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READING LAW*

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I. CANNIBALISM, LOVE LETTERS, AND YESTERDAY'S NEWS: SOME NEGLECTED MATERIALS OF LAW STUDY

The phrase "reading law" can be variously interpreted. It can mean studying law, as in the phrase: "He read law at Cambridge." It could mean interpreting law, according to one or another theory of interpretation. It could, perhaps, refer to the kind of law they do or study at the University of Reading, as in the phrase "LA Law." But I shall be concerned with a more mundane and general usage of "reading law" as the intellectual activity of studying and using various kinds of texts.

My thesis can be summarized in four propositions. First, the range of materials available for the study of law is much wider and more varied than orthodox Anglo-American practice suggests. Second, attempts to broaden the range of materials used in law study have often failed to establish themselves because of a lack of clarity about objectives and methods. Third, the tools for providing such clarity are readily available. They are called questions. The central theme of these lectures is putting texts to the question. Fourthly, broadening the range of materials of law study in this way is not only illuminating; it can also be enjoyable.

* This is a revised text of the sixth Seegers Lectures delivered at Valparaíso School of Law on April 12-13, 1989. The style and form of the original lectures has been retained, but some additional material has been added in the footnotes and the appendices. Parts of the lectures have been adapted from the F.H. Lawson Lecture, delivered at the University of Lancaster on April 30, 1987. The substantial differences in the two texts reflect perceived differences between English and American audiences and some developments in my own thoughts on the subject. I am grateful to the Dean and Faculty of Law for their kind invitation, generous hospitality, and stimulating comments, and to Terry Anderson and the Editors of the *Law Review* for helpful criticisms and suggestions.

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I shall deliver on my promise to talk about love letters and cannibalism. As a bonus I shall also say something about the law reports. But these examples will merely serve to illustrate a general thesis: that in reading any text it pays to ask: Why? What? How? In the second part, I shall go into more detail about the How? with particular reference to newspapers and juristic texts.

The term "materials of law study" was first popularized by Professor Brainerd Currie in a seminal article on academic law in America.¹ It is rather ungainly, but it accurately delineates my subject. "Law study" is broader than legal education as conventionally conceived. For it also encompasses legal research and individual study for a variety of purposes, including self-education about law. "Materials" is rather more homely than the more forbidding and fashionable term "text"; the latter carries associations of swarms of semioticians, phenomenologists, hermeneuticists, discourse analysts, structuralists, narratologists, literary theorists, and even jurists declaiming abstrusely and abstractly about "discourse" and "texts." I am not entirely skeptical about the value of these recent fashions. But here I want to be more pragmatic and down-to-earth. "Materials" suggests something to be used for specific purposes.

The first step in my argument is quite familiar. Despite many attempts, Anglo-American legal scholars and teachers have never managed to break the stranglehold of the law reports on the study of law. Compare today's legal literature with that of twenty or thirty years ago and there is no question that it is broader and more varied than it used to be: Cases and materials now co-exist with casebooks; contextual studies compete with blackletter texts; and most law students are exposed to Reports of Committees and other policy documents, empirical studies, and other kinds of materials. There is even reputed to be a Law and Literature Movement with at least 38 American law schools claiming to offer courses in Law and Literature.² Legal scholarship is also more varied than it was in respect of perspectives, methods, and sources. But the one thing that we do well in a sustained way is to read and use the law reports. I wish neither to overstate nor to labor the point, so let two examples suffice. First, legislation. We pay lip-service to the idea that legislation is at least as important as case law in our political, social, and legal life. Courses on legislation were pioneered in the United States at the start of the century, if not before.³ Yet in England

1. Currie, *The Materials of Law Study*, 8 J. LEGAL EDUC. (1955); Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331 (1951).

2. Gemmette, *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of Law School Curriculum*, 23 VAL. U.L. REV. 267, 268 (1989).

3. In the Anglo-American tradition pleas for the systematic study of legislation go back at least as far as Bentham: J. Bentham, *Proposal for a School of Legislation* (c. 1794) (unpublished manuscript available at University College, London, CVII 31-36). One of the pioneers

in 1968, Patrick Fitzgerald could entitle an article *Are Statutes Fit for Academic Treatment?*⁴ in England in 1989, legislation does not appear to be the subject of much more sustained attention than it was twenty years ago. There are a few courses⁵ and the *Statute Law Review*,⁶ but generally speaking our handling of cases is much more assured and systematic than our handling of statutes. I am not aware that the situation is very different in the United States, where the case method has survived repeated attacks to a truly remarkable degree. Even leading members of the Critical Legal Studies Movement are primarily caselaw scholars.

My second example is so-called "contextual studies." For over twenty years I have been associated with the "Law in Context" series, which sought to break the mold of orthodox "blackletter" textbooks and casebooks in the United Kingdom. I remain a committed contextualist, but I would be the first to acknowledge that contextual works in England and elsewhere in the common law world are not based on a coherent theory of law either as a phenomenon or as a discipline.⁷ The case law tradition is a tough tradition in a way that its challengers seem not to be. I shall suggest some reasons for this; but here I am concerned less with the Why? and the Whether? than with the How?

The following are examples of potential materials of law study that are used only spasmodically, if at all, by law teachers and scholars: trial records; contracts and legal documents; manuals of advocacy; historical studies; newspapers; stories, plays, and other works of the imagination; and films. In so far as we use other kinds of materials that I have mentioned, such as legislation, policy documents, or empirical studies, we tend to use them irregularly and uneasily.⁸

of teaching legislation in the United States was Ernst Freund of the University of Chicago, who clashed with Joseph Beale and James Barr Ames on this issue. See K. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 379 (1962); see generally F. ELLSWORTH, *LAW ON THE MIDWAY* (1977); E. FREUND, *STANDARDS OF AMERICAN LEGISLATION* 310-14 (2d ed. 1965). Freund introduced courses on statutes at Chicago but, from a longer view, it was a Pyrrhic victory over Langdellism.

4. Fitzgerald, *Are Statutes Fit for Academic Treatment?*, 11 J. SOC'Y PUB. TCHRS. OF LAW 142 (1971).

5. The longest established is probably that in the University of Edinburgh. See Henderson & Bates, *Teaching Legislation in Edinburgh: An Outline*, 1980 STATUTE L. REV. 151; Miers & Page, *Teaching Legislation in Law Schools*, 1980 STATUTE L. REV. 23.

6. The *Statute Law Review* was established in 1980 as an off-shoot of the Statute Law Society, an organization devoted to the improvement of the form, organization, and accessibility of legislation.

7. TWINING, *RETHINKING EVIDENCE*, ch. 11 (forthcoming 1990) [hereinafter *RETHINKING EVIDENCE*]; see Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 327, 372-78 (1985).

8. This theme is developed in W. Twining, *The Reading Law Cookbook: A Primer of Self-Education about Law* (1987) (unpublished University of Miami edition), extracts from which are quoted in the Appendix to this article.

Before proceeding to the second stage of the argument, let me anticipate two possible objections. Some students may wonder what all of this has to do with them. "Here is this fellow telling us what we are missing in our legal education. If he's right, there's not much that we can do about it, as we don't control what we have to study—and we are given too much to read anyway." I don't have too many illusions about law students, but it may not be totally unrealistic to think that at least some students, out of interest or necessity, *may* have occasion to do some law-related reading after they graduate (or even sooner). The gist of my message is that should they ever have occasion to read a statute or a newspaper or a legal biography or a novel or a love letter, they should pause before starting and ask: Why? What? How?

A second objection needs to be considered. It might be asked: What has he got against the law reports? The answer is: not much. There is, of course, a familiar list of their limitations: they are unrepresentative of the law in action—in legal practice and society; they emphasize the pathological rather than the routine and the prophylactic; the problems they treat tend to be narrowly focussed; they are at best slices of legal life abstracted from the total process of litigation; and so on. Far from denigrating the law reports as source material, I believe that they are a vast anthology of concrete, real life problems, solutions, and arguments, selected, organized, and presented in ways that are convenient, accessible, and open to a variety of uses.⁹ I shall argue that, in a sense, they represent neglected materials of law study because they tend to be used for a narrower range of purposes than they need be. There is little wrong with the law reports except our tendency to be obsessed by them. Rather it is more useful to treat orthodox use of the law reports as a paradigm of the approach that I wish to advocate.

