

CRITICAL READING FOR LAW STUDENTS

I. Reading is Reading, Right? Wrong.

Reading in law school will most likely be a very different experience than what you are familiar with from college. The difference lies in the fact that the reading materials themselves are different and the purpose for which you are reading those materials is different.

In college, most of your reading assignments were descriptive. That is, the author's goal was to provide you with a basic understanding of the topic under discussion with a relatively straightforward explicit description of relevant information, moving from general to specific. For example, in a textbook about psychology, the author might dedicate a chapter to describing a specific psychological disorder. The author might begin by defining the disorder and then proceed to provide more specific information about symptoms, diagnosis, causation, and treatment. In class, the professor might review the information discussed in the text or provide additional information about those disorders, such as recent developments in treatment. On the exam, students would likely be expected to remember and repeat that information. Thus, the straightforward nature of the textbook conformed to the purpose of the class – providing a student with an understanding of the subject – and to the purpose of testing – confirming that the student obtained that understanding.

In law school, however, most of your reading assignments will be from casebooks, i.e., textbooks that are primarily made up of selected (and edited) court cases with some limited explanatory text. If you are like most law students, you will find that these reading assignments are often far from straightforward. The authors of the court cases were not writing to provide students with a description of the legal issue under discussion; they were writing to resolve a question presented by the case. Moreover, the purpose of a law school course is not simply to provide you with a broad understanding of the law. Rather, the purpose of a law school course (and of law school in general) is to teach you how to “think like a lawyer.” Thus, while you will ultimately learn the law,¹ you will also learn how to find the law in the cases and how to apply the law to new factual situations.

As the purpose of a law school course is different from the purpose of an undergraduate course, the reading assignments, class structure, and exams are different as well. Instead of simply describing the law, the reading assignment will require you to extract the law (and more, as discussed below) from the cases. Instead of simply

¹ To be clear, you will not learn *all* of the law. That is an impossible task for you and your professors given the vast scope of the law and its ever changing nature.

reviewing the reading assignment or providing some additional information in class, the professor will ask you to reflect on and evaluate the case. For example, the professor might ask you to apply the law from the case you read to a new factual situation, determine whether the outcome would be the same or different, and explain why. Or the professor might ask you to consider whether the case conflicts with the law as announced in a previous case you read and, if so, to explain the reason for the conflict. Similarly, on the exam, recalling the rules you learned will be necessary but not sufficient. Rather, you will need to apply the rules to a factual scenario that you have never seen before. Thus, the nature of the casebook conforms to the purpose of the class – helping you develop both an understanding of the law *and* the ability to apply the law – and to the purpose of testing – confirming that you obtained both the knowledge of the law and the skill of analyzing and applying that law to a new situation.

Given the differences in the nature and purpose of the reading assignments in law school, it is no surprise that you may need to change the way you read. Indeed, empirical studies have demonstrated that the *way* law students read impacts overall academic performance.² Higher-performing students frequently are active readers, which means that they apply critical thinking to their reading – a/k/a critical reading. Rather than simply gathering information from the text, these higher-performing students use advanced reading strategies that have them interacting with the text, evaluating it, and placing it in the broader context of their own knowledge. Although you may not be using these advanced strategies yet (and perhaps did not need to with your undergraduate texts), *any* student can learn and apply critical reading strategies!

II. Overview of Reading Strategies

Reading strategies can be classified into three categories: default strategies, problematizing strategies, and rhetorical strategies.³

As the name suggests, default strategies are the basic strategies that most readers employ when reading text for understanding. These strategies typically involve moving through the text from beginning to end to gather information. Examples of default strategies include underlining, highlighting, rereading, and making notes in the margin (or on a separate document) that restate or paraphrase the text.⁴

² See, e.g., Leah Christensen, *Legal Reading and Law School Success: An Empirical Study*, 30 SEATTLE U. L. REV. 603 (2007); Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, 83 IOWA L. REV. 139 (1997).

³ Dorothy H. Deegan, *Exploring Individual Differences Among Novices Reading in a Specific Domain: The Case of Law*, 30 READING RES. Q. 154, 161 (1995).

⁴ *Id.* at 160-61.

