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What Is Reading in the Pratice of Law?

WHAT *IS* READING IN THE PRACTICES OF LAW?

Kirk W. Junker*

Abstract:
Law professors offer to teach students something called "thinking like a lawyer." They suggest thereby that legal thought is in some way unique. If it is, through what means is it acquired? By reading the law. And so reading the law must be a different experience than reading other things, as is implied by the admonition that thinking like a lawyer is somehow different than other thinking. In most law school education, reading is practiced as a means to an end—to produce a description of the substance or procedure of a particular area of the law. Too often, it is only in legal research and writing courses that reading is explicitly addressed. Even there, it is most often analyzed only in its role as a counterpart to the goal of writing; of producing tangible text. But although reading is not studied on its own terms, it makes up most of the practice of learning the law and much of the practice of law. When we read in the utilitarian senses of describing substance or procedure or in order to learn to write, we omit the powerful, tacit learning that occurs with this reading—the learning of the legal worldview. This remains true in the practice of law as well, where reading maintains the acquired worldview. This article explores how that worldview seeps silently into the lives of lawyers while they are busy learning to describe and inscribe the law. While social science has much to tell us about the process of reading, we need to turn to the arts to see the worldview that is learned and perpetuated when one learns to read the law.

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* Assistant Professor of Law and Director of International Programs, Duquesne University School of Law, 600 Locust Street, Pittsburgh, Pennsylvania, 15282, telephone + 412 396 1047, facsimile 412 396 4014, e-mail junker@duq.edu. The author would like to thank Dean Donald J. Guter for his generous writing stipend to support the research and writing of this article, Professor Bruce Ledewitz for his review and comments, Professor Saso Georgievski of Sts. Cyril and Methodius University, Skopje, Macedonia for facilities and research support, Mr. Philippe M. Roy for his research assistance and German translation work, Dr. Robert Conrow for discussions and bibliographic suggestions, Ms. Jean McBride for her library research support, Mssrs. Peter Schmid, Avocat à la Cour, Orrick, Paris, France and Raphaël Sergi, Tax Adviser, Hewlett-Packard, Paris, France for their reviews, insights and translation on French legal education, and Ms. Anna Fernqvist for her assistance and insights with Swedish texts.

I. The Occasion—Reading Has a History

Alberto Manguel allows Robert Darnton to begin *A History of Reading* by reminding us that "reading has a history."[1] We may need to be reminded of this because, as Friedrich Nietzsche announced, forgetting may well be a survival device for the human animal.[2] That may explain how we all forget the difficult process of having learned to read at all for the first time.[3] Darnton's observation that reading has a history does help us to realize that reading is not only in the context of cultural history, but in the context of personal history, and in the contexts of religion, race, geography and gender, as well. Therefore "when?" "where?" "how?" and now "why?" are questions that should be asked of reading. The questions can be answered in part through observation and analysis. But we also need theory building.

"What is reading in the practices of law?" may sound initially like a peculiar question. "*How* does one read the law?" would likely sound more common, and in an age of scientific evidence, of course it is. But "how?"—the epistemological question—is not mine. My question is "What *is*?"—a more ontological question.[4] In its *Educating Lawyers* report, the Carnegie Foundation for the Advancement of Teaching introduced seven recommendations for legal education by noting that "legal education needs to be

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[1] Robert Darnton, *What Is the History of Books*?, *in* THE KISS OF LAMOURETTE, (Robert Darnton ed.,1990) (quoted in ROBERTO MANGUEL, A HISTORY OF READING 1 (1996)).

[2] FRIEDRICH NIETZSCHE, ON THE ADVANTAGE AND DISADVANTAGE OF HISTORY FOR LIFE, transl. Peter Preuss (Hackett Publishing Co., Inc., 1980).

[3] If in fact we have learned to read at all—"Grades Rise but Reading Skills Do Not" announced the *New York Times* recently. "The National Assessment of Educational Progress, an exam commonly known as the nation's report card, found that the reading skills of 12th graders tested in 2005 were significantly worse than in 1992, when a comparable test was given, and essentially flat since students previously took the exam in 2002." The cause(s) assigned to this trend "may become clearer in the future." Diana Jean Schemo, *Grades Rise but Reading Skills Do Not*, New York Times, February 23, 2007, at A13.

[4] Of course, it must be admitted that the word "how," alone, is not determinative. Mortimer Adler's famous *How to Read a Book* is not a book of technique only, although teasing and responsive detractors in some ways were: "How to Read Two Books," and "How to Read a Page," for example. .." MORTIMER ADLER AND CHARLES VAN DOREN, HOW TO READ A BOOK

responsive to both the needs of our time and recent knowledge about how learning takes place . . .."[5] When one considers that legal education demands that a student read thousands of pages of text, we clearly ought to be responsive to recent learning about how legal reading takes place. The latest Carnegie Foundation Report contextualizes legal education by noting that if legal education were serious about serving clients and a solid ethical grounding, then in pursuit of such a goal, law schools could also benefit from, among other things, "research on learning."[6] Reading practices used by students in reading the law infrequently make use of that which the natural sciences, social sciences or the arts can tell us about reading. "The case-dialogue method drills students, over and over, in first abstracting from natural texts, then operating upon the 'facts' so abstracted according to specified rules and procedures, and drawing conclusions based upon that meaning."[7] In legal education, when we teach legal research and writing, we treat the research—that is, the reading—as though it is only prolegomena to the writing. "In general, law school professors do not consider reading to be an important variable contributing to differences in law school performance"[8]

In legal practice—especially when it comes to billable hours—too often we maintain that attitude when we emphasize speaking and writing and treat reading the documents produced in discovery or the contract draft or the brief of a party opponent as somehow less productive time than time spent writing. This might be explainable because of the demonstrable nature of work product that is the written text. Likewise

[5] William Sullivan, et al., *Educating Lawyers: Preparation for the Profession of Law*, The Carnegie Foundation for the Advancement of Teaching, 2007, at 8.
[6] *Id*. at 4.
[7] *Id*. at 6.
[8] Dorothy H. Deegan, *Exploring Individual Differences Among Novices Reading in a Specific Domain: The Case of Law*, 30 Reading Res. Z. 154, 157-58 (1995).

legal academics get tenure and recognition for what we have written, not for what we have read.

By treating reading this way in legal education, we tacitly suggest not only that the reading that one does in legal practice has utilitarian value only, but also that it is an already-known skill. If it is a skill already known, where does the student learn it? Undergraduate reading practices,[9] reading the newspaper,[10] e-mail correspondence, blogs, web-sites,[11] novels,[12] and magazines. Yet, "[t]here is no doubt that reading the law, indeed reading any novel discourse, provides challenges [to the reader] previously unmet. This is all the more reason to allow challenges to be made public. . . . Keeping the subject of reading closed at the level of higher education [might suggest that] there is nothing worth talking about."[13] It would seem absurd, would it not, to suggest that one could read a work in philosophy with the same practices that one reads e-mail correspondence from friends? Likewise, a person knowledgeable about statistics would read a statistics text using different processes than someone who does not have a background in statistics.[14] So why should we assume differently for reading the law? Legal texts too, are different. "Legal texts can be considered a genre, and success with

[9] Education scholar Peter Dewitz points out that "Even after four years of undergraduate education, often from distinguished universities and brandishing strong grade point averages and high LSAT scores, first year law students are [reading] novices." Peter Dewitz, *Reading Law: Three Suggestions for Legal Education*, 27 U. Tol. L. Rev. 661 (1995-1996)

[10] Marshall McLuhan is often quoted as having said that we do not read the newspaper, but rather slip into it like a warm bath (although none of the sources consulted have cited where or when he said it.)

[11] Nicholas C. Burbules, *Rhetorics of the Web: Hyperreading and Critical Literacy*, PAGE TO SCREEN: TAKING LITERACY INTO THE ELECTRONIC ERA 102 (Ilana Snyder ed., 1998).

[12] Mortimer Adler called the difference that between "expository" and "imaginative" literature, and said "Expository books *try to convey knowledge* . . .. Imaginative ones *try to communicate an experience* itself . . .." Adler, *supra*, 205.

[13] Deegan, *supra* note 8, at 168.

[14] MICHAEL PRESSLEY & PETER AFFLERBACH, VERBAL PROTOCOLS OF READING: THE NATURE OF CONSTRUCTIVELY RESPONSIVE READING 12 (Lawrence Earlbaum Associates, 1995).

legal texts is based upon some general reading skills, as well as specific knowledge of that genre."[15]

"A common-sense notion that most educated adults generally read the same way pervades both lay and professional communities, despite clear evidence that differences in reading achievement levels increase with years of schooling."[16] This is in fact how education turns novices into experts. In the social scientific studies of reading, all sorts of educational distinctions cascade from the distinction of reading novices from reading experts. When it comes to the study of reading, researchers make clear distinctions between the reading practices of novices and experts in any given field.

Even within the law, reading practices differ among substantive areas of the law. "The process of reading differs depending on what you are reading. Reading contracts, most would concede, is not quite like reading anything else."[17] Furthermore, it is not just the genre that changes reading as we shift from other areas outside of the law to reading inside the law, or as we change from one substantive area of the law to another. The medium also greatly affects our reading: "The pragmatics of reading [on the web]—the speed of our reading, when we pause, how long we can concentrate, how often we skip over material or jump back and reread what we have read before, and so forth—are clearly going to be different, and these differences affect how we interpret, understand, and remember what we read."[18] Thus, when it comes to reading the law, a field of study

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[15] Dewitz, *supra* note 9, at 657 (*citing* James F. Stratman**,** *The Emergence of Legal Composition as a Field of Inquiry: Evaluating the Prospects*, 60 Rev. Educ. Res. 153 n. 1 (1990)).
[16] Dorothy H. Deegan, *supra* note 8, at 154 **(***citing* M.A. JUST & P.A. CARPENTER**,** THE PSYCHOLOGY OF READING AND LANGAUGE COMPREHENSION **(**1987); J.I. GOODLAD, SCHOOL, CURRICULUM AND THE INDIVIDUAL **(**1966**)).**
[17] Scott J. Burnham, *Critical Reading of Contracts*, 23 Legal Stud. F. 391, 391 (1999).
[18] Burbules, *supra* note 11, at 102 (*citing* B.C. Bruce, *Twenty-first Century Literacy*, Technical Report No. 624, Center for the Study of Reading, University of Illinois, Urbana/Champaign, (1995). Marshall

and profession in which the very substance is words, we dare not dance lightly over what new or different reading practices are required, only to get right to the production of our own texts.

Returning to Darnton's opening, to say that reading has a history is to say that learning to read and the practices of reading have contexts, one of which is history, both for entire cultures and for individuals; for law and for lawyers. The goal of this text is to explore what it is to learn to read the law—however implicitly—and what it is to continue to read the law; the ramifications of those practices, and what might be gained or lost if we change our reading practices. Should the reader be persuaded that the gains outweigh the losses, it will remain for the reader to determine how to change our reading. All of this here is just to identify the occasion for examining legal reading practices.

Does one study reading as a natural science, a social science or an art? A survey of the amount of research conducted would suggest that most often, reading has been studied as a social science. Before reviewing what social science offers, one might mention natural science considerations, although that is not the focus of this article.

II. Reading, As Understood Through Natural Sciences

In 1908, Edmund B. Huey "suggested that the human achievement of reading has few if any equals.[19] Our capacity to read can, in some sense, surely be considered as an animal function. In opposition to those who would distinguish the human from other

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McLuhan famously addressed this phenomenon in his book: THE MEDIUM IS THE MESSAGE: AN INVENTORY OF EFFECTS (1967).

