

SEVEN

Teaching Lawyering

One hallmark of contemporary U.S. legal education is its professional emphasis. This focus contrasts with that of the legal education of American universities in the early years of the nineteenth century, or earlier in English universities. Those schools expected the study of law to be an intellectual enterprise, whose most practical benefit was to prepare students to become civic leaders, and they left to the practicing bar the niceties of instructing its apprentices in the arts of practice.

The universities' emphases on the intellectual enterprise of the law persists in better law schools, but it is tempered with the ideal that the student of the common law should be prepared with the basic skills necessary to practice law. These include, most importantly, that nearly mystical skill of "thinking like a lawyer," or understanding the methods of common law legal analysis, couched in certain limits, such as the relevance or irrelevance of specific evidence in a given analysis. They also include most specific tools of the workaday lawyer, such as an understanding of the tools of written pleadings and arguments, as well as skills in oral argument and negotiation. In the last quarter of the end of the twentieth century, law schools began placing a greater emphasis on two forms of practice skills, the ability to properly counsel a client and a sense of professional ethics and conduct.

The Mind of the Lawyer

Perhaps no element of thinking like a common law lawyer is as important as the skill of "thinking like a lawyer," the essence of which is to understand the interplay between rules and facts as indeterminate, multivariate, and contingent. Each of these three aspects of rules is important, and lawyers in the common law tradition understand each instinctively, if rarely by these terms.

The outcome of rules applied to facts is indeterminate because of the problems of categorization and definition. Both suffer from vagueness, which to some extent affects the definition of all words, not merely the words in rules. It is imperative your students understand these problems, which were central both to ancient and to twentieth-century thought, associated with both Plato and Wittgenstein. You need not dig so deeply though, as it is illustrated in many ways. Since at least Cicero's time, lawyers have realized the problem of determining how few hairs must a bald man have to be bald. If the average number of hairs for a man is 125,000, would a rule applying to bald men apply

to a man with 100 hairs? 1000? 50,000? For more fun in this area, see Jeremy Waldron, *Void for Vagueness: Vagueness in Law and Language: Some Philosophical Issues*, 82 Calif. L. Rev. 509, 517 (1994), in which Waldron considers Michael Dummett's thoughts on a variation of the bald guy problem, according to which all near answers collapse into the answers they are near: a guy with one more hair than a bald guy is, well, still bald.

The question of vagueness is important to your students, and we think you need to explain it to them, especially as we are in the business of helping them present apparent solutions. This aspect of vagueness is nicely illustrated in Melville's famous ending to his moral classic *Billy Budd*, when the narrator is considering whether Captain Vere has gone insane, and the question is framed in a context quite useful to us in framing legal conclusions:

Who in the rainbow can draw the line where the violet tint ends and the orange tint begins? Distinctly we see the difference of the colors, but where exactly does the one first blindingly enter into the other? So with sanity and insanity. In pronounced cases there is no question about them. But in some supposed cases, in various degrees supposedly less pronounced, to draw the exact line of demarkation few will undertake though for a fee some professional experts will. There is nothing namable but that some men will undertake to do it for pay.¹

Laws, even the simplest statutes, require lawyers constantly to divide the red from the orange. We offer a short example in the book in Appendix Three, at p.643. You can use these illustrations of the classic statement that thinking like a lawyer is to reject thinking of all questions in black and white and to think in shades of grey.

The rules are rarely so easy to articulate as even the dog-bite statute at issue in Appendix 3, and articulating a single "rule" usually involves sorting the many possible rules from a large assortment of possible sources. This is the problem in synthesizing cases, or cases and statutes, or cases, statutes, and rules. We illustrate it in Appendix Two, at p. 639. The difficulty then is that even the simplest rule is unlikely to be determined by a single variable but by many variables, and these variables are not likely to be satisfied by answers of

¹Herman Melville, *Billy Budd, Foretopman*. in —, *SELECTED WRITINGS OF HERMAN MELVILLE: COMPLETE SHORT STORIES* 871 (New York, Modern Library, 1952).

yes or no, but by answers as a matter of degree. How important is A's use of the water in determining A's liability for running B's well dry? The answer cannot be in black or white, but another shade of grey.

Most importantly, the rules of law apply to situations that are utterly contingent upon the facts that can be established in a manner in which legal officials can act upon them. It is not enough to merely identify a fact. The fact must be ascertained sufficiently in evidence of the form needed, which in the case of facts that might be proved at trial can be quite difficult. And, the fact has to be established sufficiently to persuade someone else – perhaps a judge or the entire panel of jurors – to accept it as proven, usually proven to some level of confidence. Each of these conditions can be difficult to estimate, and whether the sum of the conditions can be satisfied is often left to guesswork.

The sum of these conditions of the common law – indeterminacy, multivariancy, and contingency – means that most lawyers make decisions based on a personal instinct defined by their participation in the custom of the legal community. This participation includes reading cases and other writings on the law, or about lawyers or lawmakers. It also includes “practicing law,” a phrase that has a peculiar resonance in the common law tradition.

The effect, too, of this reliance by many common law lawyers on instinct as to how rules apply to fact is that the law is only partly manifest in its writings. Despite the best efforts of reformers across millennia, law, particularly the common law, remains largely unwritten, the *lex non scripta*. Thus, the skills needed to work from the writings are essential, but so too are the skills to interpret those writings and develop the lawyer's instinct.

We have integrated some aspects of these skills into the course. The materials in part one and the appendices are designed to develop critical thinking, and writing skills. Chapters twenty-six and twenty-seven are devoted to the very detailed obligations of pleading and procedure.

The Character of a Lawyer

One other aspect of lawyering is, we believe, of paramount importance, which is the ethical character of the lawyer. While we have not devoted considerable space in this book to the questions of client counseling and professionalism, we invite you to emphasize this problem in chapter nine, discussing *In re Griffiths* and the ability of a foreign lawyer to take an oath to support the U.S. Constitution. We offer an extended note discussing the formal sources from which professional obligations for lawyers arise,

beginning on p. 216. Even so, we are opposed to thinking of these types of question only in a particular class, whether over that chapter or any other.

We believe that the questions of the relationship of the lawyer to the client, the court, the public, the law, and the truth are too important to be limited to a single discussion. Nor do they need to be. The nature of the dialogue allows you to raise questions of both client representation and professional judgment and responsibility in almost every context. We believe that the most important source of such questions is likely to be your own experiences and ideas, and we commend to you the hope that you will embrace this task among the many others of the course.