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LEVELING THE PLAYING FIELD: HELPING STUDENTS SUCCEED BY HELPING THEM LEARN TO READ AS EXPERT LAWYERS

LAUREL CURRIE OATES†

INTRODUCTION

I agree with Professor Vernellia Randall that law schools have an obligation to admit a diverse student body.¹ In addition, I agree with Professor Richard Delgado that law schools should not allow concerns over their *U.S. News & World Report* ranking to affect their decisions about whether to admit a student who shows great promise but does not have “high numbers.”² It is not, however, enough to admit a diverse group of students. Law schools also have an obligation to level the playing field, or at least the exam room floor, so that all of the students they admit can be successful both as law students and as attorneys.

This Article explores one way in which law schools can level the field. In particular, the Article builds upon an article that I wrote almost ten years ago about how students’ reading skills and beliefs about text affect their success in law school.³ It then explains why, given recent studies showing a decrease in reading, teaching legal reading is even more important today than it was ten years ago. The final section describes techniques that law schools can use to help their students develop their reading skills and calls for further research on the factors that

† Laurel Currie Oates is an Associate Professor and Director of Legal Writing at Seattle University School of Law.

¹ See Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN’S L. REV. 107, 108, 142–44 (2006).

² See Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 613–14 (2001).

³ See generally Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, 83 IOWA L. REV. 139 (1997) (describing a study in which a legal expert, well-performing students, and poor-performing students were all asked to read and analyze the same case).

affect students' success.

I. HOW STUDENTS' READING SKILLS AND BELIEFS ABOUT TEXT AFFECT THEIR PERFORMANCE IN LAW SCHOOL

For the last twenty-five years, I have worked closely both with students admitted to law school through the regular admissions process and with students admitted through an alternative admissions program. In working with these students, I have learned one thing: good undergraduate grades and a high LSAT score do not guarantee success. Similarly, low undergraduate grades and/or a low LSAT score do not mean that a student will rank at the bottom of the class.

When I first began teaching, I tended to explain these results in terms of effort. The students with high numbers who did not do as well as predicted were having trouble because they were not spending enough time preparing for class or for exams, and the students who did much better than predicted "beat the odds" because they worked hard. Although this theory explained some of the "failures" and "successes," it did not explain all of them. While some of the students who did not do well may not have spent enough time studying, many of them did. In addition, while some of the students who did well did, in fact, spend a lot of time studying, many of them did not spend any more time studying than the students who did not do as well.⁴

As I worked with students in class and in individual conferences,⁵ I gradually came to an "ah ha" moment. At least some of the students with high grades in law school seemed to have different reading skills and a different approach to reading than those students with lower grades. In an attempt to explore the effect of reading on law school success, I began by exploring the existing literature.

Unfortunately, at that point, the literature was very limited: the only study that was directly on point was one by Mary Lundeberg in which Lundeberg had ten non-lawyers and ten lawyers read a case.⁶ Lundeberg then compared the ten non-

⁴ *Id.* at 145.

⁵ For the last twenty-five years, I have taught legal writing, which has allowed me to work with students in small classes and in individual conferences.

⁶ See Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 READING RES. Q. 407, 410 (1987); see also Dorothy H. Deegan, *Exploring Individual Differences Among Novices*

lawyers, whom she labeled as novices, and the ten lawyers, whom she labeled as experts, on six criteria:

- (1) whether the individuals placed the case into context, *i.e.*, by reading the caption and noting the names of the parties, the court that had decided the opinion, the date of the opinion, and the name of the judge;
- (2) whether the individual obtained an overview of the case by checking the length of the opinion and by looking to see whether the appellate court had affirmed or reversed the lower court, whether the individual identified the cause of action, and whether the individual summarized the facts;
- (3) whether the reader read analytically, looking up terms that he or she did not understand, and making sure that he or she understood both the rule and the facts of the case;
- (4) whether the individual underlined as he or she read;
- (5) whether the individual engaged in synthesis by trying to reconcile statements made in the opinion or by thinking about hypotheticals; and
- (6) whether the individual evaluated the court's decision by stating that he or she agreed with the court's opinion or by demonstrating a sophisticated understanding of the role of the courts.⁷

The following chart summarizes Lundeberg's findings:⁸

Reading in a Specific Domain: The Case of Law, 30 READING RES. Q. 154, 161-62 (1995); James F. Stratman, *The Emergence of Legal Composition as a Field of Inquiry: Evaluating the Prospects*, 60 REV. EDUC. RES. 153, 172 (1990).

⁷ Lundeberg, *supra* note 6, at 412.

⁸ For the original chart in the context of Lundeberg's research, see *id.*

NUMBER OF INDIVIDUALS WHO USED A STRATEGY

	Novices	Experts
1. Use of Context		
Headings	1	10
Parties	4	9
Court	1	9
Date	1	9
Judge	0	8
2. Overview		
Length	4	9
Decision	0	8
Marking the action	0	8
Summarizing facts	2	10
3. Reading Analytically		
Terms	3	6
Facts	5	9
Rule of the case	3	9
4. Underlining	5	6
5. Synthesis		
Cohesion	3	6
Hypotheticals	0	4
6. Evaluation		
Approval/disapproval	1	10
Sophisticated view of Jurisprudence	2	9

Following Lundeberg's lead, I then conducted a study in which I compared the reading skills of a professor and four students who had been admitted to law school under a special admissions program. Although all four students had undergraduate GPAs and LSAT scores that placed them in the bottom 10% of their entering class, at the end of the first semester of law school, two were in the top 15% of their law school class and two were in the bottom 20% of their law school

class. The following chart shows the pseudonyms assigned to each student,⁹ their LSAT scores and undergraduate GPAs,¹⁰ their first semester GPAs and class rank,¹¹ and their ethnicity.¹²

Name	LSAT	First Semester GPA	Age	Race
James	145	1.88 (bottom 10%)		Asian American
Jackie	142	2.28 (bottom 20%)		African American
Maria	144	3.28 (top 15%)		Filipina
William	146	3.39 (top 10%)		Nigerian

As part of the study, I met with each of the students for approximately two hours. I began each of the sessions by training the students to think aloud, which is a qualitative research method in which the subject speaks aloud while performing a task or reading a particular text.¹³

Once the students were comfortable with the technique, I had them read a section from a first-year torts casebook dealing

⁹ To protect the identity of the students, the students were assigned pseudonyms, and the year the study was conducted has not been indicated.

