

Appendix IV

The Reading Law Cookbook¹

A primer of self-education about law

Abbreviations

BT	W. Twining	<i>Blackstone's Tower</i> (1994)
CLT	K. Llewellyn	<i>The Common Law Tradition: Deciding Appeals</i> (1960)
GJB	W. Twining	<i>The Great Juristic Bazaar</i> (2002)
KLRM	W. Twining	<i>Karl Llewellyn and the Realist Movement</i> (1973)
LIC	W. Twining	<i>Law in Context: Enlarging a Discipline</i> (1997)
LMSR	S. Hanson	<i>Legal Method, Skills and Reasoning</i> (3rd edn, 2010)
LLR	J. Holland and J. Webb	<i>Learning Legal Rules</i> (6th edn, 2006)
TCAL	S. Mentschikoff and I. Stotzky	<i>The Theory and Craft of American Law</i> (1981)

For other citations and abbreviations, see any standard work on how to use a law library.

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.

¹ Adapted from W. Twining (1989) 24 *Valparaiso University Law Review* 1, reprinted in *LIC* (1997), ch. 12. This Appendix reproduces the text from the fourth edition of *How To Do Things With Rules* (1999) with only minor revisions and some more recent references. Page numbers and appendices refer to this edition.

I let them rest from nine till 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!

Rudyard Kipling

1 Clarification of standpoint

Who am I?

At what stage in what process am I?

What am I trying to do?

See ch. 1, section 5; ch. 2, p. 72; ch. 4, section 5

2 Reading any text: Why? What? How?

For what purpose (s) am I reading this?

What are the salient characteristics of this kind of text?

What technique (s) of reading are appropriate for my purpose (s) in reading *this* text?

3 Legal literature in general

(a) Two useful distinctions

(i) Within legal discourse: law talk and talk about law. For example: any proposition of law (e.g. the rule in *Hadley v. Baxendale* (1854) 9 Exch 341) is law talk; any historical, sociological or critical statement about legal rules or phenomena falls under ‘talk about law’. Legal discourse is often a mixture of law talk and talk about law, with the latter predominating.

(ii) Within legal literature a corresponding distinction between law books and books about law.² ‘Law books’ include primary sources (e.g. law reports, legislation and secondary accounts of legal doctrine such as treatises, restate-

² R. L. Abel, ‘Law Books and Books about Law’, *Stanford Law Review*, 26 (1973), 175.

ments, reference works); 'books about law' is a much wider and more varied category, including historical, philosophical and critical works by legal scholars and many kinds of writings by non-lawyers. These distinctions are, of course, not clear-cut and often break down.

(b) A total picture of legal literature

Walk around the law library identifying the main types of books, distinguishing between law books and books about law. Then explore the rest of the library and ask: how many law books are there here? How many sections do not contain a significant number of books about law? (BT, ch. 5)

4 Newspapers

4A Introductory: the Newspaper Exercise³

WHY? (a) Affective: law as a subject of study is interesting, relevant to everyday life, personal relationships and public affairs; and it changes daily,
 (b) Consciousness-raising about:
 (i) the pervasiveness of law in society;
 (ii) the relevance of legal perspectives in interpreting current events;
 (iii) the relevance of international, transnational, European, foreign, Islamic, African, Jewish law in an interdependent world (non-parochialism);
 (iv) the amount of law that students have already experienced before law school;
 (v) the problematic nature of the concepts of 'law' and 'legally relevant'.

WHAT? Today's newspaper.

HOW? (a) Reading a whole newspaper per instructions.
 (b) Systematic content analysis.

4B Media treatment of law (and order)

WHY? (a) To explore various aspects of the relationship between law and public opinion and opinion-formation – e.g. 'moral panics'.
 (b) To analyse or deconstruct media treatments of legal issues and events.

WHAT? News as socially constructed forms of 'knowledge'.

HOW? (a) Case studies of media treatments of particular issues or events.
 (b) Deconstruction (see below).

4C Routine update

WHY? Keeping up to date (a) generally (b) on specific issues.

