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## Critical Legal Reading: The Elements, Strategies and Dispositions Needed to Master this Essential Skill

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# CRITICAL LEGAL READING: THE ELEMENTS, STRATEGIES AND DISPOSITIONS NEEDED TO MASTER THIS ESSENTIAL SKILL

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## I INTRODUCTION

It is perhaps a truism that law and its practice are overwhelmingly about the written word: reading words, explaining words, and reducing thoughts and incidents to words. Legal analysis is built on, and built with, words; legal rights and duties are expressed in words. The ability to critically read legal documents is therefore a fundamental threshold skill for law students.<sup>1</sup>

Until minimum competency is acquired, students will have difficulty reading primary legal sources in the way the legal profession expects them to be read, or extracting principles to apply to different scenarios. They may face significant challenges in understanding core topics if reading skills are the assumed method of accessing bodies of

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<sup>1</sup> For a review of the theory of threshold concepts and its applicability to law, see Melissa H Weresh, ‘Stargate: Malleability as a Threshold Concept in Legal Education’ (2014) 63 *Journal of Legal Education* 689. We would argue that critical legal reading contains thresholds of understanding for legal education. As reading and understanding are linked concepts, reading skills are also continuously developed throughout a law degree, and then over the course of a professional career.

rules and principles.<sup>2</sup> These difficulties are likely to be greater in the current environment where students' reading and writing abilities and inclinations differ from those of previous generations.<sup>3</sup> As a recent review of neuroscience literature concluded:

In terms of information processing, we are shifting toward a shallow mode of learning characterized by quick scanning, reduced contemplation, and memory consolidation. This can be attributed to the increased presence of hypertext environments that reduces the cognitive resources required for deep processing. ... the ease of online information retrieval ... reduces the need for deep processing to commit information to memory. Relying on technology as an external memory source can result in reduced learning efforts as information can be easily retrieved later.<sup>4</sup>

Students entering university are likely to have read less complex texts than previous generations and acquired fewer skills for extracting meaning without external aids. The teaching of critical reading skills may have to become more explicit as a result,<sup>5</sup> particularly as research has linked proficient use of legal reading skills to higher law school grades.<sup>6</sup>

However, it can be difficult for lawyers and law teachers to remember how they learnt to 'read like a lawyer', or even to describe how they go about reading.<sup>7</sup> In this article, we aim to make the implicit techniques and strategies of expert critical legal reading explicit and thereby assist law teachers to better articulate them to their students. We bring together a range of research in reading, and legal reading

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<sup>2</sup> Mary A Lundeberg, 'Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis' (1987) 22 *Reading Research Quarterly* 407.

<sup>3</sup> For an articulation of such fears in a law school context, see, eg, Kari Mercer Dalton, 'Their Brains on Google: How Digital Technologies are Altering the Millennial Generation's Brain and Impacting Legal Education' (2013) 16 *SMU Science and Technology Law Review* 409; Debra Moss Curtis and Judith R Karp, "'In a Case, In a Book, They Will Not Take a Second Look!'" Critical Reading in the Legal Writing Classroom' (2005) 41 *Willamette Law Review* 293.

<sup>4</sup> Kep Kee Loh and Ryota Kanai, 'How Has the Internet Reshaped Human Cognition?' (2016) 22 *Neuroscientist* 506; see also J Michael Cavanaugh, Catherine C Giapponi and Timothy D Golden, 'Digital Technology and Student Cognitive Development: The Neuroscience of the University Classroom' (2016) 40 *Journal of Management Education* 374.

<sup>5</sup> Karen Manarin et al, *Critical Reading in Higher Education: Academic Goals and Social Engagement* (Indiana University Press, 2015).

<sup>6</sup> Leah M Christensen, 'Legal Reading and Success in Law School: An Empirical Study' (2007) 30 *Seattle University Law Review* 603. The use of reading strategies appears to be a significant predictor of success even for students with learning difficulties (Leah M Christensen, 'Legal Reading and Success in Law School: The Reading Strategies of Law Students with Attention Deficit Disorder (ADD)' (2010) 12 *Scholar: St. Mary's Law Review on Minority Issues* 173) and alternative entry students (Laurel Currie Oates, 'Beating the Odds: Reading Strategies of Law Students Admitted through Alternative Admissions Programs' (1997) 83 *Iowa Law Review* 139).

<sup>7</sup> This is seen to be a characteristic of threshold concepts. See, eg, Jan HF Meyer and Ray Land, 'Threshold Concepts and Troublesome Knowledge: An Introduction' in Jan HF Meyer and Ray Land (eds), *Overcoming Barriers to Student Understanding: Threshold Concepts and Troublesome Knowledge* (Routledge, 2006) 3.

specifically, providing research on which to build high quality law teaching.<sup>8</sup> In doing so, this article contributes to a law-specific taxonomy of the elements of critical reading. Sources cited throughout the article provide gateways to further literature on the issues and to specific teaching tips.

### A *Critical Legal Reading*

Manarin et al identify two dimensions of critical reading: reading for academic purposes, and reading for social engagement.<sup>9</sup> In both dimensions they identify four key elements: the ability to comprehend, analyse, interpret and evaluate texts. Reading for academic purposes additionally requires recognition of text genres, and the ability to draw connections across disciplinary conventions. Reading for social engagement requires an ability to integrate academic knowledge with community or civic engagement, and the ability to connect academic knowledge to relevant life experiences.<sup>10</sup>

The beliefs that readers have about their own roles are also critical.<sup>11</sup> Schraw and Bruning make a distinction between a transmission and transactional model of reading:

The transmission model is characterized by the belief that meaning exists independent of the reader and must be transmitted from the text and author into the reader's memory. This model predisposes readers to be passive takers of meaning rather than active makers of meaning. In contrast, the transaction model is characterized by the belief that meaning exists in the mind of the reader and must be actively constructed from the text.<sup>12</sup>

They argue that readers bring these implicit models to their reading, and the model applied to a text impacts on how it is interpreted. Manarin et al point out that transactional approaches are necessary for reading for academic purposes and social engagement.

We see critical legal reading in similar terms. But despite the complex interplay of skills involved, critical reading skills are so

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<sup>8</sup> There is a burgeoning amount of scholarly work related to legal language. By way of example, see the review in Elizabeth Mertz and Jothie Rajah, 'Language-and-Law Scholarship: An Interdisciplinary Conversation and a Post-9/11 Example' (2014) 10 *Annual Review of Law and Social Science* 169; Brenda Danet, 'Language in the Legal Process' 14 (1980) *Law and Society Review* 445; Peter M Tiersma and Lawrence M Solan (eds), *Oxford Handbook of Language and Law* (Oxford University Press, 2012).

<sup>9</sup> See, eg, Manarin et al, above n 5.

<sup>10</sup> Ibid 24-5.

<sup>11</sup> Helge I Strømsø and Yvonne Kammerer, 'Epistemic Cognition and Reading for Understanding in the Internet Age' in Jeffrey A Greene, William A Sandoval and Ivar Bråten (eds), *Handbook of Epistemic Cognition* (Routledge, 2016) 230; William A Sandoval, Jeffrey A Greene and Ivar Bråten, 'Understanding and Promoting Thinking About Knowledge: Origins, Issues, and Future Directions of Research on Epistemic Cognition' (2016) 40 *Review of Research in Education* 457.

<sup>12</sup> Gregory Schraw and Roger Bruning, 'How Implicit Models of Reading Affect Motivation to Read and Reading Engagement' (1999) 3 *Scientific Studies of Reading* 281, 282.

fundamental to legal practice and teaching that they are largely implicit – rather than explicit – in graduate learning outcome statements.<sup>13</sup> This implicit nature of critical legal reading skills can mask the difficulty law students face acquiring them.

Reading in law is not passive, it is a critical ‘reading against the grain’ activity in which the lawyer interrogates a text and makes independent judgments about its meaning and veracity. This is not an easy thing to do. In addition, students may feel reticent to be critical. As Fajans and Falk point out:

almost all students will come up against an inhibition present in no other secular discipline. Judicial opinions are not just interpretation - they are adjudication, and adjudication is power, coercion, even violence. To read judicial opinions closely and critically is to talk back to power.<sup>14</sup>

### *B How Critical Legal Reading Underpins Critical Legal Thinking and Writing*

As we have discussed elsewhere,<sup>15</sup> critical legal reading is a constituent and fundamental aspect of critical legal thinking. The read words provide the basic materials with which the student can engage in problem solving, critical communication and collaboration, and in the production of legal writing or oral advocacy.