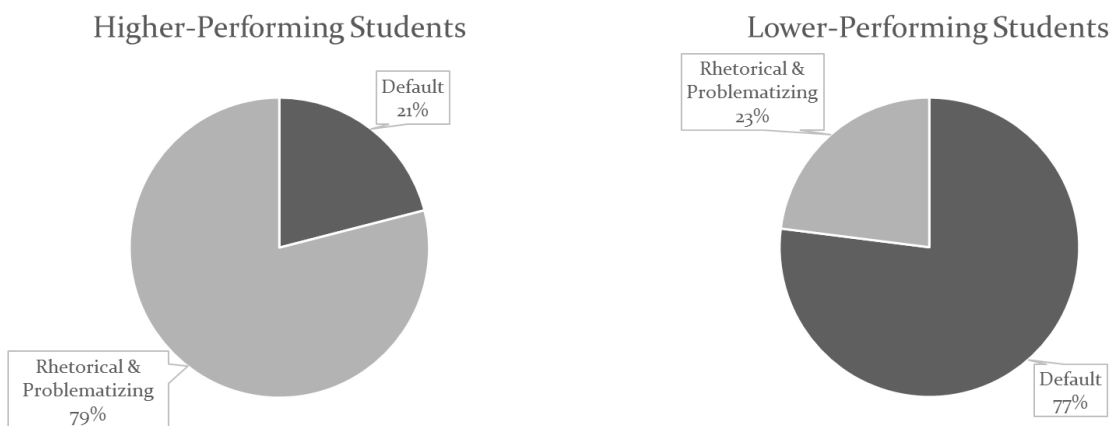
Problematizing strategies help the reader solve problems (e.g., a lack of clarity) that arise within the text itself.⁵ These strategies involve actively engaging with and responding to the text. Effectively, the reader carries on a conversation with the text. Examples of problematizing strategies include consciously asking questions about the text while reading (e.g., questions about a confusing section), synthesizing (not just paraphrasing) the text, and making predictions about the outcome of a case or study.⁶

Rhetorical strategies take the reader outside of the text itself. “While using rhetorical reading strategies, readers move through the text in an evaluative manner, or in a way that synthesizes what is being read with the reader’s own experiences.”⁷ Examples of rhetorical strategies include identifying weaknesses in the positions taken in the text, connecting the text to a specific reading purpose, connecting the text to the reader’s pre-existing knowledge or experiences, reacting to the text (e.g., noting disagreement or surprise with the conclusions reached).⁸

So, based on what you read earlier about the purpose of law school courses (and by extension law school exams), which reading strategies do you think higher-performing law students use more frequently than lower-performing law students?

According to one study, higher-performing students spend most of their reading time using problematizing and rhetorical strategies, while lower-performing students spend most of their reading time using default strategies. The allocation of time to each reading strategy category by student performance level is summarized in this chart:

Allocation of Time to Each Reading Strategy Category⁹



⁵ *Id.* at 161.

⁶ Oates, *supra* n.2, at 159-60.

⁷ LEAH M. CHRISTENSEN, “ONE L OF A YEAR”: HOW TO MAXIMIZE YOUR SUCCESS IN LAW SCHOOL 25 (2012).

⁸ *Id.*

⁹ *Id.* at 28-30.

You might wonder why these strategies have such a significant impact on student performance. First, problematizing and rhetorical strategies ensure that you are actually engaging with the reading materials rather than passively consuming them, which facilitates comprehension. Second, problematizing and rhetorical strategies play to the way your brain creates, stores, and recalls long-term memories. In short, by giving context, associations, and meaning to the information that you want to remember, the problematizing and rhetorical strategies help you convert the information to long-term memories and make those long-term memories readily accessible so that you can retrieve the information when appropriate *and* apply it in a novel context.¹⁰

Does all of this mean that you should abandon default reading strategies? Of course not. But you should realize that those default strategies will not be sufficient by themselves. Rather, you would be well served by incorporating a healthy dose of problematizing and rhetorical reading strategies as you read for your classes.

III. Reading Strategies for Cases

Problematizing and rhetorical reading strategies can be applied to any type of reading to produce better comprehension and recall. That said, as previously noted, most of your reading assignments in law school – especially in your 1L year – will be cases. Effective case reading actually involves pre-reading, reading, and post-reading strategies. The following text provides some suggestions for specific critical reading strategies at each of these stages.¹¹

A. Pre-Reading Strategies

Read Like an Advocate or a Judge. A lawyer typically reads cases to solve a legal problem faced by his client. As the lawyer reads the case, he is trying to identify the applicable legal rules and determine how those rules will affect his clients.

A judge typically reads cases in connection with a case pending before her. Much like the advocate, she is reading to identify the applicable rules and determine whether and how the case affects the decision she will render in the case.