[19] EDMUND B. HUEY, THE PSYCHOLOGY AND PEDAGOGY OF READING (1908) (*cited in* PRESSLEY & AFFLERBACH, at 2).

animals through the use of tools or the opposable thumb, Kenneth Burke later announced, as part of his "Definition of Man," that "man is the symbol-using animal."[20]

But there are also those who would perhaps prefer to reduce reading, if not all of human symbol-using, thinking and abstract behavior to the biochemistry and biophysics of the animal.[21] Without reducing reading to chemistry, but nevertheless being mindful that we are animals, there remains of course much to be learned from the natural sciences about what reading is in the practice of law.

> Legal theories . . . need to achieve several goals if future technological and social challenges are to be met. First, theories of law, justice, and human behavior should avoid the kind of oversimplification that can facilitate the construction of a pseudoscientific ideology. . . . A legal theory should not make assumptions about human nature that are contradicted by what we know concerning hominid evolution, social organisation, or neurophysiology.[22]

Nor should a theory of reading the law make such assumptions. While one may apply natural science, such as neuropsychology, to reading or even to reading the law, more social science has been applied explicitly to reading in general, and to reading the law. Therefore the remainder of this text will be looking to the explicit applications in the social sciences, as well as adding ideas from the arts, rather than speculate on potential applications from the natural sciences.

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[20] Kenneth Burke, *Definition of Man, in* PERMANENCE AND CHANGE (1935).

[21] *See, e.g.* STEPHEN PINKER, HOW THE MIND WORKS (1997). "Although Pinker does not aim to derive psychology from physics, he shares the general philosophical outlook behind such aims. . . . [*How the Mind Works*] is massively and uncompromisingly reductive." John Dupre, *Philosophy of Science*, vol. 66, no. 3, September 1999, at 489.

[22] D. ELLIOTT, THE SENSE OF JUSTICE: BIOLOGICAL FOUNDATIONS OF LAW 305 (R. D. Masters & M. Gruter, eds., 1992) (*quoted in* Hugh Brayne, *Learning to Think Like a Lawyer—One Law Teacher's Exploration of the Relevance of Evolutionary Psychology*, *in* 9 International Journal of the Legal Profession 283, 303 (2002)).

III. **Reading, As Understood Through Social Sciences**

The social sciences, like the natural sciences, offer insights into reading, and more specifically, into reading in the practices of law. Moreover, in their study of reading the law as human behavior, the social sciences specifically address how teachers, students and practitioners in the law may modify their reading behaviors in order to achieve articulated goals.[23] While anthropology, sociology or political science might be applied to the study of reading, those who publish in the journals explicitly related to reading are most often either education specialists or psychologists. This observation speaks directly to the practice of law, because "professions can be distinguished by the nature and the structure of their discursive field."[24] In this section, several of the theories of social scientists will be introduced. Later in comparison with contributions from the arts, the application and conclusions of the social scientific theories will be discussed.

Educationalists and psychologists often concentrate on reading strategies. Strategic reading means that a reader has expectations and a plan, may skim or outline the text, go immediately to the conclusion or any of many other strategies in the construction of meaning of a text. Key ideas and theories that result from studying reading strategies are at least five: metacognitive theory,[25] schema theory,[26] discourse comprehension

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[23] My literature review is meant to be representative based upon the fact that the social science studies selected reference, cross reference, or build upon one another; none has refuted another, and the methods are sufficiently similar as to be comparing apples with apples.

[24] M.S. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 7 (1977).

[25] *See* Mary A. Lundeberg, *Metagognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 Reading Res. Q. 407, 417-432; PRESSLEY AND AFFLERBACH *supra* note 14, (*citing* L. Baker and A. L. Brown, *Metacognitive Skills in Reading*, *in* HANDBOOK OF READING RESEARCH 353-394 (1984)).

[26] PRESSLEY & AFFLERBACH, *supra* note 14, at 87 (*citing* R. C. ANDERSON AND PEARSON, A SCHEMA-THEORETIC VIEW OF BASIC PROCESSES IN READING COMPREHENSION (1984)).

theory,[27] socio-cultural theories[28] and constructive responsivity theory.[29] Even the social science aspects of rhetoric, if rhetoric is understood as the study and practice of composition, might also be included.[30]

Within those theories, "much of the preliminary research on differences in adult readers has compared cognitive[31] and affective[32] variables between adult readers classified as better or poorer. The theories that have been most often applied to specific professions are verbal protocols,[33] including concurrent protocols,[34] some of which have been situated in specific professions such as biology,[35] engineering,[36] social science,[37]

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[27] *Id*. at 92. (*citing* T.A. VAN DIJK AND W. KINTSCH, STRATEGIES OF DISCOURSE COMPREHENSION (1983)).
[28] Socio-cultural theories include a variety of work by a variety of researchers. *See also* PRESSLEY & AFFLERBACH, *supra* note 14, at 95-96, but of direct relevance to reading the law is that of Stanley Fish. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (Harvard University Press, 1980).
[29] PRESSLEY AND AFFLERBACH, *supra* note 14, at 87.
[30] Composition teachers in law, as in English departments, often tend to skew communication disciplines, such as rhetoric, to feature mostly only writing. *See* Berger, *infra*, or Kunz, *infra*, for examples.
[31] *See, e.g.,* L.B. Gambrell and B.S. Heatherington, *Adult Disabled Readers' Metacognitive Awareness About Reading Tasks and Strategies*, Journal of Reading Behavior 13, 215-222 (1981); V.C. Hare, *Readers' Problem Identification and Problem Solving Strategies for High- and Low-Knowledge Articles,* Journal of Reading Behavior 13, 359-365 (1981); N.J. Kaufman, A.L. Randlett & J. Price, *Awareness of the Use of Comprehension Strategies in Good and Poor College Readers***,** Reading Psychology, 6, 1-11 (1985)**;** S.B.Kleitzien, *Strategy Use by Good and Poor Comprehenders Reading Expository Text of Differing Levels*, Reading Researc Quarterly, 26, 67-86 (1991)**,** C. Spring, *Comprehension and Study Strategies Reported by University Freshmen Who are Good and Poor Readers*, Instructional Science, 14, 157-167 (1985) (*cited in* Deegan, *supra* note 8, at 154).
[32] P.M. Fischer & H. Mandel, Learner*, Text Variables, and the Control of Comprehension and Recall*, *in* H. LEARNING AND COMPREHENSION OF TEXT 213-254 (Mandl, N. L. Stein, & T. Trabasso, eds.) (Hillsdale, NJ: Earlbaum, 1984) (*cited in* Deegan, *supra* note 8, at 154).
[33] *See, e.g*., PRESSLEY & AFFLERBACH, *supra* note 14.
[34] *See, e.g*., Scott J. Burnham, *supra* note 17.
[35] D.Charney, *A Study in Rhetorical Reading: How Evolutionists Read "The Spandrels of Marco" in* UNDERSTANDING SCIENTIFIC PROSE 203-231 (J. Selzer, ed., 1993) (*cited in* Deegan, *supra* note 8, at 157).
[36] C. Geisler, *The Thread of Narrative in Domain Knowledge: Exploring the Professionalization of Academic Literacy Through Expert-Novice Contrasts*, Paper Presented At The Annual Meeting Of The American Educational Research Association, Chicago, IL, (April 1991) (*cited in* Deegan, *supra* note 8, at 157).
[37] D. Wyatt, M. Pressley, P.B. El-Dinary, S. Stein, P.Evans, and R. Brown, *Reading Behaviors of Domain Experts Processing Professional Articles That Are Personally Important To Them: The Critical Role Of Worth and Credibility Monitoring*, Learning and Individual Differences 5, 49-72 (1993) (*cited in* Deegan, *supra* note 8, at 157).

and law.[38] From these theories, it has been noted that "verbal protocols are probably the best tool, albeit an unrefined tool, for investigating what these authors have identified as the meaning-making, monitoring, and evaluating processes that constitute acts of strategic reading."[39] Analyses of strategic reading include domain theory[40] and analyzing distinctions between expert and novice reading practices.[41] In domain theory, researchers observe and record differences relative to reader expertise defined as differential domain knowledge,[42] or degree of domain knowledge.[43]

In addition to the above taxonomy, the introduction of protocol analysis offered by cognitive psychologists Pressley and Afflerbach provides a helpful historical survey of some of the relevant social science. According to Pressley and Afflerbach, the standard reference book for protocol analysis is Ericsson and Simon's *Protocol Analysis: Verbal Reports as Data*, describing and explaining think-aloud methods, protocol analyses, their uses and misuses.[44] Ericsson and Simon's "most important conclusion is that people can self-report the contents of their short term meaning"[45] after reading a text. Pressley and Afflerbach's protocol analysis uses verbal reports of subjects (also known as "think-aloud studies"), produced as the subjects read, as the data for psychological interpretation.[46] (They go back so far as to suggest that because Plato and Aristotle encouraged people to

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[38] *See generally* Lundeberg, *supra* note 25; James F. Stratman**,** *The Emergence of Legal Composition as a Field of Inquiry: Evaluating the Prospects*, 60 Rev. Educ. Res. 153 **(**1990) (*cited in* Deegan, *supra* note 8, at 157).
[39] Deegan, *supra* note 8, at 157.
[40] *See* Deegan *supra* note 8, or Dewitz *supra* note 9, for examples.
[41] *See* McKinney, Dewitz, or Burnham for examples.
[42] *See* PRESSLEY & AFFLERBACH, *supra* note 14; Bereiter & Bird, 1985, as cited by Deegan, *supra* note 8, 154.
[43] *See* Charney, *supra* note 36; Barbara Graves & Carl H. Fredericksen, *Literary Expertise in the Description of Fictional Narrative*, 20 Poetics 1, 18 (1991); Christina Haas & Linda, *Rhetorical Reading Strategies and the Construction of Meaning*, 39 C. Comp. & Comm. 167 (1988); Lundeberg, *supra* note 25 (*cited by* Deegan, *supra* note 8, at 154).
[44] PRESSLEY & AFFLERBACH, *supra* note 14, at 5.
[45] *Id*. at 7.
[46] *Id*. at 1.

talk about what was on their minds, it may be said that think-aloud studies were extant even then.)[47] Protocol analysis as well as the think-aloud studies upon which the protocol analyses are based, were used throughout the twentieth century to report on the processing of diverse tasks, including physics problem solving,[48] student cognitions during instruction[49] and expert and novice reading of legal texts.[50]

According to Pressley and Afflerbach, by the middle of the twentieth century, confidence in protocol analysis declined, as introspection (a tendency of think-aloud subjects when describing more than short term memory) was challenged by behaviorists, whose theories mostly ignored cognition.[51] Later however, with a renewed interest in reading, we began

> to make explicit what was previously implicit. In critical reading, making the implicit explicit has been called a 'concurrent protocol.' In the protocol, we try to make explicit the steps we go through while undertaking a task, such as reading a contract. Once we have made those steps, they can develop expertise in performing the task.[52]

Specifically applied to legal reading, one can visit several examples.

> Metacognitive research, which is research concerned with the process of thinking, falls into two categories: regulation of cognition and knowledge about cognition. Regulation of cognition involves consciously manipulating our cognitive strategies: planning, monitoring, and checking our thinking processes. Knowledge about cognition means being aware of how we regulate our cognitive strategies: that is, thinking about our thinking.[53]

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[47] *Id*. at 1 (*citing* E. Boring, *History of Introspection*, Psychological Bulletin 50, 169-189 (1953) **(***citing* R. Pritchard, *The Evolution of Introspective Methodology and Its Implications for Studying the Reading process,* Reading Psychology: An International Quarterly 11, 1-13 (1990)).
[48] Simon and Simon (1978) (*cited in* PRESSLEY & AFFLERBACH, *supra* note 14, at 4).
[49] Richard C. Anderson & P. David Pearson, A Schema-Theoretic View of Basic Processes in Reading Comprehension, *in* 1 HANDBOOK OF READING RESEARCH (P. Pearson et al., eds., 1984) (*cited in* PRESSLEY & AFFLERBACH, *supra* note 14, at 4).
[50] *See* Burnham, *supra* note 17, Deegan, *supra* note 8, and Lundeberg, *supra* note 25.
[51] PRESSLEY & AFFLERBACH, *supra* note 14, at 4.
[52] Burnham, *supra* note 17, at 391. Burnham then offers some "techniques" for developing expertise in the reading of contracts.
[53] Lundeberg, *supra* note 25, at 408 (*citing* Brown et al., (1982)).