WHAT? This week's or today's news (newspaper, Law-Tel, LexisNexis, Westlaw, *New Law Journal*, specialized services).

HOW? Skim, mark, digest, file.

³ See Chapter 1, section 2.

5 Policy documents and public inquiries

- WHAT?** Reports of official committees, private organizations, etc., and other documents dealing with issues of public policy or law reform or perceived 'problems' to which law might contribute, e.g. Royal Commissions; Reports and Working Papers of Law Commissions and law reform bodies; JUSTICE Reports; First Report of Select Committee on Violence in Marriage (see Appendix VII).
- WHY?** E.g. diagnosis and analysis of a problem to the solution of which it is thought that law might contribute (c.f. 'There oughta be a law.') Part of legislative history of a particular statute. (See Chapter 2.)
- HOW?** Quick
Why? When? Who? To do what? How? What conclusions and recommendations? Then what? So what?
Slow
Why? The historical context of the enquiry leading to the report. *Why then?* Motives for giving task to this committee (whitewash; delay; public demand; to stimulate or dampen public debate; to remove an issue from party politics; social engineering).
When? Main dates in sequence of events from initial triggering event to 'end' of story (e.g. enactment, shelving or rejection of recommendations).
Who? Membership of committee. Who chose them how? (Spread of interests; orthodox 'great and good'; loaded; significant absentees.)
To do what? Precise terms of reference. How were these interpreted by the committee?
How? Procedures followed. Oral 'evidence'? Specially sponsored research? Public meetings? Discussion documents ('Green papers'), etc.
What? Conclusions and recommendations. Perception and diagnosis of the problem. History, context, date. What were perceived to be the main controversial issues. What options considered, rejected. Overt/covert disagreements within the committee.
Then what? Post-report events.
So what? Historical, analytical, theoretical significance of the report and its story for this reader.

Some variants

- 1 Other kinds of report (e.g. 'fact-finding' enquiries); other kinds of policy document.
- 2 Some official reports provide exceptionally useful syntheses and statements of existing law, historical background, public debates and social data. They are accordingly useful as materials of law study for a variety of purposes.

Note: Reports of Royal Commissions, official committees and the like have probably been more *politically* significant in the UK than in the

USA. Nevertheless, it is fair to say that they number among neglected materials of law study in both countries.

6 Legislation

Quick

WHY? E.g. (a) To learn about the structure and content of the instrument as a whole.

(b) To find and interpret the exact words in the text applicable to a particular point of law.

(c) To use as raw material for a legal argument.

(d) Other.

HOW? For (a), chart the design of the statute (see Appendix III); thereafter depends on exact purpose. For (b) and (c), clarify standpoint; identify relevant statutory materials; where appropriate, locate exact words in text giving rise to doubt; consider immediate textual context: adjoining words; this section; statute as a whole; collect relevant non-statutory materials; state competing interpretations; specify the conditions of doubt; construct argument.

Slow

No cookbook can make you skilful at handling statutes.

7 Law reports I: orthodox reading

7A The single case

1 Précis ('briefing a case')

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' (Dowling *et al.* See ch. 9, p. 298)

HOW? A standard form of précis covering:

(a) Title; citation; court; topic(s); outcome (who won?); order.

(b) Facts; question (s) of law; competing answers to questions; holding (court's answer to question); reasons for decision. Comment. E.g. case note of *Rv. Allen* (p. 275ff.).

Slow

(c) Additional details, e.g. on procedure, arguments of counsel, treatment of prior authorities; reasoning of individual judges; historical background to this case (see below, 8B and 10). *LMSR* ch. 5.

2 Attacking an adverse precedent

WHY? To weaken authority and persuasive force of a precedent.

WHAT? A potentially adverse precedent.

HOW? Precedent techniques – i.e. cumulation of *reasons* for not following or applying prior case to the case at hand.

E.g. Treatment of *Fanning* in *Allen* (p. 298ff.). This was an *Irish* case; four judges dissented; *Fanning* was based on misinterpretation of prior cases; *Fanning* inconsistent with prior cases.

NB: Cockburn CJ could have distinguished *Fanning*, but chose not to do so. Why not?

