajectories, based on their own histories, language proficiency, goals, and engagement with the CBI curriculum. They should not be interpreted as ‘types’ of students through which future students can be categorized. Likewise,
the rich points in case reading and types of analogies the students produced should not be considered recipes for teaching future students what to do or what to avoid doing when studying U.S. common law. Rather, this study has revealed the presence of complex issues at play when internationally-trained lawyers study a second legal languaculture.
Appendices
Appendix A Pre-semester questionnaire

Name:

1. Where are you from?

2. Please list the languages that you speak and your educational experience with each language. Which languages have you used when practicing law?

3. Why are you pursuing an LL.M. degree? What are your career plans after graduating from the LL.M program?

4. Is there anything else you think we need to know about you as a student?

1. Do you have a first degree in law?

2. What is your experience working with law in your home country? How many years did you work with law? In what area of law (e.g., corporate, criminal, family)?
3. What legal system does your home country use?

4. Please describe the thinking or reasoning process you would use to solve a legal problem in your home legal system. (Use words, drawings, or whatever will help you express your process)

5. Please describe what you know about the thinking or reasoning process you would use to solve a legal problem in the American common law system. (Use words, drawing, or whatever will help you express the process)

Post-semester questionnaire
1. Please describe the thinking or reasoning process you would use to solve a legal problem in your home legal system. (Use words, drawings, or whatever will help you express your process.)
2. Please describe what you know about the thinking or reasoning process you would use to solve a legal problem in the American common law system. (Use words, drawing, or whatever will help you express the process).

3. What were the most useful activities we did in 912? That is, which activities helped you learn and you would like to see us do them again for the Constitutional Law course?

4. Which activities were not very useful for you and we should do less of for the Constitutional Law course?

5. How (if at all) did the Reading Roles help you develop 1) your case reading and 2) your knowledge of criminal law?
6. What was most useful about the Reading Roles? What should we keep for next semester and future years using the Reading Roles?

7. What could be changed about the Reading Roles for the process to better help you develop as a U.S. common law reader and law student?

8. Do you have any preferences for Reading Roles partners for next semester? (I will take these into consideration when assigning partners, but do keep in mind that I like to keep the partners cross-gender, cross-legal system, and cross-native language to the extent possible.)
Appendix B Teaching Hypo

Precedent case – *State vs. Sophophone*

One morning in July, sixteen-year-old Jose was at his home in Indiana with sixteen-year-old Blake, and seventeen-year-old Levi. The three teenagers searched the neighborhood for unoccupied homes to burglarize.

The teenagers ultimately decide to burglarize a house in the neighborhood, belonging to Scott. Scott had been laid off from his regular employment and was sleeping in a second-floor bedroom. The construction of Scott's house was such that anyone in the upstairs portion of the house could not always hear someone knocking on the front door. The doorbell at Scott's house was not functioning, but he had installed a wireless doorbell. The wireless doorbell, however, only chimed on the first floor of his residence.

Jose, Blake, and Levi chose Scott's house as the target for the burglary. Subsequently, Jose called Sharp, who had just turned eighteen years old, and his cousin, Danzele, to help the boys break into the house. The group met at Jose’s residence where they spent some time socializing. Sharp later told police officers that during this meeting at Jose's house, Jose and Danzele discussed where the money was and where the police were. They did not discuss the dangers associated with burglarizing homes. The group then left to burglarize Scott's house. Levi stayed outside the house and acted as the “lookout.”

Scott awoke around 2:30 p.m. Scott later recalled, “As soon as I sat up on the side of the bed, there was this boom, and my whole house just shook.” Scott heard a second loud booming noise and felt another vibration. Everyone but Levi had entered Scott's house by kicking open the rear door to Scott's kitchen, a door which Scott kept locked when he was sleeping. The force used was such that it ripped away enough of the door's frame to allow entry through the doorway and into the kitchen. The group then began looking for items to steal from Scott's home. A knife block containing knives was located in the kitchen. Scott's watch and wallet, which were also located near the knife block, were taken by the burglars.