¹⁰ The students gave me permission to obtain their undergraduate GPAs and LSAT scores from the admissions office. Their GPAs and LSAT scores placed the students in the bottom 10% of that year's entering class.

¹¹ The students gave me permission to obtain their first-semester grades and class rank from the registrar.

¹² The students self reported their ethnicity/national origin.

¹³ A think-aloud was used as the primary method of data collection because this method provides what many researchers believe is the most valid data on cognitive processes. See, e.g., Peter Afflerbach & Peter Johnston, *On the Use of Verbal Reports in Reading Research*, 16 J. READING BEHAV. 307, 311 (1984). Because participants state their thoughts as they are thinking them, these reports are considered more accurate than reports obtained through introspection or post hoc questioning. See K. ANDERS ERICSSON & HERBERT A. SIMON, *PROTOCOL ANALYSIS: VERBAL REPORTS AS DATA* 60-61 (1984) ("By having the subjects verbalize their thoughts at the time they emerged, the difficulties and sources of error associated with keeping thoughts in memory or retrieving them from memory could be eliminated.").

with false imprisonment.¹⁴ The authors of the casebook began the section by setting out the applicable *Restatement* section. They then set out an edited version of *Whittaker v. Sandford*,¹⁵ notes written by the casebook authors dealing with cases involving parents who hired individuals to "kidnap" their grown children from cults and deprogram them, and a second case. After the students completed the think-aloud, I conducted a structured interview in which I asked them questions about how they prepared for class, whether what they had done in the think-aloud was the same or different from how they typically read a case for class, and how they viewed text. The students also allowed me to photocopy sections of their casebooks in which they had highlighted or taken notes and, if they typically prepared case briefs and took notes during class, their case briefs and class notes.¹⁶

By luck, the four students illustrate what I have subsequently identified as four types of students: the expert reader, the expert student, the misguided student, and the student who does not care.

A. *The Professor*

So that I could contrast the way in which the students read the *Restatement* section, cases, and notes with the way in which an expert read the same material, I asked a law school professor to participate in the study. The professor who participated had had three years of practice experience and three years experience teaching legal writing.

The first "crisis" occurred when, after training the professor to do a think-aloud, I asked her to begin reading the excerpt from the casebook. The professor paused, and then announced that she "couldn't do the task." Since graduating from law school, she had not read a case to "just read a case": when she was in practice, she had read statutes and cases because she needed to research an issue for a client, and since she had begun teaching, she had read the statutes and cases that her students needed to write their memos, client letters, and trial and appellate briefs. Thus, before she could begin reading, she needed to know why

¹⁴ The section was taken from JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, *THE TORTS PROCESS* 968-71 (3d ed. 1988).

¹⁵ 85 A. 399 (Me. 1912).

¹⁶ Oates, *supra* note 3, at 145.

she was reading the material. After a short discussion, we decided that she should read the cases to see whether they might form the basis for a memo problem for her first-year students. Satisfied, she began reading.

Once she began reading, the professor used the first of Lundeborg's strategies: she put the cases into their historical and legal context. For example, in reading the first case, *Whittaker*, the professor commented on the fact that the case was an old case and that the Supreme Court of Maine decided it. She kept this information in mind as she read the case, on one occasion commenting on the fact that in 1912, the \$1100 award would have been a lot of money; on another occasion noting that in 1912, women had far fewer rights than women have today; and on still another occasion bemoaning the fact that she did not know how "cults" or other non-mainstream religious groups were viewed in the early 1900s.

In addition, like Lundeborg's experts, the professor read analytically and engaged in both synthesis and evaluation. The following excerpts from the professor's think-loud are representative. The text is in boldface type, and the professor's statements about the text are in italics.¹⁷

<p style="text-align: center;"><i>Whittaker v. Sanford</i> 110 Me. 77, 85 A. 399 (1912)</p> <p>Savage, J. Action for false imprisonment. The plaintiff recovered a verdict for \$1100. The case comes up on defendant's exceptions and a motion for a new trial.</p> <p><i>Savage is the judge. This is an action for false imprisonment. The plaintiff recovered a verdict for \$1100. I just glanced back at the caption. In 1912, \$1100 would probably have been a significant amount.</i></p>	<p>Text of the opinion.</p> <p>The professor puts the case into its historical context.</p>
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¹⁷ The following charts consist of research and data that were originally published and analyzed in *Iowa Law Review*. See Oates, *supra* note 3.