¹⁰ For an informative and easy to understand description of the way in which your brain creates, stores, and recalls long-term memories in the context of study strategies, see ACADEMIC SUCCESS PROGRAM, MICH. STATE UNIV., COLL. OF OSTEOPATHIC MED., *Study Tips for Improving Long-Term Retention and Recall* (Dec. 8, 2016), http://com.msu.edu/Students/Academic_Guidance/long_term_retention_recall.pdf.

¹¹ The following strategies and corresponding discussion are adapted from MICHAEL HUNTER SCHWARTZ, *EXPERT LEARNING FOR LAW STUDENTS*, 85-103 (2d ed. 2008).

Both the lawyer and the judge realize that in reading the case their role is not simply to gather the information set forth by the court. Rather, they are developing their own understanding about what the case means, not only for the parties to the case, but also for the judges, lawyers, and parties who come after. They are figuring out how the case can be stretched to fit their own facts or compressed to avoid their own fact.

By identifying a similar purpose, e.g., by taking on the role of a lawyer reading the case on behalf of a client who might be affected or a judge reading the case before resolving a similar pending matter, you lay the foundation for using problematizing and rhetorical strategies when you read the case. That is, you put yourself in a mindset that looks for strengths and weaknesses in the court's analysis, sees the bias of the court,¹² and seeks to construct meaning instead of merely gather information.

Contextualize the Case. As you read earlier, rhetorical strategies include strategies that connect the text to the reader's pre-existing knowledge or experiences. Those strategies are helpful because it is easier to understand and recall new information if we connect it to pre-existing knowledge. So, before reading the case, place it in the broader context of the course.

To do that, you must first gather information about the structure of the course and how the different concepts covered in the course relate to each other. This information will provide you with an organized knowledge base that you can connect to as you read new material. Consider the following sources:

- *Course Syllabus & Casebook Table of Contents.* Both the syllabus and the casebook table of contents can provide broad context so that you can draw tentative conclusions about the topic covered by your assignment and how the topic connects to other topics in the course as well as how the specific reading assignment fits into the overall structure of the course.
- *Introductory Text for Each Chapter, Section, or Subsection.* Some students skip over the introductory text on the theory that class discussion is likely to focus on the cases. That is a mistake. Indeed, it may well be a good use of your time to read the introductory text even if it isn't assigned. This text often provides an overview of the topic or subtopic and may even identify the specific legal issues that the cases in the chapter, section, or subsection will cover. Additionally, the introductory text often explains the connections between the previous readings and the readings to come. Thus, the introductory text will provide you with background information that will help

you expand your knowledge of the structure of the course and connect the new information you are about to learn with the information you learned earlier in the course.

- *Questions & Notes Following The Assigned Case.* The notes and questions at the end of a case often identify key issues in the case, identify weaknesses in the court's analysis, and explain connections to cases or principles previously discussed in the course. Thus, reading these questions and notes *before* reading the case can make reading the case easier because you will have an idea of what to look for as you read the case.

Note the Details. When you brief a case, you will most likely make a note of certain factual details, like the issuing court, the date of the opinion, party names, and perhaps even the authoring judge. But what do you *do* with that information besides make a note of it in your case brief? Expert readers attend to these details because they remember that these details can impart meaning to the case. Consider the following when you read cases:

- The issuing court is critical because it tells you where the case fits in the hierarchy of authority. But you should also think about whether the court is located in a traditionally conservative state or a traditionally progressive state and the extent to which that impacted the decision.
- The date of an opinion tells you how the case fits into the timeline of related decisions. But you should also consider what it tells you about where we were in history when the decision was issued (e.g., economic boom or bust?) and how the authoring judge might have been influenced by the society in which he lived.
- The party names may help you get a handle on the case facts, but they can also provide you with some insight into the unspoken facts. Were the parties rich? Famous? Powerless? Hated? Did the status or identity of the parties affect the outcome?
- The author of the opinion may also tell you something about the case. Some judges are well known as experts in certain areas or as judges who take a certain view on interpreting the law.

¹² Although court opinions are often described as objective writing, the author no doubt wants to persuade the reader that the decision is correct. Thus, the expert reader keeps in mind that the judge crafted the opinion in a way that was intended to support the decided-upon outcome.

Preview the Case. Before you read the case, skim the case using a strategy aimed at understanding the structure of the case and identifying the issues covered by the case:

- Read all of the headings in the case.
- Read the first sentence of each paragraph, which will usually be a topic or thesis sentence. By drawing on these sentences, you will likely be able to develop a basic understanding of the rules relied on by the court as well as the holding. You may also get key details about the facts in the case and the arguments considered by the court.