Reading law is itself a form of legal reasoning. Students ask legally relevant questions and identify legal issues, search for coherence in fact patterns, think linearly, perceive ambiguity, appropriately engage in deductive and inductive reasoning, seek all sides of an argument, and pay attention to detail while recognising which issues are more important than others.<sup>16</sup> Students often face a range of conflicting documentary sources from which to develop their own position.<sup>17</sup>

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<sup>13</sup> The Threshold Learning Outcomes for Law (TLOs) (Sally Kift, Mark Israel and Rachael Field, *Bachelor of Laws Learning and Teaching Academic Standards Statement* (Australian Learning & Teaching Council, 2010)) assume: the ability to engage in critical legal reading as a necessary component of the acquisition of legal knowledge (TLO 1); critical reading of texts in appreciating the ethical implications of particular readings of law, and the way in which others may read law (TLO 2); critical reading skills as part of the core skills of researching and applying accepted canons of interpretation to legal texts (TLO 3 and TLO 4); the ability to read other lawyers’ correspondence in communication skills (TLO 5). The TLOs were endorsed in Council of Australian Law Deans (CALD), *CALD Standards for Australian Law Schools* (CALD, 2009).

<sup>14</sup> Elizabeth Fajans and Mary R Falk, ‘Against the Tyranny of Paraphrase: Talking Back to Texts’ (1993) 78 *Cornell Law Review* 163, 165 (citations omitted).

<sup>15</sup> Kate Galloway et al, ‘Working the Nexus: Teaching Students to Think, Read and Problem-Solve Like a Lawyer’ (2016) 26 *Legal Education Review* 95.

<sup>16</sup> For a detailed analysis see Larry O Natt Gantt, ‘Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind’ (2007) 29 *Campbell Law Review* 413; James F Stratman, ‘When Law Students Read Cases: Exploring Relations between Professional Legal Reasoning Roles and Problem Detection’ (2002) 34 *Discourse Processes* 57.

<sup>17</sup> For an interesting examination of how students construct knowledge in such circumstances, see Ivar Bråten and Helge I Strømsø, ‘When Law Students Read Multiple Documents about Global Warming: Examining the Role of Topic-Specific

There may be significantly different approaches to reading in different legal systems.<sup>18</sup>

Much of the initial development of writing in law proceeds through observation and imitation.<sup>19</sup> Law students are encouraged to learn to write in legal formats through mimicry of existing legal text formats, and to develop documents according to accepted templates. One example is the writing of case notes in first year. Consequently, an ability to read and interpret template legal documents is an essential precursor to effective legal writing.<sup>20</sup> To achieve mastery of legal writing in its diverse formats requires a nuanced understanding of the construction of meaning and authority in the legal text being mimicked. Assisting students to deconstruct legal texts as they read thus has significant positive effects on their legal writing ability.

The way in which law is read is also linked to philosophical, ideological and moral ideas about the role of law. Law graduates need to be able to appreciate how law will be read by people with particular world views or experiences and to be aware of their own interpretative glosses.<sup>21</sup> This meta-cognition of possible interpretations of texts is at the heart of legal analysis. There are also important linkages with the broader fields of discourse analysis<sup>22</sup> and critical discourse analysis,<sup>23</sup> and the underlying question of how law students develop their own personal and professional epistemology.<sup>24</sup>

### C Article Structure

This article provides a theoretical background to understanding the process of legal reading.<sup>25</sup> It outlines our conception of the skills in critical legal reading, followed by what we see as some of the broader implications for legal education.

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Beliefs about the Nature of Knowledge and Knowing' (2009) 38 *Instructional Science* 635.

<sup>18</sup> Kirk W Junker, 'What Is Reading in the Practices of Law' (2008) 9 *Journal of Law in Society* 111, 142.

<sup>19</sup> Cf Fleurie Nievelstein et al, 'The Worked Example and Expertise Reversal Effect in Less Structured Tasks: Learning to Reason about Legal Cases' (2013) 38 *Contemporary Educational Psychology* 118.

<sup>20</sup> Jay A Mitchell, 'Reading (in the Clinic) is Fundamental' (2012) 19 *Clinical Law Review* 297.

<sup>21</sup> Clifford Geertz, 'Found in Translation: On the Social History of the Moral Imagination' (1977) 31 *Georgia Review* 788.

<sup>22</sup> See, eg, John Gibbons (ed), *Language and the Law* (Routledge, 2014).

<sup>23</sup> See, eg, Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language* (Routledge, 2<sup>nd</sup> ed, 2013).

<sup>24</sup> Sarit Barzilai and Anat Zohar, 'Reconsidering Personal Epistemology as Metacognition: A Multifaceted Approach to the Analysis of Epistemic Thinking' (2014) 49 *Educational Psychologist* 13.

<sup>25</sup> The analysis in this article began as work done by the authors in an Office of Learning and Teaching funded project, Smart Casual. One of the outcomes was an online module on Reading Law designed to help sessional colleagues assist students with their reading skills development. For a description of the project and access to the online modules see: <http://smartlawteacher.org>.

We see critical legal reading as comprising three core sets of skills: mechanical, strategic and critical. Mechanical skills involve decoding, ie knowing how to break a text down into its constituent parts, and comprehension, ie understanding how those parts have legal impact or effect. We discuss these under three headings: ‘Terminology and Syntax’, ‘Abstraction and Performativity in Legal Writing’, and ‘Text Structure’. Strategic skills involve the ability to deploy appropriate techniques to read a text efficiently and with purpose. These we describe as default, problem formation and rhetorical strategies. Linked to these skills is awareness of the different genres of legal documentation. In this article we examine judgments, statutes and contracts with some general comments about other legal genres. Critical skills involve bringing an interrogatory gaze both to the text and to its position in a broader environment. We discuss both broader critical perspectives and self-critical awareness.

The explication of these elements of critical legal reading has implications for legal education more broadly. We consider how teachers can help students to overcome their lack of understanding and knowledge in comprehension, how to develop reading strategies and broader critical thinking, and what barriers may have to be overcome.

## II THE MECHANICS OF LEGAL READING<sup>26</sup>

Linguistic analysis of reading, as applied to law, suggests that the mechanics of reading can be broken down into two broad processes – decoding and comprehension. These processes are second nature to expert readers, such as law teachers. However, they are often opaque for novice learners.

Decoding involves the processes of recognising words and how they are pronounced, the role of spelling, and the importance of punctuation and grammar. The decoding of standard English writing is largely autonomic for university students.<sup>27</sup> The complexity of legal language as discipline-specific professional communication can, however, require greater concentration, and be particularly difficult for students for whom English is not a first language.<sup>28</sup> The grammatical precision of statutory and contractual language may generate challenges for

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<sup>26</sup> General guides to legal reading for students include Ruth Ann McKinney, *Reading Like a Lawyer: Time-Saving Strategies for Reading Law Like an Expert* (Carolina Academic Press, 2<sup>nd</sup> ed, 2012); Laurel Currie Oates and Anne Enquist, *The Legal Writing Handbook: Analysis, Research, and Writing* (Wolters Kluwer, 2014) ch 3: Reading and Analyzing Statutes and Cases.

<sup>27</sup> Described as ‘English language proficiency’ in Neil L Murray, ‘Conceptualising the English Language Needs of First Year University Students’ (2010) 1 *International Journal of the First Year in Higher Education* 55.

<sup>28</sup> The challenges generally for international students was highlighted in a landmark study by Bob Birrell and others in Bob Birrell, ‘Implications of Low English Standards among Overseas Students at Australian Universities’ (2006) 14(4) *People and Place* 53. Issues for law students specifically are addressed in a US context in Oates, above n 6.

students not used to having to consider precisely the effect of punctuation, grammar and sentence order on meaning.<sup>29</sup>

While decoding is a crucial generic reading skill, comprehension is the most obviously challenging element of reading for law students.<sup>30</sup> Drawing on the approaches of Deegan<sup>31</sup> and Dewitz<sup>32</sup> we see comprehension as comprising four main areas: terminology, the performative role of words, domain knowledge, and text structure.