Cognitive problem-solving research, for example, has compared reading strategies used by expert readers versus novice readers within several disciplines including the study and practice of law, where Mary A. Lundeberg has compared the reading practices of beginning law students with those of advanced law students, law professors and practicing lawyers.[54] These, she divided into experts and novices where legal experts brought to case reading their knowledge of the text type, and knowledge of case and case analysis strategies. When reading and discussing legal texts, they behaved in some ways like expert readers. In contrast, the legal novices, who lacked knowledge of the law, legal text type and case analysis strategies, sometimes behaved like good readers, and sometimes behaved like poor readers.[55]

Lundeberg's metacognitive study concludes that "legal reasoning in cases is often ill-structured because it is based on precedent and in the judge's interpretation of the similarity or dissimilarity of the facts given in previous cases compared to those in the case at hand."[56] Lundeberg concludes that one type or another of direct instruction is more useful for novice learning, despite the fact that "some professors believe that students must flounder and experience pain to learn to think like lawyers. *These beliefs are not grounded in empirical evidence*."[57] According to Lundeberg, "Fredericksen summarizes this debate about whether processes should be taught explicitly or should be learned by discovery."[58] He cites Doyle, who suggests that for certain groups, such as novices in a field of expertise, "direct instruction is more appropriate, whereas indirect

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[54] *Id*. at 409 (*citing* Johnson, (1984)).
[55] Lundeberg, *supra* note 25, at 417. (citations omitted).
[56] *Id*. at 428.
[57] *Id*. at 428. (emphasis added) *citing* D. P. Bryden, *What Do Law Students Learn? A Pilot Study*. 34 J. LEGAL EDUC. 479-506 (1984).
[58] Norman N. Frederiksen, *Implications of Cognitive Theory for Instruction in Problem Solving*, 54 Rev Educ. Res. 363, 392 (1984) (*quoted in* Lundeberg, *supra* note 25, at 417**).**

instruction is more important after basic knowledge structures and skills have been acquired."[59] For reading the law, this would strongly suggest that first year students would benefit more from direct instruction, and only thereafter benefit from indirect instruction, such as the Socratic method of interrogating case readings.

The many articles and books that tell the law student "how to read a case" treat the process as one of what reading scholars would call "decoding" a structure (facts, issue, rule, application, conclusion) to produce a predictable and replicable outcome, thereby making law a science. This process moves the reader from decoding to text structure knowledge, but ignores domain knowledge and strategic knowledge. "The simple view of reading argues that reading is the product of decoding and comprehension."[60] According to reading scholars, all three reading knowledges are necessary for reading comprehension.[61] In general,

> decoding a word . . . does not mean that the reader has access to its meaning, and legal texts are full of new terms which represent new concepts (e.g. situs, *in intinere*) and new meanings for old labels. Reading comprehension is based on decoding ability, but requires three additional important types of knowledge—domain knowledge, text structure knowledge, and strategic knowledge.[62]

So what must be done to include domain knowledge and strategic knowledge? Ericsson and Simon's view from social science was that "conscious processing besides decoding is not necessary in order for readers to understand easy texts. Active and strategic efforts at meaning construction only occur in reaction to more challenging

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[59] *Id*.
[60] Peter Dewitz, *Reading Law: Three Suggestions for Legal Education*, 27 U. Tol. L. Rev. 657 (1995-1996) (*citing* Philip B. Gough & William E. Tunmer, *Reading and Reading Disability*, 7 Reading & Special Educ. 6, 7 (1986)).
[61] *Id*.
[62] *Id*.

texts."[63] "Studies in areas other than law document that differences in reading comprehension among adult readers can be explained by differences in domain knowledge. To comprehend legal text requires knowledge of case law, jurisprudence, legal theory, and so forth."[64] This suggests that direct instruction in the domain of law is necessary. First year students, who may have a prior degree in any discipline, are not well-suited to learning the domain of law largely by reading excerpts from cases selected from a variety of jurisdictions.

Like asking "why read?" the question "What is it to read?" redirects thinking away from the more common question of "how?" When we explicitly address reading in the law, it would seem that we assume that like most students' answer to the question, we too at least imply that a lawyer should read to get information. Educationalist Peter Dewitz has noted pointedly that "after four years of undergraduate education, often from distinguished universities and brandishing strong grade point averages and high LSAT scores, first year [law] students are novices [when it comes to reading the law.]"[65] If a lawyer regards reading as a work task, treating text as something to be "ploughed through," how does that attitude toward reading affect his or her understanding of what law is, and consequently, his or her practices of law? I now turn to the remainder of the types of knowledge that have been catalogued, and their connections to the social sciences.

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[63] PRESSLEY & AFFLERBACH, *supra* note 14, at 14.
[64] Dewitz, *supra*, note 9, at 658 (*citing* Peter P. Afflerbach, *The Influence of Prior Knowledge on Expert Readers: Main Idea Construction Strategies,* 25 *Reading Res. Q*. 31, 35 (1990)); Barbara Graves & Carl H. Fredericksen, *Literary Expertise in the Description of Fictional Narrative*, 20 *Poetics* 1, 18 (1991).
[65] *Id*. at 661.

The second type of knowledge necessary for reading comprehension is an understanding of text structure.[66] "The more a reader knows about the structure or organization of the text, the more smoothly comprehension can proceed."[67] "Legal cases and legal briefs present new legal structures and a new challenge for just-graduated college students who have spent four years reading narratives or expository text structures. Legal cases have their own unique structure . . .."[68] Therefore, textual analysis beyond the distillation of rules of law is needed if a student is to learn about the law in its social and cultural context.

> The third type of knowledge necessary for reading comprehension is called "strategic knowledge." There are three broad categories of strategies that readers employ as they move through a text—problem formation strategies, default strategies, default strategies to set expectations for a text. Readers use problem formation strategies to set expectations for a text. They ask themselves questions, make predictions, and hypothesize about the developing meaning. . . . Default strategies represent summarizing, paraphrasing, retelling that readers employ to build an on-going sense of the text. For most of our reading we are building our own representation of the text and we use both our existing schema and the ideas presented by the author to do so.[69]

Strategic knowledge means that reading is no longer passively sounding out each word, one after the other, in the way that a beginning reader does, with no sense of direction beyond the present word. Rather, a "reading strategy is a set of mental processes or tactics used by a reader to achieve a purpose."[70] "All readers use strategies; the use of strategies depends on the difficulty of the reading material, the maturity of the

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[66] *Id*. at 658, with n. 5.
[67] Dewitz, *supra* note 9, at 658 (*citing* n. 6).
[68] *Id*. at 658.
[69] Dewitz, *supra* note 9, at 659-660 (*citing* Deegan, *supra* note 8; PRESSLEY & AFFLERBACH, *supra* note 14; Janice A. Dole et al., *Reading Comprehension Instruction,* 61 Rev Educ Res. 239, 242-49 (1991); Rand J. Spiro, *Constructive Processes in Prose Comprehension and Recall*, *in* THEORETICAL ISSUES IN READING COMPREHENSION: PERSPECTIVES FROM COGNITIVE PSYCHOLOGY, LINGUISTICS, ARTIFICIAL INTELLIGENCE, AND EDUCATION 245, 255 (R.J. Spiro et al. eds., 1980)).
[70] *Id*. at 659 (*citing* Scott G. Paris et al., *The Development of Strategic Readers*, in 2 HANDBOOK OF READING RESEARCH 609, 610-11 (Rebecca Barr et al. eds., 1991).

reader, and the [social] context of the reading."[71] "For most of reading, strategies are used in a relatively unconscious manner, yet reading difficult material often makes these strategies conscious and intentional."[72] While strategies remain flexible,[73] according to Peter Dewitz, readers can generally be said to use three broad categories of strategies: problem-formation strategies, default strategies, and rhetorical strategies. The impacts of the strategy, and consequently the analysis of a strategy, are considerable. For example, "[t]he use of problem-formation strategies was found to be a better predictor of first year grades in law school than LSAT scores or a student's undergraduate grade point average."[74] That point recalls the research that finds that "novices in a field show greater growth in learning when knowledge and strategies are directly taught rather than when students are encouraged to discover them on their own."[75]

The social sciences, especially applied psychology, though very helpful in our understanding of what it is to read in the practices of law, nevertheless remain focused upon questions of "how"? Pressley and Afflerbach admit that even protocol analysis for example has constraints. "When a subject provides verbal reports, there is the built-in language variation that is part of the individual's personality and way of interacting with the world. When a researcher attempts to analyze the verbal report, a separate worldview, vocabulary, and set of inferencing processes is put into action."[76] The development, transfer and maintenance of that worldview is of great interest to the study

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[71] *Id*. at 660.
[72] Dewitz, *supra* note 9 (*citing* S.B. Kletzien, *Strategy Use by Good and Poor Comprehenders Reading Expository Text of Differing Levels,* Reading Research Quarterly, 26 (1991)).
[73] Dewitz, *supra* note 9, at 659, citing Michael Pressley et al., *Strategies That Improve Children's Memory and Comprehension of Text*, 90 ELEMENTARY SCH. J. 3, 3-32 (1989).
[74] Dewitz, *supra*, note 9, at 663 (*citing* Dorothy H. Deegan, *Exploring Individual Differences Among Novices Reading in a Specific Domain: The Case of Law*, 30 Reading Res. Z. 154, 166 (1995)).
[75] *Id*. at 668 (*citing* Janice A. Dole et al., *Reading Comprehension Instruction*, 61 Rev Educ. Res. 239, 249-255 (1991)).
[76] PRESSLEY & AFFLERBACH, *supra* note 14, at 2.

of reading in the law. While natural science got this discussion started, and social science developed the notions of what it is to read the law, to study the development, transfer and maintenance of the worldview to which Pressley and Afflerbach refer, one must therefore consider reading as it is understood through the arts. With these and other constraints in mind, what follows are some examples of what we can learn about reading the law from the tradition of the arts.

IV. Reading As Understood Through the Arts

A study of what it is to read through the arts helps to find the "Trojan horses" of worldview that come along with our reading practices. Often, these hidden values and ideas resist analyses that ask how we know, and which can only be found when asking what we know or why we know it.

> To nurse that spark, common to the king, the sage, the poorest child—to fan, to draw up to a flame, to 'educate' *What Is* –to recognize that it is divine, yet frail, tender, sometimes easily tired, easily quenched under piles of booklearning—to let it run at play very often, even more often to let it rest in what Wordsworth calls "a wise passiveness," passive—to use a simile of Coventry Patmore—as a photographic plate which finds stars that no telescope can discover, simply by waiting with its face turned upward—to mother it, in short, as wise mothers do their children—this is what I mean by the Art of Reading.[77]

In what ways might we understand reading through the arts? First, reading may be considered an art itself. In 1916, Sir Arthur Quiller-Couch, Professor of English literature at the University of Cambridge, delivered a series of twelve lectures to those men fortunate enough to be in lecture theaters at Cambridge and not in the theater of war on the continent. It should be noted that these lectures, with the surprising title of "The

[77] ARTHUR QUILLER-COUCH, ON THE ART OF READING 3 (1920).

