LEGAL EDUCATION: A PROBLEM OF LEARNING FROM TEXT

PETER DEWITZ*

INTRODUCTION

In the spring of 1996 I participated in a panel discussion of pedagogical theory and gender diversity at the New York University's School of Law: A Public Discussion of Voices in the Classroom. To this panel discussion I did not bring experience as a lawyer, a law professor, or even a law student. My experience with the law was limited to a few traffic tickets and some moderately extensive case studies of law students who were struggling to learn the material in their case books. These students sought my help as the director of a university reading clinic when they believed that reading disorders were hindering their efforts in law school.[1] From this experience with struggling law students I found that what educators know about reading comprehension could be used to improve the text learning of law students.

To the panel discussion at New York University I brought knowledge of reading theory and instructional practices that support the reading of complex material like legal case books. My comments at the symposium were not focused directly on issues of gender, but rather on what cognitive theory has to say about reading and learning with text. Educators have learned a great deal about how knowledge is created from text and how instructors can aid this learning process. In this article I will first explore some characteristics of reading with an emphasis on reading in complex domains like law. Next, I will discuss what we know about the differences in reading between successful and less successful law students. Finally, I will situate the reading assignments of law students in their classroom and suggest what instructors might do to improve their students' learning with text. These suggestions will require an examination of the case method and the Socratic method of questioning that often accompanies the reading of appellate cases.

I.
THE READING PROCESS

Reading is the product of word recognition and comprehension.[2] Word recognition is the set of skills we use to recognize and identify words.

* Professor, Curriculum and Instruction, Curry School of Education, University of Virginia. Ph.D. Claremont Graduate School.

1. My work with law students took place at the University of Toledo, where I served as director of the Reading Center from 1977 to 1994.

2. Philip B. Gough & William E. Tunmer, *Decoding, Reading and Reading Disability*, 7 READING & SPECIAL EDUCATION 6, 7 (1986). Decoding is the process of recognizing words.

Word recognition for the adult reader is an automatic process during which the reader will employ knowledge of letters, sounds, word parts, whole words, and contextual constraints in a seemingly effortless act.[3] For almost all law students word recognition is well developed and fluent. While law students will occasionally encounter new terms, almost all can be identified through basic phonics principles. Recognizing a word, however, 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 itinere*). Efficient word recognition ability is a necessary but not sufficient condition for good comprehension.[4]

Reading comprehension is essentially the process of building a mental representation of the ideas expressed by the author. The first and most important factor that affects comprehension ability is the real world knowledge that the reader brings to the page.[5] Reading is a constructive process, in which the reader builds an interpretation of a text based on information provided by the author and knowledge that the reader possesses. What readers know determines what they will comprehend. Lacking knowledge in a given domain, the reader cannot make sense of new information. Studies in areas other than law document that differences in reading comprehension among adult readers can be largely explained by differences in domain knowledge.[6] To comprehend legal texts requires knowledge of case law, jurisprudence, legal theory and so forth. Thus, the novice is at a serious disadvantage compared to the expert, but that is why he or she attends law school.

Legal education is an example of learning in a complex and often ill-structured domain. The domain of law is ill-structured because many different concepts are pertinent to a specific case, and the combination of concepts changes constantly from one case to another. (You may read the term case in its generic meaning or its specific meaning within legal studies. The

---

Several processes can be used to recognize words: visual skills, contextual skill, and phonics. All of these skills operate automatically and almost effortlessly in the mature reader.

3. MARILYNE J. ADAMS, BEGINNING TO READ 95 (1990).

4. Keith E. Stanovich, *Word Recognition: Changing Perspectives*, 2 HANDBOOK OF READING RESEARCH 418 (1990).

5. Richard A. Anderson & P. David Pearson, *A Schema-Theoretic View of Basic Processes in Reading*, HANDBOOK OF READING RESEARCH 255, 259-69 (1984). This chapter presents the basic precepts of schema theory as an explanation for reading comprehension. A schema is an abstract representation of stored knowledge. During reading, comprehension occurs when the reader can match the text information to the pre-existing schema. The new is interpreted in light of the old. The existing schema fills in the gaps in the text and allows for many kinds of inferences. When we read, "Marge looked at the menu" our schema tells us that she is most likely in a restaurant. Our schemata allow us to supply the information that the author omits.

6. *See* Peter Afflerbach, *The Influence of Prior Knowledge on Expert Readers' Main Ideas Construction Strategies*, READING RES. Q. 31, 35 (1990); *See also* B. Graves & C. H. Fredericksen, *Literary Expertise in the Description of Fictional Narrative*, 20 POETICS 1, 18 (1991).

meaning is correct either way.) While introductory learning demands exposure to a field and simple recognition and recall of information, the learner in the advanced stage of knowledge acquisition must "attain a deeper understanding of content material, reason with it, and apply it flexibly in diverse contexts."[7]

Learning in complex domains demands the creation of schemata or knowledge structures—not just the activation of existing knowledge structures—and the application of this new knowledge in real world situations. A schema is an abstract representation of an object, concept or event.[8] Psychologists believe that knowledge is stored in abstract representations which are then fleshed out or instantiated with the details of everyday life. The process of schema activation and instantiation is comprehension.

Learning in simple domains assumes that the learner already has a partial knowledge schemata onto which new concepts are attached, but these conceptual schema must be built in complex domains. Because the law is complex it is important for the law student to develop "a diverse repertoire of ways of thinking about a conceptual topic."[9] Flexibility is the key, not rigid conceptual systems that cannot be readily applied to new contexts. " Let me suggest that you regard the law not as a set of rules to be memorized, but as an activity, something that people do with their minds and with each other as they act in relation to a body of authoritative legal material and to the circumstances and events of the actual world."[10]

The second type of knowledge needed by the learner is an understanding of text structure or genre. The more a reader knows about the organizational structure of a text the more smoothly comprehension can proceed.[11] Text structure knowledge is the map readers follow to locate and focus on important information. With experience and instruction we acquire a number of maps for the different types of texts we read.[12] When we read a typical textbook we know that the introduction will foreshadow the author's main points. The headings and subheadings will illuminate the ideas as we proceed through the chapter. The summary will restate these ideas. Knowing this structure is essential to comprehension and to learning with texts.

---

7. Rand J. Spiro, *Cognitive Flexibility Theory: Advanced Knowledge Acquisition in Ill-Structured Domains*, THEORETICAL MODELS & PROCESSES OF READING 602, 603 (1994).

