

INSIGHTS FOR LEGAL REASONING FROM STUDIES OF LITERARY ADAPTATION AND INTERTEXTUALITY

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Legal theorists advance conflicting theories to explain judicial reasoning, for example, that judges' decisions are constrained but not determined by legal materials, that judges do not apply legal principles but make value judgments, and that they make pragmatic judgments based on an assessment of the consequences of their decisions. Like cases should be decided alike, but theorists disagree on the role of analogy in legal reasoning and how one determines which similarities and differences are relevant. Judicial decisions revise and adapt previously decided cases. The concept of fidelity to precedent in legal reasoning can be illuminated by recent research into fidelity to source in adaptation studies. Research into literary adaptations shows that similarity and difference are not mutually exclusive and that an analysis of differences may undermine determinations of relevant similarity. By reading decided cases as intertextually situated adaptations, underlying views of the world that might not otherwise be evident in judicial reasoning can be interrogated.

I INTRODUCTION

A review of recent legal writing shows that our understanding of legal reasoning, and in particular the role of similarity and difference in legal reasoning, is incomplete if not contested.¹ Whatever else may be said about

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¹ Jefferson White, 'Analogical Reasoning' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2010) 576–7. See also, eg, Cass Sunstein, 'Commentary on Analogical Reasoning' (1993) 106 *Harvard Law Review* 741; Scott Brewer, 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy' (1996) 109 *Harvard Law Review* 923; Dan Hunter, 'Reason is Too Large: Analogy and Precedent in Law' (2001) 50 *Emory Law Journal* 1197; Lloyd L Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (Cambridge University Press, 2005); Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005); Richard Posner, *How Judges Think* (Harvard University Press, 2008) 180–91; Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning*

legal reasoning, it appears to be accepted that it is not demonstrative; that is, it cannot prove itself.² In other words, legal reasoning may result in outcomes on which opinions differ, and it is for this reason that we have created courts to finally settle matters.

The role of analogical reasoning and its relationship with reasoning from precedent is disputed. Edward Levi describes a three-step process of reasoning from precedent: first, identify a similarity between precedent and the present case; second, determine a rule from the precedent by a process of induction; and third, apply the rule to determine the present case by a process of deduction.³ There does not appear to be any agreement about what part, if any, of Levi's process may be called analogical reasoning.

Some critics of analogical reasoning suggest that there is an analogy in the first step but that it has no further work to do after the initial observation, whereas those who defend analogical reasoning argue that the analogy retains its force if the observed similarity is relevant to the further similarity that is in question.⁴ Schauer argues that reasoning from precedent requires an initial determination of relevant similarity, but that this is not analogical reasoning.⁵ Hunter argues that analogical reasoning is fact-based, and does not involve the second step — that is, it does not require the generalisation of a rule.⁶ Schauer believes that analogical reasoning enables us to construct generalisations that illuminate comparisons.⁷ Brewer suggests that analogical argument encompasses any argument that relies on relevant similarity to support a conclusion from a set of premises.⁸

(Cambridge University Press, 2008); John Farrar, 'Reasoning by Analogy in the Law' (2009) 9 *The Judicial Review* 309; Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, 2009).

² McCormick, above n 1, 277; Weinreb, above n 1, 92; see also Marilyn Warren, 'The Obligation to Communicate: The Interaction between Language and the Law' (2010) 15 *Deakin Law Review* 117, 128–9.

³ Edward Levi, *An Introduction to Legal Reasoning* (University of Chicago Press, 1948) 2.

⁴ See, eg, discussion by Weinreb, above n 1, 27–32; Brewer, above n 1, 951; Posner, *How Judges Think*, above n 1, 181.

⁵ Frederick Schauer, 'Precedent and Analogy' (2008) 3 *Perspectives on Psychological Science* 454.

⁶ Hunter, above n 1, 1208, 1251–2. However, while he says no generalisation is required for fact based analogy, at 1221 he uses such classes as 'hotels' and 'ferries' to illustrate his proposed model of analogy.

⁷ Schauer, 'Precedent and Analogy', above n 5, 456–7.

⁸ Brewer, above n 1, 950–1.

A reviewer of Schauer's book, *Thinking Like a Lawyer*, queries where this debate leaves lawyers in legal practice.⁹ As a practising lawyer, the writer of this article suggests that legal practice has gone on largely untroubled by the theoretical controversy, and believes that experience in the field of commercial (or non-litigious) legal practice can usefully inform the debate. This article also suggests that recent research into adaptations of literature to the screen, in particular the role of fidelity, similarity and difference in reading intertextually situated adaptations, can inform our understanding of legal reasoning and illuminate current controversies.