### A Terminology and Syntax

Terminology is comprehension at its most basic – understanding the meaning of words. Issues with terminology can arise with interpreting unknown words, and where words are given different or multiple meanings in legal discourse. Law students may encounter ‘ordinary’ English words for the first time. They will also discover archaic words in the diverse narratives of case law – across time, jurisdiction and style.<sup>33</sup> They will encounter legal words, Latin and Law French possibly for the first time.<sup>34</sup> Otherwise straightforward English words can pose a challenge when the law sees them as terms of art having a precise and often different meaning.<sup>35</sup> These words may mean different things in different legal contexts: they may be used as ordinary English words or as legal terms.<sup>36</sup>

Lawyers use words in very particular ways, and it is easy for expert readers to underestimate the complexity facing a novice reader. While, in general use, words can be used imprecisely and expressively, in law words are used for precise reasons to limit concepts and rights. Novice readers need to learn not to assume meanings but to search out legal

<sup>29</sup> See further the discussion in Alison Riley, ‘The Meaning of Words in English Legal Texts: Mastering the Vocabulary of the Law — A Legal Task’ (1996) 30 *Law Teacher* 68; Elizabeth Mertz, *The Language of Law School: Learning to ‘Think Like a Lawyer’* (Oxford University Press, 2007).

<sup>30</sup> Students tend to be aware of a failure to derive a meaning from a passage, but are often unaware of their failure to apply critical thinking to the apparent meaning or implication of the passage.

<sup>31</sup> Dorothy H Deegan, ‘Exploring Individual Differences among Novices Reading in a Specific Domain: The Case of Law’ (1995) 30 *Reading Research Quarterly* 154. Deegan’s approach appears to have been largely based on the schemata approach to reading comprehension which has now been overtaken by more sophisticated analyses, but the main insights we think remain valid: P David Pearson and Gina N Cervetti, ‘Fifty Years of Reading Comprehension Theory and Practice’ in P David Pearson and Elfrieda H Hierbert (eds), *Research-Based Practices for Teaching Common Core Literacy* (Teachers College Press, 2015) 1.

<sup>32</sup> Peter Dewitz, ‘Reading Law – Three Suggestions for Legal Education’ (1996) 27 *University of Toledo Law Review* 657.

<sup>33</sup> See, eg, the discussion in Martin Davies, ‘Reading Cases’ (1987) 50 *Modern Law Review* 409.

<sup>34</sup> These can range from procedural terms such as appellant, demurrer, puisne to case-law jargon such as *cur ad vult*, *ex tempore* and abbreviations such as AJA. They can involve words that import whole legal doctrines such as estoppel, tort, or laches.

<sup>35</sup> Words such as consideration, frustration, equity, charge, fine, real, custody have many years of legal interpretation defining them into non-obvious legal meanings.

<sup>36</sup> For example, ‘this is a fine legal point’, ‘the damaged property was a fine vase’, ‘I will impose a fine on the defendant’.



authority for them. This is a difficult skill to master, requiring attention to the possibility of diverse interpretations of a word in terms of both meaning and context.

Even learning aids can be troublesome. Students are often encouraged to read with a law dictionary. But dictionaries only provide summaries that themselves may need explanation, and assume an understanding of other legal terms that a novice lawyer can miss.<sup>37</sup> For a novice, the dictionary definition appears to provide a complete meaning. For the expert, it is a simplified meaning, workable for initial purposes but lacking authority and without sufficient detail. Further adding to the complexity of legal documentation is the complex syntax employed in documents such as statutes and contracts.<sup>38</sup> While expert readers have grown used to this idiosyncratic approach to language it is deeply alien to novice readers. Reading contracts and statutes is a complex linguistic puzzle.

### B *Abstraction and Performativity in Legal Writing*

The way in which legal documents describe people, events and concepts is difficult for novice readers to grasp and requires explicit instruction. Language frequently describes the physical in concrete terms and the social with multi-faceted complexity. By contrast, legal language often strives to reduce complexity and increase the ability to say two situations are legally ‘the same’ by expressing concepts in abstract terms.<sup>39</sup> Thus ‘land’ is a concrete term with a clear meaning but the law resorts to abstract notions of estates and fixtures (amongst others) to allow the creation of separate conceptual categories that can be regulated. Describing a motorist as driving ‘negligently’ is an abstract term that highlights the legally relevant aspects of the behaviour rather than the full social description of emotions and

<sup>37</sup> The following definition from the *Australian Law Dictionary* – written for the student market – potentially poses as many questions as it answers for the law student:

Factor: A person acting as a commercial agent for the sale of goods of another person, known as the principal. The factor has legal possession to the goods, unlike a broker, who also sells the goods of another, but does not have title to goods being sold.

(Trischa Mann (ed), *Australian Law Dictionary* (Oxford, 2<sup>nd</sup> ed, 2013) 307). Definitions such as these can leave law students more confused.

<sup>38</sup> Hiltunen comments: ‘Legal syntax is distinctly idiosyncratic in terms of both the structure and arrangement of the principal sentence elements. The sentence constitutes the basic syntactic unit, and... is traditionally constructed as a self-contained, context-free entity. This is a basic starting-point for the drafting of legal texts, and its consequences for the language are pervasive. Such salient features as the length and complexity of sentences, the typical organization of clauses in complex patterns of parataxis (coordination) and hypotaxis (subordination), the preference for the passive voice over the active, the extensive use of nominalized verb forms,... and the avoidance of grammatical ties across sentence boundaries, including pronominal anaphoric references ... may all be due, in one way or another, to the special status of the sentence, which is of overriding importance in the drafting of statutes’. Risto Hiltunen, ‘The Grammar and Structure of Legal Texts’ in Peter M Tiersma and Lawrence M Solan (eds), *Oxford Handbook of Language and Law* (Oxford University Press, 2012) 39, 41.

<sup>39</sup> Mertz, above n 29, 130-3.

relationships that may be involved in the behaviour. Expert readers develop an affinity for such abstract categorisation that can be foreign to the novice. Even ‘facts’ are reframed:

In learning to pay attention to some aspects of the cases they read, while discarding others, students are, in effect, learning a new definition of what constitutes a fact. In the law, they are gradually being led to see, facts are only those details that contribute to someone’s staking a legal claim on the basis of precedent.<sup>40</sup>

Legal language also often acts performatively: it creates relationships or events.<sup>41</sup> Law students must learn to distinguish between words in legal documents that merely describe or justify versus those that create legal relationships or results. The distinction between *ratio decidendi* and *obiter dicta* is an example with which students struggle.

Students thus learn to ‘think like lawyers’ through the experience of reading texts that reframe life through the lens of law.

### *C Domain Knowledge*

Domain knowledge refers to the expertise needed to recognise terms and their relationship to larger linked bodies of knowledge.

What readers know determines what they will comprehend. Lacking knowledge in a given domain, the reader cannot make sense of new information - we need to know something about physics to understand a physics text. ...To comprehend legal text requires knowledge of case law, jurisprudence, legal theory, and so forth. Thus, the novice is at a serious disadvantage compared to the expert...<sup>42</sup>

For example, consider this opening paragraph of a High Court judgment. Without any prior explanation the judgment begins:

FRENCH CJ, BELL, KEANE AND NETTLE JJ. In October 2011, the appellant stood trial before the Supreme Court of New South Wales by judge alone (Mathews AJ) on two counts of murder. To each count he pleaded not guilty of murder but guilty of manslaughter by reason of provocation. The sole issue at trial, therefore, was provocation. On 18 November 2011, the judge found the appellant guilty of murder on both counts and, on 22 December 2011, her Honour sentenced the appellant to an effective head sentence of imprisonment for 31 years with an effective non-parole period of 25 years.<sup>43</sup>

In this passage the only elements that do not assume knowledge of areas of law are the dates. If a law student does not have sufficient understanding of the conventions for referring to judges, the offences of murder and manslaughter, the partial defence of provocation, the

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<sup>40</sup> William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007) 56. See also Mertz, above n 29, 66-7.

<sup>41</sup> The most famous example is when a priest says ‘I now pronounce you man and wife’. For further discussion see, eg, Mertz above n 29, 60.

<sup>42</sup> Dewitz, above n 32, 658.

<sup>43</sup> *Filippou v The Queen* (2015) 256 CLR 47, 51 [1].

process of criminal trial, court structure, the concept of appeal, the role of judges in punishment, imprisonment, the ideas of parole, non-parole periods and head sentences, the passage is meaningless and prevents the student from understanding the very important legal frame in which the rest of the judgment proceeds.

A passage such as this reveals that general cultural understandings from pre-law studies or half-understood legal terms can be necessary crutches to reading law. Some students may be overwhelmed, but many students will have the decoding skills and prior experience to make some sense of a passage with only limited expert knowledge of the terminology it contains. While guesses and folk-knowledge may be necessary crutches initially, they can be unreliable, and as a result each student is likely to have different understandings of terms and concepts unless corrected.