One reason why reading cases is a successful practice in our tradition is that, generally speaking, we have relatively clear ideas about the Why? the What? and the How? of our readings. In orthodox study we read a case or a series of cases with one or more objectives in mind: for example, to discover how a particular doubt about the law has been resolved; or to garner raw material for constructing an argument; or to find a concrete illustration of some general rule, principle, or problem; or to study an episode in the development of a particular doctrine or a general, authoritative disquisition on a legal topic. We also have a rather clear idea about the nature of the material: how it is constructed and organized, who is responsible, why it has been published, and what is its official status as an authoritative text. Our tradition also does reasonably well in respect of ways of reading, al-

9. See also Twining, *Cannibalism and Legal Literature*, 6 OXFORD J. LEG. STUD. 423 (1986).

though I think that these could be improved by a more self-conscious and direct concern with method.¹⁰ Most students learn to adjust their methods to their purposes—they learn how and when to do a simple precis or a closer or more critical reading and how to case, skim, browse, precis, delve, analyze, compare, synthesize, criticize, or deconstruct.

It has been estimated that American law students on average read more than two thousand appellate cases during three years of law school.¹¹ English undergraduate law students probably read less than half that number. The frequency with which practicing lawyers read the law reports varies considerably. But how many law students have read the whole of one trial record? Five? Ten? How many have read one or more secondary analyses of a *cause celebre* for a serious purpose, *i.e.*, not just for entertainment? For example, how many have studied a serious account of the Sacco-Vanzetti case or Dreyfus or Jack the Ripper or Alger Hiss or the Kennedy assassination, or a volume in one of the Notable Trials Series? If you have read such material, ask yourselves what, precisely, was your purpose? What was the nature of the material? What equipment did you have for reading it? Why? What? How? If you have not asked such questions, ask why not?

The question remains: What justification is there for neglecting this kind of material in our legal cultures? There are some *prima facie* reasons. Let me quickly dispose of two. First, “these materials are not as accessible as the law reports.” In so far as this is true, this is a self-confirming argument. Published records and detailed scholarly accounts of trials are less extensive than the law reports partly because there is no demand for them, other than as entertainment. But, largely because there has been a popular market for such works, there is an extensive literature. The market fluctuates and what gets published is open to the charges of being even more unrepresentative than the law reports. Sensational murders and spy stories dominate the genre. Nevertheless, there is a mass of material that is relatively accessible; there could be more, if there were a demand.

A second reason for neglect relates to the nature of the materials (the What?). Trial records, it is said, tend to be longer, more diffuse, and less well-organized than the law reports. They are unmanageable, even if one knew what one was managing them for. In my opinion, these criticisms are only partly correct. Trials are highly structured events and most trial records are almost as uniformly organized as law reports, though less well-provided with indexes and other furniture. They do tend to be less succinct

10. On the advantages of the direct as opposed to the “pick-it-up” approach to learning legal skills, see W. TWINING & D. MIERS, *HOW TO DO THINGS WITH RULES*, Preface (2d ed. 1982); see also N. GOLD, K. MACKIE & W. TWINING, *LEARNING LAWYERS' SKILLS* (1989).

11. Anderson & Catz, *Towards a Comprehensive Approach to Clinical Education: A Response to the New Reality*, 59 WASH. U. L.Q. 727, 733 (1981).

than the law reports, and it takes time and experience to read them in a disciplined way. But this reasoning can be turned on its head: in so far as records are difficult to use because of unfamiliarity, this reflects a general tendency to neglect procedure and trials at first instance in academic law.¹² The use of this kind of material may help to remedy that neglect. Similarly, it is bizarre that the subject of evidence is still largely studied through appellate cases. In so far as trial records are inherently difficult to manage, this is an additional reason for using them as educational material. For surely an important intellectual skill in legal practice, administration, or academic life is the skill of organizing and managing a complex body of amorphous data. As we shall see, that is one of the main objectives for which I use materials relating to famous trials in my own teaching. The law reports are too neatly packaged for the purpose.

The judicious use of trial records and similar materials can serve other aims. For example, Professor Landsman of Cleveland-Marshall Law School uses them for the purpose of analyzing the conditions and dynamics of alleged miscarriages of justice. When do they occur? What goes wrong? How far can the risks be lessened by improved institutional design? He tells me that his teaching and research in this area floundered and lacked focus until he found and adopted a suitable theoretical framework for undertaking this kind of analysis.¹³ A seat-of-the-pants approach did not work.

During the past fifteen years or so, I have used and adapted John Henry Wigmore's method of analyzing mixed masses of evidence, using trial records as the main raw material.¹⁴ The primary learning objectives are fairly clear: students who have undertaken such exercises should have begun to develop techniques of macroscopic analysis (structuring complex arguments from extensive, seemingly amorphous data) and microscopic analysis (very detailed and precise construction and criticism of arguments based on single items of evidence). After some preliminaries, the whole class reads some sixty pages from the trial of Frederick Bywaters and Edith Thompson.¹⁵ As some of you may know, Edith Thompson was hanged for inciting or conspiring with Freddy Bywaters, her lover, to murder her husband. The main, but not the only evidence, against her was a collection of

12. Much more emphasis is placed on the study of procedure in the curriculum of American law degrees than in the United Kingdom. But trial records are neglected in both systems, and more theoretical and "scientific" attention is generally paid to procedure in the continental European tradition than in the English-speaking world.

13. Personal communication to the author. See also Landsman, *When Justice Fails*, 84 MICH. L. REV. 824 (1986).

14. See generally T. Anderson & W. Twining, *Analysis of Evidence* (1988) (tentative edition, University of Miami); W. TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE*, ch. 3, Appendix (1986).

15. Anderson & Twining, *supra* note 14, ch. 4. The case is analyzed in detail in RE-THINKING EVIDENCE, *supra* note 7, ch. 8.

her love letters to Freddy. We spend approximately four weeks in class reading Edith's love letters. I chose the case deliberately for its complexity and because, on one view, if one can analyze Edith's prose, one can analyze anything. Thereafter each student selects a case that interests him or her and subjects it to intensive analysis. It is great fun and rewarding to teach; it is a great sweat, but rewarding to learn. We try not to lose sight of the primary objective, which is to master a fairly simple, but demanding, intellectual procedure. The educational rewards tend to go far beyond the development of a single analytical skill.

What, precisely, are these other rewards? I am unable to give a confident answer, partly because the rewards vary from student to student and are unplanned. It is also because it is often the case that what we learn or teach goes beyond our capacity to articulate clear learning objectives or precise criteria of success. For example, I recommend to my students that they should read the novel based on the case by F. Tennyson Jesse, *A Pin To See The Peepshow*.¹⁶ This excellent book produces very positive reactions from those who read it, but who is to say what, if anything, they have learned from the experience? What, precisely, did you learn from the last novel that really gripped you?

This poses some difficult questions in educational theory: to what extent must our answer to the Why? be formulated as learning objectives that can be specified in behavioral terms?¹⁷ To what extent should teachers or learners embark on educational enterprises in an open-ended way with no clear objectives? My bias is to try to articulate learning objectives in a disciplined way, but not to allow the theories of Bloom and Mager to force me to distrust my intuition that some text is really worthwhile in some open-ended way.

In the history of legal education there have been some brave attempts to teach law through literature.¹⁸ After all, *Bleak House*, the *Antigone*, *A Man for All Seasons*, Kafka's *The Trial*, *One Flew Over the Cuckoo's Nest*, and many courtroom dramas seem to beg to be used in enlightened

16. F. TENNYSON JESSE, *A PIN TO SEE THE PEEPSHOW* (1934) (reissued in the U.K. as a feminist novel, 1979).

17. See R. MAGER, *PREPARING INSTRUCTIONAL OBJECTIVES* (1962); B. BLOOM, *A TAXONOMY OF EDUCATIONAL OBJECTIVES HANDBOOK I* (1956); D. KRATHWOHL, B. BLOOM & B. MASIA, *TAXONOMY OF EDUCATIONAL OBJECTIVES HANDBOOK II* (1964). On the application of the approach to legal education, see Pirie, *Objectives in Legal Education*, 37 J. LEG. EDUC. 576 (1987).

18. These have been usefully surveyed by Gemmette, *supra* note 2. A striking feature of this survey is that almost none of the statements of objectives of the courses covered conforms to the Bloom-Mager model for the formulation of educational objectives. The most succinct statement is by Barbara A. Burnett: "Fun." Gemmette comments that this is not only the most honest statement, but also "one of the best reasons for teaching the course." Gemmette, *supra* note 2, at 311.

courses that seriously try to live up to the claims that the study of law can be a vehicle for genuinely liberal education. Law journals contain occasional descriptions of attempts to use literature in law teaching. I myself have tried to base a class about interrogation and confessions on the marvelous passages in Dostoyevsky's *Crime and Punishment* in which Porfiri Petrovich plays cat-and-mouse with Raskolnikov.¹⁹

On the last occasion that I tried to use it, the dialogue proceeded along the following lines:

Self: "How do you find the readings this week?"

Class: (in chorus) "Great!"