8. *See* Anderson & Pearson, *supra* note 5, at 269.

9. *See* Spiro, *supra* note 7, at 605.

10. James B. White, *The Study of Law as an Intellectual Activity*, 32 J. LEGAL EDUC. 1, 3 (1982).

11. Bonnie J.F. Meyer, David M. Brandt, & George J. Bluth, *Use of Top-Level Structure in Text: Key for Reading Comprehension of Ninth-Grade Students*, 16 READING RES. Q. 72, 96-103 (1980).

12. *See e.g.* Bonnie J. F. Meyer & G. Elizabeth Rice, *The Structure of Text*, 1 HANDBOOK OF READING RES. 319, 319 (P. David Pearson et al. eds., 1984). The concept of text structure in the present article refers to the organization of a text existing above the paragraph level including the macropropositional level and the top-level structures.

Legal cases and legal briefs present new text structures and a new challenge for entering law students, many of whom have just spent four years reading in the humanities and social sciences. Legal cases have a unique structure, typically including a summary of previous proceedings, issues or disputes, a rationale of the reasoning, decisions and the rule. Experts use their knowledge of this structure to guide their comprehension as they locate the facts, then the decisions, and finally the rationale behind the legal reasoning.

Grammatical knowledge is the third type of knowledge utilized by the reader. While text structure knowledge helps the reader navigate through the ideas developed across a text, grammatical knowledge helps the reader understand the relationship among concepts within a sentence. All mature readers have well developed grammatical knowledge, but occasionally the syntax of a sentence is so complex that a reader must strain to parse the ideas within that sentence into some logical relationship. The demands of syntax are easily appreciated when we compare the complex prose of Faulkner to the less demanding writing of Hemingway.

The final type of knowledge used by a reader is strategic knowledge or procedural knowledge. A reading strategy is a set of mental processes used by a reader to achieve a purpose. Strategies are intentional, flexible, and self-evaluative.[13] Readers act strategically when they set a purpose for reading, self-question, search for important information, make inferences, summarize, and monitor the developing meaning. For most of our reading, strategies are used in a relatively unconscious manner, yet reading difficult material often forces us to be more intentional and then we become more conscious of these strategies.[14] A strategic reader is flexible. At times it is important to make an inference, to build causal coherence where the author failed to be explicit. At other times making such an inference may be premature, resulting in an incomplete or erroneous interpretation of the text.

There are three broad categories of strategies that readers employ as they move through a text: problem formation strategies, default strategies, and rhetorical strategies.[15] Readers use problem formation strategies to set

13. Scott G. Paris, Barbara A. Wasik, & Julianne C. Turner, *The Development of Strategic Readers*, 2 HANDBOOK OF READING RESEARCH 609, 610-11 (Rebecca Barr, Michael L. Kamil, Peter B. Mosenthal, and P. David Pearson eds., 1991).

14. *See* Sharon Benge Kletzien, *Strategy Use by Good and Poor Comprehenders Reading Expository Text of Differing Levels*, 26 READING RES. Q. 67, 80-82 (1991) (study finding that good high school comprehenders used more reading strategies as the text became more challenging).

15. *See* Dorothy H. Deegan, *Exploring Individual Differences Among Novices Reading in a Specific Domain: The Case of Law*, 30 READING RES. Q. 154, 161 (1995). These terms are peculiar to Deegan and represent summary terms for strategies that often are given more specific labels. *See also* MICHAEL PRESSLEY & PETER AFFLERBACH, VERBAL PROTOCOLS OF READING: THE NATURE OF CONSTRUCTIVELY RESPONSIVE READING 1-14, 119-40 (1995); Janice A. Dole, Gerald G. Duffy, Laura R. Roehler, and P. David Pearson, *Moving*

expectations for a text. They ask themselves questions, make predictions, and hypothesize about the developing meaning.

Default strategies represent the summarizing, paraphrasing and retelling that readers employ to build an on-going sense of the text. The use of these strategies results in building our mental text models. 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, personal text. Much of these default strategies demand inferences, using information from our background knowledge to flesh out the ideas in the text and using the specifics of a text to elaborate the abstract knowledge of our schema.

Rhetorical strategies go beyond the text itself as the reader comments and evaluates the ideas read. According to 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 the effect on the audience."[16] In reading law we might try to fit the case in a historical setting, question the decision or the rationale, and comment on the clarity of the judge's writing.

Being strategic is part of the overall self-regulated nature of reading. Good readers constantly monitor their reading, noting when comprehension is proceeding smoothly and when difficulties occur. When comprehension breaks down, readers attempt to repair their problems through rereading the text, summarizing, making inferences or consulting outside help. This twofold nature of self-regulation, monitoring of comprehension and repair of comprehension breakdown, is called metacognition. Metacognition, or thinking about thinking, is critical to a reader's success especially when reading challenging text.[17]

While all readers use strategies, their use depends on the difficulty of the reading material, the maturity of the reader and the context of the reading. When text is relatively easy, we are largely unaware of the strategies we employ; but as text becomes more demanding, we become aware of our own comprehension or lack of it and maybe even our use of strategies to resolve misunderstanding. Reading law is more than knowledge acquisition, it is a process of thinking demanding the reconstruction of ideas and a critical mind.

From the Old to the New: Research on Reading Comprehension Instruction, 61 REV. EDUC. RES., 239, 242-249 (1991).

16. Charles Haas & Linda Flowers, *Rhetorical Reading Strategies and the Construction of Meaning*, 39 COLLEGE COMPOSITION & COMMUNICATION 167, 176 (1988).

17. *See* Linda Baker and A. L. Brown, *Metacognitive Skills and Reading*, HANDBOOK OF READING RESEARCH 353, 353-54 (P. David Pearson ed., 1984).

II.
Differences Between Novice and Expert Readers of Law

Legal texts can be considered a specialized genre, and success with legal texts is based on specific knowledge of that genre and specific reading strategies.[18] Scott Turow, once a beginning law student and now a successful novelist, compared legal case reading to "something like stirring concrete with my eyelashes."[19] All first year law students are novices, but they differ in how rapidly they acquire the reading skills of the expert. A small but growing body of research has begun to document the differences between expert and novice readers of law and, more importantly, successful and less successful law students. These readers differ in how they use knowledge of the text structure and cognitive reading strategies.