<p>The plaintiff had been a member of a religious sect which had colonies in Maine and in Jaffa, Syria, and of which the defendant was a leader. Some months prior to the alleged imprisonment, the plaintiff, while in Jaffa, announced her intention to leave the sect.</p>	<p>Text of the opinion.</p>
<p><i>Ok. The court is setting out the facts.</i></p>	<p>The professor identifies the type of information that the court is setting out.</p>
<p>The defendant, with the help of the plaintiff's husband, persuaded the plaintiff to return to the United States aboard the sect's palatial yacht, the Kingdom. The defendant promised the plaintiff that she and her children would be free to leave the ship any time they were in port. After their arrival in Maine, the plaintiff asked to be put ashore with her children and baggage and the defendant refused.</p>	<p>Text of the opinion.</p>
<p><i>Ok. So the plaintiff is a woman wanting to leave a sect and the defendant is the leader of the sect. The false imprisonment occurred when the defendant refused to let the plaintiff go ashore with her children and baggage.</i></p> <p>....</p>	<p>The professor easily identifies the parties and the cause of action.</p>
<p>There was evidence that the plaintiff had been ashore a number of times, had been on numerous outings, and</p>	<p>Text of the opinion.</p>

had been treated as a guest during her stay aboard the yacht. According to the uncontradicted evidence, at no time did anyone physically restrain the plaintiff except for the defendant's refusal, once the plaintiff announced her decision to quit the yacht, to let the plaintiff use a small boat to take herself, her children, and her belongings ashore.

I'm sort of getting a visual image of the boat that she was in and out of . . . uhm . . . the plaintiff had been ashore. I'm thinking about the elements that I just read [a reference to the Restatement section immediately before the case] and I'm trying to see how, I guess, frankly how I would decide the case on a certain level before I even want to know what Judge Savage thought. [pause] I need to look at the Restatement again. [looks back to Restatement section] Is the defendant acting to or with intent to confine the plaintiff? She got off the boat. That kind of bothers me. That results directly or indirectly in confinement. Maybe that's relevant here. The other is conscious of the confinement or is harmed by it. Given these facts, that bothers me too.

Professor creates a mental image of what occurred.

The professor engages in analysis and synthesis when she applies each "element" of the Restatement to the facts in *Whittaker v. Sandford*.

The professor engages in evaluation when she assesses the evidence.

In summary, like Lundeberg's experts, the professor put the case into its historical and legal context, and she engaged in analysis, synthesis, and evaluation. However, she also used two strategies that Lundeberg did not explore. First, the professor would read only when she knew why she was reading; once she identified that purpose, she read with that purpose in mind, and she seemed to visualize what had happened in the case. Second,

the professor was a good reader: she did not stumble over words or mispronounce words, and she did not misread any of the text.

Finally, during the interview, the professor, who happened to be the daughter of a judge, indicated a firm belief that knowledge is socially constructed. According to the professor, the role of the attorney is to persuade the judge to see the case in a particular way, and the role of appellate judge is to assess how society will view a particular set of facts or actions.

B. The Expert Reader

Like the professor, William also used some of the strategies that Lundeborg identifies. However, he used by far fewer of the strategies, and he used those strategies in a far less sophisticated manner.

For instance, unlike the professor, William did not put the court's decision in its historical, social, political, or legal context. In fact, in reading the case, he appears to apply today's values. In addition, unlike the professor, William never engaged in any type of synthesis. For example, in reading *Whittaker*, he never referred to the *Restatement* section, and, in reading the second case, he never referred to the *Restatement* section, the first case, or the casebook authors' notes.

However, William did engage in analysis when he read and reread the facts of the case until he was sure that he understood who the parties were and what the issue was, as is exemplified by the following excerpt. Once again, the material that is in bold is the text of the case, which William read aloud, and the sentences that are in italics are the statements that William made about the text.

<p style="text-align: center;"><i>Whittaker v. Sandford</i> 110 Me. 77, 85 A. 399 (1912)</p> <p>Savage, J. Action for false imprisonment. The plaintiff recovered a verdict for \$1100. The case comes up on defendant's exceptions and a motion for a new trial.</p> <p><i>So the defendant is the appellant and is</i></p>	<p>Text of the opinion.</p> <p>William does not put</p>
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<p><i>appealing the verdict of \$1100.</i></p> <p>The plaintiff had been a member of a religious sect which had colonies in Maine and in Jaffa, Syria, and of which the defendant was a leader. Some months prior to the alleged imprisonment, the plaintiff, while in Jaffa, announced her intention to leave the sect.</p>	<p>the case into its historical or legal context.</p> <p>Text of the opinion.</p>
<p><i>I need to reread this again. [rereads sentence] So just prior to the alleged imprisonment the plaintiff was in Jaffa and expressed an intention to leave the sect. At this point, I am a bit confused about who the parties are. I need to reread this to make sure that I have the facts straight. [rereads from the beginning] Ok. This is an action for false imprisonment. The plaintiff recovered a verdict for \$1100. The case came up on the defendant's exceptions. The plaintiff is a member of the sect and the defendant is the head of the sect, so Whittaker is the member of the sect and Sandford is its leader.</i></p>	<p>William reads and rereads the text until he is sure that he understands who the parties are, what the cause of action is, and who did what when. As he was reading, he drew small diagrams in the margins of his casebook.</p>
<p>The defendant, with the help of the plaintiff's husband, persuaded the plaintiff to return to the United States aboard the sect's palatial yacht, the Kingdom. The defendant promised the plaintiff that she and her children would be free to leave the ship any time they were in port. After their arrival in Maine, the plaintiff asked to be put ashore with</p>	<p>Text of the opinion.</p>

<p>her children and baggage and the defendant refused.</p> <p><i>So at this point the defendant is reneging on the promise that he made to the woman in Syria.</i></p>	<p>William puts his own "spin" on the facts.</p>
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After he had finished reading the facts, William evaluated them and predicted how the court would decide the case. It is important to note, however, that although William evaluated the facts, his evaluation was that of a lay person and not a lawyer. For example, rather than applying the applicable rule or *Restatement* section to the facts of the case, William evaluates the credibility of the parties, determining that he does not believe the plaintiff's story.