II FIDELITY TO SOURCE IN LAW AND LITERATURE

What can a study of adaptations of literature to film tell us about legal reasoning? This article will use Levi's three-step process to show how the process of reading intertextually situated adaptations can contribute to the understanding of legal reasoning.

The role of adaptation in the law should be obvious, since judges adapt and revise transmitted law; this has long been recognised, for example by Gadamer, MacCormick and Posner.¹⁰ Similarly, it seems beyond doubt that the law is inherently intertextual (that is, a particular text such as a judicial decision cannot be interpreted without regard to its relationship to other texts).¹¹ Yet the implications of these observations do not appear to have been fully explored in the debate about legal reasoning.

'Fidelity' is a much debated subject in adaptation studies. However, there are few references to 'fidelity' in the discourse on legal reasoning. The word is used, for example, by Ray Finkelstein to highlight the tension in the common law system between 'fidelity to precedent' and the creative role of the judge in interpreting and applying law appropriately to the circumstances of the case.¹² In the field of literary adaptations, 'fidelity to source' is generally regarded as unhelpful and inadequate to explain an adaptation. For many years the favoured approach was to consider an adaptation as a translation, or

⁹ See Irene Baghoomians, 'Book Review: Thinking Like a Lawyer by Frederick Schauer' (2009) 31 *Sydney Law Review* 299; see also Farrar, above n 1.

¹⁰ Hans-Georg Gadamer, *Truth and Method* (Continuum, 1997) 328; MacCormick, above n 1, 157; Richard Posner, *Law and Literature* (Harvard University Press, 2009) 320, 376.

¹¹ Peter Brooks, 'Literature as Law's Other' (2010) 22 *Yale Journal of Law & Humanities* 360.

¹² Justice Ray Finkelstein, 'Decision-Making in a Vacuum?' (2003) 29 *Monash University Law Review* 11, 17 n 21. See also Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 158–9. The expression 'fidelity to precedent' is also used in Caleb Nelson, 'Stare Decisis and Demonstrably Erroneous Precedents' (2001) 84 *Virginia Law Review* 1, 52.

transposition, of the literary source into another medium, which requires a search for ‘cinematic equivalents’, and to distinguish this from a ‘revision’.¹³ This approach treats adaptation as a vector resulting from the forces of (A) transposition and (B) revision respectively, as shown in Figure 1 below.

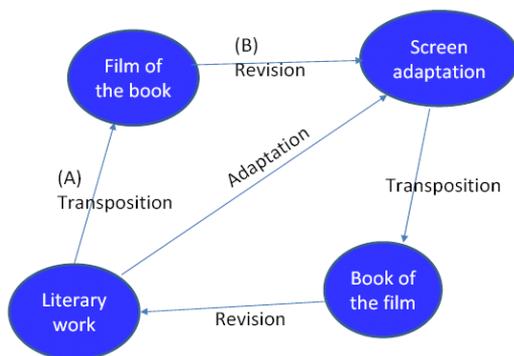


Figure 1

The author’s research suggests that transposition and revision cannot be separated because it is impossible to determine ‘equivalence’, but ‘differences’ in adaptation can nevertheless be observed and, accordingly, ‘difference’ is a more reliable comparator.¹⁴ In law, fidelity to source is generally regarded as a desirable constraint.¹⁵ This entails a search for ‘relevant similarity’,¹⁶ a concept that needs further examination.

The prevalent concern in adaptation studies with fidelity to source, and cinematic equivalence, has tended to mask the effect of difference. It can be shown that similarity and difference are not mutually exclusive and that reading an adaptation informed by differences between source texts, and other texts in an intertextual cluster, can undermine received interpretations and

¹³ See discussion in George Raitt, ‘Still Lusting after Fidelity?’ (2007) 38(1) *Literature/Film Quarterly* 47.

¹⁴ George Raitt, ‘Hidden Differences: New Meanings in Adaptations of Literature to the Screen’ (2010) 12 *Double Dialogues* <http://www.doubledialogues.com/issue_twelve/Raitt.html>.

¹⁵ Posner, *How Judges Think*, above n 1, 212; Posner, *Law and Literature*, above n 10, 274, 315–6; Hunter, above n 1, 1211 emphasises that ‘similarity-matching processes ... introduce a constraint upon human thinking’.