Self: "What did you think of the account of the second meeting between Porfiri and Raskolnikov?"

Student: "It said it all, man."

Self: "That's it then."

This experience did not undermine my belief in the text, but the class was a failure. The fault lay with the teacher rather than the material—I just did not know *how* to use it.

What is striking about most such experiments is that they have failed to become institutionalized, even at the margins.²⁰ The major exception to this generalization is James Boyd White's *The Legal Imagination*.²¹ This is an American coursebook-anthology that draws very largely from literary sources and includes a significant amount of poetry. It explores in great detail and depth analogies between literary and legal interpretation, and the operation of language and values in legal and literary imagination. Not only has White taught successful courses in Chicago and Michigan based on these materials, but his book has been reissued in paperback.²² I happen to disagree with White's theory of legal interpretation²³ and I am frankly skeptical of any suggestion that Jane Austen's *Emma* is a book about law,²⁴ but the success of the enterprise is both significant and welcome. Perhaps the key lies in the fact that James Boyd White is a Professor of both Law and Literature and that he has borrowed techniques from literary education

19. F. DOSTOYEVSKY, *CRIME AND PUNISHMENT*, esp. III.5, IV.5, V.2 (D. Magarshak trans. 1951).

20. Gemmette's survey suggests that this statement may no longer be true in the United States. She found that, out of 135 law schools that responded to her survey, 38 offered a course on Law and Literature in 1987. Whether these will become regular offerings remains to be seen. Gemmette, *supra* note 2, at 267-68.

21. J. B. WHITE, *THE LEGAL IMAGINATION* (1973, abr. ed. 1986). On the surprisingly modest sales figures and adoptions, see Gemmette, *supra* note 2, at 269 n.6.

22. J. B. WHITE, *supra* note 21. See also J. B. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984); J. B. WHITE, *HERACLES' BOW* (1985).

23. See W. Twining, *RETHINKING EVIDENCE*, *supra* note 7, ch. 7.

24. *WHEN WORDS LOSE THEIR MEANING*, *supra* note 22, at 163-91.

in presenting his materials to law students.

On this note of caution, let us turn to cannibalism. In recent years there has been published a number of contextual studies of leading cases, such as *M'Naghten*, *Carlill v. Carbolic*, *Rylands v. Fletcher*, *Palsgraf v. Long Island*, *American Banana v. United Fruit*, *Hadley v. Baxendale*, and *Regina v. Dudley and Stephens*.²⁵ In each instance, a leading case familiar to most law students has been studied in detail in its particular historical context. Very often such treatment significantly changes one's perceptions or understanding of the original case. One enthusiastic advocate of this approach, Professor (now Judge) John Noonan has said: "(It) is my own belief that about half of law school should be devoted to studying cases in this historical way. A curriculum based almost totally on appellate opinions, while excellent for stimulating analysis, distorts what actually happened."²⁶

Although I have both enjoyed and benefited from these studies, I think that this is overselling contextualism. Some of the reasons for this are illustrated by Brian Simpson's book *Cannibalism and the Common Law*.²⁷ This is a learned, ghoulish, and highly entertaining study of *Regina v. Dudley and Stephens*, the leading case on the defense of necessity at common law. The defendants were convicted of murder for killing and eating the cabin boy of the shipwrecked vessel *Mignonette* in order to save their own lives. The book is well-written, scholarly, enjoyable, and illuminating. But what, precisely, does it illuminate? From it you can learn about the immediate background to the case; about the custom of the sea in respect of emergencies; about cannibalism on land and sea, its culinary and gastronomic aspects, and the songs it provoked. You can also read about the growth of the Merchant Shipping Acts; about Sawney Bean and Liver-eating Johnson and the devious Baron Huddleston; about how a leading case was fixed; and

25. On *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843), see I N. WALKER, *CRIME AND INSANITY IN ENGLAND* ch. 5 (1968).

On *Hadley v. Baxendale* [1854] 9 Ex. 341, 156 Eng. Rep. 145, see Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975).

On *Rylands v. Fletcher* [1868] L.R. 3 H.L. 330, see Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher*, 13 J. LEGAL STUD. 209 (1984).

On *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) and *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928), see J. NOONAN, *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASK* 65-151 (1976).

On *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256, see Simpson, *Quackery and Contract Law: The Case of the Carbolic Smoke Ball*, 14 J. LEGAL STUD. 345 (1985).

On *Regina v. Dudley and Stephens* [1885] 14 Q.B.D. 273, see Simpson, *infra* note 27 and accompanying text.

This general theme is explored further in Twining, *supra* note 9.

26. Noonan, *Review of Cannibalism and the Common Law*, 63 TEX. L. REV. 749, 752 (1984).

27. A.W.B. SIMPSON, *CANNIBALISM AND THE COMMON LAW* (1984).

about the golden age of yachting.²⁸ One even gains quite a lot of insight into the dilemmas and hypocrisies of necessity as a justification and excuse. And like other such studies, it shows that the law reports often conceal as much as they reveal about the cases that they report.

"The fox knows many things; but the hedgehog knows one big thing."²⁹ *Cannibalism and the Common Law* is definitely a foxy book. Both as a work of scholarship and as potential educational material, it is a splendid failure. The best scholarship and the best education focus on specific questions and have at least some fairly clear touchstones of relevance. *Cannibalism and the Common Law* lacks focus. It is in essence a product of serious scholarship that has been presented to the world as a work of entertainment. Some of the colorful characters and stories that add to our enjoyment divert attention from any central theme or theories that there might have been. Yet, sadly, I fear that Professor Simpson may have made the right choice. For if he had presented us with a more focussed case study of necessity or strategic litigation or official hypocrisy, it would have attracted far less attention with no corresponding benefit. Presented as material for law study it would probably have been neglected. Simpson was faced with a dilemma familiar to legal scholars. If you present unconventional material in unusual form, it probably will not be used; if you present it in palatable form, it may be consumed, but for no apparent purpose. The paradox of contextual studies of leading cases is that a case becomes leading because it raised and perhaps resolved an issue of law of general significance; this issue becomes abstracted from the original context of the particular historical event. It is largely a matter of serendipity whether or not leading cases provide good material for detailed case studies. The significance of an historical case study is normally determined by criteria other than doctrinal importance. Thus, works like Simpson's can play a useful role in reminding us of the connections between law and ordinary or not-so-ordinary life, but I do not think that they can provide a staple diet for even a truly humanistic study of law.

To restate the argument to date: in our practice of the discipline of law we tend to neglect a wide range of potentially valuable texts. But if such texts are to become a regular part of the materials used for studying law in our legal culture, we need to develop clear ideas about why we are reading them, their nature and limitations as raw material, and what methods of reading a given kind of material are suitable for different purposes. We should recognize that our capacity to learn and to understand often outruns our capacity to articulate clear learning objectives, but this should not be an excuse for abandoning a relatively purposeful approach.

28. See also the amusing index, especially the entry under "Cannibalism."

29. Archilocus (Diehl, Frag. 103).

The next step is to propose a reasonably disciplined method for exploiting this rich heritage of neglected materials. The germ of such a method is found in the general precept that I have already given: in approaching any text, ask Why? What? How? (Why am I reading this text? What is the nature of this text? What method is suited for reading this text for this purpose?). To a large extent the Why? should determine the What? and the How? By and large, purpose should determine the selection of material and should indicate (or at least provide a test of) what method is appropriate. Of course, life is not in practice so simple, but this general approach is a straightforward way of maintaining a sense of direction. One implication of the proposition that the Why? tends to dominate the What? and the How? is that a systematic methodology for exploiting potential materials of law study presupposes a coherent theory of the nature and objectives of such study. This opens up the Pandora's box of the competing aims and objectives of legal education and legal research.³⁰ My central thesis, however, will fit a wide range of different educational and scholarly priorities.

Suppose we decide that we want to explore our notions of what constitutes excellent or deviant behavior by an appellate judge. An obvious, but not yet hackneyed, approach would be to select a sample of judgments that are conventionally viewed as models of excellence, or the reverse, and to consider what reasons might be given for admiring or criticizing them. An exercise I sometimes do with first year students is to take some well-known judgments of Lord Denning at his best (*e.g.*, *Candler v. Crane Christmas*)³¹ and at his worst (*e.g.*, *Ward v. Bradford*)³² and then to move on to a case that tends to produce more ambivalent reactions, *Miller v. Jackson*.³³ The following is from the opening paragraph of Lord Denning's judgment in *Miller*:

In summer time village cricket is the delight of everyone. [The Millers, one asks?] Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played for these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club-house for the players and seats for the on-lookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring vil-

30. My own biases as a scholar and teacher are clear: I tend to favor broad understanding of legal phenomena closely linked to sharply honed intellectual skills, such as skills of analysis and reasoning. See, *e.g.*, Twining, *Legal Skills and Legal Education*, 22 THE LAW TEACHER 4 (1988).