Previewing the case in this way will make it easier for you to understand the full case.

Predict What You Will Learn From the Case. Drawing on the knowledge you have developed through the previous pre-reading steps, you should be able to identify several questions that will be answered by the case. Like establishing a purpose for your reading, this strategy lays the foundation for problematizing and rhetorical strategies as you read. If you identify the questions before you read, you are more likely to actively look for the answers to your questions as you read. Certainly, you would expect the case to answer information-gathering questions, like who the parties were and what result the court reached. But expert readers go beyond these information-gathering questions and develop questions that require them to use the information found in the case. These questions can be classified into comprehension questions and connection questions¹³:

Comprehension questions focus on whether the student understands what he or she is learning. Question stems . . . that are useful for coming up with good comprehension questions are:

- Describe _____ (the facts in _____ case, the holding in _____ case, etc.) in your own words.
- What does _____ (a concept or term of art used to describe the subject area) mean?
- Why is _____ important?
- Why did the court decide _____?

¹³ The following text is an excerpt from MICHAEL HUNTER SCHWARTZ, *supra* n.11, at 95-96.

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Connection questions link new reading to ideas students learned previously in the course or before they came to law school. . . . [M]aking such connections increases retention, comprehension, and ease of recall and use. Question stems that are common to connection questions include:

- Why is _____ (this case, this excerpt from a law review article, this entire topic) in this casebook?
- How does this concept tie in to _____ concept (that you learned before law school, that you learned in another law school class, that you already learned in this class)?
- How are this case and _____ case similar?
- How are this case and _____ case different?
- What is the difference between _____ and _____ (two similar concepts that have different legal implications)?
- What are the strengths and weaknesses of the court's reasoning?
- What are the benefits and detriments of the court's conclusion?

B. Reading Strategies

Read for Your Purpose. Recall that one of our pre-reading strategies was to identify a purpose (e.g., representing a client with a certain set of facts). Of course, identifying a purpose won't be a very effective strategy if you don't follow through on it when you read the case. That is, the benefit is not in the act of identifying a purpose; the benefit is in the approach to reading the case that doing so encourages. So, as you read the case, periodically remind yourself of your purpose and consider how what you've learned from the case connects to your purpose. For example, are the facts for your imaginary client analogous to the case? If so, what does that mean for the client? If the outcome is undesirable, what are the best arguments for the client based on the strengths and weaknesses in the court's reasoning? If the outcome is desirable, what are the arguments that your imaginary opponent will make based on the strengths and weaknesses of the court's reasoning? If your imaginary client facts were not specific, what questions do you need to ask your client? How will the answers affect the client in light of what you've learned from the case? By reconnecting to your purpose in this way, you will engage with the material in a way that will increase comprehension and

enhance retention and recall by applying the new information and giving it meaning and associations.

Seek the Answers to Your Questions. Another pre-reading strategy that we discussed was to identify questions that we expected the case to resolve. The point of identifying the questions is to prepare you to engage with the materials when you read. Expert readers keep those questions in mind as they read the text and actively seek the answers. Moreover, after expert readers finish reading the case, they will revisit the case, skimming over it to find the appropriate section that would contain the answer to any question that remains, and then reread that section to find the answer.

Develop New Questions & Find the Answers. As you gain a better understanding of the case, develop and answer new comprehension and connection questions. For example:

- If I changed the facts of the case in this way _____, would the outcome be the same? Why or why not?
- The court didn't address the losing party's arguments, but surely the losing party had an argument or two. What were they?
- What's the purpose of this rule?
- What is the court really trying to accomplish (even if it isn't saying so)?
- Why did the judge frame _____ (the issue, the fact, the rule, etc.) that way?

Talk Back to the Case: To be a critical reader, you must be a true critic. As you read a case, remember that courts are fallible, judges write to persuade others that their holdings are correct, and the rules can change. Don't just accept what the court said as an absolute truth. Look for mistakes or holes in the court's reasoning, description of the facts, etc. Argue with the court in your margin notes. Evaluating the case – talking back to it – in this way is part of constructing meaning out of the case.