#### D *Text Structure*

Beyond terminology and domain knowledge, text structure plays an important interpretive role in comprehension. This can be highlighted by the passive way in which most readers approach novels. The novel genre assumes that the reader will see the book as a journey directed by the author. The reader understands that they are not expected to skip ahead, or to consult an index. The aims of the novel as a genre include surprising the reader, juxtaposing ideas and events in intriguing ways and scintillating the reader with the author's artistry. With the possible exception of the last aim, legal texts operate differently.

As Stern notes:

the judgment, lacks two of the key ingredients that contribute to the lure of literary narrative—namely, the drive, fuelled by uncertainty and anticipation, that propels readers on towards the conclusion, and the pleasure of observing and reflecting on others' mental states, which accounts for a considerable part of fiction's cognitive appeal. ... The recitation of facts ... admits no space for the techniques that foster readerly engagement with fictional plots—techniques that offer direct access to a character's mental state, or that hint vaguely at an upcoming setback, encouraging readers to speculate about the protagonist's future. Judges write in anticipation of a skeptical reader, and they take the need for support as their primary consideration. The measured and laborious style elicits an attitude of readerly vigilance, militating against the immersive experience of fictional narrative, the experience of being "lost in a book".<sup>44</sup>

Legal texts are intended to be as predictable as possible, anticipating that the reader will skip ahead and juxtapose concepts and facts, albeit in accepted ways. The latter requirement is a facet of domain knowledge, illustrating the overlapping nature of these concepts. Dewitz explains:

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<sup>44</sup> Simon Stern, 'Narrative in the Legal Text: Judicial Opinions and Their Narratives' (21 December 2016) Social Science Research Network, 1, 10–11 <<http://papers.ssrn.com/abstract=2830904>>.

Legal cases have their own unique structure, and they typically include 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. The expert reader will first locate the facts of the case, then the decision, and finally read to understand the rationale behind the reasoning.<sup>45</sup>

### III SKILLS AND STRATEGIES OF READING<sup>46</sup>

Researchers suggest that expert readers predominantly read with skill rather than strategy. A strategic reader is one who is aware that the text is difficult to understand and intentionally employs strategies to uncover the text's meaning.<sup>47</sup> A skilful reader intuitively adopts these strategies in a near autonomic manner. Almasi and Fullerton give the example of the automatic driving of an experienced car driver and the highly intentional behaviour of a learner driver.<sup>48</sup> But even skilful expert readers intentionally adopt strategies when they encounter difficulty with a text. Experienced drivers quickly become intentional when faced with traffic jams. Students, like learner drivers, must initially adopt strategies, and will often benefit from guidance about which strategies to use and why. Over time these strategies will become skills. As a strategy becomes an automatic skill, the reader has more capacity in their working memory to take on a new intentional strategy when passages are difficult.<sup>49</sup> The more quickly a student can assimilate a strategy into their skill set, the more capacity they have for higher order meta-cognitive processes. The literature has described these strategies as default, problematising and rhetorical strategies.<sup>50</sup>

*Default strategies* represent 'the summarizing, paraphrasing, and retelling that readers employ to build an on-going sense of the text'.<sup>51</sup> Default strategies, as the name implies, are strategies used as a first step in reading. They tend to be linear in nature and include methods such as mentally paraphrasing passages, making marginal notes or highlighting. For novice readers using these strategies, 'reading processes would be driven not by the dominant organizational structure of the text, but by a simple listing strategy'.<sup>52</sup>

*Problem formation strategies* set the reader's expectations for a text:

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<sup>45</sup> Dewitz, above n 32, 658.

<sup>46</sup> Tips on how to encourage students to develop these strategies can be found in Leah M Christensen, 'The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law' (2008) 1 *Brigham Young University Education and Law Journal* 53; Peter Dewitz, 'Legal Education: A Problem of Learning from Text' (1997) 23 *New York University Review of Law & Social Change* 225.

<sup>47</sup> Peter Afflerbach, P David Pearson and Scott G Paris, 'Clarifying Differences Between Reading Skills and Reading Strategies' (2008) 61 *Reading Teacher* 364.

<sup>48</sup> Janice F Almasi and Susan King Fullerton, *Teaching Strategic Processes in Reading* (Guilford Press, 2<sup>nd</sup> ed, 2012) 1-2.

<sup>49</sup> Afflerbach, Pearson and Paris, above n 47, 368.

<sup>50</sup> This terminology is used by, eg, Deegan, above n 31; Dewitz, above n 32; Christensen, above n 46.

<sup>51</sup> Dewitz, above n 32, 659.

<sup>52</sup> Deegan, above n 31, 161.

[Readers] ask themselves questions, make predictions, and hypothesize about the developing meaning. [Readers] might pose questions about the forward direction of the text or ... look back to wonder why an event occurred or whether an argument was sound.<sup>53</sup>

These strategies seek to understand the intention of the author. They query the purpose of passages for the overall meaning. Problem formation strategies are linked to strategic reading, or 'reading for a purpose'. This involves an understanding of which information is key to the reader's purpose. For example in reading legislation, while an Act may seek to regulate all forms of activity in a field, the reader is likely to only be interested in the regulation of one particular activity. An expert reader will automatically look to identify where to go within the Act to find that information. A novice will first need to be aware that this is an appropriate strategy for reading legislation, and then remember to intentionally deploy that strategy to achieve her purpose. The strategy is thus based on knowledge of the structure of the document and its purpose.

*Rhetorical strategies:*

go beyond the text itself as the reader comments on and evaluates the ideas read, trying to account for author's purpose, context, and effect on the audience. 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.<sup>54</sup>

An expert reader thus uses broader contexts to position the document and to evaluate its persuasiveness. This can include consideration of what is omitted as well as included.

For example, legal rights and duties derive from legal authority and so it becomes crucial to read legal writing with an appreciation of the linguistic authority of the author. The reader might consider, for example, whether a previous judicial statement comes from a higher court; whether it is *ratio decidendi* or *obiter dicta*; whether an actor is subject to the jurisdiction of the legislative provision, or an alternative overriding provision; or whether the statement is a binding contractual term.

As noted above, use of these techniques as strategies is an intentional approach to reading that law teachers can explicitly invite and support. As readers develop proficiency, these techniques become more autonomic. Appropriate use of these techniques is also dependent on genre.

#### IV READING AND WRITING ACCORDING TO LEGAL GENRES

Legal documents can be differentiated into a number of genres both on linguistic grounds<sup>55</sup> and on the nature of their legal effects.

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<sup>53</sup> Dewitz, above n 32, 659.

<sup>54</sup> Ibid, 660.

<sup>55</sup> See, eg, the classifications in Maurizio Gotti, 'Text And Genre' in Peter M Tiersma and Lawrence M Solan (eds), *Oxford Handbook of Language and Law* (Oxford

Rappaport notes that legal genres are both categories and biases.<sup>56</sup> Seeing the document as falling into a particular genre influences how we read and understand it. For Australian law students the most commonly understood divisions are between statutes and regulations, case-law and private legal documents. Lawyers need to be able to interrogate and unpack each in order to identify the rights and duties, opportunities and restrictions, rewards and punishments that law places on their clients' past and future behaviour. Law students, by graduation, should also be able to relate this analysis to broader contexts, ethical frameworks and personal values.<sup>57</sup>

Statute law, case law, and private legal documents are complex, non-intuitive forms of writing the interpretation of which requires significant skill. Significant bodies of law – both judicial and legislative – provide interpretive directives that students must be able to apply. In terms of the preceding discussion of reading strategies, the different genres of legal documents differ both in structure and purpose. Some of the key differences are outlined below.

#### A *Case-law*<sup>58</sup>

Legal judgments typically use a narrative style, often without headings. This style can appear to be similar to that of literature,<sup>59</sup> and may utilise literary devices, but contains a hidden structure that expert readers use to find information quickly. For the novice reader, there is no indication which parts of a judgment generate legal rules or generalisable principles. Judges follow legal and literary conventions which require decoding. Context within and external to the written judgment is often necessary to give sense to particular pronouncements.<sup>60</sup>

Legal judgments are performative in that they create legal facts to which legal rules can apply and legal precedents that are applicable to other situations. But the extent of their authority is based on the procedural history of the case: what legal issue has been raised, what facts have been determined as necessary to resolve it, and what previous judicial findings are relevant and binding.<sup>61</sup> This is determined by the expert reader through a combination of structural analysis and external

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University Press, 2012) 52; VK Bhatia, 'Legal Genres' in Keith Brown (ed), *Encyclopedia of Language & Linguistics* (Elsevier, 2<sup>nd</sup> ed, 2006); a review of linguistic categories is included in Bret Rappaport, 'A Lawyer's Hidden Persuader: Genre Bias and How It Shapes Legal Texts By Constraining Writers' Choices and Influencing Readers' Perceptions' (2013) 22 *Journal of Law and Policy* 197.