31. [1951] 2 K.B. 164.

32. [1972] 70 L.G.R. 27.

33. [1977] Q.B. 966.

lages. On other evenings after work they practice while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. [How was this proved?] But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that, when a batsman hits a six, the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped; with the consequences, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.³⁴

In the course of three pages Denning uses the word “newcomer” five times and “70 years” six times. What is he up to? Is this judge-like behavior?

Tempting as it is, I do not intend to analyze this passage here.³⁵ The judgment as a whole has received a mixed reaction: Cricket lovers and environmentalists love it; property owners and precedent lovers tend to dislike it; many are ambivalent—some like the outcome, but sense that “the rhetoric” (note the term) is “over the top.” “Lord Denning departed from the high standards of the judge and adopted the mantle of the advocate,” wrote one critic.³⁶ Yet the same commentator considered it an excellent example of the art of persuasion.³⁷ It is fairly obvious that one can have great fun analyzing Lord Denning’s intentions, who he thought his audience was, how persuasive his argument is, and in what respects he is deviating from conventional norms of judicial excellence and propriety. Whether one adopts a

34. *Id.*

35. See RETHINKING EVIDENCE, *supra* note 7, at 235-38; cf. B. JACKSON, LAW, FACT AND NARRATIVE COHERENCE 94-97 (1988).

36. Atiyah, *Contract and Tort in Lord Denning: The Judge and the Law* 73 (J.L. Jowell and J.P.W.B. McAuslan eds. 1984).

37. *Id.*

common sense approach or borrows more sophisticated techniques from a neighboring discipline, such as literature or rhetoric or semiotics, it is obvious that the Why? of this reading requires a different How? from the conventional ones. It is only slightly less obvious that all judgments can be viewed as exercises in rhetoric and can be subjected to scrutiny as such.³⁸ The differences between sophisticated and common sense techniques is that the former tend to subject the text to sharper questions. Both seem to me to be valid and neglected ways of reading the law reports for this purpose. Why? To clarify notions of excellence in writing judgments. What? Examples of judgments considered to be excellent or deviant or about which there is some ambivalence. How? Asking questions of the text designed to elicit what are considered to be acceptable criteria of propriety, validity, and cogency in judicial reasoning.

A very different kind of analysis involves trying to diagnose in depth what factor or factors in a reported case occasioned difficulty or doubt either in the minds of the judge(s) in the case itself or in subsequent cases. This involves the systematic diagnosis of what can be called "the conditions of doubt" in a given context of interpretation. I have elaborated this method elsewhere.³⁹ It can take one far beyond intuition in identifying the factors that made or make the case problematic and in providing a basis for constructing arguments. The technique is quite simple: it involves little more than running through a check-list of possible factors that tend to give rise to difficulties in interpretation. These fall into four broad categories:⁴⁰ events before the creation of the rule; factors relating to the nature and form of the rule itself, such as bad drafting or a poor fit between instrument and purpose; factors coming into existence after the rule, such as changes in values or other legal rules or technology or the social or political context; and finally, peculiar features of the particular case, such as particular conditions of sympathy or fairness (what Karl Llewellyn called "fireside equities"⁴¹) or the likely undesirable consequences of a particular outcome of the case, such as creating a diplomatic incident. What is striking about this kind of analysis is that it involves a different kind of reading from normal case analysis. It involves systematically asking a series of more sharply focussed questions about why a given rule or text is difficult or puzzling or controversial, before moving on to conventional analysis. More often than not one finds that several factors combine, some of which may be overlooked or underplayed by more intuitive reading.

38. There is now an extensive literature about different kinds of reading of the law reports, which is by no means confined to different fashions in "deconstruction." Recent English examples include P. GOODRICH, *READING THE LAW* (1986) and Davies, *Reading Cases*, 50 *MOD. L. REV.* 409 (1987).

39. See TWINING & MIERS, *supra* note 10, ch.6.

40. TWINING & MIERS, *supra* note 10, at 220-26.

41. K. LLEWELLYN, *THE COMMON LAW TRADITION* 121, Index (1960).

So far, I have suggested that there is a wide range of materials of law study that are under-exploited largely because we have not developed conscious and systematic techniques for reading and using them. The potential of even the law reports is not realized in our practices largely because we are unselfconscious about our methods of reading. I have also hinted that the key lies in knowing what questions to ask and developing habits of asking such questions in a systematic way. In the next section I shall try to develop this theme in relation to some specific kinds of reading of some particular kinds of text. Some of what I am suggesting may sound at once simple-minded and radical. But perhaps we can agree on one point: The art of questioning should be one of the main skills of any law-trained person. Knowing what questions to ask is the first step to wisdom, as Kipling clearly recognized:⁴²

I keep six honest serving-men;
(They taught me all I know)
Their names are What and Where and When
And How and Why and Who.
I send them over land and sea,
I send them east and west;
But after they have worked for me,
I give them all a rest.
I let them rest from nine to five,
For I am busy then,
As well as breakfast, lunch and tea,
For they are hungry men.
But different folk have different views;
I know a person small -
She keeps ten million serving-men,
Who get no rest at all!
She sends 'em abroad on her own affairs,
From the second she opens her eyes -
One million Hows, two million Wheres,
And seven million Whys!

II. READING LAW II: SOME APPLICATIONS AND IMPLICATIONS

In this section, I propose to illustrate some of the potential of a systematic approach to texts by considering two specific examples in more depth. The central theme remains the idea of putting texts to the question. In order to do this I shall focus on two texts that I use in my own teaching. I shall concentrate on some specific educational objectives, but for present

42. R. KIPLING, *The Elephant's Child*, in JUST SO STORIES (1902).

purposes education and scholarship in this context have shared aims: they are part of the general enterprise of understanding law. First, we shall look at one specific exercise involving newspapers. Next, we can have a second helping of cannibalism, by examining Lon Fuller's *The Case of the Speluncean Explorers* as a vehicle for exploring the nature of legal theory.⁴³ Finally, I shall try to link my thesis about materials of law study to a broad conception of legal theory within the discipline of law.

The Newspaper Exercise

In recent years I have persuaded my colleagues to join in a collaborative effort that we call "The Newspaper Exercise." This is the very first assignment we give to entering law students; indeed, we ask them to prepare for it before they arrive in our law school. We ask each of them to read every word of a non-tabloid (*i.e.* up-market) newspaper published in the week before they embark on their legal education. One version of the precise instructions is as follows:

The Newspaper Exercise: The Pervasiveness of Law in Society

Buy a copy of the *Guardian* or the *Times* or the *Telegraph*, preferably for the last week of September of this year. Read through *all* of it marking with a coloured pencil or pen all the passages which have some clear "law-related" content. Calculate the number of column inches which, in your view, are devoted to legal or law-related matters. Then answer the questions below.

Before starting on this exercise:

- (i) stipulate your working definition of "legal" and "law-related";
- (ii) work out a method for calculating the amount of space devoted to "law-related" content; and
- (iii) devise a rough scheme for categorizing the type of material.

Questions

1. What branches of the law would you expect regularly to feature in or be relevant to understanding items in:
 - (i) the sports pages;
 - (ii) the Arts section;
 - (iii) the Business section; and
 - (iv) advertisements.
2. Identify the national legal systems and other bodies of law (*e.g.*, Public International Law) that would be directly rele-

43. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

vant to the items reported on *one* of the foreign/international pages in the particular newspaper you have read.

3. Which features more prominently in your newspaper: legislation? case law? 'non-legal' rules?

4. Identify *two* passages in your newspaper that you would expect would be more easily understood by a person with a law degree.

5. What lessons have you learned from doing this exercise?

Bring your marked copy with you to the first tutorial. To do this exercise should take you not less than four and not more than six hours.

This exercise can be interpreted and used in various ways. The constraints of time, team-teaching, and the particular context dictate that we treat this quite lightly and informally. We devote only one hour of classroom time to discussing it, and later I make some informal comments in part of a lecture. In short, we do not try to exploit its full potential. Despite, or perhaps because of, this relatively light treatment, the exercise is generally well-received, but one wonders whether it makes a lasting impact. In the first tutorial my colleagues ask different questions and emphasize different points. Students, when asked, claim to have learned, or to have been reminded of, a remarkable range of lessons: that contract is everywhere; that administrative law is almost as important as contract in interpreting the sports pages; that it helps to know something about Islamic law in order to understand reports in the business section as well as foreign news; that the *Financial Times* contains rather good drama criticism. Perhaps the highest compliment about his undergraduate legal education that I have heard paid by a former student was that he left equipped to read every page of the *Financial Times* with a discerning and critical eye.