As Scott picked up his cell phone, he remembered that a burglary had occurred in the neighborhood earlier that week. He retrieved a handgun from his bedroom and opened the bedroom door. Scott, who weighed approximately 270 pounds, decided to proceed by loudly running down the wood stairs, to the first floor in case there were burglars inside his home, hoping that they would hear him and flee. He did so and walked through the living room of his house to determine if anyone was on the first floor.

As Scott reached the dining room, looking to one side, he saw someone in his kitchen turn and flee from the house through the kitchen's back door. Looking to the other side, Scott saw two burglars standing at the door to the bedroom adjacent to the dining room. Scott was between them and the kitchen exit door. Scott, who held his handgun at his side, feared that he might be hurt or killed, and did not know if the burglars were armed. He decided to frighten the burglars and cause them to remain in the bedroom before they could attack him and before the burglar who fled might return. Scott began firing his handgun, aiming low toward the floor. A subsequent examination of Scott's residence confirmed that the shots he fired struck several locations just above the level of the floor.

The two burglars in the bedroom fled into the bedroom's closet and closed the door behind them. Scott then called 911 and spoke with a dispatcher who informed him that police officers were en route to his location. The closet door then opened and Scott shouted, “Keep the door closed” and “Don't open up that door.” The door opened a few moments later and Scott
observed one of the burglars go to the floor. Jose told Scott that the burglar who had fallen to the floor, who was later identified as Danzele, had been shot. Scott, who had remained in contact with the police dispatcher, informed the dispatcher about the injury and requested an ambulance.

Blake emerged from the closet holding his leg and asking if he could sit on the bed. Scott denied Blake's request, telling him to remain where he was. Jose poked his head out of the closet, but Scott told him to remain where he was. When the police arrived and entered Scott's house, Scott put his handgun down and told the officers, “They're right there in the bedroom by the closet.” Danzele died at the scene from his gunshot wound.

You are the Indiana prosecutor assigned to this case. Which of the defendants (Jose, Blake, Levi, and Sharp) will you be able to win a conviction for felony murder in the death of Danzele? Explain using the cases provided and please use IRAC structure in your response.
Appendix C Hypo for Precedent Case 1 – *Commonwealth vs. Koczwara*

Tommy Truckdriver works delivering cigarettes and soft drinks to gas stations in Harrisburg, Pennsylvania. He owns the truck he uses for delivers. Every day he works, Tommy drives to the distribution warehouse to load his truck with the cargo to be delivered that day. On May 4, 2015, Tommy picked up a load of cargo that included 5,001 cigarettes for Joey’s Gas Station. While Tommy was unloading the cigarettes at Joey’s Gas Station, the goods were inspected and the 5,001 cigarettes were found to be stamped with counterfeit Pennsylvania tax stamps.

The Pennsylvania Cigarette Tax Act of July 20, 1970, P.L. 513 (No. 178), art. Ix sec. 903(b) 72 PS 3169.903(b) reads:

“All person other than a duly licensed stamping agency or other person specifically exempted by the provisions of this act who shall possess more than five thousand cigarettes, the packages of which do not have affixed thereto the proper amount of genuine Pennsylvania cigarette tax stamps shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to a find of not less than a thousand dollars ($1000) nor more than five thousand dollars ($5000) and costs of prosecution or in default thereof to suffer imprisonment for not more than ninety days.”

Note that transcripts of the legislative sessions when the Pennsylvania Cigarette Tax Act was passed indicate that the legislature depended on published research that indicated that cigarettes are the number one cause of preventable death in the United States, that raising the cost of cigarettes in the most effective tobacco prevention and use measure, and applying tax stamps to cigarette boxes helps reduce illicit trade of cheaper, illegal cigarettes.

Under the Pennsylvania Tax Act and following Koczwara, can Tommy be convicted of a violation of The Pennsylvania Cigarette Tax Act?
Appendix D Hypo for Precedent Case 2 – Commonwealth vs. Malone

Billy Boxer and Vinny Victim both worked for Schmidt & Sons Brewing Company of Philadelphia. Schmidt & Sons sponsored a baseball team that played in the Philadelphia City Recreational League. Both Billy and Vinny played on the baseball team and were campaigning to be voted team captain. Prior to finding work at the Brewing Company, Billy had been a professional heavyweight prize fighter from 1936-1944.