Research on expert and novice readers reveals some important differences in how they approach legal cases. Mary Lundeberg explored these differences by having 10 experts and 10 novices think aloud while reading an appellate court decision.[20] The experts, law professors or practicing lawyers, used text structure knowledge far more frequently than did novice readers.[21] The expert began the reading of a text by reading the headings, noting the parties involved in the case, the type of court, the date, and the name of the judge. Novices did attend to the parties, but ignored the rest of the contextual information.

The difference between the expert and the novice is further revealed in how they read a case after establishing, or in the case of most novices, failing to establish, the facts of the case. The experts previewed the decision, examined the length of the case, located the action taken and studied the facts more consistently than did the novice. Experts also attempted to create a mental picture of what happened in the case.[22] One law professor gave this advice for his first year class:

> Begin by trying to reconstruct from the opinion, so far as you can the facts that occurred in the real world before any lawyer was brought into play. Tell the story chronologically, without any terms of legal conclusion. You should try to create a movie of life, a story of the experience of ordinary people in the ordinary world. Reflect in your story how each of the participants would characterize the events in his ordinary language. This is the experience

18. J. F. Stratman, *The Emergence of Legal Composition as a Field of Inquiry: Evaluating the Prospects*, 60 Rev. Educ. Res. 153, 155-160 (1990).

19. Scott Turow, One L 30-31 (1978).

20. Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 Reading Res. Q. 407, 417-32 (1987).

21. *Id.*

22. Laurel C. Oates, Beating the Odds: Reading Strategies of Law Students Admitted through Alternative Admissions Programs 1-5 (1996) (unpublished manuscript, on file with N.Y.U Rev. L. & Soc. Change).

> upon which the law will be asked to act in its peculiar and powerful ways and for which the various people of the law will claim particular—and competing—legal meanings.[23]

"One of the first strategies the experts used when handed the photocopied case was to flip to the end of it, and mark the *decision* (which usually tells in one or two words how the judge decided the case—whether he or she supported it or reversed it). The experts, on some level, knew that having this information prior to reading the rest of the case would be beneficial."[24] In contrast, the novice rarely if ever noted the decision prior to reading the case. These simple strategies—cognitive "secrets" which professors often fail to reveal to their students—help explain the success of an expert compared to the novice.

Lundeberg also reported that while very few of the novices evaluated the opinion, most of the experts made statements agreeing or disagreeing with the court's holdings or rationale. That the novices did not evaluate the opinion speaks more to their lack of legal knowledge than to any specific difference in reading strategy.

Martin Davies, a law professor, relied on his own introspection to describe the process of reading for experts and novices.[25] Davies believed that two things distinguished strong legal reading: (1) supplying legal context to a case, and (2) reading for a sound purpose. Davies argued that it is the reader's task to provide context and significance to a case:

> The primary source of the common law is the text, and no text has meaning without a readership. There is no apodictic "true legal meaning". . . which exists like a Platonic Ideal, independent of the process of understanding, and which readers struggle to grasp with varying degrees of success.[26]

Finally, the expert and the novices also differ in their use of time. Experts actually read the beginning of cases slower than the novice, trying to firmly establish the facts. After this slow introductory reading, the expert is then able to read the case at twice the rate of the novice. In contrast, the novice reads each portion of a case at an almost equal rate, albeit slower than the expert. This difference in the use of time reflects a difference in allocating attention and thought to important elements of the text.

Experts and novices also differ in the thinking strategies they use while reading a legal text. The use of problem formation strategies, a powerful and important strategy for reading a legal text, is described by Elizabeth Fajans and Mary Falk, who tried to engage law students in a close reading

23. James B. White, *The Study of Law as an Intellectual Activity*, 32 J. OF LEGAL EDUC. 1, 6-7 (1980).

24. Lundeberg, *supra* note 20, at 413.

25. Martin Davies, *Reading Cases*, 50 MOD. L. REV. 409 (1987).

26. *Id.* at 421.

of the text.[27] Fajans and Falk felt that too many students read denotatively, to locate, retrieve and remember ideas. They did not ask questions such as: (1) Whose story is the court telling? (2) How is the court reading the law? (3) How is the court trying to obtain our assent to its position? or (4) What did the court omit from its opinion? These passive readers did not engage in a dialogue with the author.

Dorothy Deegan also analyzed the reading strategies of stronger and weaker beginning law students.[28] Two differences emerge in Deegan's research. First, strong law students employ more problem formation strategies than do weaker students. The high performance law students spent 58.9% of the time engaging in problem formation strategies, while the low performing students did so only 40.3% of the time.[29] The strong students made more predictions while they read and asked themselves more questions. Thus, their reading had a stronger sense of purpose and inquiry than did the weaker reader.

While the weaker students engaged in less problem formation strategies, they spent more time summarizing and retelling the content of the material. The weaker students spent 44.7% of their time engaging in these default strategies, while the high performance group did so only 29.1% of the time.[30] Since we have already seen that they are prone to misunderstandings, these summaries may be amiss. Even when the weaker law students employed problem formation strategies, they were less persistent and resolved fewer of the problems that they defined. The strong readers resolved 14.8% of the problems they raised while the weaker readers resolved 6.3% of the problems.

A close look at the think-aloud protocols from Deegan's studies reveals the reading strategies that successful and unsuccessful law students employ. In the example, students were asked to read about enterprise liability theory which was never directly defined in the passage but the principles of which were clearly presented. The following is taken from a think-aloud of a successful first year student:

> OK, here's this word enterprise liability theory again, which I sort of glossed over at the beginning. So I'm gonna go back and make

27. Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of the Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993) (This approach foreshadows the Questioning the Author technique developed by Isabel Beck and her associates.). *See* Beck et al., *Questioning the Author: A Yearlong Classroom Implementation to Engage Students with Text*, ELEMENTARY SCH. J. 385 (1996).

28. Dorothy H. Deegan, *supra* note 15, at 154, 157-159 (1995). *See also,* PRESSLEY & AFFLERBACH, *supra* note 15, at 1-14, 199-240 (stating that in a think-aloud protocol the reader reads a text and stops periodically to talk about what they are thinking. These oral protocols are analyzed and categorized to capture the thinking of the subject. Think-aloud protocols have been validated as an effective means of understanding the thinking of a reader).