<p>Throughout the entire episode the plaintiff's husband was with her and repeatedly tried to persuade her to change her mind and remain with the sect.</p> <p><i>At this point, mentally I think, . . . I don't think the plaintiff's story holds water, . . . that's what I am thinking. Because her husband was there, so maybe you know, there's in my mind that her story doesn't hold water. So I am thinking at this point that the court might end up reversing her position.</i></p>	<p>Text of the opinion.</p> <p>Instead of applying the rules to the facts of the case, William evaluates the plaintiff's credibility. While the professor played the role of an attorney or judge by engaging in legal analysis, William played the role of a juror by evaluating the facts.</p>
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However, like the professor, William read with a strong sense of purpose. For example, his think-aloud indicates that he read to see how he would have decided the case and, in his interview, he stated that when he reads cases, he puts himself in

the role of the decision maker and evaluates what the outcome of the case should be.

While William's think-aloud indicates that William had a long way to go in learning how to read as an expert reads, in his interview he made statements that indicate that he views text in much the same way as experts view it. For example, he understood that he needed to do more than just "parrot" back statements made in a case, that judges do more than decide who is telling the truth and who is lying, and that in many instances both sides can use the same case to support their positions. Finally, he made statements indicating his belief that meaning is socially constructed. For instance, during his interview, William stated that during a trial, "each side presents its version of the facts" and the court, by "looking at prior cases, decides how to interpret them."

C. The Expert Student

Like William, Maria did very well in her first year, ranking in the top 15% of her class. However, unlike William, Maria employed very few of Lundeborg's experts' strategies. For example, Maria did very little analysis and almost no synthesis or evaluation.

Maria was, however, what most individuals would label as a good reader. She did not stumble over any words, she pronounced all of the words correctly, and she appeared to understand all of the words and references. In addition, she paid close attention to the structural clues that judges provided, paying particular attention to sentences introduced by phrases like "most importantly" and "therefore." Additionally, Maria read very methodically, looking first for the parties and nature of the action, then for the issue and rule, and finally for the holding and reasoning.

Although Maria highlighted as she read, she did not prepare a brief while reading the case. Instead, she waited to prepare her briefs until after class so that her briefs would set out, to the best of her understanding, what the professor thought the issue, rule, and holding were, and how the professor had evaluated the court's reasoning. The following quote reflects Maria's approach: "I usually adopt the professor's way [of reading the case]. I guess it is survival. If he says or she says it, it must be right. That is what you need to know for the exam."

Thus, Maria "transferred"¹⁸ to law school the strategies that had helped her get through high school and college. She "read" her professors, figured out what they wanted, and then gave them what they wanted on the exam. Maria was, however, "smart enough" to recognize that what her law school professors wanted was different from what most of her college professors had wanted. For instance, Maria understood that, while for most of her undergraduate exams her professors had wanted her to demonstrate that she knew a particular set of facts or that she knew how to do a particular act, for example, to solve a particular type of problem, her law school professors wanted her to identify the issue, set out the rules that governed that issue, and to present and evaluate each side's arguments. Thus, Maria understood that law school involved more than information transmittal or skill acquisition. However, instead of telling her professors how she might present and evaluate the arguments, Maria tried to set out the arguments that her professors might make and predict how her professors would then evaluate those arguments.

Maria did, however, view text in a way that was similar to the way in which William viewed text. During her interview, Maria stated that what she finds intriguing about the law is the fact that "there can be so many different interpretations of what happened," and that the "court gets to decide, by looking to precedent, which interpretation to adopt."

D. The Misguided Student

Although she worked very hard, Jackie did not do very well on her fall semester exams, and, by the time she participated in the study, she was discouraged. She told me that despite the fact that she was doing everything she could, she just did not get it.

As it turned out, what Jackie did not understand was the difference between law school and college. She had gotten her undergraduate degree in history from a college that emphasized the memorization of facts. For her classes, Jackie would memorize events, names, and dates of historical events, and she would then recite these on exams. She read primary documents

¹⁸ Transfer is defined as "the degree to which a behavior will be repeated in a new situation." Douglas K. Detterman, *The Case for the Prosecution*, in *TRANSFER ON TRIAL: INTELLIGENCE, COGNITION, AND INSTRUCTION* 4 (Douglas K. Detterman & Robert J. Sternberg eds., 1993).

on only a few occasions, and she rarely had to critique an account of a particular historical event.

Although at some level Jackie knew that her law school classes were different from her college classes, she did not understand the significance of those differences. Thus, she read the cases for information. As a consequence, her think-aloud consisted almost entirely of close paraphrases of the court’s opinion.

<p><i>Whittaker v. Sandford</i> 110 Me. 77, 85 A. 399 (1912)</p>	
<p>Savage, J. Action for false imprisonment. The plaintiff recovered a verdict for \$1100. The case comes up on defendant’s exceptions and a motion for a new trial.</p>	<p>Text of the opinion.</p>
<p><i>This was a trial for false imprisonment. The plaintiff was able to recover or receive \$1100. The defendant is taking exception to the case.</i></p>	<p>Close paraphrase of what court said.</p>
<p>The plaintiff had been a member of a religious sect which had colonies in Maine and in Jaffa, Syria, and of which the defendant was a leader.</p>	<p>Text of the opinion.</p>
<p><i>This sentence says to me that the defendant was the leader and the plaintiff was a member of a religious sect and this occurred perhaps in Jaffa or Syria.</i></p>	<p>Close paraphrase of what court said. Jackie does not seem to realize that Jaffa is a city in Syria.</p>
<p>Some months prior to the alleged imprisonment, the plaintiff, while in Jaffa, announced her intention to leave the sect. The defendant, with the help of the plaintiff’s husband,</p>	<p>Text of opinion. Jackie mispronounces “palatial” and does not seem to know the word’s meaning.</p>