Art of Reading," were delivered only after twelve lectures entitled "The Art of Writing" had been previously delivered by Quiller-Couch to a similar audience. According to Quiller-Couch, those lectures on writing "provoked another Professor (emeritus, learned, sagacious, venerable) to retort that the true business of a Chair such as this is to instruct young men how to read rather than how to write. "Well be it so," responded Quiller Couch, "I accept the challenge."[78] Quiller-Couch does more than help to understand the art of reading by instructing university students how to read. He addresses the art of reading by asking "What is?"

Quiller-Couch's interest is in reading as an art, not reading understood through the arts. One can address the occasion of Quiller-Couch's instruction by returning to the Recalling the Carnegie Foundation Report, the first recommendation for legal education of the seven offered is that "law schools should offer an integrated, three part curriculum [including] (3) exploration and assumption of the identity, values and dispositions consonant with the fundamental purposes of the legal profession."[79] To do so, we need to know what they are; in short, what the worldview of a lawyer is and how legal education contributes to that. An example from contracts might help.

Scott L. Burnham notes that when we read cases, for example, "we implicitly see the legal world from the perspective of litigation. A few days into law school, lawyerlings think any problem is solved by a lawsuit."[80] No one told the novice students that the selection of the reading material alone—cases—was already a value choice, destined to guide the worldview of the law. Quiller-Couch pauses at one point in a 1916 lecture, after discussing the pruning effect of the fires at the library of Alexandria, to say

[78] *Id*. at 9.
[79] Sullivan, *supra* note 5, at 8.
[80] Burnham, *supra* note 17, 391-92.

"that to read all the books that have been written—in short to keep pace with those that are being written—is starkly impossible, and (as Aristotle would say) about what is impossible one does not argue. We *must* select."[81] Nor did anyone tell the novice students that by reading cases, they were being trained that this is how problems are solved, how lawyers and judges behave, and how lawyers make these meanings through texts. And a final "problem with reading cases is that while one of our goals is to prepare our students to be lawyers, there are no lawyers in the cases.[82] Burnham specifically then notes that if instead we were to read contracts in the first year contracts class, the litigation worldview would change.[83]

> Contracts is not a litigation course but a planning course, a preventive law course. The legal reasoning process used in planning is the reverse of that used in the case method. In cases, the facts are a given and their legal significance is a variable. In planning, the desired outcome is a given and the facts that will best produce it are a variable.[84]

Burnham speculates that we force our study of contracts to the Procrustean bed of the litigation worldview by teaching the law of contracts through reading litigation cases about contracts, and not reading contracts themselves.

Yet, "in an upper-level drafting course, hours and hours of instruction on contract drafting skills make only a small dent in . . . sub-par reading skills,"[85] observes Christina Kunz, based upon her experience in teaching upper level courses that do focus upon the drafting of contracts. She notes that "Before students take a contract drafting course, they need to gain competency in reading and understating contracts at a macro level, as well as

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[81] QUILLER-COUCH, *supra* note 77, at 26.
[82] Burnham, *supra* note 17, at 391.
[83] *Id*.
[84] *Id*. at 391, 392 (*citing* LOUIS M. BROWN & EDWARD A. DAUER, PLANNING BY LAWYERS 270 (1978)).
[85] Christina L. Kunz, *Teaching First-Year Contracts Students How to Read and Edit Contract Clauses*, 34 Toledo Law Review, 705, 706 (2003).

reading and understanding clauses at a micro level. This competency to read contracts accurately seems like an important enough skill to merit instruction in a first year Contracts course, rather than reserving it for only the select few students who choose to take a contract drafting course as an elective."[86] Contracts is just one example. It is cases and the case method that dominates what it is, as law students, to read the law.

A. λόγος Blocks: An Inherent Historical Connection of Law to Language

The above example serves only as a heuristic transition to the focus upon the arts. What remains are examples from several different arts, arranged chronologically. This focus is upon the seven arts that liberated one from manual labor, found directly in, or arising from, the ancient Greek trivium or quadrivium first referred to as such by Boethius in the sixth century. The trivium consisted of the disciplines of grammar, logic and rhtetoric, while the quadrivium consisted of the disciplines of arithmetic, geometry, music, and astronomy. As Linda Ardito explains:

> The disciplines of the Quadrivium, together with those of the Trivium, came to be known collectively as the "Seven Liberal Arts," from the Latin "*artes liberales*," or "arts of a free man." This notion has its roots in the ancient Greek distinction between "liberal" and "vulgar" arts. Culture had played a vital role in ensuring that these would become art's most popular classifications. "More than any other ancient classification [that of 'liberal' and 'vulgar'] was dependent on social conditions in Greece. It was based on the fact that certain arts require physical effort from which others are free…It was the expression of an aristocratic regime and of the Greek contempt for physical work and preferences for activities of the mind. The liberal or intellectual arts were considered not only a distinct but also a superior group.[87]

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[86] *Id*.
[87] Linda Ardito, *Liberal Education in Greece*, *in* GREEK PHILOSOPHY AND THE FINE ARTS 210-217 (Konstantine Boudouris, ed., Athens: Ionia Publications 2007) (*citing* W. Tatarkiewicz, *Classification of the Arts*, *in* DICTIONARY OF THE HISTORY OF IDEAS: STUDIES OF SELECTED PIVOTAL IDEAS I: 457, 4 Vols. (1973).

The first example is based upon the philologic practice of etymologic research. Building from the work of André Magdelain,[88] who in turn had adopted the etymology of the Latin word *lex* that was proposed by Michel Bréal and Franz Skutsch, Jesper Svenbro finds an inherent relation between λόγος (*lógos*) and ηόμος (*nómos*). Svenbro finds that the relation suggests that law, like reading, is an act of distribution or a diffusion of words in its most basic, physical sense.[89] According to Svenbro, "The word *nómos* means not only 'musical diffusion' or 'melody,' but also 'distribution of words.' . . . How can we explain this transition from 'vocal distribution,' which is not dependent upon writing (as reading is), to the kind of 'distribution' in the sense of 'reading' that the verb *némein* suggests?"[90] Svenbro concludes his discussion of "Nómos, Exegesis, Reading" by stating that

> The notion of an oral distribution which is the fundamental meaning of *nómos*, corresponds to that of the 'oral distributor' that is implied by *exegetés*. The *nómos*, in the sense of reader, complements the *nómos*, in the sense of 'reading.' That profound complementarity, which is anything but gratuitous, is symptomatic of the way in which Greek culture developed a conception of law inseparable from its conception of reading, both of which set the very highest value upon the word spoken aloud.[91]

Here, one can see perhaps the strongest connection imaginable between reading and the law—they arise from the same words! Reading, and in particular, reading the law, not only accomplishes the pedestrian task of informing the reader about the

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[88] ANDRE MAGDELAIN, LA LOI A ROME (Paris, 1978).
[89] JESPER SVENBRO, PHRASIKLEIA: AN ANTHROPOLOGY OF READING IN ANCIENT GREECE 109 (Janet Lloyd, transl., 1993).
[90] *Id*. at 114.
[91] *Id*. at 122. Exegesis, in turn, became the fourth stage of learning to read, called "*sententia*" (various opinions of approved commentators on the meaning of a text are discussed), after one had first learned *lectio* (a grammatical analysis), *littera* (a literal sense of the text), and *sensus* (the meaning of a text according to different established interpretations.) MANGUEL, *supra* note 1, at 77.

substance and procedure of the law, but also develops, guides and shapes the reader's worldview of the law because law and reading are inherently related.[92]

A second example in the tradition of the arts comes from religious studies, where one may understand the shift from novice to expert reader, as identified by social scientists above, but treated in a different way: "In every literate society, learning to read is something of an initiation, a ritualized passage out of state of dependency and rudimentary communication. The child learning to read is admitted into the communal memory by way of books, and thereby becomes acquainted with a common past which he or she renews, to a greater or lesser degree, in every reading."[93] Whether the initiation is from illiterate to literate in general, or from illiterate to literate in a special field, the social passage is still that of novice to expert. So for example, in the Middle Ages,

> On the Feast of Shavuot, when Moses received the Torah from the hands of God, the boy about to be initiated was wrapped in a prayer shawl and taken by his father to the teacher. The teacher sat the boy on his lap and showed him a slate on which were written the Hebrew alphabet, a passage from the Scriptures and the words 'May the Torah be your occupation.' The teacher read out every word and the child repeated it. Then the slate was covered with honey and the child licked it, thereby bodily assimilating the holy words. Also, biblical verses were written on peeled hard-boiled eggs and on honey cakes, which the child would eat after reading the verses out loud to the teacher.[94]

Here we are reminded of the physicality of reading, and the ways in which one can be taught to read by ingesting words rather than memorizing them. This physical relationship of the reader to the text helps to emphasize the notice we must take of the

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[92] Svenbro's revelation also raises all sorts of issues regarding the meaning of Aristotle's idea of "distributive justice." Should it in fact be translated more like "legal" justice? If so, then the proper species is the law, not distribution, in its English translation. This would suggest that Aristotle believed there was justice outside of the law, or at least, what one would not call "legal" justice. This issue is not directly related to the current inquiry of what it means to read the law, however.

[93] MANGUEL, *supra* note 1, at 71.

[94] *Id*. at 71 (*citing* ISRAEL ABRAHAMS, JEWISH LIFE IN THE MIDDLE AGES (London, 1896)).

various forms of transition that occur when one grows from novice to expert reader. It also reinforces what a necessary, important and noteworthy step it is.

B. Humanism, Scholasticism and Changing Reading Practices in History

The next example comes to us from a priest, not as part of religious studies, but rather of one of the seven liberal arts—grammar.

> In 1441, Jean de Westhus, priest of the Sélestat parish and the local magistrate, decided to appoint a graduate of Heidelberg University—Louis Dringenberg—to the post of director of the school. Inspired by the contemporary humanist scholars who were questioning the traditional instruction in Italy and The Netherlands, and whose extraordinary influence was gradually reaching France and Germany, Dringenberg introduced fundamental changes. . . . He explained the rules of grammar, rather than merely forcing his students to memorize them; he discarded the traditional commentaries and glosses, which he found did "not help students to acquire an elegant language," and worked instead with the classic texts of the Church Fathers themselves. By largely disregarding the conventional stepping-stones of the scholastic annotators, and by allowing the class to discuss the texts being taught . . . Dringenberg granted his students a greater degree of reading freedom than they had ever known before.[95]

Like the implicit but inherent connection between reading and law, there is an inherent connection between law and the scholastic tradition, a tradition, developed mainly in the twelfth and thirteenth centuries, by philosophers for whom "thinking is a craft with meticulously fixed laws."[96] While "[s]cholasticism proved a useful method for reconciling the precepts of religious faith with the arguments of human reason,"[97] it soon became "a method of preserving rather then eliciting ideas."[98]

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[95] MANGUEL, *supra* note 1, at 78.
[96] *Id*. at 73.
[97] *Id*.
[98] *Id*.

> Essentially, the scholastic method consisted in little more than training the students to consider a text according to certain pre-established, officially approved criteria which were painstakingly and painfully drilled into them. As far as the teaching of reading was concerned, the success of the method depended more on the students' perseverance than on their intelligence.[99]

Manguel's description of scholasticism sounds familiarly like second year law study, as it is presented in the old saw repeated by American law students: "the first year they scare you to death, the second year they work you to death, and the third year they bore you to death." A scholastic teacher would "copy the complicated rules of grammar onto the blackboard—usually without explaining them, since, according to scholastic pedagogy, understanding was not a requisite of knowledge. The students were then forced to learn the rules by heart. As might be expected, the results were often disappointing. One of the students who attended the Sélestat Latin school in the early 1450s, Jakob Wimpfeling, commented years later that those who had studied under the old system "could neither speak Latin nor compose a letter or a poem, nor even explain one of the prayers used at mass."[100] This raises the similar concern that legal education has begun to address only recently; that is, can a law student, after his or her required first year course in contracts, write one? Burnham points "out to students that it is possible to take a law school course in Contracts and never [even] be asked to read one."[101]

I return for a moment to Quiller-Couch, or "Q," the pseudonym under which he wrote. Q went on with the preface to his lectures on "The Art of Reading" by saying that the first thing to be noted about the reading of English (his concern was limited to

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[99] *Id*. at 74.
[100] *Id*. at 77.
[101] Burnham, *supra* note 17, at 391.