At about 9:30 AM on January 7, 1949, Billy complained to the vice-president of the company that a campaign flyer was being circulated by Vinny and that if Vinny were not stopped he (Billy) “was going to let him have it.” At about 10 AM, Billy approached Vinny and told him “to lay off passing out the flyers”, and if he didn’t Billy was “going to send [him] home in an ambulance.”

Shortly after 3 PM, Vinny and several other men to the Neighborhood Bar. Vinny had several beers and was distributing more campaign flyers. Billy saw Vinny distributing the flyers at the bar, but Vinny did not see Billy. At about 4 PM, Vinny left the bar in the company of two men, Witt and Amberg. As Vinny and his companions were walking near the brewery, Billy was hiding behind a pillar near the brewery plant. Billy came from behind the pillar and “starting swinging” at Vinny and struck him. Vinny turned and said, “It’s Billy Boxer” and ran away from Billy back towards the brewery. Billy chased him. Vinny ran into a brewery building known as the brew house.

When Witt and Amberg caught up with Billy and Vinny, they found Vinny on the floor. Billy was standing over him punching him in the head and body. Witt tried to pull Billy off Vinny, but Billy knocked Witt down several times. Amberg also ran up to Billy to stop him, but Billy struck him in the stomach and knocked him down, momentarily rendering him breathless. Billy tried to run from the brewery but was arrested by the police.

Vinny was taken to a neighborhood hospital where he was treated and release at 6:00 PM. At 8:00 PM, Vinny slipped into a coma, was taken back to the hospital, and died around 9:00 PM.

In his autopsy report, the coroner state that death was “a result of hemorrhage with pressure against the brain resulting from a fracture of the skull”; that there was a “widespread comminuted fracture throughout the right temporal and parietal bones” with massive epidural hemorrhage pressing in and distorting the brain. The report further stated that there were various lines of fracture as though the head either hit or was bit by a hard object. According to the physician “it is seldom that a fist – a blow of a fist can cause a comminuted fracture like that, but I would not exclude the possibility.” The doctor stated that it was his opinion that the injuries were the result of one powerful blow.

Billy Boxer has been charged in connection with the death of Vinny Victim. Which type of homicide can Billy be convicted of?
Appendix E Hypo for IRAC Essay 3

Four years ago, Jeannie Piaget, a reformed cocaine addict who was studying to obtain a Ph.D. in psychology at New York University, attended a lecture on AIDS sponsored by the National Institutes of Health. At the lecture, Piaget learned that the AIDS virus is often transmitted when infected drug users share needles. Inspired by this lecture, Piaget began doing volunteer work at a needle exchange program in New York City that gave drug users a legal opportunity to exchange their dirty hypodermic needles, possibly infected with AIDS, for clean ones.

Two years ago, Piaget moved to Omaha, Nebraska, to take a job teaching psychology at Creighton University. Eager to continue her volunteer work, but unable to find a needle exchange program listed in the Omaha phone book, Piaget decided to set up her own program. She checked several pharmacies and discount drug stores in the area; although she could not find hypodermic needles on the shelves in any of the stores in Omaha, she learned that the Wal-Mart across the river in nearby Council Bluffs, Iowa, sold sterile needles over the counter.

Piaget legally purchased needles at the Council Bluffs Wal-Mart. Every Wednesday evening from 5:00 to 7:00 p.m., she took a supply of clean needles to the corner of College Street and University Avenue, one of Omaha’s high drug areas, and exchanged them for dirty needles. Each night, she exchanged between 150 and 200 needles for 50 to 60 addicts. She did not charge for her services.

On Wednesday, December 17, 2014, Norman Bates and his mother, both long-time drug addicts and regular customers of Piaget’s needle exchange, came to the corner of College and University to exchange dirty needles for clean ones. It was a particularly busy night for Piaget, and there was a long line of addicts who had braved sub-zero temperatures, waiting to exchange needles.

When it was her turn, Mom Bates created a small ruckus because she complained that Piaget had given her only three clean needles even though she had turned in four dirty ones. Piaget checked through the dirty needles, but was unable to identify which of them belonged to Mom Bates. Nevertheless, Piaget gave Mom Bates a fourth clean needle because she continued to insist that she had turned in four. During the confusion, Piaget put one of Mom Bates’ dirty needles in the pile of clean ones.