See ch. 9, p. 298; *CLT*, pp. 77–92.

3 Boosting the precedent value of a favourable precedent

E.g. this case is indistinguishable from the present case; it is a judgment of Dixon (a former Chief Justice of Australia; see Diplock LJ in *Gould*; see Appendix I, section E1) (or some other respected judge); the reasoning was impeccably based on principle and authority; it has been followed in subsequent cases; it makes sense.

7B Groups of cases

1 Synthesizing all relevant precedents on a single question of law

WHY? E.g. to resolve a doubt about the law; constructing a legal argument; exposition of a legal topic.

WHAT? A collection of authoritative decisions and arguments about the issue in question.

HOW? Grand style synthesis of potentially conflicting precedents.

2 Studying a sequence of cases on a topic

WHY? *TCAL*, pp. 297–8

WHAT? A temporal sequence of precedents in a single jurisdiction.

HOW? See references below

8 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. For examples for 8C–J see references (below).

8A Reconstructing the arguments in a single case

E.g. charting the structure of the arguments in *Allen* (pp. 338ff.).

8B Analysing 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? (a) as a preliminary to reconstructing the arguments in the case; or
(b) to analyse the case in depth as raw material for constructing an argument on a point of law; or
(c) for some other purpose.
- HOW?
- 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) incompleteness, indeterminacy or imperfection of applicable doctrine at the time;
(c) events after the original creation of the rule or doctrine;
(d) special features of this case?
- Slow* (a) Which of the checklist of 36 conditions of doubt (see Chapter 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 colourable argument for one side?
(d) Was this an appellate case worth appealing or was it foredoomed? (CLT, pp. 25, n. 27; KLRM, pp. 248–9.)
(e) Was this a ‘hard case’ in Dworkin’s sense? Did any of the issues relate to matters that are ‘essentially contested’?

8C Analysis of styles of reasoning of judicial opinions

Objective: to analyse a single opinion or a collection of opinions in terms of the style employed.

WHAT? Judicial opinions.

- WHY? (a) 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
(b) as an aid to predicting how a known judge or court is likely to respond to a particular point or line of argument; or
(c) 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 US Supreme Court or speeches in the House of Lords in 1900, 1950 and 1990; appellate cases in different common law and civil law jurisdictions; the styles of the Court of Justice of the European Communities and the European Court of Human Rights.

HOW?

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

Slow See Chapter 10, pp. 000–00.

8D Critical analysis of the corpus of opinions of a single judge or court

8E Critical analysis of alleged political biases of one or more courts, by considering treatment of cases involving women, ethnic minorities, students, labour unions, etc.

8F Deconstruction of judicial opinions

8G Quantitative analysis of judicial opinions

8H Economic analysis of legal doctrine

8I Narrative

8J 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).

C Knapp: 'no study of law is adequate if it loses sight of the fact that law operates first and last *for, upon and through* individual human beings'; John T. Noonan, *Persons and Masks of the Law* (1976); Charles Dickens, *Bleak House*; Jonathan Harr, *A Civil Action* (1996). See further below at 10 (Contextual studies.)

9 Trial records

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

9A Analysis of evidence in cases involving disputed questions of fact

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

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

WHAT? E.g. trial records and secondary accounts of trials involving disputed questions of fact. National trial competition problems.

HOW? Wigmore's Chart Method.

9B Miscarriages of justice

WHY? Analyse what factors contributed to acknowledged or alleged failures in the criminal justice system.

WHAT? Trial records or secondary accounts of *causes célèbres* (e.g. Sacco-Vanzetti; Alger Hiss; Bywaters and Thompson; Luke Dougherty in the Devlin Report; the Lockerbie bombing case).

HOW? Various methods. See references below.

9C Models

E.g. famous cross-examinations. F. Wellman, *The Art of Cross-Examination* (various editions, reprint 2009), M. Stone, *Cross-Examination in Criminal Trials* (3rd edn, 2009).