¹⁶ Brewer, above n 1, 933; Weinreb, above n 1, 32–3. MacCormick, above n 1, 44, speaks of ‘relevant likeness’.

views of the world implicit in each.¹⁷ These ideas can be applied to the interpretation of legal texts such as precedents, and to legal reasoning, where similarity and difference also tend to be regarded as mutually exclusive.¹⁸

MacCormick argues that legal precedents could not be taken to be absolutely binding unless there were a strict requirement that the same circumstances apply (which is impossible).¹⁹ Because there will always be differences in the facts of cases, Schauer suggests that the doctrine of precedent cannot be founded on the objective to treat like cases alike.²⁰ Curiously, these considerations led Schauer to propose a strict precedential system and MacCormick to propose on the other hand that precedents should be regarded as persuasive rather than absolutely binding.²¹ Schauer suggests that a judge does not even have to think about the merits of a precedent because it binds regardless of its merits, and he derives from this the proposition that the judge faced with such a precedent does not have to make an initial determination of relevant similarity.²²

Judges may legitimately decline to follow a precedent if the precedent decision can be distinguished. However, it appears to be accepted that the liberty to distinguish precedents is undesirable because it can be misused and so creates uncertainty. A common objection is that differences between sets of facts are too many and too difficult to identify, for distinctions to be usefully made.²³ Alexander argues that the liberty to distinguish precedents gives judges undesirable power to amend the precedent rule.²⁴ Posner argues that ‘distinguishing a precedent is a useful pragmatic tool when it is not merely a euphemism for overruling’.²⁵ Posner suggests that the focus on ‘relevant similarity’ obscures differences that would animate consideration of policy issues.²⁶ It seems that theories of legal reasoning are preoccupied with fidelity

¹⁷ See further discussion in Raitt, ‘Still Lusting after Fidelity?’, above n 13; Raitt, ‘Hidden Differences’, above n 14.

¹⁸ For example, Farrar, above n 1, 324–5 describes reasoning by analogy as ‘the mirror image of distinguishing’.

¹⁹ MacCormick, above n 1, 148.

²⁰ Schauer, *Thinking Like a Lawyer*, above n 1, 47.

²¹ MacCormick, above n 1, 154.

²² Schauer, ‘Precedent and Analogy’, above n 5, 454.

²³ Weinreb, above n 1, 123; Larry Alexander, ‘Precedent’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2010) 499; Sunstein, above n 1, 741.

²⁴ Alexander, above n 23, 496–7.

²⁵ Posner, *How Judges Think*, above n 1, 184.

²⁶ Posner, *Law and Literature*, above n 10, 186.

to precedent and this discourages theorists from considering the role and implications of difference in legal reasoning.

While there does not seem to be any agreement on the answer, there is broad agreement that the key question about similarity and difference in legal reasoning is: What guides the selection of some among many points of similarity, despite many differences?²⁷ Sunstein concedes that the concept of ‘relevant similarity’ appears to be problematic and indeterminate.²⁸ Other writers such as Hunter, Farrar, Finkelstein, MacCormick, and Calleros acknowledge that reason alone cannot guide selection, or the weighing up of opposing factors, and that this requires a value judgment.²⁹ Morawetz states that ‘interpretative choices’ in the law can ‘expose the potential embrace of moral strictures’.³⁰ Alexander and Sherwin argue that judges in reality make moral decisions that are not constrained by legal principles or analogical reasoning (though judges purport to apply legal principles and reasoning).³¹ The interpretative strategies suggested in this article offer a way of interrogating these underlying factors. Experience suggests that competing policies and values are not always evident in judgments, which typically explain the outcome having regard to precedent.³² It is suggested here that the outcomes reflect the judges’ view of the world, and that comparative reading informed by differences can illuminate this more effectively than, for example, research into the political flavour of the government that appointed the judges.³³

The terms ‘world view’ and ‘view of the world’ are used in this article to refer to any view about how the world is or should be. This concept embraces variously described underlying factors such as ‘value judgments’ and ‘policy considerations’. The key word is ‘view’, indicating that we are dealing with constructs. It is suggested that any view about how the world ‘is’ carries with it a view about how the world ‘should be’. It is suggested here that adaptation alters the relationship between views about how the world is and should be. In the context of adaptation studies, it is shown that reading an intertextually

²⁷ See for example Weinreb, above n 1, 123; Hunter, above n 1, 1214; MacCormick, above n 1, 43; Schauer, above n 1, 95–6.

²⁸ See Sunstein, above n 1, 774.

²⁹ Hunter, above n 1, 1225–6; Farrar, above n 1, 310; Finkelstein, above n 12, 18; MacCormick, above n 1, 277; Alexander, above n 23, 499; Charles Calleros, ‘Introducing Civil Law Students to Common Law Legal Method through Contract Law’ (2011) 60 *Journal of Legal Education* 641, 649.

³⁰ Thomas Morawetz, ‘Law and Literature’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2010) 451.

³¹ Alexander and Sherwin, above n 1, 103–4.

³² Finkelstein, above n 12, 21.