29. Deegan, *supra* note 15, at 163.

30. *Id.*

> sure I knew what he was talking about when he was saying enterprise liability in the first paragraph [flips back and reads] 'genesis of current theories of enterprise liability.' So he must just be talking about the liability of not just the individual but corporations, for instance, or insurance companies or whatever. So now I link that back into what he's talking about [reads silently]. And this thing called enterprise theory. Apparently that's the traditional theory, but I'm not sure [writes in margin 'i.e., the traditional theory?'] which is to be contrasted with the social welfare theory. But again, I'm not sure that's what he's getting at.[31]

At this point Deegan points out that the reader has developed an interpretation of enterprise liability theory, and while his current thinking is wrong, he has left the issue open and several paragraphs later returns to resolve his partial misunderstanding.

> OK, OK, now I'm back to enterprise liability. Now more of this is becoming clear. Enterprise liability is not a traditional theory, because he talks about that it pursues two of the traditional goals of tort law, which I understand are these [flips back in text] the three that I wrote here. [reads aloud] 'But it greatly attenuates the renaming goals, that of condemning the traditional blameworthy conduct' which is the deterrence aspect. Now that makes, now I see that distinction a little more clearly.[32]

Skimming and reading the student continues to work to resolve his developing understanding of the passage.

> So before in this I was going through the whole passage, I thought that enterprise theory was to be distinguished from the social welfare aspects. And now I realize that they are the same. So I'm confident as I go through it again, its gonna make sense.[33]

In contrast, less successful law students read in a very different manner. They, too, open up questions or problems, but more quickly resolve them. They make connections across ideas in a text that should not be made, and construct inferences based on faulty understanding of words and sentences. In many cases they do not know that they do not understand. Less successful law students list what they have read, summarize, and rely on ineffective strategies even when the meaning of a passage does not become clear. Similar problems have been noted with high school and undergraduate college students.[34] As Deegan points out, rhetorical strategies

31. *Id.* at 164.
32. *Id.* at 164-65.
33. *Id.*
34. Several researchers have investigated the comprehension strategies used by good and poor readers. *See* S. B. Kletzien, *Strategy Use by Good and Poor Comprehenders Reading Expository Text of Differing Levels*, 26 READING RES. Q., 67-86 (1991) (proving that strategy use by high school students parallels that of law students).

can be dangerous especially when readers attempt to comment on or evaluate the ideas in a text before they understand them. All readers would be advised to refrain from judging a text until they had developed a full and accurate representation of its ideas.

Oates' close analysis of law students admitted through alternative admissions programs reveals differences among these students in the use of reading strategies.[35] Of the four students Oates studied, two struggled in law school but two succeeded, and their grades at the end of the first year exceeded the predictions of their LSAT scores. Oates compared, through think-alouds, the reading of the four students and also one law professor. The struggling law students did not set a clear purpose for reading the text nor did they try to read from the critical perspective of a judge or lawyer. They rarely attempted to synthesize what they read and failed to raise and answer questions while they read. One of the students stated that his purpose was to simply avoid embarrassment if called upon to speak in class.

> When I read cases, I usually read them not for briefing cases per se, but more out of fear of being called on in class. I don't want to look like a fool so I just want to know the basic principles. I notice when I am sitting in class that as long as the person knows the basic facts, the rule, and how to apply them then anything that the person says doesn't matter.[36]

In contrast, two of the law students succeeded beyond what their LSAT scores predicted and each did so in a different manner. One student, William, adopted many of the reading strategies of experts and successful law students. He was actively involved with the text, and like experts, he tried to clearly establish the context of the case, even employing mental imagery. While he read, William adopted the critical stance of a judge and evaluated the merits of the plaintiff and defendant in the case.

Maria succeeded in law school, not by becoming an expert reader, but by becoming a strong student. She read in a very methodical manner, first noted the parties, then the facts, the rule and the court's reasoning. She did not prepare a brief of the case before class, but waited to hear the professor's explanation and then adopted that position. "I usually adopted the professor's way [of reading the case.] I guess it is survival. If he says or she says it, it must be right. That is what you need to know."[37]

The weak students in Oates' study exhibited few of the strategies used by the expert. These students did not read with a sense of inquiry or self-questioning. They read the text as given and attempted to assimilate as much information as they could. On occasion they had vocabulary

35. Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, Paper Presented at the National Reading Conference (1996).

36. *Id.* at 25.

37. *Id.* at 32.

problems and rather than infer or look-up a word's meaning they made inferences that bridged over the misunderstanding. Failing to realize that they did not understand, they committed to memory incomplete and inaccurate information.

Given the difficulties faced by reading legal text, most law students attributed their problems to themselves and not to the text. When interviewed about their difficult reading assignments they comment:[38]

> I feel like an idiot. Why is this so hard for me to figure out?
>
> I don't have a logical mind.
>
> I don't have any idea what the issue is: I lost my concentration on the second page.

Few law students attribute their difficulties to the text or the new conceptual problems that they face. Similar findings were noted in a study of women's experiences at one Ivy League law school.[39] These negative and personal attributions are somewhat surprising given the academic success almost all law students have experienced during their undergraduate years. When law students have reading problems and then attribute their difficulties to themselves, it is incumbent for law schools to address these problems. Luckily these issues can be resolved with reasonably easy changes in regular law school classroom instruction or in short introductory seminars before classes commence.

III.
DEVELOPING THE READING COMPREHENSION OF LAW STUDENTS

Legal texts are the central focus of the law school classroom, and the law professor has multiple opportunities to promote the students' comprehension of these cases. In the case method, a traditional and still popular approach, comprehension and understanding is developed and reinforced through a Socratic dialogue after the students have completed the reading. The benefits of the case method have been debated since its creation and a number of experts have raised questions about its efficacy.[40] Critics argue that the case method does not impart information, fails to promote analytic skills and has an adverse emotional impact on students and instructors.[41] However, when one global method of instruction, like the case method, is

38. Lundeberg, *supra* note 20, at 416.

39. *See* Lani Guinier, Michelle Fine, & Jane Balin, with Anne Bartow & Deborah Lee Stachel, *Becoming Gentlemen: Women's Experience at One Ivy League Law School*, 143 U. PA. L. REV. 1, 143 (1994).

40. Paul F. Teich, *Research On American Law Teaching: Is There a Case Against The Case System?* 38 J. LEGAL EDUC. 167 (1986).

41. *Id.* at 171.

contrasted with another global method researchers typically find few differences.[42] Individual student variation in learning is so vast that differences between methods are obscured. Some students benefit from one approach, other students from alternative methods. The point of my comments is not to challenge directly the case method, but rather to suggest embellishments to that method, and to contrast elements of the case method with research from educational psychology.