English), was that "for Englishmen it has been made, by Act of Parliament, compulsory."[102] Q's second observation was that in English schools and colleges and universities, reading had "been made, by Statute or in practice, all but impossible."[103] Then Q delivered the third and conclusory observation to his introduction with what one might imagine was all the clarity and impact that an Englishman, a knight of the Empire, and the King Edward VII Cambridge Professor of English Literature could summon during a time when another culture and his were engaged in mutual violent destruction. That final step was: "to reconcile what we cannot do with what we must: and to that aim I shall, under your patience, direct this . . . lecture."[104]

It deserves to be noted that although he was lecturing during the early years of the first World War, the occasion for Q's lectures, as consciously announced by him, included more locally, a serious change in the teaching of English literature in Britain. Having been the Chairman of an Education Committee several years prior[105] Q speaks with the authority of one familiar with English education at many levels. Despite this, in his lectures he advocated the overthrow of the English Tripos, a new English Literature curriculum, one even "worthy of this University" (Cambridge), in favor of the "spirit which maketh alive,"[106] and offered a balanced criticism of The Education Act of 1870.[107] Q illustrates the attitude with which we read literature, and the inherent position that our reading attitude gives us toward the author of the text:

> It is remarkable (says he) that involuntarily we always read as superior beings. Universal history, the poets, the romancers, do not in their stateliest

[102] QUILLER-COUCH, *supra* note 77, at 10.
[103] *Id*.
[104] *Id*.
[105] *Id*. at 111.
[106] *Id*. at 74.
[107] *Id*. at 108.

> pictures . . . anywhere make us feel that we intrude, that this is for better men; but rather is it true that in their grandest strokes we feel most at home. All that Shakespeare says of the king, yonder slip of a boy that reads in the corner feels to be true of himself.[108]

In 1940, again when much of the world was at war, Mortimer Adler published his surprisingly popular *How to Read A Book*, the stated point of which was not a mere "how" but rather more important: to improve understanding when reading books, rather than just increasing information. "The methods by which we learn to read not only embody the conventions of our particular society regarding literacy—the channeling of information, the hierarchies of knowledge and power—they also determine and limit the ways in which our ability to read is put to use."[109]

C. The *Nomoi* of All the Birds, Old and New

German legal philosopher Gustav Radbruch has asserted that "sciences which have to busy themselves with their own methodology are sick sciences."[110] Legal comparativists Konrad Zweigert and Hein Kötz insist that legal science is precisely one of these sick sciences, due to the "hollowness of its traditional attitudes—unreflecting, self-assured, and doctrinaire . . .."[111] They offer as a remedy, the practices of comparative law and comparative legal study. I would suggest that if they are correct, then included in their remedy is yet another practice from the tradition of the arts—the practice of comparative reading of the other nomoi.

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[108] QUILLER-COUCH, *supra* note 77, at 33 (*quoting* Ralph Waldo Emerson).
[109] MANGUEL, *supra* note 1, at 67.
[110] GUSTAV RADBRUCH, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 253 (12th ed. 1969) (*quoted in* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 33 (Tony Weir transl., 3d. ed., Oxford: Clarendon 1998).
[111] ZWEIGERT & KÖTZ, *supra* note 110, at 33.

In making the comparisons, I begin with the English language and English law. Unlike Q's English language nearly one hundred years ago, law is not being attacked from the outside by a foreign sovereign with a foreign language that carries a foreign culture. But it might be simply sick from within, according to Radbruch, Zweigert and Kötz, and an investigation of this sickness must be an investigation of its insides, not its outside surface. Of what are law's insides constituted? The language and language relations of human beings. Unlike the natural scientist, we lawyers have no physical material to call our object of study. Instead, we learn to speak and write as the demonstrable services for which the practicing bar will grant us licenses and clients will pay our fees, largely for speaking and writing. But at the same time, and often before we can speak and write, we must learn to listen and read in particular ways.

Why did Q claim that learning to read under the Act of Parliament and the University Statute was impossible? Because the curriculum designed to get the student from novice to Cambridge degree, due to what was accepted as the breadth and depth of English literature, would require reading five to six hundred pages-worth of titles and authors in simple enumeration just to cover, for example, the period of 1700-1785. Consequently, one achieved the Cambridge degree by reading not the literature itself, but rather something called "the Outlines of English Literature."[112] One can quite easily make the analogy to the twenty-first century legal casebook, with its vast collection of case excerpts from various jurisdictions, and ask whether reading the words in it, in any way, better teaches the student to read the law than "the Outlines of English Literature" taught students to read English literature. Using Robert Browning's *A Death in the Desert*, as presented in *The Aims of Literary Study* by someone known as "Dr. Corson,"

[112] QUILLER-COUCH, *supra* note 77, at 12.

who is described only as a "distinguished American Professor,"[113] Q alights at the line "What Does, What Knows, What Is; three souls, one man." Due to their "minds being perverted by hate," persons of his time had confused the order of these three souls, according to Q, and thereby focused upon feeding the guns and perfecting the explosives all in the service of What Does; all in the service of Efficiency; "no one stopping to think that 'Efficiency' is—must be—a relative term! Efficient for what?"[114]

Under what cultural form of reading do we read constitutions, statutes, cases, briefs, memoranda, regulations, discovery, and so on? Q said that we read literature because the practice of reading literature "deals with What Is rather than What Knows," the latter of which was the nature of reading for examinations.[115] "Only by learning to *be* can we understand or reach, as we have an instinct to reach, to our right place in the scheme of things: and that, any way, all the greatest literature commands this instinct."[116] To say that literature commands this instinct is to give life and power to the text, consistent with rhetoric's notion that the text must be given equal weight with the speaker and the audience, when it comes to making meaning. So when a reader employs the strategy of a reading for the purpose or goal of examinations, he or she is not in the position of being, but rather of knowing. But being what? Being a good person, for one thing. The Roman orator Marcus Cato defined a perfect orator as *vir bonus dicendi peritus* ("a good man who speaks well.")[117] Quintillian adopted this definition as well, and Cicero varied the statement in its grammatical form by adding the copula "*esse*"

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[113] *Id*. at 14.
[114] *Id*. at 14.
[115] *Id*. at 67.
[116] *Id*. at 60.
[117] EDWARD P. J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT 496 (4th ed., Oxford University Press, 1999).

(is).[118] I would suggest that the use of "*esse*" in this statement helps us to understand that good oratory, like the good reading of which Q writes, is characterized by What Is.

Still chafing under the two year reading period and the examination at the end thereof and the consequent necessity that the students therefore read the Outline of literature, rather than the literature, Q notes that this practice fails to therefore address his framework question of What Is. What IS literature? What IS English literature? Q proposed that "the human soul's activities being separated, so far as we can separate them, into *What Does, What Knows, What Is*—to *be* such-and-such a man ranks higher than either knowing or doing this, that or the other: that it transcends all man's activity upon phenomena . . .."[119] And if we take my point—that the stuff of law is text—then perhaps we too ought to be asking What IS law (as a text), rather than What Does or What Knows.[120] Law is a set of language practices within a culture, but serves also to identify and maintain that culture.

If it is true that our reading unconsciously directs our worldview, through what means does it do this? In addition to providing the factoids of information that we consciously gather, the act of reading directs our worldview, for example, through defining "the various actors it addresses—the citizen, the officer, the court—and the relations it establishes among them."[121] And here again, one of the liberal arts can provide insight. The focus upon audience and reflecting what the speaker or writer can learn from this focus, are practices well-known since the antique art of rhetoric, in both

[118] Eric Laughton, *Cicero and the Greek Orators*, The American Journal of Philology 27-49 (vol. 82, no. 1, 1961).
[119] *Id*. at 60.
[120] QUILLER-COUCH, *supra* note 77, at 24.
[121] JAMES BOYD WHITE, JUSTICE AS TRANSLATION 203 (1994).

its Greek and Latin heritages,[122] and today are found in the study of rhetoric proper, but also in such places as reader-response theory. To the orator's "*esse*" of Cato and the literary "What Is" of Q, I wish to add the "is" in asking "What *is* reading the law?" If one looks to the readers themselves to answer this question, reader response theory offers perspectives from both the sciences and the arts.

> Reader response theory was offered as a reaction to the model of literature education that predominated early in the 20th century. In contrast to the perspective that texts have objective meanings, Rosenblatt (1938) proposed that the meanings of texts will vary somewhat from reader to reader. This followed from the observation that people vary in their interpretations of the same text (e. g. Richards, 1929). According to reader response theory, interpretive variability occurs because the meaning of a text involves a transaction between a reader, who has particular perspectives and prior knowledge, and a text, which can affect different readers in different ways (e.g., Beach & Hynds, 1991; Rosenblatt, 1978). What is critical from the perspective of reader response theory is how the reader experiences and reacts to the text.[123]

Perhaps the most important point of reader response theory is that it does not permit the meaning of a text to be understood as something completely subjective. As both Rosenblatt and Eco have stated, while everyone is free to make his or her own interpretation of a text, there are indeed better and worse interpretations, measured by the degree to which an interpretation accounts for elements in a text.[124] The more elements accounted for by an interpretation, the better the interpretation is said to be. Rosenblatt balances this tendency to hierarchy with the fact that a reader's experience with a text will be unique because of the "reader's personal history, mood at the moment, and the state of the reader's world at the time that the text is encountered"[125] He suggested that literature can permit cognitive experiences that would not or could not occur to the reader

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[122] *See, e.g.,* CORBETT & CONNORS, *supra* note 117.
[123] PRESSLEY & AFFLERBACH, *supra* note 14, at 84.
[124] *Id*. at 85.
[125] *Id*.

otherwise Rosenblatt further asserts that literature permits readers to have cognitive experiences that would not occur to the reader otherwise, to experience different points of view, the social perspectives of different places, peoples and times, and by reflecting on one's responses to literature portraying foreign events and alternative points of view, it is possible to learn much about oneself.[126]

In order to make a slightly more expansive claim about reading the law than just the Anglo-American traditions, it will be worthwhile even if briefly, to consider some others. For the illustrative purposes of comparing reading practices, I shall follow the point made by the legal comparativists, Konrad Zweigert and Heinrich Kötz in their oft-cited treatise on the subject, *Introduction to Comparative Law*.[127] Among the legal families that Zweigert and Kötz distinguish in this important work for comparative law, these four remain paramount. Zweigert and Kötz note that their categories of legal families vary only slightly[128] from that of the older, and also highly-influential work of Arminjon, Nolde and Wolff.[129] Thus, Zweigert and Kötz divide the world's legal families among the Romanistic family, the Germanic family, the Nordic Family, and the Common Law family. Zweigert and Kötz must acknowledge that this is a Euro-centric set of categories, and that Chinese, Japanese, Islamic and Hindu law differ considerably from these families. Those legal families and legal reading practices are beyond the scope of this article, however.