³³ See, eg, Posner, *Law and Literature*, above n 10, 19–29.

situated adaptation informed by differences between source and other texts can illuminate and undermine received interpretations of a text and embedded views of the world.³⁴ This article argues that this method of reading should be capable of application in the legal context with corresponding results. To develop that argument it is desirable to discuss some aspects of adaptation and intertextuality in more detail.

III ADAPTATION AND INTERTEXTUALITY

Comparative reading of a screen adaptation and literary source has been criticised on the grounds that reading the two in isolation often privileges the literary source, and is considered inadequate to explain and interpret the adaptation.³⁵ It is often suggested that an adaptation must be interpreted having regard to other works in the intertextual field.³⁶ It is said that ‘adaptation studies seek to understand not individual texts, but rather the relationship between texts’,³⁷ and adaptation invites intertextual reading practices.

At the same time, approaches to film adaptation which emphasise difference have tended to be regarded as the opposite of approaches which emphasise similarity (that is, which treat an adaptation as a translation, or transposition,

³⁴ See George Raitt, ‘Hidden Differences’, above n 14; George Raitt, ‘*Lost in Austen*: Screen adaptation in a post-feminist world’ (2012) 40 *Literature/Film Quarterly* 127.

³⁵ Linda Hutcheon, *A Theory of Adaptation* (Routledge, 2006) xiii; Sarah Cardwell, ‘Adaptation Studies Revisited: Purposes, Perspectives, and Inspiration’ in James Welsh and Peter Lev (eds), *The Literature/Film Reader: Issues of Adaptation* (Scarecrow Press, 2007) 51, 52; Thomas Leitch, ‘How to Teach Film Adaptations, and Why’ in Dennis Cutchins, Laurence Raw and James Welsh (eds), *The Pedagogy of Adaptation* (Scarecrow Press, 2010) 1. See also Deborah Cartmell and Imelda Whelehan, *Screen Adaptation: Impure Cinema* (Palgrave Macmillan, 2010).

³⁶ See, eg, Robert Stam, ‘Introduction: The Theory and Practice of Adaptation’ in Robert Stam and Alessandra Raengo (eds), *Literature and Film* (Blackwell Publishing, 2005) 45; Thomas Leitch, *Film Adaptation and its Discontents: From *Gone With the Wind* to *The Passion of Christ** (The Johns Hopkins University Press, 2007) 120–3.

³⁷ Cutchins et al, above n 35, xii; see also Phyllis Frus, ‘The Figure in the Landscape: *Capote* and *Infamous*’ (2008) 36 *Journal of Popular Film & Television* 52, 57. Culler points out that the original use of the term ‘intertextuality’ referred not to relations between individual texts but to the participation of a text in the ‘discursive space of a culture’: Jonathan Culler, *The Pursuit of Signs* (Routledge, 2001) 114. In Roland Barthes’ terminology, such a text is a ‘methodological field’ rather than a book: Roland Barthes, *Image Music Text* (Hill and Wang, 1977) 157. See further Graham Allen, *Intertextuality* (Routledge, 2000). This article will depart from Barthes’ terminology and use the term ‘text’ to refer to any particular literary or film work (or judicial opinion).

of a literary text into screen media).³⁸ This view persists in recent discourse in the field which advocates rejecting the transposition approach,³⁹ advocating instead an approach based on difference rather than similarity.⁴⁰

Similarity and difference are not mutually exclusive and one may rehabilitate the study of difference without resorting to ideas of fidelity. Further, difference may be observed even where there is sameness or equivalence.⁴¹ The reason for this is simply that the criteria of comparison are many and varied so that sameness on some criteria is consistent with difference on others. This can be demonstrated by comparing, for example, the lemons in a basket of lemons, all of which are superficially ‘the same’ (or in legal terms, ‘fungible’).

The lemons of course are all the same if you want to pulp them, but concurrently they are different sizes, shapes, weights, colours, textures; they have different surface blemishes and so forth — differences which might become relevant if you want to create a visual display or grade them for retail sale. We choose criteria of comparison according to our purposes.

Lamarque uses the term ‘identity conditions’ in the context of comparing a poem with a hypothetical prose paraphrase (that is, an adaptation across literary forms).⁴² He concludes that sameness depends upon your chosen criteria of comparison (which he calls ‘the interests of the questioner’), so there is no absolute answer to the question whether two or more things are the same.⁴³ The terms ‘sameness’ and ‘equivalence’ are used in the discourse on adaptation and also in the discourse on legal reasoning (along with the corresponding terms ‘similarity’ and ‘relevant similarity’).⁴⁴

There are significant implications from the conclusion that there is no absolute answer to the question whether ‘similarity’ or ‘relevant similarity’ is determinable. The first is that adaptation is a vector of forces which cannot be separated into translation, or transposition, on the one hand and revision on

³⁸ James Naremore, ‘Introduction’ in James Naremore (ed), *Film Adaptation* (Rutgers, 2000) 1, 7–8.