The Newspaper Exercise is designed to convey one central set of messages to beginning law students: Law is interesting, pervasive, dynamic, and relevant to most aspects of private and public life; it features on the sports pages, the Arts pages, in the business section, and the foreign section, as well as in the more obvious places; all school-leavers know quite a lot of law already and they have had practical experience of it as criminals, tortfeasors, licensees, contractors, tenants, debtors, violators of copyright, and slanderers. What is encompassed by the notion of "law" is highly elusive, but the most important message of all is that law is capable of being fascinating as a subject of study.

One way of evaluating the potential of this and other kinds of readings of newspapers as a means of understanding law is to seek to formalize this exercise in terms of learning objectives. To put the matter briefly, one could rationalize the pedagogical objectives of the exercise in some such terms as

these. The exercise has both affective and cognitive objectives, as well as some that fall in the grey area of "consciousness-raising." The affective aspects are probably achieved, at least temporarily, for most students merely by spending a few hours on a single newspaper. At least the idea is sown that it is *possible* for law study to be fascinating, dynamic, and concerned with issues that are truly important for ordinary people as well as in political and economic life. This, in turn, may start the process of undermining a different image of law as fustian, esoteric, drily technical, and tedious. Such an image may represent the expectations of English students more than their older American counterparts, and it may be less prevalent in England today than it was twenty years ago.

There are also some cognitive lessons built into the exercise. One learns that it is difficult to identify what is "legal" or "legally relevant", that the first step in legal diagnosis is classifying legal issues in terms of fields of law, and that real life situations do not come neatly parcelled in legal categories—torts do not walk typically into your office ready labeled, and that this is one reason why law reports and legal textbooks tend to be artificially de-contextualized and abstracted from "real life." More fundamentally, reading a newspaper through legal lenses can provide one starting-point for developing two related themes about the broader significance of legal perspectives. First, consider how much the discourse of newspapers is expressed in terms of concepts that take their meaning from law. "Murder," "marriage," "alien," "income tax," "tenant," and "heir," are obvious examples of terms in everyday use that are both constituted and given precision by law. Turn to the business section and the phenomenon is even more striking: "corporation," "bankruptcy," "debentures," "mergers," "take-overs," "insider dealing," "charities." Indeed, one might ask, which important concepts of the business news do not derive their precise meanings from law?

Perhaps less obvious is how many institutions and dignitaries can only be defined and explicated by reference to law: What is the Federal Trade Commission or the F.B.I.? What are the powers, authority, and status of the Director-General of Fair Trading, a Commissioner for baseball, an Archbishop or an Ayatollah? These are all legal questions. And the legal perspective as a lens for interpreting the news goes beyond concepts. For example, only legally-informed people can give answers to some questions that are central to in-depth interpretation of the Salman Rushdie affair. What is the meaning of the alleged death sentence? Who has authority to pronounce it in what circumstances? With what specific offenses against Islam is Rushdie charged? Are these "offenses" against religion or law, or is there no such distinction? What, if any, crimes have been committed in England by those who have supported or repeated the Ayatollah's sentence? Is there anything in the book itself that is criminal or actionable or otherwise illegal in any of the countries in which it has been distributed? Is a given government's decision to take no action against the book based on law

or policy or a combination of the two? What are the limits of freedom of speech for authors and Ayatollahs in different countries? Take any public event and one cannot go far before in-depth understanding and interpretation involve addressing lawyers' questions.

Reading a newspaper in this way illustrates the point that legal lenses are essential to understanding society as much as non-legal lenses are necessary to understanding law. But having created or reinforced awareness of the general point, can we use newspapers to carry it further? The short answer is "yes", but as with other under-exploited materials of law study, one cannot go very far without disciplined answers to the What? the Why? and the How? The uses and limitations of newspapers (and other types of public media) for purposes of understanding aspects of the interrelations between law and society depend on a sophisticated understanding of the What? Who owns them? How are they structured, constructed, and produced? What is the influence of economic, ideological, and other factors on the selection, presentation, and interpretation of news? and so on. My impression is that to date, in England and the United States, there are some interesting particular examples, such as studies of law-related "moral panics" and the image of law and lawyers in the media⁴⁴ but little sustained research or literature. There are some well-developed tools within media studies, such as content analysis, and from a different quarter, deconstruction, but so far I know of no sustained attempt to address the What? the Why? and the How? of using newspapers and other public media as materials for studying law.

Cannibalism Again: "The Case of the Speluncean Explorers"

For my next example, I want to turn to a classic of Jurisprudence in order to carry one stage further the notion of putting texts to the question. The text is Lon Fuller's *The Case of the Speluncean Explorers*. The fact that I intend to subject it to quite stringent criticism should be taken as a compliment: normally, only classics deserve such attention.

Before describing and criticizing the text from a particular perspective, let me briefly state my own view of legal theory.⁴⁵ Jurisprudence is the theoretical part of law as a discipline. A theoretical question is a question posed at a relatively high level of generality; a philosophical question is one

44. E.g., S. CHIBNALL, *LAW AND ORDER NEWS* (1977); S. COHEN, *FOLK DEVILS AND MORAL PANICS* (1972); Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 1986 AM. B. FOUND. RES. J. 281; Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527; *Symposium: Popular Legal Culture*, 98 YALE L.J. 1545 (1989); Rosen, *Ethical Soap: L.A. Law and the Privileging of Character*, 43 U. MIAMI L. REV. 1229 (1989).

45. See W. TWINING, *LEGAL THEORY AND COMMON LAW* chs. 4, 13 (1986); *RETHINKING EVIDENCE*, *supra* note 7, ch. 11.

posed at a very high level of abstraction. "What constitutes valid reasoning?" is a philosophical question. "What constitutes valid reasoning about questions of law?" is a question of legal philosophy. "What constitutes valid reasoning in American state appellate courts?" or "in the English Court of Appeal?" are still sufficiently general to be regarded as questions belonging to legal theory, but they are not purely philosophical questions, because answering them also requires some familiarity with particular institutional contexts.⁴⁶ Jurisprudence is thus equivalent to legal theory, but is wider than legal philosophy. Since generality is a relative matter, theory cannot be sharply separated from particular fields of study. Theory knows no boundaries. Since there is no necessary correlation between generality and utility or uselessness, the idea that all theory is useful or useless is a fallacy, just as contrasting theory and practice involves a false dichotomy.

Teachers of Jurisprudence generally fall into one of two categories—those who teach *about* Jurisprudence and those who ask their students to *do* it. In most countries Jurisprudence is seen as a vast heritage of classic or near-classic texts, from which a very few are selected for study; so one reads bits of the work of Hart or Fuller or Aristotle or Aquinas or Dworkin; one learns about their ideas; and one interprets and criticizes them. In the other approach, theorizing is seen as an *activity* involving posing, refining, answering, and arguing about important general questions relating to law, ideally to stimulate students to work out their own positions in a coherent and relatively informed way.⁴⁷ The range of significant questions is not as vast as the heritage of attempted answers, but nevertheless selection is still necessary in almost any Jurisprudence course. So even in the activity courses, attention tends to be focussed on a few questions from one sphere of legal theory, such as ethical or epistemological questions or questions about reasoning about disputed issues of law. I am a late convert to the idea of treating theorizing as an activity rather than a subject. I still use selected texts as the main means for raising questions and getting students to develop their own answers through dialogue with the text. The difference is one of emphasis, but it is significant: we study questions raised by Bentham or Dworkin and their attempted answers as a means to clarifying our own views on the significance of the questions and the validity of our own answers. We are not studying Bentham or Dworkin as such.⁴⁸

46. For example, philosophers who contribute to discussions of "legal reasoning" tend to assume that the distinction between questions of fact and questions of law can be treated as unproblematic in judicial contexts and that "legal reasoning" is the only or the main or the most distinctive kind of reasoning engaged in by lawyers, judges, and other participants in legal processes. See *RETHINKING EVIDENCE*, *supra* note 7 *passim*.

47. *LEGAL THEORY AND COMMON LAW*, *supra* note 45, ch. 13.

48. The problems of anachronistic reading of juristic texts are explored further in my Maccabean Lecture in Jurisprudence entitled "Reading Bentham." (Proceedings of the British Academy, forthcoming 1990).

My conception of legal theory and legal theorizing is relevant here because I start my courses on Jurisprudence with *The Case of the Speluncean Explorers*. I use it, first, to present and discuss different conceptions of Jurisprudence, and, second, to suggest a particular method of reading juristic texts as a vehicle for stimulating students to clarify their own ideas.