When a text is used for any class, the instructor has three opportunities to affect a student's understanding—before the text is read, while the text is being read, and after the text is read. Instruction at each time can have a significant effect on students' learning. Many law professors ignore instructional opportunities that, if taken, would boost the learning of most students. In the sections that follow I will describe what a law professor can do to promote understanding before, during, and after the students read. Before students read legal texts, professors can foreshadow the structure and the knowledge necessary to facilitate comprehension. While professors cannot be with the students while they read, they can demonstrate and explain strategies for reading that will promote comprehension. After students have read and when they return to class, professors can engage them in dialogues that promote understanding. Some forms of discussion are more useful than others.

A. Before Reading

Law professors assume that the students will complete the assigned readings before coming to class, and make the implicit assumption that further understanding and analysis can be facilitated through the classroom lectures and discussion. Research has demonstrated that what is presented before a text is read can influence students' subsequent understanding.[43] The knowledge a reader brings to a text will strongly influence what he or she learns from the text. Comprehension occurs when the reader can mentally reconstruct the key concepts in a text. To facilitate this construction, students benefit from two types of instruction. First, instructors can provide students with some of the knowledge that is necessary to understand the readings. This knowledge provides the reader with a foundation to begin his construction. All texts are incomplete, even law texts, and bringing some knowledge to the text enables the reader to make inferences that build coherence and understanding. With even a small knowledge base, the reader is able to read in a problem-seeking manner, asking questions and making predictions. While previewing a text may seem to some like spoon

42. *Id.* at 185,

43. Janice A. Dole, Sheila W. Valencia, Eunice Ann Greer, and James L. Wardrop, *Effects of Two Types of Prereading Instruction on the Comprehension of Narrative and Expository Text*, 26 READING RES. Q. 142, 154 (1991).

feeding, the actual benefits to the students are significant. The understanding of the novice is greatly facilitated when some of this information is presented before the text is read. Some students sense this and deliberately choose to read the text after and not before a class discussion, risking the penalty of being called on to recite in class.

A simple ten minute oral preview is enough to give students the necessary background to facilitate the subsequent reading.[44] Tell the students that their next set of readings will cover the following concepts and then list them. Try to provide a brief example of each concept and, if possible a negative example. Examples are more powerful than definitions when learning new concepts. With new material, start with concrete examples and then move to the abstract.

The second approach to improving comprehension is providing students with a scaffold to support their new knowledge constructions. These scaffolds are typically graphic organizers - charts, graphs, and diagrams. A graphic organizer is a visual display that presents the key ideas in a structure that reflects the relationships among the concepts in the texts.[45] Graphic organizers are useful because they provide a more concrete means of representing ideas and hence a guide or a map for the reader as he or she constructs information with a text.

There is most likely a continuum along which ideas can be represented from the very concrete (representational pictures) to the very abstract (written text). Graphic organizers occupy the middle ground; they are more concrete than text, but more abstract than pictures. Graphic organizers have been used for some time to represent complex legal ideas.[46] At the simplest level are charts and matrices which transform the textual information into a series of columns and rows allowing the reader to compare and contrast variables. At a more complex level are diagrams which depict the interrelationship among a set of ideas or variables. Diagrams can be constructed to represent hierarchical ideas and causal relationships. Finally, flow charts can be used to depict a decisionmaking process.[47]

The most functional device is the semantic map, a free form outline, which is a visual presentation of ideas and their hierarchical, temporal, or

44. *See* Michael. F. Graves & Maureen Prenn, Effects of Previewing Expository Passages on Junior High Students' Comprehension and Attitudes, in CHANGING PERPECTIVE ON RESEARCH IN READING/LANGUAGE: PROCESSING AND INSTRUCTION 173-177 (Jerome A. Niles & Larry A. Harris eds., 1984).

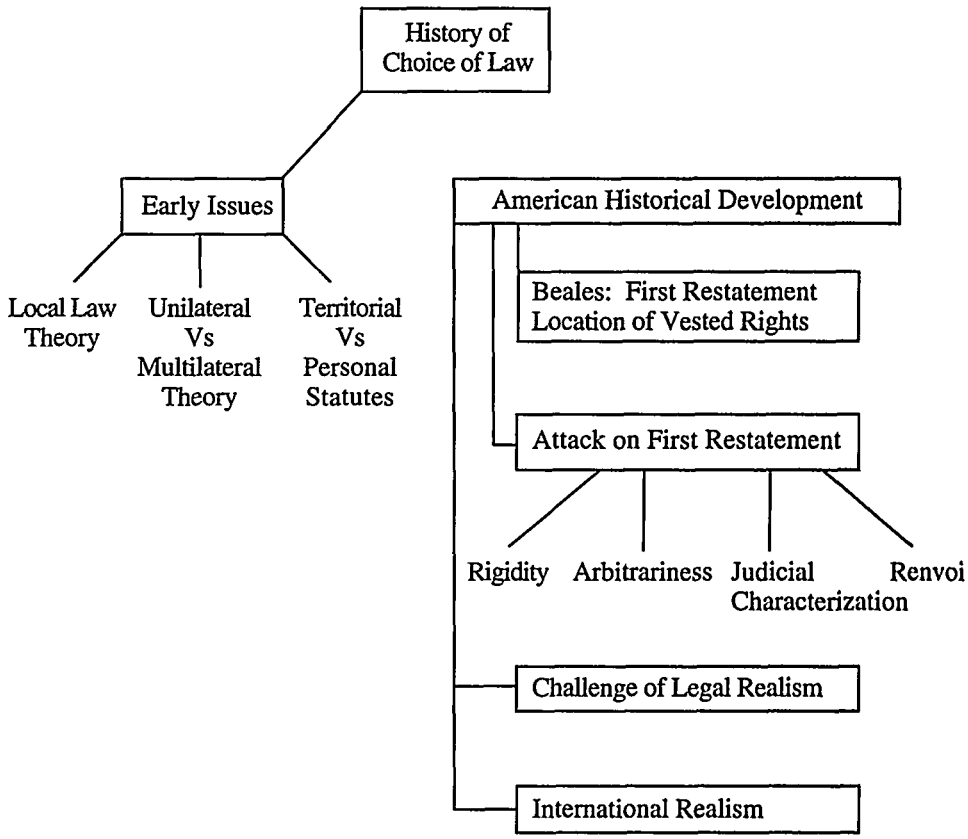
45. William M. Richman, *Graphic Forms in Conflicts of Law*, 27 U. TOL. L. REV. 631, 631 (1996).