³⁹ Cutchins et al, above n 35, xiii.

⁴⁰ Christa Albrecht-Crane and Dennis Cutchins, ‘Introduction: New Beginnings for Adaptation Studies’ in Christa Albrecht-Crane and Dennis Cutchins (eds), *Adaptation Studies: New Approaches* (Fairleigh Dickinson University Press, 2010) 11, 16.

⁴¹ See Raitt, ‘Still Lusting after Fidelity?’, above n 13.

⁴² Peter Lamarque, ‘The Elusiveness of Poetic Meaning’ (2009) XXII *Ratio* (new series) 398, 409–10.

⁴³ *Ibid.*

⁴⁴ Schauer, *Thinking Like a Lawyer*, above n 1, 91.

the other. The second is that it is possible, nevertheless, to identify differences.

The approach followed in this article provides the conceptual underpinning to rehabilitate difference without framing it as the opposite of similarity or framing an approach based on difference as the opposite of a 'fidelity' approach. Gilles Deleuze, in his seminal study of the philosophy of difference, suggests that, by means of this opposition, sameness 'crucifies' difference.⁴⁵ By privileging fidelity to source, or similarity, in legal reasoning, the effect is likewise to neglect difference.

Leitch argues that the attempt to impose order on 'what would otherwise be an endless flow of intertextuality' by, for example, giving primacy to a source text over other texts in the intertextual field, in fact only creates an illusion of order.⁴⁶ In the present author's view there is nothing to fear, and no impending chaos, in having regard to interrelations of difference (in either the literary or legal context). An individual text is distinguished by what it is, and also by how it differs from other texts. Sunstein quotes Bishop Butler: 'Everything is what it is, and not another thing.'⁴⁷ This could be adapted as: 'Everything is what it is, and differs from every other thing.'

In comparative literary studies it is taken for granted that the juxtaposition of two texts leads to the illumination of both.⁴⁸ Bazin comes to a similar conclusion with respect to adaptation of literature to film when he says that the effect of juxtaposing a literary source and the film adaptation is to 'reaffirm their differences'.⁴⁹ A further example of the role of difference in interpretation is Bakhtin's dialogic theory of the 'utterance', which always responds to a previous utterance, and is regarded as 'non-reiterative',⁵⁰ that is, it cannot be repeated without giving rise to differences. As Warren observes, '[e]very true use of language is an attempt to explore a new meaning, a new idea, or a new perspective on an old idea or concept'.⁵¹ It can be argued that any text is intertextually situated; it sits in an interrelationship of difference

⁴⁵ Gilles Deleuze, *Difference and Repetition* (Continuum, 2004) 174.

⁴⁶ Thomas Leitch, 'The Texts behind *The Killers*' in Barton Palmer (ed), *Twentieth-Century American Fiction on Screen* (Cambridge University Press, 2007) 41.

⁴⁷ Sunstein, above n 1, 757.

⁴⁸ Anna Balakian, 'Theorising Comparison: The Pyramid of Similitude and Difference' (1995) 69 *World Literature Today* 263, 264.

⁴⁹ André Bazin, *What is Cinema?* (University of California Press, 1971) 136.

⁵⁰ Tzvetan Todorov, *Mikhail Bakhtin: The Dialogical Principle* (University of Minnesota Press, 1984) 45; Valentin Voloshinov, *Marxism and the Philosophy of Language* (Seminar Press, 1973) 99; see also Allen, above n 37, 27–8.

⁵¹ Warren, above n 2, 123.

with other texts which may inform reading. This interplay between intertextually situated texts can be regarded as a dialogue mediated by difference. As noted above, judicial decisions are inherently intertextual, which suggests that legal reasoning may be illuminated by having regard to such a dialogic relationship.

As noted above, some approaches to adaptation studies emphasise relations of connection — they focus on traces and degrees of sameness. Iampolski develops an intertextual approach to film adaptation that is based on relations of connection between the literary source and the film adaptation.⁵² Hunter's proposed process of 'similarity matching' or 'mapping' in legal reasoning seems also to be based on relations of bilateral connection between source and target cases.⁵³ These approaches treat the adaptation and source in apparent isolation from other texts whereas this article suggests that when we approach an intertextually situated text (whether a literary work or film adaptation or a judicial opinion), our interpretation of the text can be usefully informed by relations of difference between that and other texts in the intertextual field and by switching between new interpretations made possible by differences between those texts.⁵⁴

Hutcheon suggests that, in experiencing a work as an adaptation, one 'oscillates' between the adaptation and its source.⁵⁵ Hutcheon also describes this as 'flipping back and forth',⁵⁶ which leads Leitch to propose more generally:

Watching or reading an adaptation as an adaptation invites audience members to test their assumptions, not only about familiar texts but about the ideas of themselves, others, and the world those texts project against the new ideas fostered by the adaptation and the new reading strategies it encourages.⁵⁷

⁵² Mikhail Iampolski, *The Memory of Tiresias: Intertextuality and Film* (University of California Press, 1998).