Given that the objective of reading juristic texts is to enter into intelligent dialogue with them, and given that the texts are selected because they raise important questions and suggest answers, reasons, and perspectives bearing on those questions, what might be a reasonably systematic way of reading such texts for this purpose? Over the years I have developed a quite simple and flexible method. I ask students to approach any juristic text at three levels: the historical, the analytical, and the applied.

The extent to which the historical context of a work is important in interpreting and evaluating it has been a matter of central concern to theologians, intellectual historians, literary theorists, and jurists, among others. Here one can by-pass some of those controversies,⁴⁹ because our reading is for a specific ahistorical purpose: the text is being used as a means to clarifying one's own views on significant questions *today*. Why, then, bother about history at all? A brief answer is that at the very least setting the text in its historical context can help one to identify the central concerns of the author and hence enter into an intelligent dialogue with the text in a way that avoids some of the cruder caricatures that contaminate much secondary writing about Jurisprudence. It also can have other uses, as I shall illustrate with reference to the Speluncean Explorers. Usually it is quite sufficient for this particular purpose to learn enough about the background of the text and its author to establish the general nature of his enterprise and its underlying concerns. In short: What was biting him? (Most classic jurists are, alas, still male.).

Translating concerns into questions marks the transition from the historical to the analytical mode of reading. And as Professor Hart has shown, some articulated questions are very poor expressions of their underlying concerns.⁵⁰ If one is puzzled about the meaning of a familiar abstract word, such as "law" or "right" or "justice," a question expressed in the form of a dictionary definition is unlikely to be helpful. If one interprets Holmes's *The Path of the Law*⁵¹ as an expression of concern about legal education at Harvard becoming out of touch with the realities of everyday legal practice, then it is strange to read it as a text centrally concerned with the question What is law? and intended to launch a general theory of law.⁵² Identifying,

49. *Id.*

50. Hart, *Definition and Theory in Jurisprudence*, 70 L. Q. REV. 37 (1953).

51. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

52. Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275 (1973).

clarifying, and, if necessary, reposing questions involves interpretation and is often not a straightforward matter.

The most basic kind of analytical reading can be designated as "reading for plot." What questions does this text address? What answers does it propose? What are the alleged justifications for the answers? Elementary reading for plot provides the basis for the next step in dialectical reading: Do I agree with the questions? Do I agree with the answers? Do I agree with the reasons? This process of dialogue can be extended in many directions almost indefinitely, again depending on one's purposes and the value of reading this text for those purposes. In my experience, Holmes's *The Path of the Law*, like *Hamlet*, yields fresh interpretations, insights, and puzzles at each reading—perhaps the highest compliment one can pay to any text. Of the analysis of texts there is no end, but in this context, the suggested method provides an economical and disciplined basis for entering into worthwhile dialogues without getting bogged down unnecessarily.

The third level, rather uncomfortably designated as "the applied," involves exploring particular implications and applications of the questions, answers, and reasons attributed to the text and alternatives developed in the course of the dialogue. Theorizing involves considering particulars in relation to general ideas. To put the matter briefly and crudely: In studying Bentham's classic exposition of the principle of utility in *An Introduction to the Principles of Morals and Legislation*,⁵³ we begin by clarifying Bentham's concerns. What seems to be a plausible interpretation of this version of his utilitarianism developed in that text? Is this the least vulnerable interpretation of utilitarianism in the view of the reader (this may involve looking at other texts)? The purpose is to stimulate each student to develop an answer to the question: Am I a utilitarian? Moving to the applied level is a means of testing out a position provisionally adopted at the general level: Does utilitarianism necessarily commit you both to vegetarianism and to justifying torture and punishment of the innocent in extreme circumstances? If so, are you sure you are a utilitarian? And so on.

This, in outline form, is a simple recommended intellectual procedure for a systematic approach to the reading of juristic texts for a given purpose. Let us apply it briefly to *The Case of the Speluncean Explorers* by way of illustration.

Historical⁵⁴

The Case of the Speluncean Explorers was written in about 1948. It

53. J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J.H. Burns & H.L.A. Hart eds. 1970).

54: For background, see R. SUMMERS, L. FULLER (1984); L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* (temp. ed. 1949).

was the first of a series of hypothetical examples in a course on Jurisprudence at Harvard Law School. At the time Fuller was in his mid-forties. Ten years later he was to come into prominence as the first and one of the most important critics of the positivism of H.L.A. Hart and as a leading exponent of the idea that no sharp distinction can be made between legal and moral reasoning in debating questions of law. Fuller wrote "the Speluncean Explorers" before the appearance of Hart, Dworkin, Nozick, and Rawls. Marxism, Critical Legal Studies, and Economic Analysis of Law had not yet made themselves felt in American law schools. So it is hardly surprising that none of these feature in what can reasonably be interpreted as an attempt to provide a conspectus of rival approaches to legal argument (and, more broadly, competing visions of law). So perhaps we can impute the following objective to Fuller: to introduce Harvard students to the subject in the late 1940s by raising a range of central and perennial questions in Legal Philosophy and by presenting a conspectus of different approaches and positions on those questions.⁵⁵

Analysis I. Plot

The Case of the Speluncean Explorers is based on two leading cases involving cannibalism and the defence of necessity in criminal law—the English case of *Regina v. Dudley and Stephens*⁵⁶ and the earlier American case of *U.S. v. Holmes*.⁵⁷ Simpson's recent book reveals that Fuller had intelligently researched the background. Fuller's version takes the form of five opinions of the Supreme Court of Newgarth in the year 4300 (a time roughly equidistant from 1950 as 1950 was from the Age of Pericles).⁵⁸ Four members of the Speluncean Society had been trapped in an underground cave. Stupendous efforts were made to rescue them, at the cost of ten lives and a great deal of money. By the twentieth day the unfortunate explorers decided that they could only avoid death by starvation before they could be rescued if they killed and ate one of their number. One of them, Whetmore, suggested that they should decide who should be the victim by casting dice. The others agreed only after much hesitation, whereupon

55. *Supra* note 43, at 645. Fuller's general views on the teaching of jurisprudence are outlined in Fuller, *The Place and Uses of Jurisprudence in the Law School Curriculum*, 1 J. LEGAL EDUC. 495 (1949) (roughly contemporaneous with the first publication of *The Case of the Speluncean Explorers*); see also Summers, *supra* note 54, at 8.

There have been several attempts to adopt Fuller's device of the imaginary case for similar purposes. See, e.g., Seidman, *The Inarticulate Premiss*, 3 J. MOD. AFR. STUD. 567 (1965) (the case of Kwame s/o Nighihili); A. HUTCHINSON, *DWELLING ON THE THRESHOLD* ch. 6 (1988) (the case of Derek and Charles v. Anne and Martin); A. D'AMATO, *JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW* ch. 12 (1984) (further proceedings in the case of the Speluncean Explorers).

56. [1884] 14 Q.B.D. 273, *aff'd* [1885] 14 Q.B.D. 560.

57. 26 F. Cas. 360 (E.D. Pa. 1842) (No. 15, 383).

58. *Supra* note 43, at 645.

Whetmore declared that he withdrew from the arrangement. The others decided to go ahead and one of them cast the dice on Whetmore's behalf. The throw went against Whetmore and he was killed and eaten. In due course the survivors were rescued and charged with murder. The report contains five individual judgments, each of which adopts a seemingly different approach.

Fuller's standpoint in this context was that of a Socratic teacher, and this was not intended as a coherent statement of his own views. However, his views can to some extent be inferred from the opinion of Foster, J., and, indirectly, from the element of caricature in his treatment of some of the other judges. His perennial concern with problems of value is revealed by the single question he appended to the case in his collection of materials entitled *The Problems of Jurisprudence*:

It is fairly clear that the root difficulty in the case of the Speluncan Explorers lies in the fact that values ordinarily protected by law have come into irreconcilable conflict, so that one must be sacrificed if the other is to be preserved. In the case as it is put the values in conflict are human lives. Would it be possible to construct a similar case in which one property value was pitted irreconcilably against another? If it is more difficult to construct such a case, why is this so?⁵⁹

The standard way of reading the case is to identify the issues and the competing positions taken on each of them. It is widely regarded as an excellent way of starting a Jurisprudence course. However, in the present context, let us look at it in terms of Fuller's conception of Jurisprudence: What did he consider to be central questions and what did he consider to be the most important competing approaches or theories?

We can restate the main issues in the case in non-Fullerian language as follows:

1. Is it ever morally
 - (a) justifiable
 - (b) excusable
 to kill and eat a fellow human being?
2. Whether or not it is morally justifiable or excusable, is it legally justifiable to kill and eat a fellow human being in order to save one's own life? Alternatively, is necessity a defense to a charge of murder?
3. What is the connection, if any, between questions 1 and 2?
4. What is the proper role of an appellate judge in deciding a hard case on a question of law? How does this differ from other officials?
5. What kinds of reasons are admissible, valid, and cogent in

59. See Fuller, *supra* note 53, at 645.

(a) reaching

(b) justifying a judicial decision in a hard case? What is the relationship between (a) and (b)? In particular, should public opinion be taken into account in reaching and justifying such decisions?