<p>persuaded the plaintiff to return to the United States aboard the sect's palatial [sic] yacht, the Kingdom.</p> <p><i>What this is saying is that with the help of the plaintiff's spouse, she was prevented from leaving to go back to . . . (voice fades).</i></p>	<p>Close paraphrase.</p>
<p>The defendant promised the plaintiff that she and her children would be free to leave the ship any time they were in port.</p>	<p>Text of the opinion.</p>
<p><i>The defendant had promised her and the children that they would be able to leave.</i></p>	<p>Close paraphrase.</p>

Although most of Jackie's paraphrases are accurate, her think-aloud indicates that she did not always understand the court's references or words used in the opinion. For example, Jackie's think-aloud suggests that she did not know that Jaffa is a city in Syria. In addition, she mispronounced the word "palatial" and, in discussing the case with Jackie, I concluded that Jackie did not know whether the "yacht" was a nice boat, an average boat, or a boat with very poor living conditions. As a consequence, Jackie did not realize that the court's decision may have been influenced, at least in small part, by the fact that the boat was a palatial yacht.

In addition, Jackie did not use any of the reading skills that Lundeberg's experts used: she did not put the case into its historical or legal context, and she did not do any analysis, synthesis, or evaluation. During the interview, it also became clear that Jackie did not read for particular purpose: she simply read the cases because her professors had told her to read them.

Jackie's case briefs and class notes confirmed that her think-aloud was typical of what she did for class. She had lengthy case briefs for every case. In fact, sometimes her case briefs were as long or longer than the cases themselves. In addition, Jackie often took five to ten pages of notes during class. As she told me during her interview, she tried to write down everything that the

professor said.

When we talked about the role of the courts, Jackie stated that the court's purpose is to determine who is telling the truth and who is lying. In addition, she stated that in most instances one side would use one case or set of cases and the other side would use another case or set of cases. Finally, she stated that if a judge did a good job writing the opinion, everyone would agree with the court.

While Jackie did not do well on her fall semester exams, she was eager to do whatever it took to be successful in law school and, several weeks after she had completed the think-aloud and interview, she met with me and asked what I thought were her strengths and weaknesses as a reader. As we talked about the difference between reading for information and the type of reading her law professors wanted her to do, you could almost see the light bulbs going on. Although it took Jackie several months to retrain herself, she knew, almost in an instant, what she was doing wrong. While the second part of the conversation was more difficult, when presented with examples from her think-aloud, Jackie also understood how her weak vocabulary and lack of knowledge were affecting her ability to understand the cases that she was reading. Because the study was conducted prior to the days of easy access to a computer, Jackie bought a dictionary to look up words that she did not completely understand.

The good news is that Jackie's grades improved every semester and, despite her low fall semester first-year grades, she graduated in the upper third of her class.

E. The Student Who Did Not Care

More likely than not, James came to law school not because he wanted to become a lawyer, but because his family wanted him to become a lawyer. At least on the surface, he did not appear to be particularly interested in the law or particularly upset about his poor fall semester grades. The following quote from his interview sums up James's approach to preparing for class:

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

them, then anything that the person says, it doesn't matter. To me, he answered the question correctly, so I am capable of doing the same thing, so I just want to make sure that I don't look like a fool in class.

Because his primary motivation was to avoid embarrassment, James spent very little time reading the assignment unless he thought the professor would call on him in class. James did, however, use some of the reading strategies associated with expert legal readers, and he acknowledged others. For example, James engaged in synthesis when he tried to reconcile the *Restatement* provisions with the rules that the courts set out and applied. In addition, on several occasions, James posed hypotheticals. The following quotes are from James's think-aloud:

At this point, I need to look again at the [*Restatement*]. I don't remember seeing the words "actual physical restraint."

....

The next time that I think about false imprisonment I'll think about the room [a reference to the analogy used by the court] and I'll know that it will extend to not giving someone a rowboat. Therefore, if there is another hypothetical, let's see, say someone locks someone in a car, I try to see if it is the same type of situation, how it is different and how you could argue either way.

However, like Jackie, James did not recognize a number of words, such as "palatial." In addition, James read the following sentence to mean that the defendant refused to allow the plaintiff go ashore on only one occasion rather than that the defendant's refusal came once the plaintiff announced her decision to leave the ship. The text of the case is set out first. James's reading of that text is set out next in boldface type.

According to the uncontradicted evidence, at no time did anyone physically restrain the plaintiff except for the defendant's refusal once the plaintiff announced her decision to quit the yacht to let the plaintiff use a small boat to take herself, her children, and belongings ashore.	Text of the opinion.
According to the uncontradicted	What James read.

<p>evidence, at no time did anyone physically restrain the plaintiff except for the defendant's [pause] defendant's refusal once [pause] defendant's refusal once [pause] the plaintiff announced her decision to quit the yacht to let the plaintiff use a small boat to take herself, her children, and belongings ashore.</p>	
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Similarly, James misread or misinterpreted the note following the first case, reconciling what appeared to be contradictory decisions by deciding that one case dealt with children under the age of eighteen while the other case dealt with adult children. In fact, both decisions dealt with adult children. What the opinions illustrated was that the courts did not want to get involved: the courts did not want to appoint the parents as temporary guardians of their adult children, and the courts were reluctant to support the adult children by holding that their parents had falsely imprisoned them.