Norman was next in line. Piaget gave him the dirty needle that Mom Bates had turned in as well as several clean ones. Later that evening, Norman unknowingly used the dirty needle to inject himself with heroin. Unfortunately, the needle was infected with the AIDS virus. Norman contracted AIDS from the dirty needle, and died shortly thereafter as a result.

Piaget has clearly violated 7-31 of the Nebraska Criminal Code, which makes it a felony to “distribute without a prescription a hypodermic syringe, hypodermic needle, or any other instrument used to inject a controlled substance.” But the local prosecutor would also like to file homicide charges against Piaget in connection with Norman’s death. Discuss what homicide charges can plausibly be brought against her and what arguments she can plausibly raise in response.
Appendix F Hypo for Precedent Case 4: *State v. Norman*

On 24 September 2008, Vick was driving a four-wheeler illegally on a public road and refused to stop for the police. In his effort to flee, Vick drove his four-wheeler through Derrick Defendant’s mother’s yard. Derrick Defendant was outside mowing his mother’s lawn and saw Vick cut through the yard.

The next evening, at around 10:00 p.m., Derrick Defendant went to Anderson Barber Shop for a haircut. While Derrick Defendant was getting his hair cut, Vick arrived at the shop. Everything “seemed to be fine” between Derrick Defendant and Vick until Derrick Defendant brought up the four-wheeler incident. Derrick Defendant told Vick, “Don’t ride through my mother’s yard, tearing up the yard” but Vick denied having driven the four-wheeler through the yard. The two men then began fighting with Vick hitting Derrick Defendant four or five times. As a result, Derrick Defendant fell into a newsstand and sustained several cuts to his lip and forehead.

The barber intervened and escorted Vick to the door. As Vick left, he turned to Derrick Defendant and said, “Don’t be here when I get back.” The barber helped Derrick Defendant clean up, and Derrick Defendant drove away in his truck. Derrick Defendant told Vick that he would shoot him if he ever saw him drive through his mother’s yard again.

Meanwhile, Derrick Defendant drove to his fiancé’s apartment and retrieved a gun he had purchased for deer hunting. Derrick Defendant’s fiancé, Alissa Wiggins, attempted to stop Derrick Defendant from leaving, but he took the keys to her car and drove off in her car rather than in his truck.

Derrick Defendant drove in the direction of his mother’s house, taking a route that went past the barber shop. He saw Vick standing by his car in the barber shop parking lot. Vick was holding something that looked like a gun from afar. Derrick Defendant hit his brakes and fired three or four shots at Vick from the car and drove away.

When the Police arrived at the scene of the shooting, Vick was found dead, lying next to his car, holding a cordless drill. Police found a shotgun locked in the trunk of the car. Vick died from a single gunshot wound “to his back.”

Derrick Defendant threw the gun into the woods, tried to hide the vehicle from the police, and fled to his mother’s house. The police arrested him at his mother’s house.

Derrick Defendant told police that he knew Vick has a “pretty bad reputation” in the community and that he “had a bad reputation of toting a gun, and he had once knocked his girlfriend’s teeth out using the gun.” He also knew Vick “ran with bad guys” and had been banned from the State Employees’ Credit Union. Derrick Defendant explained that he was concerned because Vick knew where his mother and children lived, as well as where Derrick Defendant and his girlfriend drove, and he “knew that he had to protect himself and his family if he saw Vick again.” Derrick said that when he drove by the barber shop he thought that Vick was holding a gun and recognized Derrick and the car he was driving, and that he was afraid that Vick would follow
through with his threats from the morning and follow Derrick’s car and shoot him. Derrick said that he fired the gun three times and sped away.

Derrick Defendant was charged with second-degree murder. Derrick Defendant claims that he shot Vick in self-defense. You are the clerk working for the judge who has been assigned the case. Using IRAC format, prepare your analysis for the judge regarding the self-defense claim.
Appendix G Legal Problem Solver Hypo Commonwealth v. Malone

Gary Gunowner was visiting the home of his friend, Valerie Victim, when he began to argue with Valerie’s boyfriend Brad over a game of cards. Gary became so angry at Brad that he walked out of the house to his car, which was parked in front of the house and removed his loaded shotgun from the trunk. Gary walked to the front of the house, pointed the gun toward the front door, and called to Brad to come out and “finish the fight like a man”. Brad stayed inside, but Valerie came outside and stood by the front door. Another friend, Harry Helper, came out of the house and walked toward Gary, trying to calm him down. Harry then tried to take the gun away from Gary. In the scuffle for the gun, the gun fired, striking and killing Valerie.