46. *See* CORINNE COOPER, GETTING GRAPHIC 2: VISUAL TOOLS FOR TEACHING AND LEARNING (1994); Harry Henn, CORPORATIONS: CASES AND MATERIALS (1984); LYNN M. LOPUCKI, A BANKRUPTCY VISUAL (1991); JOHN H. WIGMORE, EVIDENCE (James Chadbourn ed., 1981); William H. Lawrence, *Diagramming Commercial Paper Transactions*, 52 OHIO ST. L.J., 267 (1991).

47. See Richman, *supra* note 45, for a more complete discussion of graphic organizers in legal study.

causative relationships. The semantic map can take many forms, and it attempts to capture in a visual way the conceptual structure that underlies the topics being studied. Figure 1 presents a semantic map that might be used at the beginning of a conflicts of law course.[48]

FIGURE 1



The nodes, or boxes, of the semantic map identify the key ideas that the students will encounter in their reading. The lines that connect the nodes represent the structure of the ideas, how concepts are imbedded one within another. In some college courses semantic maps have been used successfully to guide students' reading.[49] The instructor introduces a partial semantic map, students copy it, and their note-taking is guided by the map as

48. *See* Peter Dewitz, *Reading Law: Three Suggestions for Legal Education*, 27 U. TOL. L. REV. 657, 667 (1996).

49. Bonnie. B. Armbruster, *Does Text Structure/Summarization Instruction Facilitate Learning From Expository Text?*, 22 READING RES. Q. 331, 333 (1987).

they read. They add information to the map and expand it by creating additional nodes and lines. In this way the semantic map acts as a scaffold for the reader, presenting a skeleton of the text's basic ideas. With this support the reader can more successfully locate and comprehend additional information.

B. During Reading

Law students read alone, but law professors should describe and model strategies for reading that have proven useful for both beginning and advanced students. Experts have an implicit understanding of the structure of legal cases and use that knowledge to locate important information and build an understanding of the text. Some legal educators argue that they acquired this text structure knowledge and their reading strategies through a process of discovery, and law students should retrace those same tortuous steps. However, research by cognitive psychologists suggests 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. According to Frederiksen "indirect instruction is more appropriate after basic knowledge structures and skills have been acquired."[50]

The most effective instructional approach is to explain the structure of a legal case and the process for reading it. Law professors should describe the basic structure of a legal case and its most likely variations, then model how they read a case. A simple structure like the one in Figure 2 is often sufficient for novices to understand the structure of a case and use it to improve understanding. Students can use this structure as a reading guide, adding summaries and details to each section as they proceed through the case.

FIGURE 2
TEXT STRUCTURE OF A LEGAL CASE

Summary of previous legal proceedings
Precedents and other legal cases. These may or may not be included in typical cases presented in casebooks.
Issues or dispute—the facts
What happened? To whom? Why?
Why is this case in court?
Decision—(may precede or be part of the rationale)
How did the court rule?
Rationale or reasoning
How did the court arrive at its opinion?

50. Norman Frederiksen, *Implications of Cognitive Theory for Instruction in Problem Solving*, 54 REV. EDUC. RES. 363, 392 (1984).

The rule—may be part of the reasoning

Lundeberg has tested a procedure for teaching text structure and reading strategies to law students. Her simple three hours of instruction proved to be effective for improving the reading comprehension of first, second and third year law students. Lundeberg suggests that a case be read in three stages.[51]

1. Put the case in context.
2. Read the case for an overview.
3. Reread the case analytically.

These simple guidelines can be expanded into a specific set of directions for law students. Figure 3 presents an expanded version of these guidelines which were taught to law students in short half-day seminars.[52]

FIGURE 3

1. PUT THE CASE IN CONTEXT: Think before you read.
   Examine the chapter and section title.
      What do the words in the chapter and section titles mean?
      What questions might they address?
   Examine the citation.
      What is the name of the case? Are the parties individuals or companies?
      Is it a state or federal court?
      What's the date? What was the social and political climate of that time?
2. READ THE CASE FOR AN OVERVIEW
   Be alert to structure.
      Summary of previous legal proceedings
      Issues or dispute
      Facts
      Rationale or reasoning
      Decision
   Understand the legal proceeding.
      Focus on the fist few sentences which describe the parties and dispute.
   Picture the facts.
      What happened? To whom? Why?
   Identify the issue.
      Why is this case in court? On what general legal grounds?

51. *See* Lundeberg, *supra* note 20, at 430-432.
52. *Id.*

What does the court say on this issue? Since the decision and the rule answer the issue, sometimes it is easier to frame the issue after finding the decision and rule.

Find the decision and rule.

At the end of the case the court states its decision. Is the judgment reversed or affirmed? Is the motion denied? Why? What rule of law is the judge applying?

3. REREAD THE CASE ANALYTICALLY: Pause and think about the implication of words.

Notice terms and qualifying words.

Try to define the central terms using the context of the passage, a traditional dictionary or a legal dictionary.

Pay attention to qualifying words (if, when, only). They can significantly alter the meaning of a sentence.

Distinguish relevant from irrelevant facts.

With the issue, decision, and rule in mind, determine which facts were important to the court's decision. Often facts which may be essential to one party's argument are considered irrelevant by the court.

Study the rationale.

Separate the rationale from the dicta, the other legal rules and statements not directly involved with the decision.

The rationale may contain the reasons for the rule and the application of the rule.

Synthesize the case.

How do the elements (issue, decisions, rule and rationale) fit together?

Why did the editor include this case in your casebook?

How would you apply this rule to different facts?