Although James did not realize that he had misread this text, he was aware that his understanding of a case sometimes differed from that of his professors and classmates. In addition, he acknowledged that sometimes he underlined without reading what he was underlining. While he recognized key words, he did not always read the text following those key words.

In summary, while James used some of the reading strategies associated with expert legal readers, his use of those strategies was flawed. James knew what strategies to use, but he did not use them because the strategies were inconsistent with his goal in reading cases and he lacked basic reading skills, including word recognition and the ability to correctly interpret what was printed on the page.

F. Summary of Results

When I took a step back from the think-alouds and interviews, I determined that four things distinguished William's and Maria's reading of the cases from Jackie's and James's.

First, William and Maria had more "world knowledge" and better vocabularies than Jackie and James. While both Jackie and James mispronounced more words or phrases, neither

William nor Maria made those "mistakes."

Second, like the professor, both William and Maria read for a particular purpose. William read as a member of the jury, and Maria read to find particular information. In contrast, Jackie's reading was more mechanical, and James's reading was controlled by his personal fears.

Third, William and Maria appear to share similar beliefs about text. Like the professor, they seem to believe that meaning is socially constructed rather than fixed. For example, during his interview, William stated that during a trial, "each side presents its version of the facts" and that the court, by "looking at prior cases, decides how to interpret them." Similarly, Maria stated that what she finds intriguing about the law is the fact that "there can be so many different interpretations of what happened," and that the "court gets to decide, by looking to precedent, which interpretation to adopt." In contrast, both Jackie and James seemed to think that there were right and wrong answers. While Jackie stated that there was probably more than one way of interpreting an opinion, she also stated that if the judge wrote a good opinion, "everyone would probably read it in pretty much the same way." Similarly, James stated that while there was probably more than one way to see the facts or read a case, he usually tried to check his reading against one of the study guides to make sure that he had read the case correctly. In addition, both Jackie and James stated that it was the court's role to determine who was telling the truth.

Finally, like the professor, William and Maria read for a specific purpose. William's protocol provides evidence of his belief that the reader's role is to construct meaning either from the text itself or from the facts and rules presented in that text. Similarly, Maria's protocol provides evidence that she believes part of the reader's role is to interpret the text. However, unlike William, she is not yet willing to assume that role herself, instead choosing to defer to the professor's reading. In contrast, both Jackie and James see the reader's role as more limited. The reader's role is simply to decode what the writer writes.

II. WHY TEACHING READING IS MORE IMPORTANT TODAY THAN IT WAS EVEN TEN YEARS AGO

There was a time when most of the individuals who came to law school seemed to be not only good readers but also frequent

and avid readers.¹⁹ A recent study by the National Endowment for the Arts indicates that today's students do not do as much reading.²⁰ In the study, entitled "Reading at Risk," investigators surveyed 17,000 individuals, asking whether they had read any novels, short stories, plays, or poetry in their leisure time during the prior twelve months.²¹ (The study did not look at reading done for school or for work). The investigators then compared their data to data collected in 1982 and 1992.

Based on the survey results, the NEA found that the percentage of adult Americans reading books or literature declined dramatically in the last twenty years. The following chart, taken from the study, illustrates the drop between 1992 and 2002.²² The study established that the decline in reading is not confined to individuals with a particular education.²³

LITERARY READING BY EDUCATION

	Percentage By Group			Percentage Point (pp) Change	
	1982	1992	2002	1992- 2002	1982- 2002
Grade School	21.2	17.3	14.0	-3.3 pp	-7.2 pp
Some HS	38.8	34.5	23.3	-11.1 pp	-15.4 pp
HS Graduate	54.2	49.0	37.7	-11.3 pp	-16.5 pp
Some College	72.9	65.0	52.9	-12.1 pp	-20.0 pp
College Graduate/ Graduate School	82.1	74.6	66.7	-7.9 pp	-15.4 pp

In addition, the decline is not confined to a particular age group.²⁴

¹⁹ The National Endowment for the Arts ("NEA") has defined a frequent reader as someone who reads between twelve and forty-nine books a year and an avid reader as someone who reads fifty or more books a year. See NAT'L ENDOWMENT FOR THE ARTS, *READING AT RISK: A SURVEY OF LITERARY READING IN AMERICA* 4 (2004), available at <http://www.nea.gov/pub/ReadingAtRisk.pdf>.

²⁰ *Id.* at 26.

²¹ *Id.* at vii.

²² *Id.* at xi.

²³ *Id.*

²⁴ *Id.* (illustrating a decline in reading across all age groups).

LITERARY READING BY AGE

	Percentage by Group			Percentage Point (pp) Change	
	1982	1992	2002	1992-2002	1982-2002
18-24	59.8	53.3	42.8	-10.5 pp	-17.0 pp
25-34	62.1	54.6	47.7	-6.9 pp	-14.4 pp
35-44	59.7	58.9	46.6	-12.3 pp	-13.1 pp
45-54	54.9	56.9	51.6	-5.3 pp	-3.3 pp
55-64	53.8	52.9	48.9	-4.0 pp	-3.9 pp
65-74	47.2	50.8	45.3	-5.5 pp	-1.9 pp
75 & Older	40.9	40.4	36.7	-3.7 pp	-4.2 pp

In fact, during the past twenty years, individuals in the 18-34 year-old age group have gone from being the group most likely to read literature to the group least likely to do so. As the numbers set out below establish, the rate of decline for the youngest adults (individuals age 18-24) is greater than that of the total adult populations.²⁵

LITERARY READING BY YOUNG ADULTS

Age Group	Percentage by Group			Rate of Decline
	1982	1992	2002	1982-2002
18-24	59.8	53.3	42.8	-28 %
25-34	62.1	54.6	47.7	-23 %
All Ages	56.9	54.0	46.7	-18 %

The decline has occurred among individuals of all racial and ethnic groups.²⁶

²⁵ *Id.*

²⁶ *Id.* at x.