6. Do (a) citizens (b) judges owe an indefeasible duty of fidelity to law?

The five judges take a variety of positions on each of these issues. Three of them think that the killing was excusable to some degree, allowing for mitigation. Keen, J., implies that it may be completely justifiable, and Tatting, J., seems unsure of the morality of the action. Truepenny and Keen consider that the accused were nonetheless guilty of murder; Handy and Foster, JJ., would quash the conviction; Tatting, J., considers the case too hard and withdraws, with the result that, the court being equally divided, the conviction is affirmed. In justifying their decisions, Truepenny and Keen concentrate on the wording of the statute, which they consider to be clear; Tatting relies on precedent and analogy; Foster appeals to purpose, which he considers to be in conflict with and to override the wording; and Handy decides on "common sense" backed by articulated public opinion. Each of the judges expresses his views on the role of judges in hard cases and their relationship to other officials (in this case the prosecutor, the Chief Executive, and the Legislature).

Analysis II. Critique

The Case of the Speluncean Explorers raises a rich range of issues and arguments. It is splendid pedagogical material; it is readable, profound, and calculated to engage the interest and concern of all but the most closed-minded students. It forces students to clarify their own positions on a number of questions and to see how those views relate to different intellectual traditions. Subliminally, it communicates two important messages: Jurisprudence can be enjoyable and "relevant." When, like many teachers, I use it in class, we address the substantive issues it raises, and I ask students to note with which judge they have instinctively identified to start with and to review this at the end of the course. It is not a bad touchstone of self-definition.

Here, I want to consider the text as an indication of Fuller's picture of the world of Jurisprudence. In a Postscript Fuller claims that "the case was constructed for the sole purpose of bringing into common focus certain divergent philosophies of law and government . . . [which] presented men with live questions of choice in the days of Plato and Aristotle and which are among the permanent problems of the human race."⁶⁰

60. *Supra* note 43, at 645.

How far is the last claim sustained from the perspective of 1989? *Spelunccean Explorers* brings together a number of standard issues in Legal Theory and illustrates their interconnectedness: positive law and the law of nature; the relationship between law and morals; different modes of interpreting statutes and reasoning about questions of law; the proper role of judges and its relationship to the roles of the legislator and various executive roles; the relationship between law and public opinion; and the ultimate basis of government and the nature of fidelity to law.

Single cases or case-studies are useful as dramatizing and concretizing devices, but they have limitations as vehicles for presenting comprehensive or systematic overviews. In 1948 one might have been able to suggest a number of improvements; for example, instead of presenting a near-consensus on the morality of the action, one judge could have been a moral absolutist maintaining an indefeasible right to life, another a moral nihilist or skeptic, maintaining that moral judgments are nonsensical or purely subjective expressions of opinion, a third a utilitarian and so on. Similarly, more than one different kind of purposive interpretation could have been illustrated (for example, principled, consequentialist, or the Golden Rule) and a wider range of philosophies of government. One could also suggest that standard kinds of Legal Positivism (as represented by Austin and Kelsen) could have been presented more starkly and that Handy, J., is a rather unsympathetic caricature of a Realist.

These are by no means fatal flaws. Indeed, a good discussion can bring out most of the points. Similarly, it is not difficult to up-date Fuller's version. It is quite possible, as an example of working at the applied level, to set an exercise of writing a judgment in the case from some point of view not canvassed by Fuller, especially approaches that have come into prominence since his day. This works well with approaches, such as that of Ronald Dworkin or Economic Analysis of Law or some versions of Critical Legal Studies, that share Fuller's concern with the nature of appellate judging. It also works quite well with actual judges, such as Lord Denning, Lord Simmonds, or Judge Posner. It does not work so well with approaches that are less court-centered or are concerned with other issues, such as Marxism, Anarchism, Feminism, or macro-sociological theories. The central questions addressed by such theories tend to be rather different. Thus, one student purporting to write a feminist judgment in the case concluded that it raised no difficult issues at all since the person eaten was a man. Whether or not one finds that amusing, it trivializes the concerns of feminism precisely because those concerns are not central to the text. Similarly, while it is possible to subject the case to a Marxist analysis, this does not work, firstly, because the situation does not bear intimately on central Marxist concerns about power, class, etc. and, secondly, because both the author and the reader are invited to adopt the standpoint of appellate judges *within* a legal system, some of the ideological and institutional as-

pects of which are taken for granted in ways that Marxists are concerned to attack or at least to question.

For me, it is highly significant that *The Case of the Speluncean Explorers* works quite well in regard to some of our stock of theories of and about law, but does not work so well for others. It indicates a key point of difference between Fuller's conception of Jurisprudence, as expressed in this text,⁶¹ and my own. To put it bluntly, for the sake of succinctness, Fuller's case-study, and theories that fit it well, exhibit the classic symptoms of what Jerome Frank called "appellate court-itis," in this case treating a hard case on a question of law as paradigmatic of legal theorizing. It is revealing that some central ideas of Fuller, Dworkin, and critical scholars (and their critics) who debate about legal interpretation and even some brands of Economic Analysis of Law fit the case quite easily. These have at least some shared concerns and issue is joined.

Given time I would argue that the positivisms of Hart and Kelsen and even Holmes sit less easily precisely because the root concerns of positivism are not about how appellate judges and their satellite functionaries should reason or choose.⁶² I would also argue that American Legal Realism is caricatured by Fuller for similar reasons. In my view, it is a common fallacy to interpret the Realists as being solely or even primarily concerned with appellate court judging.⁶³ One move away is to broaden our concerns to include disputed questions of fact, as Frank suggested, or to extend this to all important decisions in litigation, as has been done by those who view litigation as a complex total process in which contested trials and appellate decisions are in practice exceptional events. But if one's view of law extends beyond appellate courts to trial courts, and beyond trial courts to pre-trial and post-trial events, and beyond litigation to dispute prevention and resolution, and beyond these to the kind of pervasive transnational phenomenon

61. I am here criticizing the text read on its own for a particular purpose. A defense of Fuller could be mounted along the lines that he himself acknowledged that *The Speluncean Explorers* did not present a comprehensive view of jurisprudence and, indeed, he included some other hypothetical cases in *THE PROBLEMS OF JURISPRUDENCE*. (See Fuller, *supra* note 54). My concern here is not to be fair to Fuller, but to consider the uses and limitations of the text, read on its own, as an introduction to jurisprudence.

62. This is a theme for another occasion. I am in general agreement with those commentators who suggest that it is a mistake to treat Hart and Dworkin as advancing rival theories of law and of adjudication in that Hart, in *THE CONCEPT OF LAW*, was doing General Jurisprudence and was only peripherally concerned with giving normative guidance to common law judges with a given legal system, whereas Dworkin's primary concern is to develop a normative, internal theory of adjudication (*i.e.*, something approaching Particular Jurisprudence). See, *e.g.*, the exchange between Gavison and Dworkin in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY* ch. 1 (R. Gavison ed. 1987); R. DWORKIN, *LAW'S EMPIRE* 418-19 n.29 (1986); Burton, *Ronald Dworkin and Legal Positivism*, 73 *IOWA L. REV.* 109 (1987). The issues are too complex to pursue here.

63. This theme is developed in *Talk About Realism*, *supra* note 7.

that is illustrated by the newspaper exercise, then a conspectus of legal theories that uses a case study set in the peculiar institutional context of a common law appellate court will not do. It is too narrowly focussed, too unrepresentative, and too culture-bound to provide a basis for capturing a balanced overview of the range of general questions that need to be asked and tackled as part of a general understanding of the subject-matter of the discipline of law.

It is just because *The Case of the Speluncean Explorers* illustrates a view of Jurisprudence that I am concerned to attack that I continue to use it in teaching the subject. The fact that it also suggests that studying the subject can be fun is a bonus. In this context, my purpose has been two-fold. First, I have tried to illustrate how the development of quite simple intellectual procedures for questioning texts in a disciplined way can yield results in terms of economy, purposiveness, and I hope, insight. Secondly, the case for developing ways of broadening the range of standard materials of law study is really part of a plea for a broader, richer, and more systematic vision of our discipline. My view of what constitute worthwhile materials of law study stems from my view of legal theory as embracing a vast range of important issues at a number of levels of generality. On this foundation, I rest my case.