Law students who have been presented these guidelines for case analysis have demonstrated improvement in their understanding of legal writing. Beginning law students were trained in the use of the guidelines and then tested on their understanding of two legal cases. The results indicated that training improved students' ability to separate relevant from irrelevant facts, to understand the parties' actions and the decision, to state the rule and rationale of a case and to apply the rule to hypothetical situations. While some training effects emerge immediately, experience suggests that law students gain even more facility with the guidelines over time. Even students beginning their second and third years of law school have benefited from learning strategies for studying law. Lundeberg measured her effects by having law students read cases and answer questions, but no long term measures of transfer and application were included. Comprehension instruction with high school students and college undergraduates suggests

that training in reading strategies, when specific to the discipline, can have sustained benefits lasting for months or a full academic year.[53]

The process of educating law students in the use of Lundeberg's legal case analysis demands a focus on self-controlled training. Lundeberg had a seminar of beginning law students read a case with half the class given the guidelines and half not. Then all the students discussed the case and the difficulties that they encountered when reading it. This discussion was used to introduce the guidelines and to elicit from the students personal statements about the value of the legal case guidelines. Next, Lundeberg modeled the use of the guidelines by reading a case, segment by segment following the guideline. Lundeberg made her thinking visible so students could see how an expert thinks while reading a case. Next the students tried out the guidelines while she provided support by giving additional directions and asking the students questions about the use of the guidelines. The focus of the instruction was on both content and process. Students had to justify their answers: "Why do you believe that? How did you reach that conclusion? What evidence in the case supports your position?" As students gained some understanding and comfort with the legal case analysis procedures, Lundeberg faded the support and released the responsibility to the students.

Finally, Lundeberg encouraged students to monitor their understanding of the case and use the questions at the end of the guidelines as a form of self-assessment. Lundeberg urged students to focus on their understanding and attribute their success to the reading strategies they had employed. Good readers monitor their understanding and attribute their success to cognitive activity under their own control.[54]

It took three hours to teach law students to use the guidelines for legal case analysis and the whole process could be incorporated into a short introductory seminar for first year students. Just handing students the guidelines provides some benefit, however, three hours of instruction with instructor modeling, guided practice and debriefing yield superior results for all law students.

---

53. *See* Peter Dewitz, Eileen M. Carr, and Judythe P. Patnerg, *Effects of Inference Training on Comprehension and Comprehension Monitoring*, 30 READING RES. Q. 99, 108-11 (1987). We have been able to achieve reasonable long-term results with middle grade students, but research still needs to be done with college and post-graduate students. Lundeberg was able to achieve short-term gains but did not follow her subjects for a full academic year. *See* Lundeberg, *supra* note 20, at 417-26. *See also* Jeanne D. Day, *Teaching Summarization Skills*, 3 COGNITION & INSTRUCTION 193, 208 (1986) (documenting research on junior college students); Victoria C. Hare & Kathleen M. Borchardt, *Directing Instruction in Summarization Skills*, 20 READING RES. Q. 62, 75 (1984) (documenting research on high school students).

54. See Peter H. Johnson & Peter N. Winograd, *Passive Failure in Reading*, 17 J. READING BEHAV. 279, 281-83 (1985); Paris, Wasick & Turner, *supra* note 13, at 619-21; Bernard Weiner, *A Theory of Motivation for Some Classroom Experiences*, 71 J. EDUC. PSYCHOL. 3, 14-15 (1979).

C. *After Reading*

The third and last time an instructor can influence students' comprehension of a text is during classroom discussions after the legal text has been read. While these classroom interchanges are often called Socratic dialogues, in reality they take on many forms. At one extreme are simple recitations which follow an initiation-response-evaluation structure (IRE). The initiating move is typically a question generated by the instructor followed by a student response (the answer) and then an instructor evaluation ("correct Ms. Smith"). These IRE's are not Socratic dialogues. The Socratic dialogue is an opened-ended inquiry led by a teacher as both teacher and student search for greater understanding. Socratic dialogues and IREs are both teacher directed, focused forms of inquiry, but in the true Socratic dialogues both the teacher and the student are in search of a truth unknown to both participants.[55] It is doubtful that most discussion in law school classrooms can be characterized as true Socratic dialogues. First, the size of most law classes is so large that they preclude any extended dialogue, and if one were to accrue, its benefits would fall differently to the few participants and the many observers. Second, the true Socratic dialogue is often a shared inquiry leading to greater understanding for both the respondent and even the inquirer. A Socratic dialogue takes time and patience. The questioner must first help the learner develop the necessary facts and then through inquiry, rearrange the facts leading to greater insight. But Socratic dialogues were one-on-one encounters, and "dialogues" in law school classrooms include a complex social dynamic that often changes the nature of discourse from shared inquiry to competition.[56]

While some interchanges in the law school classroom may truly be Socratic in nature, many are really a common form of recitation. Most teachers call recitations discussions, but a true discussion has a set of characteristics that set it apart from classroom recitations and Socratic dialogues. According to Bridges, people are engaged in a discussion when they exhibit the following behaviors and attitudes: (a) they are putting forward more than one point of view upon a subject, (b) they are at least disposed to examine and be responsive to the different points of view put forward, and (c) they have the intention of developing their knowledge, understanding, or judgment on the matter under discussion.[57] Additionally, a discussion is characterized by reasonableness, peaceableness, orderliness, truthfulness, freedom, equality regarding the opinions and interests

55. J. T. Dillon, *Paper Chase and the Socratic Method of Teaching Law*, 30 J. LEGAL EDUC. 529 (1980).

56. *Id.* at 532-533.

57. D. BRIDGES, EDUCATION, DEMOCRACY AND DISCUSSION, 16 (1979).

of each participant and respect for persons.[58] Finally, in a discussion authority is shared among the participants, while recitations and Socratic dialogues are directed by one central authority. I will leave it up to the students and instructors reading this paper to decide if their law school classroom experiences are best described as recitations, discussions, or Socratic dialogues.

A frequent debate among educational researchers is whether or not the asking of questions is instructive or merely an oral form of assessment. Some educators argue that questioning is not instructive unless questions are followed by further verbal interchanges and a line of questions that lead to greater student understanding.[59] Other researchers contend that questions even without instructive feedback alert students to what is important and therefore focus students' attention to important ideas in the text.[60] Thus, questioning can be a form of rehearsal and review.

There is some evidence that the asking of questions does produce increases in learning, but the effects are limited and the research has been of such short duration that educators simply do not understand the long term effects of questioning.[61] Most research on questioning has been conducted in elementary and secondary classrooms and the results cannot be easily generalized to the experiences in law school. The asking of questions has been shown to improve student achievement and the greatest improvements come from the use of higher level questions that demand thinking beyond factual recall.[62] Educators believe that asking questions helps for several reasons.[63] Questions cause students to recall information as they formulate a covert answer even if they are not called upon to recite. Questions cue students to what is important. This is especially significant if the cued information is eventually assessed. When the question cued information is not assessed the students are lead in the wrong direction.[64] It may be important to put responses into words; rich covert answers help students formulate their thoughts and compose formal answers.

---

58. *Id.* at 21-24.