LITERARY READING BY RACE/ETHNICITY

	Percentage by Group			Percentage Point (pp) Change	
	1982	1992	2002	1992- 2002	1982- 2002
White	59.8	58.0	51.4	-6.6 pp	-8.4 pp
African American	42.3	45.6	37.1	-8.5 pp	-5.2 pp
Hispanic	36.4	34.0	26.5	-7.5 pp	-9.9 pp
Other	50.2	42.7	43.7	+1.0 pp	-6.5 pp

While the numbers set out above show the percentage of individuals who had read *any* book, poem, or play during 2002, the NEA study also provided some information about the number of books individuals read.²⁷

NUMBER OF BOOKS INDIVIDUALS READ DURING 2002

Reading Types	Percentage
Light Readers (1-5 books during 2002)	21 %
Moderate Readers (6-10 books during 2002)	9 %
Frequent Readers (12-49 books during 2002)	12 %
Avid Readers (Over 50 books during 2002)	4 %

One cannot develop expertise quickly. Although talent may play a role in its development, it still takes talented individuals a great deal of time to develop expertise.²⁸ For example, a number of individuals have estimated that it requires between 50,000 to 100,000 hours to become a world-class chess master.²⁹ Thus, if

²⁷ *Id.* at 4.

²⁸ NAT'L RESEARCH COUNCIL, HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL 58 (John D. Bransford et al. eds., 2000), available at <http://books.nap.edu/html/howpeople1>; see also K. Anders Ericsson et al., *The Role of Deliberate Practice in the Acquisition of Expert Performance*, 100 PSYCHOL. REV. 363 (1993) (explaining expert performance in terms of acquired characteristics resulting from extended deliberative practice).

²⁹ William G. Chase & Herbert A. Simon, *Perception in Chess*, 4 COGNITIVE PSYCHOL. 55 (1973).

today's students are reading fewer books, there is a good chance that they lack expertise as readers, let alone expertise as readers of legal texts.

While it is possible that students are reading more on the Internet rather than in books, a recent article indicates that reading online is different from reading a book.³⁰

With personal computers' and the Internet's graphical interfaces, it is no longer possible to position the print text as the focal text in all instances, with images serving only a supporting role in meaning construction. As many webpages are overwhelmingly an assemblage of images, understanding reading across these images significantly decenters print-based reading. Hypermedia reading practices have at least as much to do with the multiple relations between images as they do with the paths among segments of print text.³¹

Thus, research suggests that teaching legal reading is more important today than it was ten, twenty, or thirty years ago. First, it is likely that today's entering law students have read fewer books than students who entered school ten or twenty years ago.³² Second, today's entering law students have different reading skills than their predecessors.³³ Previous generations of students developed text-based reading strategies because they read mostly from books, whereas twenty-first century students have developed reading skills that allow them to decode and understand text that is embedded in or supplemented by graphics as a result of reading from the Internet. While in the past students probably viewed reading as a linear task, current students may view reading as the process of locating and following links.³⁴

³⁰ Donald J. Leu, Jr., et al., *Toward a Theory of New Literacies Emerging from the Internet and Other Information and Communication Technologies*, in THEORETICAL MODELS AND PROCESSES OF READING 1570, 1584–85 (5th ed. 2004), available at <http://reading.org/Library/Retrieve.cfm?D=10.1598/0872075028.54&F=bk502-54-Leu.pdf>.

³¹ *Id.* at 1586 (citations omitted).

³² See *supra* notes 19–27 and accompanying text.

³³ See Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 3, 21–23 (2002).

³⁴ To date, there has been little research on how reading on the Internet changes the ways in which individuals think.

III. THREE TECHNIQUES FOR HELPING STUDENTS DEVELOP THEIR READING SKILLS

While there are no studies establishing the effectiveness of the following strategies, comments from students indicate that these techniques may assist at least some students.

A. *Explaining the Difference Between Other Types of Reading and Legal Reading*

While some law students come to law school "knowing how to play the game," others do not. For instance, some students enter law school understanding the white, middle-class values upon which much of our law is based, and other students do not. Similarly, only some students begin their legal studies with the understanding that the law involves more than information transmittal. To level the playing field, law schools should make those things that some students know implicitly, explicit.³⁵

There are a number of ways to make the implicit explicit. For example, for several years I have made one-hour presentations during the first year orientation in which I explicitly explain the differences between other types of reading and legal reading, and compare legal education with non-legal educations. I explain the difference between reading textbooks and the cases in casebooks, I walk students through Lundeberg's and my studies, and I provide students with a list of strategies that they can use to improve their reading.³⁶ While for some students the material that I present during these presentations is "old news," other students have indicated that it has completely changed the way they read cases and made them rethink their views of text. In addition, some of the students who hear the presentation after taking criminal law during the summer before their first year report that once they adopt the techniques, they feel better about their class preparation and do better on their fall semester exams than their summer exams.

Another method to make what some students know implicitly explicit is to assign reading. Although until recently the options were limited, this past summer Ruth Ann McKinney

³⁵ See, e.g., Anna O. Sotor, *Whose Shared Assumptions: Making the Implicit Explicit*, in DIVERSITY AS RESOURCE: REDEFINING CULTURAL LITERACY 52, 52 (Denise E. Murray ed., 1992).