<sup>56</sup> Rappaport, above n 55.

<sup>57</sup> Kift, Israel and Field, above n 14.

<sup>58</sup> Collections of helpful tips for assisting students to read case law can be found in Lyndal Taylor et al, 'Reading Is Critical' (2001) 3 *University of Technology, Sydney Law Review* 126; McKinney, above n 26.

<sup>59</sup> Stern, above n 44; cf James Boyd White, 'Law as Language: Reading Law and Reading Literature' (1982) 60 *Texas Law Review* 415; Junker, above n 18.

<sup>60</sup> Michael Kirby, 'On the Writing of Judgments' (1990) 22 *Australian Journal of Forensic Sciences* 104.

<sup>61</sup> Mertz, above n 29.

domain knowledge. For novice readers, this requires scaffolding through explicit commentary in casebooks and in class.

While judgments are presented as objective and dispassionate analyses, in fact, like advocacy documents,<sup>62</sup> the arrangement of facts and precedent cases, and the detail presented in explaining decisions are designed to convince readers of the correctness of the decision.<sup>63</sup> Stratman notes:

Cases present judicial reasoning about the interpretation of rules and facts, and as such their meanings, past a point, are demonstrably indeterminate. ... Although cases cannot be read to “say anything” a reader wants them to say, their reasoning and conclusions can often be reasonably interpreted to say more than one thing depending on the reader’s purpose for reading and the legal controversy in view. Therefore, skilled legal readers must be able to derive and frame the relevant interpretative uncertainties inherent in these texts, as part of their case comprehension process.<sup>64</sup>

Reading a judgment is thus intrinsically linked to legal reasoning.<sup>65</sup>

## B Legislation<sup>66</sup>

Judgments may be written in a literary style, resorting to metaphor and allusion, but statutes, legislative instruments and regulations seek to provide precise description in concise language. A large part of the law of statutory interpretation revolves around issues of structure as a facet of the broader concept of construction. The effect of words and phrases is governed by where they appear – are they in the body of a section or its title, is the word constrained by a limited definition, or is a general phrase constrained by a specific example that follows?

<sup>62</sup> Advocacy documents, such as court submissions or barristers’ briefs, adopt similar rhetorical purposes to judgments, but also contain their own particular structures and purposes. See the discussion in Christoph A Hafner, ‘A Multi-Perspective Genre Analysis of the Barrister’s Opinion: Writing Context, Generic Structure, and Textualization’ (2010) 27 *Written Communication* 410.

<sup>63</sup> White, above n 59.

<sup>64</sup> James F Stratman, ‘When Law Students Read Cases: Exploring Relations Between Professional Legal Reasoning Roles and Problem Detection’ (2002) 34 *Discourse Processes* 57, 88.

<sup>65</sup> Ibid 64.

<sup>66</sup> Collections of helpful tips for assisting students to read legislation can be found in Robert W Benson, ‘Up a Statute with Gun and Camera: Isolating Linguistic and Logical Structures in the Analysis of Legislative Language’ (1984) 8 *Seton Hall Legislative Journal* 279. Summaries of the approaches to statutory interpretation and drafting can be found in Commonwealth Office of Parliamentary Counsel’s drafting guidelines: Office of Parliamentary Counsel, *OPC Drafting Directions Series* (June 2017) <[http://www.opc.gov.au/about/draft\\_directions.htm](http://www.opc.gov.au/about/draft_directions.htm)>; Jeffery Barnes et al, ‘CALD Good Practice Guide for Teaching Statutory Interpretation’ (Practice Guide, Council of Australian Law Deans, 2015) <<http://www.cald.asn.au/assets/lists/Resources/GPGSI-June15.pdf>>; John Burrows, ‘The Difficulties of Teaching Legislation to Students’ [2010] (2) *Loophole – Journal of the Commonwealth Association of Legislative Counsel* 24; cf Deborah Maranville, *How to Read A Statute: MAP It!* <[https://courses.washington.edu/civpro03/helpful\\_hints/StatuteMAP.doc](https://courses.washington.edu/civpro03/helpful_hints/StatuteMAP.doc)>.

Linguists are now also exploring a range of linguistic turns in legislative drafting.<sup>67</sup>

While the language attempts to be clear, significant skill is needed to understand the relevant conventions and the need to read the language according to textual meaning, the context of the provision and the purpose of the statute.<sup>68</sup> Judgments can be extremely lengthy, with judges taking pages to convincingly reach a conclusion. Legislation is more precise, using as few words as possible to describe behaviours and situations. In reading judgments, students must use strategies that allow them to skim and summarise to find the key points. In reading legislation, once the appropriate sections have been located, students must carefully weigh and analyse every single word. The expert reader is aware of the very different approach needed to read case law and legislation, and that different strategies are appropriate. This is a skill students must learn. At entry level, some students are unable to grasp the fundamental differences between these genres and will benefit from very explicit teaching about them.

While judges' justifications of their approach may refer to rules of interpretation, alerting a novice reader to their relevance, no such hints are contained in legislation. The rules of statutory interpretation are a complex set of legal doctrines that a reader must know and bring to the legislation independently. Entry level law students are thus often learning to read statutes in order to acquire domain knowledge at the same time as they are learning of the existence of rules of statutory interpretation and trying to understand how to apply them.

Case-law is primarily backward looking. The facts are first established and a rule is then applied to a past situation. Legislation looks to the future. Situations are described in extremely abstract terms, with the drafter attempting to predict possible scenarios. As a result, the reader either must bring their own facts to the legislation to determine if there is a 'fit' or 'breach', or invent a range of possible scenarios to understand the scope of the provision. This requires a much higher degree of creativity from the reader and broader meta-cognitive processes.

### C *Private Legal Documents*<sup>69</sup>

Private legal documents – such as contracts, trust deeds and wills - like statutory provisions, seek to set clear boundaries and expectations around behaviour through concise wording. Procedural law contains

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<sup>67</sup> See, eg, Giulia Adriana Pennisi, 'Legislative Provisions in Context: A Linguistic Approach' (2016) 37 *Statute Law Review* 101.

<sup>68</sup> See, eg, Tom Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007).

<sup>69</sup> Collections of helpful tips for assisting students to read private legal documents can be found in Mitchell, above n 20; Scott J Burnham, 'Critical Reading of Contracts' (1999) 23 *Legal Studies Forum* 391; Scott J Burnham, 'How to Read a Contract' (2003) 45 *Arizona Law Review* 133; Christina L Kunz, 'Teaching First-Year Contracts Students How to Read and Edit Contract Clauses' (2003) 34 *University of Toledo Law Review* 705.



many requirements on the form and content of contracts derived from regulatory documents and forms. Similarly to statutes, there are interpretative conventions and a range of implications that courts can read into and around explicit contractual terms.<sup>70</sup> Students must learn to identify when such implications are appropriate as well as develop the skill of interpreting the explicit language used. Like statutes, contracts are forward looking documents. But, whereas legislation is often open-ended, contracts are commonly an attempt to close off possibilities. They seek to tie parties to predicted behaviours.

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.<sup>71</sup>

Lawyers read legislation with no power to change the provisions. Drafting contracts involves the reading of another party's terms and imagining an alternate form of words that better suits your client's interests, the ways in which another person can construe it against your client, or the extent to which your client can understand it. As Burnham notes, this means that contracts cases are mostly a result of a lawyer failing to critically read a draft contract and avoid an ambiguity – they are cautionary tales for students.

Again, like legislation, effective critical reading of contracts requires extensive domain knowledge of the extent to which law implies unstated terms, and surrounding statutory frameworks. Often these are not incorporated into the terms of the contract itself, but the contract cannot be understood without them. Like legislation, contracts are not only read in a linear fashion – the expert reader moves back and forth between clauses and definitions, and imagines fact scenarios to test their effects. This requires active, creative critical reading, which takes time to develop. Students must become aware of the strategies, learn how to use them and assimilate them as reading skills.

Close reading of private legal documents can demonstrate to students the need for precision in drafting and spelling, and the importance of a professional aesthetic to make a document more persuasive. Mitchell suggests that engaging with close reading of legal documents is also linked to building students' professional identity, developing 'a greater sense of respect for the work and the effort required to do it well, and better appreciate[ing] the products of their trade'.<sup>72</sup>

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<sup>70</sup> Burnham, 'Critical Reading of Contracts', above n 69.