⁵³ Hunter, above n 1, 1211. MacCormick, above n 1, 211 remarks that Hunter's idea about the closeness of analogies could be useful when competing analogies arise. However, for reasons explained above, the concept of 'closeness' is problematic.

⁵⁴ George Raitt, 'Looking For a Sign From Home: Fay Zwicky and Gerhard Marcks' *Der Ruf* (2007) 52 *Westery* 131, 134. The term 'switching' is taken from the author's earlier work in the field of ekphrasis (poetry responding to visual art), where it is shown that switching between new interpretations made possible by differences informs comparative reading of an ekphrastic poem and precursor work of visual art.

⁵⁵ Hutcheon, above n 35, xv, 121.

⁵⁶ *Ibid* 69.

⁵⁷ Thomas Leitch, 'Adaptation, the Genre' (2008) 1 *Adaptation* 106, 116.

It could be said that screen adaptation invites reading together with the source and other texts in the intertextual field. It is suggested that switching between new interpretations made possible by differences is more than an ambivalent flipping back and forth between opposed interpretations; rather it is a repeated process of switching between multiple texts in the intertextual field, and it is this process that reveals new interpretations that undermine, for example, received interpretations and implicit views of the world.

Much of the research on literary adaptation concerns fiction. However, research into adaptation of non-fiction narratives supports an argument that the ideas proposed above can be applied to legal texts.⁵⁸ It can be argued that selection and foregrounding, both in the case of creating a non-fiction narrative, and equally in adapting such a narrative to the screen, produces a representation that can reasonably be expected to give rise to differences from the source.⁵⁹ Turning back to the law, we can see that legal interpretation also involves elements of selection and reconstruction, as MacCormick acknowledges.⁶⁰

The method of comparative reading proposed in this article, informed as it is by differences and switching, is a new approach to the problem of reading an adaptation *as an adaptation* while acknowledging its situation in the intertextual field. The approach can be applied equally to a single source, or to works in an intertextual cluster, to show in each case how differences and switching affect the interpretation of an adaptation informed by such texts. It is recognised here that the relationship between an adaptation and a single source text is inadequate to elucidate an adaptation. This recognition is apposite to legal reasoning from precedent, as some studies referred to in this article oversimplify the analysis to consider only the relation between a judgment and a single precedent, or perhaps two precedents, whereas most cases in legal practice raise multiple issues that require consideration of many precedents, some of which inevitably conflict in their potential application with the case at hand. Further, a judgment is rarely a single coherent opinion. More often there is divergence if not dissent among the judges in a single case, who often include one or two hierarchies of appellate judges in addition to the judge at first instance.

⁵⁸ George Raitt, 'Adaptation and Self-Undermining Postmodern Views of the World' (Paper presented at the Film-Philosophy Conference, Liverpool, July 2011), organised by *Film-Philosophy* and Liverpool John Moores University, abstract available at <<http://www.film-philosophy.com/conference/index.php/conf/2011/paper/view/26>>.

⁵⁹ Dan Zahavi, 'Self and Other: The Limits of Narrative Understanding' in Daniel Hutto (ed), *Narrative and Understanding Persons* (Cambridge University Press, 2007) 182–3. See also Rocco Versace, *This Book Contains Graphic Language: Comics as Literature* (Continuum, 2007) 36.

⁶⁰ MacCormick, above n 1, 29.

The present author's research on adaptation concentrates on the way the source and the adaptation each constructs a world and how subtle differences between them undermine views of the world. In literary and visual art, it is accepted that the work of art is a representation or construct, a 'view of the world'.⁶¹ Lamarque describes the literary story world as 'a world of artifice and structure'.⁶² It is suggested here that legal argument and legal judgments also create a world of artifice and structure. This statement is not intended to be derogatory; it simply suggests that lawyers and judges each, as a group, construct a matrix of facts and a view of how the world should be (that is, legal rules) that, they consider, determine the outcome of the case.⁶³ Applying this kind of comparative reading to legal texts provides an opportunity to understand the views of the world that the texts implicitly construct, and such a reading, informed by differences and switching, should enable us to interrogate those views.