³⁶ For a copy of the PowerPoint and handout, contact Laurel Currie Oates at loates@seattleu.edu.

published *Reading Like a Lawyer: Time-Saving Strategies for Reading Law Like an Expert*.³⁷ Other potential resources include Chapter 3 in *The Legal Writing Handbook*,³⁸ Elizabeth Fajans & Mary Falk's article, *Against the Tyranny of Paraphrase: Talking Back to Texts*,³⁹ and my earlier article, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*.⁴⁰

B. Modeling Reading as an Expert Reads

Another technique is to have students model the way expert legal readers read cases by having the students listen to an expert's think-aloud while the students read a case. This can be done orally or through handouts.

Professors who choose the oral method read an assigned case aloud, stopping every few sentences to tell their students what they are thinking. After providing one or two examples, the professors then have students read aloud, stopping them every few sentences to ask them what they are thinking and, when the students are not using the right techniques, asking questions that prompt them to think differently.

Additionally, the professors provide a handout that has two columns: the left-hand column states the text and the right-hand column indicates what an expert legal reader might think.⁴¹ The following is an example taken from *The Legal Writing Handbook*.⁴²

³⁷ RUTH ANN MCKINNEY, *READING LIKE A LAWYER: TIME-SAVING STRATEGIES FOR READING LAW LIKE AN EXPERT* (2005).

³⁸ LAUREL CURRIE OATES ET AL., *THE LEGAL WRITING HANDBOOK* (3d ed. 2002); LAUREL CURRIE OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK* (4th ed. 2006) (detailing the process of reading and analyzing statutes and cases).

³⁹ Elizabeth Fajans & Mary Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 79 CORNELL L. REV. 163 (1993).

⁴⁰ Oates, *supra* note 3.

⁴¹ OATES ET AL., *supra* note 38, at 70–72.

⁴² *Id.*

Text of Opinion

Williams v. Poulos
11 F.3d 271 (1st. Cir. 1993)

[First part of opinion not set out.]

[6] Both the federal and Maine acts specifically exempt from their prohibitions the interception of telephone calls where one or more of the conversants has consented to or, in the case of the Maine act, previously authorized the interception. *See* 18 U.S.C. § 2511(2)(d) and 15 M.R.S.A. § 709(4)(C).

As we have made clear, consent under Title III need not be explicit; instead it can be implied. *See Griggs-Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir. 1990).

Implied consent is not, however, constructive consent. *Id.* "Rather, implied consent is 'consent in fact' which is inferred 'from surrounding circumstances indicating that the party *knowingly agreed* to the surveillance.'" *Id.* at 116-17 (quoting *United States v. Amen*, 831 F.2d 373, 378 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021, 108 S. Ct. 1573, 99 L. Ed.2d 889 (1988) (brackets omitted). In light of the prophylactic purpose of Title II, implied consent should not be casually inferred. *See id.* at 117.

What researcher was thinking as she read

OK, this case is mandatory authority and it is relatively recent.

[The researcher began by reading the syllabus set out at the beginning and by noting that the Court of Appeals affirmed the trial court's decision. She then read through the headnotes, locating the one that discussed consent. She then turned to that part of the opinion.]

I wonder if there is a Massachusetts statute on point? If there is, why hasn't Johnson's attorney said anything about it? Although I don't need to worry about it now, I should make the attorney aware that the plaintiff might also be able to bring suit under a state statute.

Good. This is a case that discusses the section of the statute applicable to our case.

It looks like there are two types of consent: explicit and implied. I probably should take a look at *Griggs-Ryan*: it is cited as authority for the rule and is mandatory authority.

I wonder what the court means by "constructive consent"? How is constructive consent different from implied consent? I'd better look for a definition of that term.

This may be a problem. It appears that to establish consent, we will need to prove that Ms. Johnson knowingly agreed to the surveillance. I wonder if telling her that her phone calls might be recorded is going to be enough or whether she needed to sign something. Because the court is relying so heavily on *Griggs-Ryan*, I need to make sure that I read it

C. Exercises Designed to Help Students Read as an Expert Reads

A third method involves preparing exercises designed to walk students through the process of reading a case as a lawyer would read it.⁴³ These exercises can be on paper or online interactive exercises. Such exercises would require students to place the case into its historical and legal contexts by having them identify the year of the decision and the social and political environment during that time, as well as noting the court's decision and the case's procedural history. Similarly, such an exercise could require students to do the type of in-depth analysis, synthesis, and evaluation that expert legal readers do.

D. Diagnostic Tests

Currently, several individuals are designing diagnostic tests to help law school students and professors determine whether a student is in fact reading as an expert reads. For example, James Stratman and Dorie Evenson are working with the Law School Admissions Council to develop a test that evaluates students' ability to read legal texts. In addition, I have just administered the first version of a diagnostic tool designed to evaluate basic reading skills, for example, the student's understanding of the words used in the opinion, the historical and legal context in which the case was decided, the issue before the court and the court's holding, the rule of law applied, and the court's reasoning. Students who complete this diagnostic exercise receive a "pattern of errors" sheet that shows them which "reading skills and strategies" they have mastered and which reading skills and strategies they need to develop. Professors can then work with students to assist them in developing the skills needed for the proper reading of legal text.

CONCLUSION

In addition to admitting a diverse student body, law schools have an obligation to help all admitted students succeed. The first step in this process is to do more research. As a community, we need studies examining the factors affecting a student's ability to succeed in law school, and studies evaluating interventions designed to help students develop the particular

⁴³ See Lasso, *supra* note 33, at 28–30, 37.

skills needed for expert reading. The final step is to train law professors to provide the appropriate interventions without judging the students who elect to participate in them. While we may not be able to dispose of numbers and rankings, we can level the playing field to ensure every student's success both in school and in practice.