10 Contextual studies of leading cases

- WHY?** In-depth study of a leading case in its historical context.
- WHAT?** Contextual studies of particular cases.
- HOW?** Problematic. See W. Twining, 'Cannibalism and Legal Literature', 6 (1986), *Oxford Journal of Legal Studies*, 423.
Examples: *Hadley v. Baxendale*, *Carlill v. Carbolic Smoke Ball*, and *Rylands v. Fletcher*: these and other examples of leading cases are discussed in A. W. B. Simpson, *Leading Cases in the Common Law* (1995). See also his *Cannibalism and the Common Law* (1984, Penguin 1986), discussing the case *R v. Dudley and Stephens*. *Brown v. Board of Education*, R. Kluger, *Simple Justice* (1975); *Palsgraf v. Long Island*, John T. Noonan, Jr, *Persons and Masks of the Law* (1976), pp. 111–51.

11 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.

11A 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?

11B Analytical

1 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.

2 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.?

11C 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’.

12 Casebooks

13 Textbooks

14 Law reviews

See references.

15 Cookbooks (nutshells, swots, outlines, etc.)

<i>Standpoint: Law student</i>	<i>Law teacher</i>
Why?	Why not?
To save effort.	It saves effort.
It provides structure.	It reveals the ball.
It succinctly summarizes information.	It substitutes for skill and understanding.
It is useful for professional exams.	This is not a cram course.
What? Well-organized, concise summary.	Superficial nutshell of facts.
How? Memorize.	Don't!

16 Not dealt with

Reference works, treatises, restatements, treaty series, legal history, constitutions, etc. (BT, pp. 112–18).

17 Reading about law

See: main library.

Why? What? How? – That is another story.

REFERENCES

4B Media treatments of law (and order)

LIC, pp. 210–13; Steve Chibnall, *Law and Order News* (1977); S. Cohen, *Folk Devils and Moral Panics* (3rd edn, 2002); A. Chase, ‘Lawyers and Popular Culture’ (1986) *ABF Res Journal* 281.

5 Policy documents and public inquiries

See Chapter 2; M. Komarovsky, *Sociology and Public Policy: The Case of Presidential Commissions* (1975); R. A. Chapman, *The Role of Commissions in Policy-Making* (1973); S. Cretney, 'The Politics of Law Reform' (1985) 48 *Modern Law Review*, 505; Dept. for Constitutional Affairs, *Effective Inquiries* CP12/04 (2004); W. G. Runciman (ed.) *Hutton and Butler: Lifting the Lid on the Workings of Power* (2004); M. Gibney (ed.) *The Age of Apology: Facing Up to the Past* (2008).

6 Legislation

See Chapter 8; LMSR ch. 4; KLRM, pp. 239–45; J. Bell and G. Engle, QC, *Cross on Statutory Interpretation* (3rd edn, 1995); F. Bennion, *Statutory Interpretation* (5th edn, 2008); D. MacCormick and R. Summers (eds.), *Interpreting Statutes: A Comparative Survey* (1991); G. Calabresi, *A Common Law for the Age of Statutes* (1982). See further, Appendix X and Chapter 9.

7 Studying sequences of cases

FD, ch. 8; TCAL, pp. 297–98; E. Levi, *Introduction to Legal Reasoning* (1949); C. Manchester *et al.*, *Exploring the Law* (1996), pt 3.

8C Analysis of styles of reasoning of judicial opinions

Gillis Wetter, *The Styles of Appellate Judicial Opinions* (1960), discussed in CLT, p. 465ff. and KLRM, pp. 265–6, 455; A. Amsterdam and G. Bruner, *Minding the Law* (2000).

8D Critical analysis of the corpus of opinions of a single judge or court

E.g. J. Jowell and J. P. W. B. McAuslan (eds.), *Lord Denning: The Judge and the Law* (1984); L. Bloomfield, *Methods of Interpretation: How the Supreme Court Reads the Constitution* (2009).

8E Critical analysis of alleged political biases of one or more courts

E.g. J. A. G. Griffith, *The Politics of the Judiciary* (5th edn, 1997); R. Stevens, *The English Judges: Their Role in the Changing Constitution* (2002).