IV LEGAL REASONING REVISITED

Let us consider the two examples of analogical reasoning from the practical world discussed by Weinreb.⁶⁴ Mary spills cranberry juice on a table cloth and a friend suggests pouring salt on it because that works with red wine. Charlie cannot start his lawnmower and decides to let it stand for a while because that sometimes works when his car does not start. These examples show persons forming hypotheses that can be tested empirically. In each case the hypothesis will be tested and will either succeed or fail. However, in these examples even the case of success does not amount to more than an observation of an effect without an understanding of the cause or an ability to predict whether the procedure will succeed in future. For example, further empirical testing with a control might show that the result would have been achieved without the hypothesised procedure, or that the procedure only succeeds when other critical factors are present. These examples show us that empirical theory cannot prove itself; that is, abstract reasoning about the physical world alone is not enough to provide an understanding of the world and to predict whether a procedure will give the same results in future.

⁶¹ Svetlana Alpers, 'Interpretation without Representation, or the Viewing of Las Meninas' (1983) 1 *Representations* 31, 36; A C Bradley, 'Poetry for Poetry's Sake' in *Oxford Lectures on Poetry* (Atlantic Publishers and Distributors, 1909) 5. See also Barbara Bolt, *Art Beyond Representation: The Performative Power of the Image* (I B Tauris & Co, 2004) 16.

⁶² Peter Lamarque, 'On the Distance between Literary Narratives and Real-Life Narratives' in Daniel Hutto (ed), *Narrative and Understanding Persons* (Cambridge University Press, 2007) 132.

⁶³ See, eg, Finkelstein, above n 12, 14; McCormick, above n 1, 29. Hunter, above n 1, 1217 notes that similarity is not a fixed concept but is constructed depending on the context.

⁶⁴ Weinreb, above n 1, 68.

These examples do not address the possibility of searching the body of knowledge to find out whether there is a known answer,⁶⁵ or the possibility of being faced with multiple conflicting analogies, which is more like the situation usually encountered in the law. For example, United States courts have had to decide whether a paddle steamer is more like a hotel on the one hand or a railroad on the other in determining the liability of the proprietor for a passenger's belongings.⁶⁶ They have likewise had to decide whether a mobile home is more like a residence than a motor vehicle in determining whether a search warrant is required for police officers to enter without the consent of the owner.⁶⁷ In these examples the conflicting analogies are supported by precedents, and so the court deciding the case is faced not merely with conflicting analogies but conflicting precedents. In this context we may reconsider Schauer's attempt to distinguish between analogical reasoning and reasoning from precedent: he proposes that one selects a suitable analogy in order to support an argument, so in reality analogy is merely a persuasive device. In contrast, a precedent determines the outcome of the argument and must be followed by the court deciding the subsequent case.⁶⁸ This distinction does not stand up in practice where conflicting precedents are ubiquitous.

This aspect of the legal context also confronts us when we come to the question of 'relevant similarity'. Schauer observes that the precedential system is rule-based rather than fact-based,⁶⁹ and accordingly '[i]t is the legal rule that tells us when two things are similar'.⁷⁰ MacCormick suggests that 'there is a need for formulation of some principle that captures what the relevant similarity is'.⁷¹ This raises the question of how we choose between conflicting precedents or rules because after the rule has been chosen it is self-justifying to suggest that the rule determines 'relevant similarity'. Rules have purposes and it is more likely to be these purposes than the bare rule which determine relevance. For example, why *should* a hotel proprietor be liable for guests' belongings, but not a railroad proprietor?

Sperber and Wilson recognise that 'relevance' tends to be intuitive and they seek to develop a theoretical concept of relevance that will explain and predict

⁶⁵ Weinreb, above n 1, 73.

⁶⁶ See Weinreb, above n 1, 41–5.

⁶⁷ See Calleros, above n 29, 647–50.

⁶⁸ Schauer, *Thinking Like a Lawyer*, above n 1, 87–8.

⁶⁹ *Ibid* 50.

⁷⁰ *Ibid* 52.

⁷¹ MacCormick, above n 1, 210.

such intuitions.⁷² They define ‘relevance’ as a relation between a set of assumptions and the context in which information is processed.⁷³ This article suggests that the concept of ‘world view’ captures the set of assumptions and interests of the judge deciding the case and that comparative reading informed by differences and switching should enable us to interrogate world views that are implicit in judicial determinations.