Good comparison is of course more than mere juxtaposition. In comparing legal families, one must establish a method of comparison. If that comparison is founded

[126] *Id*.
[127] ZWEIGERT & KOETZ, *supra* note 115.
[128] *Id* at 73.
[129] Arminjon, Nolde Wolff, *Traité de droit comparé* I (1950) 42 – 53.

upon comparing legal texts, then what one is really practicing is comparative reading when comparing legal families. Even without explicitly addressing legal comparison as a reading practice, Zweigert and Kötz note that any comparison of legal systems requires, as one of the comparativist's steps, establishing a syntax and a vocabulary. In connecting Zweigert and Kötz's method for legal comparison with what Q tells us about reading, we are reminded by Emerson that "Great literature never condescends. That what yonder boy in a corner reads of a king is happening to *him*."[130] So when we read the law, what is happening to us? Do we identify with a perpetrator of a civil or criminal wrong, and answer for him, as with Althusser's man on the street who, interpellated, volunteers himself as subject when he turns in response to the police office calling "hey, you"?[131] Do we identify with the author who is trying to legislate, adjudicate, mediate or persuade (as in the case of an advocate's brief or pleading)? While discussing reading for the purpose of examinations, Q revisits the practices of university students being examined in Bologna, Paris and Oxford. At Bologna, which Q notes being famous for civil law, it would seem that the reader was encouraged to identify himself with his teacher as a father, and not the author of the text. "[T]he process of graduation—of admission to the *jus docendi*, 'right to teach'—consisted of two parts, the Private Examination and the Public (*conventus*) . . .."[132] First the candidate would be examined by his own Doctor privately to determine if he was ready to be put forward. Then "the candidate appeared before the assembled College and was assigned by one of the Doctors present two passages (*puncta*) in the Civil or Canon Law as the case might be.

[130] QUILLER-COUCH, *supra* note 77, at 44.
[131] Louis Althusser, *Ideology and Ideological State Apparatuses: Notes Toward an Investigation*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS (Ben Brewster, transl. 1971).
[132] QUILLER-COUCH, *supra* note 77, at 63-64.

He then retired to his house to study the passages, *in doing which it would appear that he had the assistance of the presenting Doctor*."[133] Later in the examination, "[o]ther Doctors might ask supplementary of Law (which they were required to swear that they had not previously communicated to the candidate. . . . With a tender regard for the feelings of their comrades at this 'rigorous and tremendous Examination' . . . the Statutes required the Examiner to treat the examinee as *his own son*."[134] In this context, when asking "what is reading the law?" for an examination, the reflective candidate would reply that it was pleasing his father.

Today, in the German civil law system, one begins the process of reading the law by interpreting (*Auslegung*) words in legislation.[135] According to Reinhold Zippelius, in *Juristische Methodenlehre*,[136] "The 'classic' interpretation theory (*Auslegungstheorie*) of Savigny held it to be the job of interpretation 'to place one's self in thought from the position of the legislator, whose occupation one artificially repeats.' Thus would interpretation be 'the reconstruction of the law's inherent thinking.'"[137] Returning for a moment to what Dewitz might call a "rhetorical strategy," the civil law reader then entertains whether different real persons or different real acts may be categorized the

[133] *Id*. at 63.
[134] *Id*. at 64.
[135] REINHOLD ZIPPELIUS, JURISTISCHE METHODENLEHRE 19, 42 (9th ed., Munich: C.H. Beck 2005) (author's translation).
[136] *Id*.
[137] *Id*. at 42 (*quoting* F. K. v. SAVIGNY, JURISTISCHE METHODENLEHRE (v. G. Wesenberg, 1951), which is the same source as F. K. v. SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* 213 (1840) (author's translation).

same and calls the process "subsumption,"[138] based upon the principle from formal logic.[139]

Even in the formal deductive process described by Zippelius, readers are reminded that what might appear to be a matter of fitting an act neatly into a formal logical pattern known as "*subsumtion*" is first an act of interpretation known as "*Auslegung*," an act which requires facility with all three of Dewitz' strategies of reading. "In order to assess whether the application of a legal provision or norm is possible in a particular case, one must interpret the relevant provision/norm and establish whether the set of facts involved can be subsumed under it."[140] Students of German law learn to read the German Civil Code (*Bürgerlichesgesetzbuch* or BGB) in this manner.[141] How many students have formed their legal worldview reading the Code this way? The BGB was adopted in 1896, and has extensively influenced many other civil systems, including those of Switzerland, Austria and Japan.

By comparison, the French Civil Code is the basis of the civil law education in France. As it is older and to a certain extent less systematic than the German BGB, the education is rather based on the systematic presentation of the law as it is made by the professors than on a textual approach. In addition to civil law, French students learn the law through the reading and study of general principles of criminal law (*droit pénal*) and public law (*droit public, droit administratif*). As is more typically thought of common law, these general principles of the French public law are mainly based on case

[138] The standard legal dictionary in Germany, Creifeld's, defines "subsumtion" as "subordination of the facts of a case under a legal norm or provision." CREIFELD'S RECHTSWÖRTERBUCH 1333 (Klaus Weber, ed., 17th ed., Munich: C.H. Beck, 2002) (author's translation).
[139] Klaus Adomeit, RECHTSTHEORIE FÜR STUDENTEN 38-40 (4th ed., Heidelberg: C.F. Müller, 1998).
[140] Howard D. Fisher, GERMAN LEGAL SYSTEM AND LEGAL LANGUAGE 48, n. 60 (London, 1998).
[141] CLAUS-WILHELM CANARUS & KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT passim (4th ed., Berlin: Springer, 2003; JOCHEN ZENTHÖFER, JURISTISCHER GRUNDKURSE: RECHTSPHILOSPHIE 37(Richter Publishing: Dänischenhagen, Germany, 2001); ZIPPELIUS, *supra* note 135, at 97-101.

precedents since these principles were not initially codified as was the French private law. Accordingly, French students have to learn by heart the case precedents (together with the date of each ruling) as a substitute for codified legal rules.

As opposed to German universities, the law faculties of French universities practice a different approach in the teaching of law: students are taught law on the basis of "judicial decision comments" (*commentaire d'arrêt)* and theoretic essays (*dissertations*) which require the capacity to situate a judicial decision in its right legal context, on the one hand, and systematically to synthesize the rules applicable to a theoretic question of law, on the other hand. This situating of judicial decisions requires direct instruction in domain knowledge from the beginning. Teaching on the basis of case studies (*cas pratique*) is rather unusual, at least during the first years of studies.[142]

Yet for the student of French law, the way of reading and applying the law is similar to the German one. Students of French law learn to read the law on the basis of the deductive (categorical) syllogism (*syllogisme déductif*), resulting in applying a three step process: (1) the major (*la majeure)*, that is, the provisions of the law, (2) the minor (*la mineure*), that is, the facts involved, (3) the conclusion, that is, whether the facts meet the provisions of the law.

Zweigert and Koetz remind us that the Scandavian family of law, for comparative lawyers, must be treated as a separate family of law.[143] What is reading in the practice of law in Sweden? Swedish law students are told for instance, that it is "not necessary to neatly identify what is *ratio decidendi* on the one hand and *obiter dictum* on the other. This distinction as such can be very useful for the interpretation of Swedish court

[142] FRANÇOIS TERRE, INTRODUCTION GENERALE AU DROIT (7th ed. 2006).
[143] ZWEIGERT AND KÖTZ, *supra* note 110, at 277.

decisions, too, but its significance is different, its main usefulness not being a tool to distinguish between binding and non-binding argument but an instrument to attribute greater or lesser persuasive importance to different arguments in one judgement."[144] Further, when one asks where "can one look up the texts of Swedish laws and regulations?"[145] one is told that "The answer to this questions depends on the character of the norm, i.e. as constitutional Act, ordinary Act, ordinance or statutory instrument, and the answer further depends on whether the officially recorded text is needed or whether any other reliable publications is sufficient,"[146] which again demonstrates that prior domain knowledge is necessary for the lawyer to begin to find the rule of law for a given problem.

Having made this brief visit to the ways of reading advocated in these legal families, we find some connections in the act of reading itself. Semiotician and novelist Umberto Eco asserts that learning to read is more important than learning to write.[147] This is the case because in reading a text, a reader gives it meaning, without which it is not a text, but just ink on paper. Thus, the act of reading can properly be said to produce a text. We produce texts by reading them.

> In the act of reading there are two texts, the text provided by the author in print and the text we build in our head. Our internal paraphrasing and summarizing are the default strategies we use to build this internal text. . . . When we read about a Queen Anne chair, our abstract chair schema gives us the general structure and function of a chair, and the text makes the structure specific to Queen Anne chairs—unless you grew up in a Danish Modern home.[148]

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[144] Hans-Heinrich Vogel, *Sources of Swedish Law*, *in* INTERNATIONELL KONKURS—OCH ACKORDSRÄTT 61 (Mchael Bogdan, ed., Institutet för Rättsvetenskapling Forskning [CLXIX] Stockholm: Norstedts Juridik, 1984).
[145] *Id*. at 49.
[146] *Id*.
[147] UMBERTO ECO, THE ROLE OF THE READER: EXPLORATIONS IN THE SEMIOTICS OF TEXTS (1984).
[148] Dewitz, *supra* note 9, at 659-660 (*citing* Deegan, *supra* note 8; PRESSLEY & AFFLERBACH, *supra* note 14; Janice A. Dole et al., *Reading Comprehension Instruction,* 61 Rev Educ Res. 239, 242-49 (1991); Rand

That is to say, as Rosenblatt and others observed, it is the audience—listener or reader—who makes meaning from the word. "[W]hen readers construct meaning, they do so in the context of a discourse situation, which includes the writer of the original text, other readers, the rhetorical context for reading, and the history of the discourse."[149] In law, we teach writing as the instrumental act that mobilizes the law. But much of the practice of law, and even more of the study of law (which must be understood as more than learning to mimic the practices of the practice of law) is fundamentally if not initially concerned with reading. Social science has recognized this observation when studying student readers of the law:

> There are a number of reasons why law students were selected as the subjects for this study of individual differences in strategic reading. First, studying and practicing the law essentially involves text interpretation and production. Words are tools for lawyers, who must be able to forge words into consequential discourse. Learning to be a lawyer entails more than thinking like a lawyer, it necessitates being able to read and write like a lawyer.[150]

I would go further. If words are an end for anyone, they are so for a lawyer. Like a teacher or a poet who cannot be sure what an audience will make of his or her words, and who does not have the material world to study and use, as the natural scientist would, lawyers have as a product, words.

J. Spiro, *Constructive Processes in Prose Comprehension and Recall*, *in* THEORETICAL ISSUES IN READING COMPREHENSION: PERSPECTIVES FROM COGNITIVE PSYCHOLOGY, LINGUISTICS, ARTIFICIAL INTELLIGENCE, AND EDUCATION 245, 255 (R.J. Spiro et al. eds., 1980)).

[149] Christina Haas & Linda Flower, *Rhetorical Reading Strategies and the Construction of Meaning*, 39 C. Comp. & Comm. 167 (1988) (*cited by* Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. Legal Educ. 155, 157 n. 13 (1999)).

[150] Deegan, *supra* note 8, at 157 (citations omitted). Deegan attributes the inception of the notion "thinking like a lawyer" to Karl Llewelyn, 1951.

D. Reading, Writing and A Rhetoric?

A U.S. law school curriculum typically includes at least one course called something like "Legal Writing and Research." After all, to be a successful lawyer, one must be able to write pleadings, write briefs, write memoranda, write letters, write contracts, write wills and so on. Law schools also offer substantive courses in contracts, estates, and so forth. And of course there is the recurrent old saw by which students are admonished to "think like lawyers." Researching, writing and thinking like a lawyer are explicitly expressed in the curriculum. Implied in that expression is the linear progression that writing begins with research. Research—at least etymologically—ought to begin with searching, and how else do people working with texts search than by reading? But reading is neither explicitly nor independently[151] addressed in the curriculum. Even in the odd circumstance when reading is explicitly addressed, as when legislatures draft statutory interpretation legislation, we pay too little explicit attention to it. Why should we? Is legal reading any different from other reading? Of course it is! First of all, for many students of the law, as noted by Ruth Ann McKinney, the experience of reading primary texts is a new type of text that requires a new type of reading.[152] Moreover, reading the law is not just a means to an end, as one suggests when he or she says that the purpose of reading is to "get information," and that the method of good reading is to get information "efficiently."