<sup>71</sup> Ibid 391-2. In linguistic terms contracts can be seen as a form of 'speech act': Sanford Schane, 'Contract Formation as a Speech Act' in Peter M Tiersma and Lawrence M Solan (eds), *Oxford Handbook of Language and Law* (Oxford University Press, 2012) 100.

<sup>72</sup> Mitchell, above n 20, 318.

### D *Other Legal Writing*<sup>73</sup>

Lawyers are required to read a range of other legal and non-legal texts, and to be able to evaluate claims across conflicting documents. Emerging research suggests strong links between comprehension abilities and recognition of the complexity of knowledge, and the need to justify knowledge claims.<sup>74</sup> It is therefore important for law students to understand the different purposes of legal texts. For example, significant differences in purpose often exist between textbooks and journal articles: ‘while textbooks emphasise “what is”, speeches and articles foreground “what should be”’.<sup>75</sup>

Policy documents, law reform commission reports and similar documents have their own styles. They are read with awareness that the document is either overtly political or ostensibly apolitical, but in either case a clear underlying purpose or ideology exists, and often an intended audience. For example, a reform paper seeking public approval for new laws may emphasise case studies over the legal issues in order to encourage a sense of the need for change. A reform paper written for a more legal audience and seeking to uphold traditional lawyers’ conceptions of the rule of law may emphasise fundamental principles of law over individual instances. Being aware of these purposes allows for more effective critical appraisal of the document’s conclusions.

## V CRITICAL READING

Beyond these techniques and strategies for uncovering the meaning of a legal document, we consider there are two further elements of critical reading. The first is the ability to read with a perspective wider or alternative to a legal perspective, and the second is the capacity to read with self-awareness: a consciousness of the way in which the reader is themselves approaching the text.

### A *Broader Critical Perspectives*

Readers who subscribe to a traditional positivist and formalist view of law as a self-contained system of logic are unlikely to look to sources beyond legal and legislative precedent.<sup>76</sup> We would argue that good lawyers also attempt to see legal texts from perspectives beyond these lenses. Doing so requires an approach to reading that is transactional rather than transmissive. It is allied to the reader having a constructivist

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<sup>73</sup> Collections of helpful tips for assisting students to read a range of legal documents can be found in Taylor et al, above n 58.

<sup>74</sup> Bråten and Strømsø, above n 17.

<sup>75</sup> Taylor et al, above n 58, 135.

<sup>76</sup> David Dyzenhaus, ‘The Genealogy of Legal Positivism’ (2004) 24 *Oxford Journal of Legal Studies* 39 describes such readers as ‘judicial positivists’ (see, eg, pp 46, 51). He criticises modern positivists for disowning that tradition.

epistemology – the belief that they create meaning through their reading.

This approach to reading is mirrored in other professions. For example Wineburg, discussing how historians read, comments:

the literal text is only the shell of the text comprehended by historians. Texts come not only to convey information, to tell stories, or even to set the record straight. Instead, they are slippery, cagey, and protean, reflecting the uncertainty and disingenuity of the real world. Texts emerge as ‘speech acts,’ social interactions set down on paper that can only be understood by reconstructing the social text in which they occurred. The comprehension of text reaches beyond words and phrases to embrace intention, motive, purpose, and plan – the same set of concepts we use to decipher human action.<sup>77</sup>

There are layers of ‘slipperiness’ in legal texts that import cultural aspects of domain knowledge. A skilled reader must achieve awareness of their existence and, also, the critical skills to decode and synthesise in the process of meaning-making.

Legal documents generally define people by their place in an argument, then further define them in terms of the doctrinal requirements of the area of law, characterising them as strategists acting purposefully in their own interests;<sup>78</sup> for example, the plaintiff parent seeking child custody, or the defendant driver seeking to avoid a speeding fine. These are only partial reflections of the person and their motivations, but crucial in how law ‘objectifies’ in order to resolve disputes.

The tendency of the law to reduce life to words has fundamental impacts on how issues are understood, and what aspects of incidents are foregrounded over others. Expert readers can compensate for this in their critical reading of texts: it is only a critical reading that will expose, for example, the removal of race and gender in legally relevant facts;<sup>79</sup> the simplification in defining legally relevant states of mind; or the emphasis on economic interests in contractual rights.<sup>80</sup>

The way in which legal writing applies ideologies of meaning to situations is also critical.<sup>81</sup> Legal texts can re-interpret words from metaphorical to literal meanings, or recontextualise them. In the context of offensive language, Methven points out:

When judges, police officers, witnesses, and so on talk or write about offensive language, they recontextualise the language and the context in which it was used by reallocating roles, rearranging the social relations between the participants, reordering the events and reframing

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<sup>77</sup> Sam Wineburg, *Historical Thinking and Other Unnatural Acts: Charting the Future of Teaching the Past* (Temple University Press, 2001) 66-7.

<sup>78</sup> Mertz, above n 29, 100.

<sup>79</sup> See, eg, M H Hoeflich, ‘On Reading Cases: The Law Student in Wonderland’ (1991) 42 *Syracuse Law Review* 1163.

<sup>80</sup> Mertz however cautions that we should apply the same degree of rigour to social science discussions as we do to legal doctrines: Mertz, above n 29, 75-9.

<sup>81</sup> See Diana Eades, *Sociolinguistics and the Legal Process* (Multilingual Matters, 2010).

the context. Recontextualisations can add detail, transform persons and events, eliminate detail or shift focus.<sup>82</sup>

She demonstrates this by an analysis of how swear words spoken to police are reinterpreted literally despite the well-recognised expressive (rather than literal) use of swearing in everyday speech.<sup>83</sup>

These complexities of legal writing, on top of the mechanics and strategies canvassed earlier, mean that law students need to become critical readers to understand texts, not only in the way the profession might view them, but also in the way others might react to them. Manarin et al draw on Freire's work to emphasise the importance of a reader's ability to oscillate between reading the word and reading the world, to be able to build connections from the text to general principles and from there to their own specific experience of the world.<sup>84</sup>

### B *Self-critical Reading*

Adopting reading strategies to suit text genres and gaps in understanding requires the reader to be self-critical. Dewitz, assuming an expert reader, explains:

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 texts.<sup>85</sup>

The expert reader must recognise when the complexity of the text means they will need to read it multiple times – a first scan, followed by deeper reading of key passages/sections. Understanding that mastery is effortful is a crucial disposition for gaining expertise in critical reading.<sup>86</sup> This is a disposition law teachers can seek to inculcate in law students, but one which should not be assumed. Recognising textual complexity means that legal readers must look at the genre and structure of the text and not just read as if the text was a novel. Beginning-to-end reading might be the least appropriate approach. Online legal materials with hyperlinks might not operate in the same way as websites. Each legal genre and medium has different structures and intents, and expert readers modify strategies accordingly.

The critical reader will look for underlying conceptual frameworks and meanings, not just surface impressions, although these may be helpful on an initial reading to orient the reader's perspectives within

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<sup>82</sup> Elyse Methven, "'Weeds of Our Own Making': Language Ideologies, Swearing and the Criminal Law' (2016) 34 *Law in Context* 117.

<sup>83</sup> *Ibid.*

<sup>84</sup> Manarin et al, above n 5, 66.

<sup>85</sup> Dewitz, above n 32, 660.

<sup>86</sup> Fajans and Falk, above n 14, 164-5.

relevant domain knowledge. This tentative start, however, may alter as the reader advances more deeply into the text. Thus the reader will also critically assess their own reading success and attempt to remedy areas of uncertainty or confusion, approaching the text iteratively as meanings arise.

An expert reader should also be aware of the approach they tend to bring to bear on the process of interpretation and have the ability to apply different approaches when appropriate. Consider, for example, the formalist or legal positivist reader mentioned in the previous section. An expert reader may be able to use this approach to imagine a court's default interpretation and then read with a different perspective to highlight avenues for critique. Novice readers such as law students may not be fully aware of these choices. They may not come to the text with awareness of their own skill level or implicit theoretical approach and may need to acquire self-awareness in order to become expert readers. Metacognition links critical reading with critical thinking. It consists of the ability to look back on one's own reasoning process and critically assess the assumptions and methodology adopted, adjusting where necessary.