8F Deconstruction of judicial opinions

E.g. Murphy and Rawlings, 'After the Ancient Regime', 44 (1981), *Modern Law Review*, 617; D. Balkin, 'Deconstructive Practice and Legal Theory', 96 (1987),

Yale Law Journal, 743; Ian Ward, *An Introduction to Critical Legal Theory* (1998), ch. 7. See generally, J. Culler, 'Deconstruction: Cultural Concerns', 5 *IESBS*, 3343 (2001) and M. Freeman, *Lloyd's Introduction to Jurisprudence* (8th edn, 2008), ch. 13 (critical legal studies) and ch. 14 (feminist jurisprudence).

8G Quantitative analysis of judicial opinions

E.g. Glendon Schubert, *Judicial Behaviour* (1964); R. Sunstein *et al.*, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (2006).

8H Economic analysis of legal doctrine

R. Posner, *Economic Analysis of Law* (7th edn, 2007); S. Shavell, *Foundations of Economic Analysis of Law* (2004); A. I. Ogus, *Costs and Cautionary Tales: Economic Insights for Law* (2006).

8I Narrative

GJB chs. 12, 15 and 16; W. Twining, *Rethinking Evidence* (2006), ch. 8; B. Jackson, *Law, Fact and Narrative Coherence* (1988); W. Wagenaar, P. van Koppen and H. Crombag, *Anchored Narratives* (1993); Amsterdam and Bruner, *Minding the Law* (2000).

8J Participant perspectives

John T. Noonan, *Persons and Masks of the Law* (1976); Charles Dickens, *Bleak House*; Jonathan Harr, *A Civil Action* (1996). See further below at 10 (Contextual studies.)

9 Trial records and causes célèbres

See *Analysis* chs. 4–7. *LMSR* ch. 8; T. Anderson, D. Schum and W. Twining, *Analysis of Evidence* (2005); J. Kadane and D. Schum, *The Sacco-Vanzetti Case: A Probabilistic Analysis* (1996); A. Palmer, *Proof and the Preparation for Trials* (Australia, 2003); J. H. Wigmore, 'The Problem of Proof' (1913) 8 *Illinois Law Review*, 77.

10 Contextual studies of leading cases

Examples: A. W. B. Simpson, *Leading Cases in the Common Law* (1995); *Cannibalism and the Common Law* (1984, Penguin 1986); John T. Noonan, Jr, *Persons and Masks of the Law* (1976), pp. 111–51.

11 Reading juristic texts

GJB ch. 5 and 7; SMSR chs. 3 and 5; Quentin Skinner, *Machiavelli* (1981);

12 Casebooks

See: B. Currie, 'The Materials of Law Study', 3 (1951), *Journal of Legal Education*, 331, and 8 (1955), *Journal of Legal Education*, 1; KLRM, pp. 128–40. For a feminist perspective, see Frug (1985) 34 *American University Law Review*, 1065.

13 Textbooks

W. Twining, 'Is your Textbook Really Necessary?' *Journal of Society of Public Teachers of Law* (NS), 11 (1970), 81; cf. (1973) 12 *Legal Studies* 267 (1973); D. Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition', in W. Twining (ed.), *Common Law and Legal Theory* (1986), ch. 3.

14 Law reviews

Symposium (1985) 36 *Journal of Legal Education* 1; F. Rodell, 'Goodbye to Law Reviews' (1936–37) 23 *Virginia Law Review*, 38 and (1962) 48 *Virginia Law Review* 279.

17 Reading about law: law in literature and law and literature.

J. J. Marke (ed.), *Dean's List of Recommended Reading for Pre-Law and Law Students* (2nd, edn, 1984); Kieran Dolin, *A Critical Introduction to Law and Literature* (2007); R. Posner, *Law and Literature* (3rd edn, 2009); A. Welch, *Strong Representations: Narrative and Circumstantial Evidence in English Law* (1992); Martha Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (1995); S. Greenfield, G. Osborn, and P. Robson, *Film and the Law* (2nd edn, 2009); I. Ward, *Law, Text, Terror* (2009); (see further, Appendix X and William Twining, 'Horizontal reading' in LIC, pp. 234–6).