APPENDIX

Selections from

THE READING LAW COOKBOOK

A Primer of Self-Education About Law

William Twining

Revised: August 1987

ABBREVIATIONS

(CLT)	K. LLEWELLYN,	THE COMMON LAW TRADITION: DECIDING APPEALS (1960)
(HTDWR)	W. TWINING & D. MIERS,	HOW TO DO THINGS WITH RULES (2d ed. 1982)
(KLRM)	W. TWINING,	KARL LLEWELLYN AND THE REALIST MOVEMENT (1985)
(TCAL)	S. MENTSCHIKOFF & I. STOTZKY,	THE THEORY AND CRAFT OF AMERICAN LAW (1981)

I. *Law Reports I: Orthodox Reading*

A. *The single case*

(1) *Precis* ("briefing a case")

(a) *Quick*:

Why? "A necessary foundation for most purposes for which cases are read.

What? "A case is *the written memorandum of a dispute or controversy between persons*, telling with varying degrees of completeness and of accuracy, *what happened, what each of the parties did about it, what some supposedly impartial judge or other tribunal did in the way of bringing the dispute or controversy to an end, and the avowed reasons of the judge or tribunal for doing what was done.*" (emphasis added) (N. DOWLING, E. PATTERSON & R. POWELL, *MATERIALS FOR LEGAL METHOD* 34-35 (2d ed. 1952), *quoted in* HTDWR, at 266).

How? A standard form precis, covering:
 -Title, citation, court, topic(s), outcome (who won?), order.
 -Facts, question(s) of law, competing answers to questions, holding (court's answer to question), and reasons for decision. Comment. (*E.g.*, Case note of *R. v. Allen*, HTDWR, at 235-65. Alternative Method: TCAL, at xxviii-xxxv).

(b) *Slow:*

-Additional details, *e.g.*, on procedure, arguments of counsel, treatment of prior authorities, reasoning of individual judges, and historical background to this case.
 -Diagnosis of conditions of doubt in this case. (*See infra* II B.)

II. Law Reports II: Less Orthodox Readings

The law reports tend to be over-emphasized in legal education in respect of orthodox reading, at the expense of other materials of law study. On the other hand, they are also an under-exploited resource in terms of other purposes and methods of analysis. The following is a sample of alternative modes of reading and using law reports.

A. *Reconstructing the arguments in a single case*

(*E.g.*, charting the structure of the arguments in *R. v. Allen*, HTDWR, at 236-40, 256). *See also* HTDWR, at 235-65.

B. *Analyzing the conditions of doubt giving rise to disagreement or doubt about the law*

Objective -to diagnose in depth *why* there was a doubt or dispute about the law in a past case.

What? -the reported opinion(s) (and, if available, summary of arguments of counsel and/or the briefs).

Why? -as a preliminary to reconstructing the arguments in the case
 -to analyze the case in depth as raw material for constructing an argument on a point of law
 -for some other purpose

How?

- (1) *Quick:* What conditions gave rise to the doubt(s) in this case? Which of these conditions relate to
- (a) events preceding the creation of the rule or doctrine relevant to the case;
 - (b) to incompleteness, indeterminacy, or imperfection of applicable doctrine at the time;
 - (c) to events after the original creation of the rule or doctrine; or
 - (d) to special features of *this* case?
- (2) *Slow:*
- (a) Which of the check-list of thirty-five conditions of doubt (HTDWR, ch. 6) apply to this case?
 - (b) Are there any others?
 - (c) Which of these conditions formed the basis, on its own or in combination, for a colorable argument for one side?
 - (d) Was this an appellate case worth appealing or was it foredoomed? (CLT, at 25 n.16; KLRM, at 248-49).
 - (e) Was this a “hard case” in Dworkin’s sense? Did any of the issues relate to matters that are essentially contested?

C. *Analysis of styles of reasoning of judicial opinions*

Objective to analyze a single opinion or a collection of opinions in terms of the style employed

What? Judicial opinions

Why?

- (1) to determine whether an individual judge or a particular court conformed to a given style of reasoning at a given moment of time or during a given period; or
- (2) as an aid to predicting how a known judge or court is likely to respond to a particular point or line of argument; or
- (3) to compare and contrast predominant styles of individual judges, courts, or legal traditions in different times or places.

E.g., to compare the judgments of Lord Mansfield and Lord Eldon; the opinions of the U.S. Supreme Court in 1900, 1950, and 1986; appellate cases in different common law and civil law jurisdictions.

How?

Quick: To what extent does the material fit into Llewellyn's ideal types of Grand Style and Formal Style of reasoning?

Slow: See TCAL, at 316-22; J. WETTER, *THE STYLES OF APPELLATE JUDICIAL OPINIONS* (1960), discussed in CLT, at 465 ff and KLRM, at 265-66, 455.

- D. *Critical analysis of the corpus of opinions of a single judge*
E.g., B. H. LEVY, *CARDOZO AND THE FRONTIERS OF LEGAL THINKING* (1938); J. JOWELL & J.P.W.B. MCAUSLAN, *LORD DENNING: THE JUDGE AND THE LAW* (1984).
- E. *Critical analysis of alleged political biases of one or more courts*, by considering treatment of cases involving women, ethnic minorities, students, labor unions, etc. *E.g.*, J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* (1977, 2d ed. 1984).
- F. *Deconstruction of judicial opinions (Critical Legal Studies)*
E.g., Murphy & Rawlings, "After the Ancien Regime: The Writing of Judgments in the House of Lords 1979/1980", 44 M.L.R. 617 (1981).
- G. *Quantitative analysis of judicial opinions*
E.g., G. SCHUBERT, *JUDICIAL BEHAVIOR* (1964).
- H. *Economic Analysis of Judicial Opinions*
R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1986).
- I. *Participant perspectives*
The experience and consequences of being involved in litigation from the standpoint of the parties or other participants (*e.g.*, witnesses, legal worms).

III. *Trial Records*

One of the most neglected kinds of materials of law study.

- A. *Analysis of Evidence in Cases Involving Disputed Questions of Fact*

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Why? (1) Organizing a mixed mass of evidence in order to structure an argument about a disputed question of fact.

(2) Microscopic analysis, construction, and evaluation of arguments from evidence.

What? *E.g.*, trial records and secondary accounts of trials involving disputed questions of fact and national trial competition problems.

How? Wigmore's Chart Method (as taught at Miami by Anderson and Ewald).

[Reference: W. Twining, *Theories of Evidence: Bentham and Wigmore* ch. 3, 179-86 (1985); T. Anderson & W. Twining, *Analysis of Evidence* (tentative edition, University of Miami, 1988); Wigmore, *The Problem of Proof*, 8 ILL. L. REV. 77 (1913)]

B. *Miscarriages of Justice*

Why? Analyze what factors contributed to acknowledged or alleged failures in the criminal justice system.

What? Trial records or secondary accounts of *causes celebres* (*e.g.*, Sacco-Vanzetti, Alger Hiss, Bywaters and Thompson).

How? Various methods. *See, e.g.*, Landsman, *When Justice Fails*, 84 MICH. L. REV. 824 (1986).

[Models: *E.g.*, famous cross-examinations. F. WELLMAN, *THE ART OF CROSS-EXAMINATION* (1962)]

C. *Reading a juristic or other secondary text: the historical, the analytical, and the applied*

Assuming the purpose is to enter into a dialogue with the text on issues on which it is potentially significant.

(1) *Historical*

Quick: -What were the author's central concerns in writing this text: What was biting her?

- Slow:*
- Who was the author?
 - When was the text written, published?
 - What was the immediate (practical, intellectual, personal, cultural) context of its creation?
 - Where does it fit in the author's total opus/intellectual development?
 - Whence? Sources, 'influences' etc.
 - What were the author's main concerns?

(2) *Analytical*

(a) *Exposition:*

- Quick:*
- What questions does the text address?
 - What answers does it give to those questions?
 - What are the reasons (evidence, premises, arguments) advanced in support of the answers?

Slow: Detailed textual analysis and interpretation.

(b) *Dialogue:*

- Quick:*
- Do I agree with the questions?
 - Do I agree with the answers?
 - Do I agree with the reasons?

Slow:

- Critical analysis of multiple interpretations.
- Which is the least vulnerable interpretation of the question(s), answer(s), reason(s), etc.?

(3) *Applied: Implications and Applications*

- Quick:*
- So what?
 - What are the logical implications of the answers?
 - What is the historical significance of the text?
 - What is the contemporary significance of the text?

Slow: -Detailed study of implications, consequences, and other "significance."

[*Examples:* Quentin Skinner, *Machiavelli on Bramble Bush*, KLRM, at 140-52; on Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (full text also at TCAL, 524-48); see Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275 (1973). *Reference:* Twining, *Talk About Realism*, 60 N.Y.U.L. REV. 333-38 (1985)]