Metacognition in learning to 'read like a lawyer' also includes awareness of the reader's emotional response to material. Building on Palmer's work, Hess suggests that effective learning occurs in spaces in which students' emotions, confusions, and perspectives can be expressed and are acknowledged.<sup>87</sup> Yet many law classes offer little space in which these processes can occur. While there may be legally 'correct' analyses, individual responses to material reflect personal opinions that are valid outside of the legal construct, and may in fact be legitimate critiques of the legal way of seeing things. Just as the 'conceptual framework of the discipline helps [students] understand personal experiences',<sup>88</sup> personal experiences and responses may help students understand and give contextual meaning to a legal text.

## VI IMPLICATIONS FOR TEACHING AND FURTHER RESEARCH

This review of the techniques, strategies and dispositions of critical legal reading provides a range of insights into the barriers students face in becoming expert legal readers and some of the ways they might be more explicitly addressed in teaching. Despite the fact that the law curriculum already holds many content and skills requirements, the omnipresence of reading in the curriculum may present recurrent opportunities to broaden and deepen students' capacities for critical reading and metacognition. However, the immanent nature of reading skills may mean that there is no clear view of skill progression for

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<sup>87</sup> Gerald F Hess, 'Heads and Hearts: The Teaching and Learning Environment in Law School' (2002) 52 *Journal of Legal Education* 75, 84. See also Mary Heath, 'Encounters with the Volcano: Strategies for Emotional Management in Teaching the Law of Rape' (2005) 39 *Law Teacher* 129, 131.

<sup>88</sup> Hess, above n 87, 85.

students and staff. In this section we make some broader pedagogical suggestions.

### *A Overcoming Unknown Unknowns Through Class Dialogue*

Law curricula place emphasis on developing comprehension and analysis skills in the first year. While this revolves around reading, the context is often one of learning to ‘think like a lawyer’. Yet the reading and analysis of texts are two sides of the same coin and so continued emphasis on thinking skills in later years can therefore reinforce critical reading skills.

Students in early classes may be mistaken about the specialist meanings of words in law. They may be misled by the summary nature of legal dictionary entries, or confused by multiple possible meanings. Without domain knowledge expertise they may misunderstand key legal concepts. It can be very helpful if law teachers explain that law dictionaries give the student enough information to ‘get by’ and that sometimes terms are in themselves whole areas of contention. Explaining that in the early years of law school the meanings they are given for terms provide a simplified explanation to allow an initial grasp of an idea can be reassuring.

While often a novice reader will be aware of their lack of understanding, at other times they may be unaware of their failure to appreciate a level of meaning. This is the distinction between ‘known unknowns’ and ‘unknown unknowns’.<sup>89</sup>

A supportive classroom environment of engaged learners may be sufficient to ensure students feel able raise all issues that they know they do not understand. However, this is insufficient to deal with the unknown unknowns. Happily, the classroom dialogue of Australian legal education is ideally suited to do this where teaching takes place in person.<sup>90</sup> A key advantage of in-class discussion of passages of legal text is the opportunity to clarify and correct half-understood concepts and expose the complexity of apparently simple concepts. While a student’s ability to grasp the ‘gist’ of a legal text may provide sufficient understanding to engage in a discussion on the topic in general terms, it is often only when a class is led to develop the ability to parse the passage in detail that they begin to appreciate the flexibility of legal language and meaning exploited by advocacy.

Similarly explicit instruction in how to navigate the structures of legal documents is necessary. Expert readers know that these structures exist and use them to weigh the importance of aspects of a document, informing comprehension. Law teachers encourage this understanding

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<sup>89</sup> Popularised by Donald Rumsfeld, US Secretary of Defense. See Ali, *Donald Rumsfeld Unknown Unknowns!* (7 August 2009) Youtube <<https://www.youtube.com/watch?v=GiPe1OiKQuk>>.

<sup>90</sup> See, eg, Alex Steel, Julian Laurens and Anna Huggins, ‘Class Participation as a Learning and Assessment Strategy in Law: Facilitating Students’ Engagement, Skills Development and Deep Learning’ (2013) 36 *University of New South Wales Law Journal* 30 and the articles cited within.

of structure by students through asking precise questions such as ‘What are the facts?’, ‘Where is the ratio?’, ‘Is that term defined anywhere?’, and ‘How do we know that this section is of general application?’<sup>91</sup> Encouraging students to write notes as they read, and to create structures in which they take those notes – such as headings of Parties, Facts, Legal Proposition, etc – can also encourage students to adopt appropriate reading strategies.

Encouraging students to step back from the sentence they are reading and to locate it within the broader structure of the document can be a great help in developing meta-understanding of legal documents, and the predictability of their structures. While this is common for interpreting judgments, there is scope to increase the time in class given to interrogating structures of legislation and private legal documents.

These skills development interventions form the backbone of much first year teaching, but may not infuse later years. We would argue that the range of legal genres, and their increasing complexity through the degree, means that these basic units of understanding should be regularly revisited. Small tweaks to classroom discussion can bring even senior students back to the basics and have them reflect on the level of skill they have attained.

One clear advantage of face-to-face dialogue is the flexibility it affords to tailor support to individual and cohort needs. Formative online quizzes may also assist in ensuring all students have baseline understandings of meanings and concepts but may be less easily adapted to revealing layers of complexity and nuance in legal documents. It is important to note, however, that competency in completing reading activities or quizzes about materials does not mean the student will use the techniques or strategies. This will only occur if the student, without prompting, intentionally chooses those approaches to comprehend a subsequent text.<sup>92</sup>

### *B Developing Student Reading Strategies and Skills*

It is vital that students learn to use reading strategies – particularly rhetorical strategies – as soon as possible. Empirical studies have demonstrated that novice readers spend a significant proportion of their time intentionally using default strategies – weaker students up to half their time,<sup>93</sup> while expert readers spend far more time using rhetorical strategies. Dewitz summarises:

[L]ess successful law students ... 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

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<sup>91</sup> Cf the analysis in Mertz, above n 29, 57-9.

<sup>92</sup> See the discussion in Janice A Dole et al, ‘Moving From the Old to the New: Research on Reading Comprehension Instruction’ (1991) 61 *Review of Educational Research* 239.

<sup>93</sup> In Deegan’s study, the poorer students spent nearly 50% of their time using default strategies: Deegan, above n 31, 163.

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.<sup>94</sup>

Christensen found that, by contrast, expert readers spent half of their time reading legal documents drawing on their own prior legal knowledge and experience, aligning their reading to a purpose and contextualising passages within the broader document.<sup>95</sup> Studies suggest that good students use problematising strategies as frequently as experts.<sup>96</sup> It is thus the use of rhetorical strategies that is the hallmark of critical reading. Teachers can model these strategic reading techniques. They can, for example, set themselves a question on a set reading and through describing their thought processes out loud demonstrate to the class the strategies adopted.

Students will come to university with a range of default reading strategies such as note taking and highlighting. Again, first year teachers will have a range of activities for assisting students to recognise their need to go beyond those default strategies, but these strategies are necessarily curtailed by the short extracts of documents that students commonly read in the early years of a law degree. We would argue that to develop fully the problem formation and rhetorical strategies of expert lawyers, law students need to read full documents.

The use of extracts is an important way to reduce the cognitive load on law students while building domain knowledge. It can allow them to build conceptual structures one legal point at a time. However, legal practice is not equally simple. We should be careful to remember that, as students progress through their degree, they should develop the ability to read long judgments and statutes, to recognise what they understand and do not understand, and to appreciate whether their understanding is sufficient for the task at hand. Students need to develop the research skills of extracting for themselves the legal issues relevant to their matter. We suggest that this means that final year students should be expected to read full cases, articles and statutes in their courses.

Sullivan et al note that is important that teachers 'give students experience with fuller accounts of cases in which students can grasp the different meaning of "facts" from opposing points of view'.<sup>97</sup> The summarising of 'facts' in a short paragraph at the beginning of an extract removes from the students the understanding of how the facts are used in the document, and what alternative emphasis might be possible.

The deeply persuasive intent of judgments requires readers to very critically analyse what is presented. To do this requires significant levels of domain knowledge, and meta-cognition as to the broader context in which the judgment is to be understood, including materials or perspectives deliberately omitted. Again, this may be scaffolded by

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<sup>94</sup> Dewitz, above n 46, 233.

<sup>95</sup> Christensen, above n 46, 69.

<sup>96</sup> Christensen, above n 46; cf Deegan, above n 31.

<sup>97</sup> Sullivan et al, above n 40, 56.



a casebook, particularly if it juxtaposes academic articles with case extracts. Scaffolding is likely to be important in early classes to enable basic skills development before domain knowledge catches up.