Returning to Weinreb’s examples of reasoning in the practical world, it can be seen that they do not raise any of the normative issues or potential value judgments which are typically encountered in the law. Weinreb suggests that reasoning in the judicial context differs from reasoning in the practical world in only one significant respect: judicial reasoning cannot be tested because it determines the outcome.⁷⁴ That is, a judicial determination is not a proof, and cannot be proved.⁷⁵ It is suggested here, however, that judicial reasoning can be *tested* before the event and that this is desirable because the court is not simply disposing of the case before it — the court is adding to the common law rules that will determine future cases.⁷⁶ We know that judges can and do consider the consequences of their decisions before they make them.⁷⁷ It is not suggested that judges are guided solely by pragmatism to the exclusion of all else, but that this is one means by which a proposed ruling can be tested, albeit by ‘thought experiment’ rather than empirical test. Sunstein acknowledges that ‘analogical reasoning can go wrong when one case is said to be analogous to another on the basis of a unifying principle without having been tested against other possibilities’.⁷⁸ Weinreb discusses Brewer’s suggestion that legal reasoning involves testing proposed rules; in Weinreb’s words, this happens by ‘working back and forth’.⁷⁹ It is suggested here that switching between alternative interpretations arising from differences between the case at hand, precedents and other possibilities is part of the testing process in legal reasoning.⁸⁰

⁷² Dan Sperber and Deirdre Wilson, *Relevance: Communication and Cognition* (Blackwell, 1995) 125.

⁷³ *Ibid* 123; Hunter, above n 1, 1217 notes that similarity is constructed depending on context.

⁷⁴ Weinreb, above n 1, 76–7.

⁷⁵ *Ibid* 92.

⁷⁶ See, eg, Calleros, above n 29, 642–3.

⁷⁷ Posner, *How Judges Think*, above n 1, 40; see also Finkelstein, above n 12, 19.

⁷⁸ Sunstein, above n 1, 757.

⁷⁹ Weinreb, above n 1, 25–6; Brewer, above n 1, 962.

⁸⁰ In fact, as pointed out in Tony Blackshield, ‘Precedent’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2007), there will be a range of legal materials in addition to formally binding precedents that courts will consider.

It is useful to briefly consider the way in which commercial (that is non-litigious) legal practice can inform the understanding of legal reasoning. Traditionally, it has been assumed that to think like a lawyer requires an ability to predict what a judge would do. For example, MacCormick argues that '[k]nowing the law is knowing how to predict what the authoritative decision makers will decide'.⁸¹ However, knowing the law is not an end in itself; the task of the commercial lawyer is to advise the client what he or she can do within the law, which requires the lawyer to test a wider range of possibilities than a judge. As Flood observes, the role of commercial lawyers is to manage uncertainty for themselves and their clients.⁸² However, Flood goes on to suggest that commercial lawyers do not practise law as such because in a fluid situation such as a business negotiation, the lawyer must rely on 'experiential skills' rather than legal knowledge. It is submitted that this is incorrect, and that the way commercial lawyers and judges identify and test possibilities is different only in degree rather than in kind.

VII CONCLUSION

This article set out to examine the role of similarity and difference in legal reasoning informed by insights from studies of adaptation and intertextuality. By privileging fidelity to precedent the discourse on legal reasoning has (like the discourse on literary adaptation) tended to neglect or obscure difference. The indeterminacy which has been attributed to analogical reasoning is in fact properly attributed to 'similarity' and 'relevant similarity'. We should rehabilitate comparative reading in the intertextual field (that is, we should promote the act of 'distinguishing' differences) as a useful method in legal reasoning.

Judges test possibilities in a pragmatic way to a greater extent than might otherwise be thought. Comparative reading informed by differences, and the switching between interpretations that is made possible by differences, has a role in the process of testing possible decisions before they are made. These insights may assist to increase the appreciation of commercial legal practice and the contribution it can make to our understanding of legal reasoning.

Levi's three-step process has been followed in this article: first, it has been observed that literary adaptations and judicial decisions are both intertextually situated adaptations; second, some universal propositions concerning the role of fidelity, similarity and difference in the relationship between adaptation,

⁸¹ MacCormick, above n 1, 272.

⁸² John Flood, 'Doing Business: The Management of Uncertainty in Lawyers' Work' (1991) 25 *Law and Society Review* 41, 42–3.

source and other intertexts have been derived by a process of induction; and third, such propositions have been applied, by a process of deduction, to legal reasoning. The proposed method of comparative reading should enable us to interrogate underlying views of the world that might not otherwise be evident in judicial reasoning.

This process of reasoning has force because the analysis of similarity and difference can be seen as having universal validity. However, further empirical research is required to demonstrate that the method of reading provides insights into judicial reasoning by illuminating underlying world views. This article will, it is hoped, suggest to the reader many possibilities for further comparative research. For example, contemporary appellate decisions could be compared with the respective lower court decisions to reveal how judges select and foreground facts and how they adapt and revise transmitted law.