Discuss the type of homicide Gary can be convicted of using what you know about homicide and Commonwealth vs. Malone.
Appendix H Legal Problem Solver Hypo State v. Norman

Walter Wesler is a plumber who has been suspected by his neighbors of molesting his neighbor Holly Hooper’s son, Sonny. Wesler, Hooper, Sally Shooter, Sally’s husband Fred, and Fred’s brother Frank have all been friends for several years since Hooper and her children moved into the neighborhood.

On Friday, October 16, when Hooper first suspected Wesler had sexually abused her son she called the police to have Wesler arrested. The police refused to arrest Wesler until Monday morning when Hooper was told to go to the police station to give a statement so the police could get a warrant. Hooper was afraid Wesler would try to harm her or her children over the weekend, so she asked Sally, Fred, and Frank to spend the weekend at her home for added protection.

At around 5:00 a.m. on Saturday morning, Fred went to Wesler’s house to bring him to Hooper’s house to resolve their conflict. Wesley entered the house while Frank and Fred stayed outside. Wesley had been drinking alcohol all night long and was visibly intoxicated. While talking to Hooper and Sally, Wesley got angry and threw a beer bottle against the living room wall, narrowly missing hitting Hooper in the head. When Hooper and Sally asked him to leave Hooper’s house, Wesley refused to do so. Wesley’s refusal to leave led to a lot of shouting and confusion. Sally went to the front door to call Fred and Frank to help the women make Wesley leave the house. When Sally turned to reenter the living room, Wesler was standing right behind her. Startled, Sally shot Wesler, killing him instantly. In her statement to the police, Sally said, “It was just a reflex. He was right behind me and I was afraid he would hurt me. I didn’t think about it. I just shot him.”

Using what you learned about self-defense from State v. Norman, what is the likelihood that Sally will be successful raising a self-defense argument?
Appendix I Precedent case: *United States v. Jackson*

On June 19, Burrillville police received a 911 call at approximately 4:30 p.m. from an excited and nervous woman reporting that her son, Danny Defendant, was about to commit a robbery. The Defendant’s mother gave a physical description of him and told police that he planned to rob Sparkles Jewelry store. After receiving the call, Officer Peter Police drove to Sparkles Jewelry store and parked his police car on the street in front of the jewelry store, and stood outside on the sidewalk in his police uniform.

Peter Police waited about ten minutes, when he saw Danny Defendant walking toward him. Peter Police testified that as Defendant walked down the hill, he would have had a clear view of the police vehicle parked in front of the bank (although he appeared to be looking downward). Defendant used a cross walk to cross the street approaching the jewelry store, continued along the sidewalk, and then started to walk towards the side entrance of the jewelry store. When Defendant was several steps away from the side entrance, Peter Police decided to intervene. He approached Defendant, and placed him in handcuffs.

After being arrested, Defendant admitted to Peter Police that he had a fight with his mother, and had left his house saying he was going to rob the jewelry store. He admitted that he had no other business at the jewelry store. He told Peter Police that on the way to the store, he had changed his mind about committing the crime. After ditching the robbery idea, he continued, he had decided to go find his sister at George’s Restaurant, located next to the jewelry store.

After Peter Police arrested Danny Defendant, he took him to the police station and searched him. Scrawled on the envelope in shaky print were the words, “this is a robbery act very careful no tracking devices I have a gun.” The words were difficult to read clearly, it appeared as though the note was written very quickly and with very little thought. Defendant admitted he had written the note. He also admitted he had originally intended to use the note/envelope, and the ski mask, in connection with the robbery. No gun, or weapon of any kind, was found.

You are Danny Defendant’s attorney. Please explain any charges that the Prosecutor might bring and the likelihood that Danny will be convicted under *United States v. Jackson.*
References


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Education

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