But as Mertz points out, the arrangement of cases in casebooks also has impact:

Casebooks present “lines” of precedent using cases for disparate time and places; the principle of selection is the logic of precedent development ... [The use of cases as precedents] collapses historic time and social context in the service of a new legal framework.<sup>98</sup>

Alerting students to these impacts can help them to understand the levels of critical appraisal an expert lawyer can use in critical legal reading. While not possible in all classes, providing surrounding non-law materials as part of the reading will encourage students to evaluate the knowledge claims of the legal document.<sup>99</sup> Hoeflich makes the point that extracts can contribute to problems in understanding by removing facts which ‘hint that there is more to the case than appears’.<sup>100</sup> He provocatively suggests that law teachers are also part of the problem:

I would argue... that we have become teachers of black letter law and of uncritical reading of cases. Most of us simply pretend that the cases we teach from casebooks are complete in themselves and that they require no further research, that second and third order removes either do not exist or are trivial. .... We have, for lack of materials and lack of willingness to do our own research into the materials with which we teach, become exponents of what I have called the ordinary reader model. We have taught our students to be jurisprudentially naive and passive readers of case decisions. ... It needs to stop so that we can train our students to be better lawyers and so that we can better accommodate the diversity of views now in law school classrooms. To do otherwise would be a disservice to our students and to the profession.<sup>101</sup>

This quote makes a strong case for the broader approach to critical reading of legal materials.

### C Encouraging Broader Critical Reading

The emphasis in this article, as in introductory classes, has been on the basics of legal analysis. We have indicated, however, that we consider situating legal texts in broader contexts to also be very important. This has implications for the balance we give to different ways of analysing texts. Too much emphasis on reading for academic purposes may lead students to be overly accepting of disciplinary norms and so fail to read critically for social purposes, looking at form over

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<sup>98</sup> Mertz, above n 29, 63-4

<sup>99</sup> See the examples listed in Alex Steel, *Good Practice Guide (Bachelor of Laws): Law in Broader Contexts* (2013) Legal Education Associate Deans Network <<http://lawteachnetwork.org/resources.html>>.

<sup>100</sup> Hoeflich, above n 79, 1177.

<sup>101</sup> *Ibid* 1187.

content.<sup>102</sup> To move beyond this acceptance of norms – that they have struggled to master – some students will need encouragement and a reassurance that it is safe to take risks. The student must be willing to construct their own meaning from the text and take the chance that they are wrong, sometimes, ‘talking back to power’.

The student’s emotional reaction is also critical to their engagement in broader critique. If readings contain confronting or strongly emotional elements, students may not feel they have sufficient authority to critique it, or there may not be enough distance to be dispassionate in their analysis.<sup>103</sup> Students may have affective resistance to materials that they find too difficult or which are contrary to their own world view. The material may threaten their own identity and they may resist deep analysis. Overcoming this may require patient discussion in class, or scaffolding questions. Teachers should seek to be aware of how the material is likely to affect students and look for ways to help students approach and analyse difficult texts – perhaps through modelling the reading process or revealing their own difficulties with the material. Along with acknowledgment of, and respect for, emotional responses to written text, students may need to be provided with resources and strategies ‘to allow and encourage emotional self-management and constructive responses to others’ emotions’.<sup>104</sup>

#### D *The Implications of Technology on Legal Documents*

While the literature on reading has primarily analysed reading hard copy printed text, law teachers must now also be aware of the skills and strategies deployed in reading on digital devices. Many law teachers will have learnt their reading strategies and skills on hard copy and have taken that sense of the physical structure of text to a digital environment,<sup>105</sup> but their students may not have that sense of the text as presented on a computer screen. Students are likely to need explicit assistance in understanding how some legal documents, such as statutes, are written from a primarily analogue physical standpoint. Conversely, law teachers may be unaware of the need to teach reading strategies suitable to a digital environment. Digital formats might affect the process of reading through eschewing linearity of text, inclusion of images, and the lack of tactile experience of paper<sup>106</sup> all of which challenge analogue assumptions about reading strategies. Frequently, for example, the reader will not read digital text sequentially, particularly if there are hyperlinks or an available search function. Students need to be aware of the additional reading strategies this permits; the advantages and disadvantages for developing meaning

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<sup>102</sup> Manarin et al, above n 5, 13.

<sup>103</sup> Ibid 38.

<sup>104</sup> Heath, above n 87, 131.

<sup>105</sup> Rogelio Lasso, ‘From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21<sup>st</sup> Century Students’ (2002) 43 *Santa Clara Law Review* 1.

<sup>106</sup> See, eg, Maureen Walsh, Jennifer Asha and Nicole Spranger, ‘Reading Digital Texts’ (2007) 30 *Australian Journal of Language and Literacy* 40. Cf Loh and Kanai, above n 4.

using these strategies; and the genre biases we bring to online reading. Students will need to know when the context demands that they read items as if reading an isolated document or as a lit screen portal that is linked to a world of other information. In the near future, if not already, legal ‘reading’ itself will need to incorporate visual literacies, comprehending information graphically.<sup>107</sup>

This has flow-on effects on legal reasoning and writing and demands investigation beyond the scope of this article. Suffice to say that in addition to considering the genre of reading being undertaken by students, the medium is also an important consideration.

## VII CONCLUSION

For expert legal readers – including law teachers – most of the processes of comprehension remain unconscious. It is possible that many have little, if any, recollection of the way in which they themselves learned to read diverse legal genres. This poses a challenge for the law teacher whether faced with a class of novice readers, or even with a more experienced but still developing cohort. Essential to the ability to teach these skills is both an awareness of the components of the skill itself, and insights into the challenges of mastering each component and synthesising them.

Importantly, acquiring the capacity for synthesis required to become proficient at legal reading and thus legal reasoning and legal writing is not a linear process. Further, it depends on a variety of skills each student will bring to the classroom. Comprehension is contingent upon one’s own standpoint and capacity to manipulate language and diverse constructs into the demands of both the discipline and the specific genre.

The techniques discussed in this article are those used intuitively by expert readers, but which students must consciously learn. We argue that a high degree of awareness of the complexity of these skills is required to support the explicit teaching of reading skills necessary in law classes. It may also assist students’ development of their own epistemology to be made aware of these elements of reading. This article has sought to provide a taxonomy of the component parts of the skill set for critical legal reading. The aim here has been to spell out the complexity of the task at hand – one that might be under-estimated by the expert – to promote a deeper and more critical understanding of what is demanded even of the novice law student. In particular, in light of the importance of critical legal reading, the case is made for law teachers to pay greater attention to the explicit teaching of legal reading in order to support students in developing the comprehensive suite of language skills that are the hallmark of the graduate lawyer.

The challenge for the student (and consequently for the teacher) is that all the components of reading are required simultaneously from the

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<sup>107</sup> Richard K Sherwin, *Visualizing Law in the Age of the Digital Baroque: Arabesques and Entanglements* (Routledge, 2011).

outset to learn the law, as well as to demonstrate the skills of the discipline.<sup>108</sup> It is important that teachers recognise, within the diverse experiences of learners, the likely blockages to advancing their skills development. The complexity of the process means that a lack of comprehension may occur at any point. The teacher needs to be able to identify that point, for any individual student, and to explain how to overcome the impediment. This requires both insight into the teacher's own reading strategies, and an understanding of the elements of reading as components in a holistic endeavour.

Beyond reading, the role of the law teacher is to highlight that the elements of decoding and comprehension, critical reading and metacognition, translate into strategies for legal thinking and writing. These skills and dispositions are related and require development to become a competent lawyer.

Finally, we return to the point we made at the beginning of the article that students may have less experience with complex texts than previous generations. Learning critical legal reading is difficult, but as Davies notes:

[O]ne cannot become a legal reader by reading a descriptive account of how legal reading is done. Although this is true of any skill or ability, (that it is learned, not taught) it is particularly true of the skill of perceiving legal significance because that ability to perceive is ... dependent upon the legal reader's access to a store of specifically legal relevant contexts. ... It follows, then, that legal readers can only read cases because they have read many cases before.... technical legal skills such as case-reading cannot be simply and quickly taught, but must be acquired by the student him- or herself over a period of time. .... A store of legal relevant contexts, a cultural generator, is slowly won.<sup>109</sup>

We argue that, while learning to become a critical legal reader requires sustained effort over time, a better understanding of the mechanics, techniques and dispositions required can help students to understand why the sustained effort is needed, and what skills they are learning in the process. Better knowledge of what students are trying to achieve can make their efforts more efficient and lessen the inevitable stress of learning what is close to a new language.

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<sup>108</sup> Galloway et al, above n 15.

<sup>109</sup> Davies, above n 33, 430-1.