A variety of scholars—from legal writing teachers to educational theorists—use the term "rhetoric" in their work. Since Plato mounted his campaign against the sophists,

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[151] Much of the research conducted regarding legal reading is conducted by legal writing teachers and thus treats reading as a something coupled to writing, rather than being independent of it.

[152] RUTH ANN MCKINNEY, READING LIKE A LAWYER: TIME-SAVING STRATEGIES FOR READING LAW LIKE AN EXPERT 4 (2005) (*citing* Lisa Eichhorn's unpublished manuscript from 1988, *Hard Cases: Reading in the First Year of Law School*.

the term is often tarnished with a pejorative connotation. Plato himself exercised little trust for the discipline in his *Gorgias* dialogue, but by the time he arrived at the *Phaedrus* dialogue some years later, he had mellowed on the art, and concludes the *Phaedrus* by offering a possibility for its just use. Later, Plato's student Aristotle, defined the term in his work entitled *Rhetoric*: "Rhetoric may be defined as the faculty of observing in any given case the available means of persuasion. This is not a function of any other art."[153] Aristotle's definition would suggest that rhetoric is an analytical tool, but his definition says nothing of the practice. Thus, helpfully, Kenneth Burke points out that unlike criminology, which is capable by label of distinguishing the practitioner (criminal) from the student (criminologist), rhetoric has no such distinctive denotations. So one must recognize the connotations. Thus he calls the practice of rhetoric "rhetoric 1," and the study of rhetoric "rhetoric 2." But perhaps most important for the present discussion is "rhetoric 3," added by Trevor Melia and James E. McGuire. Rhetoric 3, as presented by Melia and McGuire, refers to a "worldview."[154] It is a worldview not offered by Plato in his *Gorgias* dialogue, nor by Aristotle in his *Rhetoric*, but by Gorgias himself in the extant fragments that we have from his work, "On Nature."[155] Gorgias' rhetorical worldview ranges over three possible connections of language to the world. First, it is possible that truth does not exist. Second, he posits, truth exists but we cannot know it. Finally he asserts that truth exists, we can know it, but we cannot communicate it. Any of the three formulations produce a worldview in which the creation of meaning from text

[153] ARISTOTLE, RHETORIC, 1355b 27-28, *in* THE COMPLETE WORKS OF ARISTOTLE, (W. Rhys Roberts, transl., Jonathan Barnes, ed., Princeton, 1984).
[154] Trevor Melia and James E. McGuire, *Some Cautionary Strictures on the Writing of the Rhetoric of Science*, Rhetorica, 87-99 (Winter, 1989).
[155] Rosamond Kent Sprague, THE OLDER SOPHISTS: A COMPLETE TRANSLATION BY SEVERAL HANDS OF THE FRAGMENTS IN DIE FRAGMENTE DER VORSOKRATIKER, WITH A NEW EDITION OF ANTIPHON AND OF EUTHYDEMUS, EDITED BY DIELS-KRANZ, Columbia, South Carolina: University of South Carolina Press, 1972.

is not a function of tethering text to things in the world, but rather to abstractions created by language or even to language itself.

We can then attach rhetoric-as-worldview to the use of the term "rhetoric" in theories of reading. "Rhetorical strategies go beyond the text itself as the reader comments upon and evaluates the ideas read."[156] Dewitz quotes Haas and Flowers: "Rhetorical strategies take a step beyond the text itself. They are concerned with constructing a rhetorical situation for the text, trying to account for author's purpose, context and effect on the audience."[157] This is far, far different than simply determining something as prevalent in legal study, but so unaccepted by psychologists, philosophers, historians, literary theorists, rhetoricians and classicists as "legislative intent."[158] Moreover, the analysis of strategies has massive practical appeal. If rhetoric can itself be a worldview, and we use it in that sense when Dewitz talks of "rhetorical strategies" in the legal reader, or Berger talks about the New Rhetoric of legal reading when it is coupled with writing, what result might obtain?

And for the novice reader of the law, who lacks extensive background knowledge and will find it difficult to determine importance in legal cases, rhetorical strategies can be that much more important, as the novice relies upon text-based strategies.[159]

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[156] Dewitz, *supra*, note 9 (*citing* Deegan, *supra*, note 8.)
[157] Dewitz*, supra* note 9, at 660 (*citing* Christina Haas and Linda Flowers, *Rhetorical Reading Strategies and the Construction of Meaning*, 39 C. Comp & Comm. 167, 176 (1988)).
[158] *See* WHITE, *supra* note 121.
[159] Dewitz, *supra* note 9, at 662.

E. From Q to QC: Lessons from Literature for Law[160]

Legal composition experts have used the theories and practices of rhetoric to enable a student to see how legal writing and reading do more than acquire and produce information. Using a rhetorical worldview, "reading is a process for constructing meaning, not just an Easter egg hunt to find it."[161] The construction of meaning is not limited to constructing a lexicon of the referents of words, nor to adjusting that lexicon to the psychological speculations of the writer's intent. Reading, in great addition to the pedestrian purpose of getting information, is in fact constitutive of legal practice, not simply preliminary to the practice. In recollecting his own history of learning to read, Alberto Manguel recalls his childhood in Buenos Aires, and reflects upon the evidence of reading practices that he and his schoolmates left behind. "Centuries from now, if some scrupulous librarian were to exhibit those notebooks as precious objects in glass cases, what would a visitor discover? . . . From the identical glosses the visitor might learn that we were taught to read not for pleasure or for knowledge but merely for instruction. In a country where inflation was to attain a monthly 200 per cent, this was the only way to read the fable of the grasshopper and the ant."[162]

The communicative function of the law, on so many occasions, is to codify that which is left open to repeated and continuous debate in other circles of life. For instance, if we are deciding for which candidate to vote or which restaurant to choose, and my interlocutor says "I have heard from my friend that candidate Schiller is good" or that

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[160] In the United Kingdom, the highest honor that a barrister can achieve is to "take silk" (in reference to the quality of his or her robe), meaning to achieve the status of "Queen's Counsel," or "QC" for short.
[161] Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. Legal Educ. 155, 156-57 (1999) (*citing* Christina Haas & Linda Flower, Rhetorical *Reading Strategies and the Construction of Meaning*, 39 C. Comp. & Comm. 167 (1988)).
[162] MANGUEL, *supra* note 1 at 68.

"my sister told me that restaurant Schwann is bad," I cannot say "objection; hearsay" and expect a third person, such as a judge, who is backed by force, such as the police, thereby to stop my interlocutor and remove her statement from consideration in making the decision. So too is it the case with codification when reading the law. The law itself, in places like the federal and state rules of statutory interpretation, codifies how we are to read. Unlike Q, who advocated not reading literature according to the Education Act, I would advocate that we consider even more thoroughly the explicit rules of legal reading found in places like Statutory Construction Acts, and even more so, the implicit rules of legal reading that we acquire through such norms as learning to "think like a lawyer." Try handing a piece of legislation or a judicial decision—or worse, a code of regulations—to someone not trained in the law, and they will have difficulty making very much meaning of it, or at least they will make a meaning of it so different than anyone trained in the law, that it might well be of no use in legal practices. And here it becomes important to note that in the academy, other scholars, such as political scientists, read legal texts, usually court decisions, and make meaning from them. The result is often played out as a battle between the lawyers and political scientists as to whose reading of the text is the right one, or the one that matters, or the one that has practical effect or influence. Thus if one is convinced that it is worthwhile to look at how lawyers learn to read law, and how legal education trains them to do so, one must look more for implications than explications, because rarely do we address "learning to read." A complementary concern is that lawyers read non-law texts as law texts because it is the only, or largest volume of text that she has ever read, thus putting her unconsciously in the practice of reading all texts as though they are law.

To bring to conscious articulation how we learn to read the law, and continue to read law, we might begin with the more basic question of how we learn to read in general. "It is often argued that reading is reading, meaning that once one has acquired good reading skills any text is equally accessible. A significant amount of research now exists to refute that claim."[163] Indeed, the opposite is true; each genre we read requires the use of special knowledge plus the tools or strategies to use that knowledge.

When I poll students with the question "Why read?" the most common answer is consistently "to get information." Which contexts influence this answer? Is it the age of the person being asked? The age in which he or she lives? The place in which he or she lives? Would Homer answer this way? Would Pa Chin or Azar Nafisi? What does it mean to read to be informed? If we allow the suggestion that the act of reading may be studied scientifically, to whom or what should we look to understand reading? Composition scholars report that students "expect knowledge or information to be given to them rather than taking an active role in obtaining or shaping that knowledge."[164]
All agree that the first reason given by students is "to get information." That answer is followed by something like "to obtain knowledge," which is offered with only blurry distinctions from "to get information." Some will admit to reading for pleasure. But the fourth answer, arrived at by only a very few students, is to form a world view. I suspect that the worldview formed by reading started long before law school, and is perhaps often unfortunately related most closely to students' previous university reading experiences. The American Bar Association and the American Association of Law Schools report that

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[163] Dewitz, *supra* note 10.
[164] Katharine Ronald, *The Self and the Other in the Process of Composing: Implications for Integrating the Acts of Reading and Writing*, *in* CONVERGENCES: TRANSACTIONS IN READING AND WRITING 231, 235-36 (Bruce T. Petersen ed., 1986) (*cited in* Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. Legal Educ. 155, 157 n. 17 (1999).

the majority of students entering law school have studied some form of business as undergraduates. For reading the law, this is a problem because according to reading and education scholars, "The most important factor that affects comprehension ability is the knowledge that the reader brings to the page."[165] Thus, it is not only whether a reader has sufficient comprehension to say that he or she understands the text with enough comfort to read on, but what the nature of that comprehension is that the reader has brought to the legal page. Many different comprehensions could be sufficient for the reader to feel that he or she comprehends and can move on. How is the study and practice of law shaped differently because the particular comprehension that the reader brings is from the study and practices of business as an undergraduate? In distinction, Similarly, Richard H. Weisberg would say that learning a worldview from the reading of law can help us to arrive at justice.[166] But this justice requires a reading that is capable of translation, not just definition.

Some may ask why one would go to the arts of literature or rhetoric for learning about reading, rather than asking neurobiologists or brain physiologists? The answer is that when studying the act of reading, it is not just the mechanics of the brain that interest us, but how we make meaning—the socio-psychological aspect of meeting the text. As Linda L. Berger notes, "The 'meaning-making view of writing appeals to those who view reading and writing as ways to live, not just as ways to make a living."[167] Similarly, Kennth Burke reminds us that when it comes to reading, there is no pure

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[165] Dewitz, *supra* note 10 at 657 (*citing* Richard C. Anderson & P. David Pearson, A Schema-Theoretic View of Basic Processes in Reading Comprehension, *in* 1 HANDBOOK OF READING RESEARCH 255, 259-69 (P. Pearson et al., eds., 1984).

[166] RICHARD H. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION (1984.)

[167] Berger, *supra* 149 n. 35.

literature. Even reading belletristic literature, for Burke, is medicine. Thus he concludes in his philosophy of literary form, that "literature is equipment for living."[168] Moreover, the "search" that forms the basis of "re-search" is the act of reading. The search was a reading search, a visual act. It was not the manipulation of the material world in a controlled experiment the way a natural scientist may search or research. When we as lawyers research, we read again what has been read before and reinterpret what previously has been interpreted. Reading, reading, reading. That's what we do—it is constitutive of the practice of law. What does it mean for one who is a student of the law to "study" the law, if it does not mean to read it and re-read it? And what practicing lawyer ever can afford to stop studying the law? In British usage, one is still said to be reading law" in reference to the formal study of law at the university. And due to the post-graduate status of professional schools, in the United States one cannot say she or he is "majoring" in law at the university. At the time before law school was mandatory in order for a student to sit for the bar examination in the United States, one had the option to sit for the bar exam having either studied the law in law school, or having "read" the law. Why take our cue from literature? If law is constituted by language then we ought to use the study of language as being constitutive of the study of law. It need not be a study of language from the perspective of literature. It could just as well be from the perspective of the philosophy of language, linguistics, rhetoric, classics, modern language, or comparative language.