Create Graphic Depictions When Necessary. When faced with complex details or concepts, expert readers often turn to graphic depictions. Creating a graphic depiction of text helps you create both a visual and a verbal memory for the same information, thus strengthening the memory and your ability to recall it. For example, a timeline can help you understand the timing of events relative to each other, a family tree can help you understand party relationships, and a flowchart can help you understand the relationships between topics, subtopics, and even rules within the

topics. Of course, the need for graphic depictions and which graphic depiction will work best will vary depending on the case details.

Resolve Confusion Before Moving On. If you don't understand a sentence, work through it before moving on. Revisit the text before and after the case for context. Look at the text surrounding the sentence for context clues to help you understand. If you don't recognize a word in the sentence, try to garner its meaning from context and then look it up for confirmation. Then, with knowledge of the word's meaning, make sure you understand the sentence. If you still don't understand, consult with a colleague or your professor. At a minimum, make a note about your confusion to resolve later.

With time, you'll find yourself struggling to understand a sentence far less often. You will become more fluent in the language of the law, which means you'll have more context clues available and you'll need to look up fewer terms. For now, however, realize that learning the vocabulary of the law is going to take conscious effort.

C. Post-Reading Strategies

Brief the Case. The process of case briefing will be covered separately. For current purposes, realize that it is a mistake to think about case briefing as an exercise intended simply to provide notes that will get you through class and perhaps be incorporated into an outline. Rather, the benefit of case briefing is the process of creating the brief and thus engaging with the case. This process forces you to memorialize your understanding of the case and impose a structure on the court opinion by reorganizing the text into the categories you've identified for your case brief.

You can maximize the learning that you achieve through this exercise with two related strategies. First, put the details of the case in your own words. This requires you to use the information in a way that builds stronger neural connections than simply copying text verbatim. Second, brief the case *after* you read it. Fill in the details from memory and then review the case and your margin notes to confirm and fill in the gaps. Knowing that you will be relying on your memory will encourage more engaged reading. Additionally, recalling the details of the case from memory strengthens the neural connections that are critical to retention and recall.

Synthesize. Now that you have read the case, it's time to complete the task of placing the case into the broader context of the course. You do this by developing an understanding of the relationships between this case and the other cases you have read on the topic or subtopic. Consider the following questions:

- Did the new case introduce a new topic (e.g., a new claim) or subtopic (e.g., a new element of a claim)?

- Did the new case reach a different outcome than a previous, similar case?
 - If so, did the new case change the law?
 - If so, how?
 - If not, what explains the different outcomes? (Factual differences? Jurisdictional differences? Minority rule versus majority rule?)
 - If the case outcomes were the same, what does this new case add to your understanding of the law?
 - Did the court frame the rules in different language?
 - Did it add a new rationale for the rule?
 - Did it expand the rule?

React, Evaluate & Apply: Hopefully, you began reacting to the case, evaluating it, and thinking about how the rules from the case would apply to different scenarios during the reading stage when you connected the case to your purpose, asked comprehension and connecting questions, and talked back to the case. Now that you have a fuller understanding of the case, having read it in full, however, you should take some time to:

- *React.* How do you feel about the case? Was this the right outcome? What about future cases that are now stuck with this rule?
- *Evaluate.* Did the court adequately support the opinion? What questions do you have about this case?
- *Apply.* Create scenarios that implicate the rules from the case. What outcome would a court reach based on the rules and reasoning of the case? Why?

IV. Conclusion

Initially, you may feel overwhelmed by all these strategies and wonder where you will find the time. Ultimately, however, these strategies result in more efficient reading by increasing comprehension. Additionally, these strategies ensure that you are getting maximum value from your reading time because you are not only gathering information but also strengthening your ability to recall and apply that information. Moreover, the more you practice these strategies, the more efficient you will become at using them. Eventually, this will just be the way you think when you read a case.

Reflection Questions

The goal of the following questions is to provide you with the opportunity to reflect on the reading strategies you have employed in the past and to think about whether those strategies will be useful to you as you transition to reading for law school.

1. Thinking about the strategies you employed for your undergraduate courses, would you say that you primarily used default reading strategies or problematizing and rhetorical strategies?

2. Think about the successful reading strategies you used before law school. List the two most successful strategies you used and briefly describe (1-2 sentences) the extent to which you think each strategy will be helpful to you as you transition to reading for law school.

3. Select three of the pre-reading, reading, or post-reading strategies discussed above (excluding case briefing) that you believe will help you understand cases better. For those three strategies, answer these three questions:
 - a. Is the strategy new to you?
 - b. Why do you think the strategy will help you understand the cases better?
 - c. Would the strategy have been useful to you as an undergraduate? Why/why not?