59. *See* Courtney B. Cazden, *Classroom Discourse*, HANDBOOK OF RES. ON TEACHING 432, 440-41 (Merlin C. Wittrock ed., 1986) (emphasizing the importance of the classroom communication system as a method of teaching).

60. *See* James L. Heap, *Understanding Classroom Events: A Critique of Durkin, With an Alternative*, 14 J. READING BEHAVIOR 391, 407 (1982) (indicating the disadvantages of using interaction analysis types of observation systems with regard to reading activities in classrooms).

61. Richard L. Allington and Rose-Marie Weber, *Questioning Questions in Teaching and Learning from Texts, in* LEARNING FROM TEXTBOOKS: THEORY & PRACTICE 47, 58 (Bruce K. Britton, Arthur Woodward, and Marilyn Binkley eds., 1993).

62. Meredith Gall, *Synthesis of Research on Teachers' Questioning*, 42 EDUCATIONAL LEADERSHIP 40, 40-42 (1984).

63. *See* Thomas Andre, *Does Answering Higher-Level Questions While Reading Faciliate Productive Learning?*, 49 REV. EDUC. RES. 280, 280-81 (1979) (discussing the effects of asking students questions at different levels of cognitive complexity during learning).

64. *See* Gall, *supra* note 62, at 43-44.

Questioning does have its limits. The asking of questions is a poor means of helping students assimilate new information. A question cannot create knowledge the student does not possess. Questions can only help a student reconfigure ideas they have already stored in memory. Questions, when properly posed, can help students make connections and build a coherent understanding of new concepts.[65] A well formulated string of questions can help a student make connections and resolve ambiguities. Listening to other students answer questions may provide some opportunity for personal rehearsal, but researchers do not know if this is true in law school classrooms. We do not know who receives the benefits of questioning in a large lecture class—the respondent or the audience. A line of questions may help the sole respondent improve his or her thinking, but does the rest of the class benefit or merely feel relief for dodging the latest bullet?

The effectiveness of questioning in a classroom should not be considered solely on the basis of its cognitive merit. Classroom questioning is situated in a social context and the type of questions, responses and reactions create a social context that influences student attitudes and learning. The simple phenomenon of wait time is an example of how the instructor can create a more positive climate for recitations and discussion. If students are called upon too quickly, the quality of their answers is terse and factual, lacking in systematic thought. Increasing the wait time, from one to three seconds, between the question and the solicitation of the response improves the quality of students' answers.[66] Student participation increases when teachers' questions are interpretational, when teachers refrain from evaluating the response, and when teachers relinquish control to the students. How to respond to students is open to debate. While there are times when students' responses are clearly wrong, it is important to evaluate the response and not the student.[67] It may be necessary at times to change the power structure in a classroom to allow more students to find their voice. When teachers relinquish control, recitations give way to discussions and eventually to conversations.

If questioning is not the best form of building understanding, what else might the law instructor attempt? One idea is to use the classroom to stimulate student self-questionings. More learning is promoted when students ask questions than when students answer questions. A law instructor might assign students the task of writing questions to a set of readings as if they were going to lead the discussion, then call on students to start the discussion by asking their questions. The generation and subsequent sharing of

65. *See* Beck, *supra* note 27, at 411.

66. William E. Carlsen, *Questioning in Classroom*, 61 REV. OF EDUC. RES. 157, 168 (1991).

67. P. R. Joseph, *Yes, Virginia, There Are Wrong Answers: A Reply to Professor Hayden*, 40 J. OF LEGAL EDUC. 473, 475 (1990).

these questions has been shown to produce improvement in students comprehension, with the side benefit that self-questioning promotes the active problem formation strategy that is characteristic of successful students.[68] Finally, law schools should encourage more small group discussion sections. Changing the size of the class promotes risk taking and the active involvement of all students.

CONCLUSIONS

Legal education and reading theory are two fields that rarely intersect. Yet theories of reading comprehension and instruction can inform legal education and the "reading problems" of law students can inform our developing theories of comprehension and learning. At present, reading educators and cognitive psychologists find the problems of reading in complex domains, like law, a research challenge that is enlightening our understanding of how people learn from text.

Professors of law should be concerned with how their students learn and should seek ideas across disciplines. Comprehension theory and instructional practices have some important implications for teaching and learning in law schools. From comprehension theory we know that activating prior knowledge and highlighting text structure before reading will improve the comprehension of many students. Inducing students to use problem formation strategies, like self-questioning, while reading will improve their understanding of what they read. Post reading recitations and discussions may help build students' understanding, but more research is needed. The constraints of large law classrooms place many students in the role of observers and we do not know what effect questioning has on the many observers and the few active respondents. Finally, recitations and discussions set up cultural environments that may not be beneficial to all students.

The ideas in this paper are not specifically gendered. Rather it is my contention that good instruction benefits all students. All of the instructional approaches I have presented are based on research findings, and none of these studies have, to my knowledge, reported an effect for gender. Yet the research by Guinier, Oates and others clearly documents the problems that women and some minorities face in the classroom. Until reading educators entered the discussion, few legal educators speculated that cognitive processing differences could account for differences in law school performance. Students who were humanities majors as undergraduates may find the leap to legal text more difficult than those who read economics, business or the social sciences. This hypothesis needs to be examined.

68. *See* Deegan, *supra* note 15, at 166.

As we learn more about how law students learn, a few simple changes in law school instruction might provide important assistance for many law students. We can explain to law students the structure of legal texts and the strategies for reading them. This direct instruction, which takes no more than three hours, can improve their comprehension. By explaining to novice law students how to use the strategies of experts, we take some of the mystery out of reading and learning the law.

Three simple changes in legal education show the potential to improve learning for all students. If professors help students understand the basic concepts and structures of ideas before they read, their understanding will be improved. If professors help students understand the structure of legal texts, students will find it easier to locate important information. Finally, law professors can change the climate of discussions in the classroom. They can increase the wait time, ask more high level questions, and induce students to develop their own questions. Law schools should also consider adding small discussion sections that change power structures during discussions.

Law professors and even some law students believe that most good lawyers had to struggle in law school and the struggle is a hallmark of learning. The research says otherwise. In any classroom it is the job of the teacher to make explicit the secrets of his or her craft. In legal learning that craft is cognitive and largely hidden. Legal educators should make their cognitive processes public, and when they do they will inform their students, accelerate the learning, and eliminate some frustrations of legal education.