[168] Kenneth Burke, *Literature as Equipment for Living*, *in* THE PHILOSOPHY OF LITERARY FORM: STUDIES IN SYMBOLIC ACTION. (Baton Rouge: Louisiana State University Press, 1941; 2nd ed., 1967; rev. abr. ed., Vintage paperback, New York: Vintage Books, 1957; 3rd ed., Berkeley: University of California Press, 1973).

Some of the study of legal reading, especially the empirical study, has been conducted by legal writing teachers, who, although they have produced excellent empirical and theoretical work, have often connected the understanding of reading to its instance of being coupled with writing.[169]

Furthermore, "We are told that, as with languages in comparative linguistics, legal systems are to be put into families on the basis of similarities and differences."[170] To complete the language connection begun by Zwiegert and Kötz from the discipline of comparative law here, one must note that "similarities" and "differences" are in fact two of the three (the third being degree) major parts of the well-known rhetorician's common topic of comparison.[171]

F. Explicit Rules of Reading

"Following the scholastic method, students were taught to read through orthodox commentaries that were the equivalent of our potted lecture notes."[172] The law itself is not silent on how to read the law. The US Code and many states' statutes[173] all have early sections telling us some explicit rules and ideas for how to read what follows. Why do we not make more use of them? After all, they are not optional—they are the law of reading the law! I would suggest that perhaps we do not pay close attention to those explicit rules, nor the very idea that there are rules because when we read those other things mentioned above—the newspaper, e-mail, magazines, novels—there is not a set of required reading rules that goes along with them. And that, to me, is evidence that we

[169] *See e.g.,* Stratman, *supra* note 39; Berger, *supra* note 166).
[170] ZWEIGERT & KOETZ, *supra* note 110 at 65.
[171] CORBETT, *supra* note 117, at 92 et seq.
[172] MANGUEL, *supra* note 1, at 77.
[173] *See e.g.*, 001 Pa. Code § 1.7. (Statutory Construction Act of 1972).

use our reading practices from those areas as the ways in which we read the law. Are there also assumptions that reading first of all is passive and second of all derivative? Insofar as the reader is making or co-producing the meaning of the text, he or she does so by the experience and knowledge he or she brings to it. That bringing is not at all a derivative act. Moreover, how one reads the law from culture to culture, and from legal culture to legal culture, has different explicit rules that are enormously telling as to the basic thought process that one takes to a particular culture's law.

Outside the law, classicists, archaeologists and historians, among others, also have rules for how one is to read particular texts. These too, are good places to look by comparison to see that one needs to state, if not justify, particular goals to be achieved by reading a set of texts in order to justify creating and enforcing rules of how one reads those texts.

G. Implicit Rules of Reading

In addition to the explicit rules of reading, there are powerful implicit rules of reading. Literary critics and scholars can spend their entire careers mapping out the conventions, conceits and fictions of belletristic writing. In the law, we also have an entire history of "fictions," and not in a simple, derogatory or pejorative sense, but as a practical solution to problems that would otherwise have absurd results under a Procrustean law.

Add here the three ways of reading that are settled upon by legal scholars: Within American constitutional theory, as taught to students of American law, it has become relatively standard to treat reading in three ways: textualism, historicism (also known as

originalism and including arguments from the intent of the framers), and pragmatism, which serves as a sort of weak liberalism.[174] This typology is repeated in the texts that hold themselves out as being representative enough to introduce a student to the field of constitutional law as well.[175] Of course one must admit that "it might be that strategies effective in one context (reading literature) might not be efficient in another (reading law)."[176] In addition, the social science researchers themselves admit limits on the warrant of their conclusions, based largely upon inherent difficulties in their methods.[177] Moreover, as Deegan points out, and Dewitz reiterates, rhetorical strategies, for example, "can be dangerous, especially when readers attempt to comment on or evaluate the ideas in a text before they understand them."[178]

V. Conclusions: Reading Law in the Danish Modern Home

Peter Dewitz offers the striking analogy for the context of a reading strategy—the abstract schema—from the world of furniture. We can understand something about Queen Anne chairs because we have an abstract schema of chairs already in mind as we begin that particular reading. This abstract default schema could, however, be thrown off if our sense of chairs is quite different, based upon our social context—the Danish modern home, suggests Dewitz. What does this mean for reading law? What assumptions do we make about the dominant abstract schema that might not apply to the no less valid legal equivalent of the Danish modern home? According to James Boyd

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[174] *See, e.g.*, MICHAEL J. GERHARDT AND THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES (1993).
[175] *See, e.g.,* THOMAS E. BAKER AND JERRE S. WILLIAMS, CONSTITUTIONAL ANALYSIS IN A NUTSHELL (St. Paul, MN: West, 2003.)
[176] Deegan, *supra* note 8, at 167.
[177] *See, e.g.*, Deegan, *supra* note 8, at 168, for an especially clear discussion on methods and limits.
[178] Dewitz, *supra* note 9, at 665 (citing Deegan, *supra* note 8, at 166).

White, "[o]ne way to think of the relation a text establishes with its reader—and a way that connects the textual community constituted in the text with the process of reading it—is to think of the text as creating an Ideal Reader, the version of himself or herself that it asks each of its readers to become."[179] White gives as examples of the Ideal Reader, that person who grabs a musket when the text is a call to arms, or buys a particular cologne and no other upon reading an advertisement. But for law, he then most helpfully alights at the literary text:

> [T]he Ideal Reader of a great work of literature, on the other hand, may feel that her whole language, and the motives it expresses and stimulates, are thrown into question, or she may find her sympathies extended in ways she could not have imagined, or she may discover herself holding for a moment contrasting perceptions in her mind, both of them true despite their incompatibility. This is one way to describe the way texts teach.[180]

This description of the reader meeting literature would seem far more like the reader meeting law than it does like the Ideal Reader's call to arms or to consume.

Many questions for further reflection remain. "Do you swear to tell the truth, the whole truth and nothing but the truth?" we ask witnesses, litigants and anyone else giving testimony that is to be accepted as evidence in a court of law. Even if the intention of the witness giving testimony, cemented by this oath, is to tell the truth, how does he or she know what the whole truth could possibly be? What must be included? If we are paleontologists, must we begin with the dinosaurs to explain what I saw at the bank robbery last week? Obviously not, yet although the law is all about making a codified process of all knowledge, it does not give the witness guidelines as to what the "whole" truth is. That is accomplished through cultural and linguistic construction. As Q reminds us:

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[179] WHITE, *supra* note 112, at 100.
[180] *Id*.

> So you see, Gentlemen, while pleading before you that Reading is an Art—that its best purpose is not to accumulate Knowledge but to produce, to educate, such-and-such a man—that 'tis folly to bite off more than you can assimilate—and that with it, as with every other art, the difficulty and the discipline lie in selecting out of vast material, what is fit, fine, applicable—I have the great Francis Bacon himself towering behind my shoulder for patron.[181]

There is the legal presupposition of relevance, but that works only to keep out that which is irrelevant, not to prescribe that which is relevant. Likewise with materiality. Materiality and relevance are legal terms of art—how can a lay witness operate with those guidelines when he or she is answering questions? There must be some other sense of "whole" truth as well for these other persons. So too with legal reading when it comes under the banner of "research." How does one know what to read, where to begin reading, and where to stop reading?

So will a better understanding of reading produce better lawyers, better judges, or even better law? Yes, it will. The skills of a lawyer are a set of socio-linguistic practices, comprised of reading, listening, writing and speaking. It is worth reiterating: "Professions can be distinguished by the nature and the structure of their discursive field."[182] First, it will enable the student and lawyer to be a better lawyer in a technical sense, because for example "effective use of the problematizing strategy, appeared in this study to be a better predictor of first-year academic performance than either LSAT scores or undergraduate GPAs."[183] Second, a focus upon reading skills, rather than things like pseudo-accounting skills, just might focus the lawyer's attention on the ideal of justice that everyone liked to talk about so much when constitutions were written,[184] but which

[181] QUILLER-COUCH, *supra* note 77, at 25.
[182] M.S. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 7 (1977).
[183] Deegan, *supra* note 8, at 166.
[184] *See* WHITE, *supra* note 121.

becomes an object of cynical scorn already by the third year of law study.[185] First year students learn their new practice of reading the law while being "told to set aside their desire for justice. They are warned not to let their moral concerns or compassion for the people in the cases they [have read and] discuss cloud their legal analysis."[186] *That* is the worldview that students tacitly learn when learning to read the law. That is unlikely to be what we intend when we insist that law students need to learn to "think like lawyers?" Social scientists note that "legal educators profess to build minds rather than fill them. Indeed they claim not to teach rules of law, but rather, to teach students how to think like lawyers."[187] Third, educationalists and reading researchers in psychology report that instruction in reading can provide a student with confidence. "Given the difficulties faced by reading legal text, most law students attributed their problems to themselves and not to the text."[188] As evidence of that assertion,"debriefing interviews [with law students] revealed a deep insecurity and anxiety about reading . . .. It was interesting that when asked why they volunteered for this study, many of the participants replied they thought they might be able to talk to someone who understood their perceived, unvoiced, but very real concerns about reading."[189] A study of reading can help a student to recognize that alone by the act of reading, he or she is maintaining a worldview. That same Professor Emeritus of whom Q was writing above, reminds us that within Christian art history, "there are numerous representations of Mary holding a book in front of the Child Jesus, and of Anne teaching Mary, but neither Christ nor His Mother was depicted as learning to write or actually writing; it was the notion of Christ reading the Old

[185] *Id*.
[186] Sullivan, *supra* note 5, at 6.
[187] Lundeberg, *supra* note 25, at 409 *citing* Bryden, *supra* note 57.
[188] Dewitz, *supra* note 9, at 665.
[189] Deegan, *supra* note 9, at 168.

Testament that was considered essential to make the continuity of the Scriptures explicit."[190]

By the time of his death in 1477, Louis Dringenberg had given his students in the small French town of Sélestat "a greater degree of reading freedom than they had ever known before" by dismissing scholasticism. To do so, he had to establish "the basis for a new manner of teaching children to read . . .."[191] While we may not be prepared to take such a complete and drastic action as Dringenberg, a change in attitude toward reading is already a change.

> The passage from the scholastic method to more liberated systems of thought brought another development. Until then, the task of a scholar had been—like that of a teacher—the search for knowledge, inscribed within certain rules and canons and proven systems of learning; the responsibility of the teacher had been felt to be a public one, making texts and their different levels of meaning available to the vastest possible audience, affirming a common social history of politics, philosophy and faith. . . . [With the humanist perspective] the students eventually reacted by circumscribing the act of reading to their own intimate world and experience and by asserting their authority as individual readers over every text.[192]

Sir Arthur Quiller-Couch called for the overthrow of the tripos. To accomplish the justice called for by James Boyd White[193] or Richard H. Weisberg,[194] reading practices and the values and substance they bring, must be made conscious. If we do not, there is a risk. "While learning one's way around with language involves a capacity to cope with . . . seldom noticed ambiguities, there seems to be a high degree of intolerance

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[190] MANGUEL, *supra* note 163, at 72.
[191] *Id*. at 78.
[192] *Id*. at 83.
[193] White, *supra* at note 121.
[194] Weisberg, *supra*, at note 166.

to talking-about-them; an intolerance that at least promotes the persuasive-manipulative potentials of their use."[195]

[195] WALTER PROBERT, LAW, LANGUAGE AND COMMUNICATION 23 (1972).