12-15-2009

The Essence of Lawyering in an Atmosphere of Faith

Kevin J. Worthen

Follow this and additional works at: https://digitalcommons.law.byu.edu/life_law_vol2

Part of the Legal Profession Commons

Recommended Citation
https://digitalcommons.law.byu.edu/life_law_vol2/33

This J. Reuben Clark Law School is brought to you for free and open access by the Life in the Law at BYU Law Digital Commons. It has been accepted for inclusion in Vol. 2: Service & Integrity by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.
This is your first formal meeting as law students. It is my first formal greeting as a dean. All of us may be wondering exactly where we are, where we are headed, and how we got here.

It reminds me somewhat of the fellow who found himself in front of the Pearly Gates. As he started to go in, Peter stopped him and explained that it’s not that easy to get into heaven. “You have to have done something good.”

“Like what?” the man responded.

“For example,” Peter asked, “were you religious in your life? Did you attend church?”

“No,” said the man.

“Well,” Peter asked, “were you generous with your money? Did you give some to the poor?”

“No.”

“Were you a good neighbor? Did you help them?”

“Not really.”

Peter, now a little exasperated, said, “Look, I’d like to help, but you’ve got to work with me. Surely, sometime in your life you did something good for someone. Now think!”

After a moment the man said, “There was this one time when I helped an old lady. I came out of a store and found her surrounded by a dozen Hell’s Angels. They had taken her purse and were shoving her around, taunting and abusing her. I got so mad I threw my bags down, fought through the crowd, and got her purse back. I helped her to her feet and
then went up to the biggest, baddest biker and told him how despicable, cowardly, and mean he was and spat in his face."

"Wow," said Peter, "that really is impressive. When did this happen?"

"Oh, about two minutes ago," replied the man.¹

Things really can change quickly for us.

As I have tried to learn a little about the role of a dean this summer, I discovered that the first dean in a U.S. university was John Collins Warren, who was appointed dean of the Harvard medical school in 1816.²

"His primary charge," you will be pleased to know, was "to be friendly and charitable to students."³ Although the duties of a dean have expanded considerably since that time, I think that initial charge is still in place, and it is as a friend that I want to visit with you today, a friend who can hopefully provide some helpful perspective as we begin these new phases of our lives together.

You are a remarkably diverse group with a wide variety of experiences and backgrounds, as Dean Pullins has indicated. We appreciate the diversity each of you brings to the Law School. That diversity will enrich your law school experience more than you likely anticipate at this point. I wish to focus, however, not on your differences but on the two features that you all have in common: 1) You have all chosen to study law, and 2) you have all chosen to study law at J. Reuben Clark Law School.

There is more to these seemingly obvious common features than may initially appear. Let me start with the first. You have all chosen to study law. But what does it mean to study law? Some of you may anticipate that the study of law will involve a massive mind meld, that in the course of the next three years the faculty will, through some mysterious process, convey to you all the statutes, cases, and other legal rules you need to instantaneously answer any question a client might put to you. While you will certainly memorize a number of legal principles during the next three years, a brief tour of the library should quickly convince you that you are not going to have time to internalize all that material.

Some may believe that the study of law is principally a research exercise, that it consists of learning how to find the information you need in that massive library. Although research instruction will be part of your legal education, it is only part. And, while important, it is not the central part.

Many if not most of you are ahead of me on this point and already anticipate that sooner or later I will trot out the shopworn phrase commonly invoked on occasions such as this and inform you that the study of law ultimately consists of teaching you to "think like a lawyer." That comes closer to the truth, but that phrase involves more than may first appear. Moreover, even a more in-depth understanding of that concept does not completely capture the fullness of the study of law.
But let me start with that concept. What does it mean to think like a lawyer? First, let me clarify a couple of things it does not mean. Contrary to the impression given by the behavior of some lawyers, “[t]hinking like a lawyer does not mean being argumentative and contentious.” As one lawyer noted, “You don’t need three years of law school to learn how to annoy and irritate others.” At the outset, therefore, I implore you not to confuse the untoward actions of some lawyers with the essence of lawyering. While there are times when you need to be zealous in your advocacy, being argumentative and contentious no more makes you a lawyer than shaving your head and wearing Nikes makes you Michael Jordan.

Nor does thinking like a lawyer consist of the ability to use clever rhetoric to take advantage of others. The story is told of a lawyer whose neighbor approached him and asked him how much he charged for his advice. “I charge $200 for answering three questions,” the lawyer responded.

“That’s awfully steep, isn’t it?” the neighbor replied.

“Yes it is,” said the lawyer. “Now what’s your third question?”

A good joke, perhaps, but not good lawyering. Again, don’t mistake the outward trappings for the essence of the matter. Thinking like a lawyer involves much more than merely being clever.

So, just what does thinking like a lawyer involve? The fact that there is no consensus as to the precise meaning of the term despite its constant use in describing what the study of law is all about is telling in and of itself because it indicates how deep and multifaceted the concept is. However, I believe it is possible to provide a good insight into what is at the heart of thinking like a lawyer at this point and that such a glimpse will be helpful as you start the process of studying law.

As the words in the phrase suggest, thinking like a lawyer is primarily—though not exclusively—a mental skill, a way of thinking about things that is different from the ways you may have thought about things in the past. It is an analytical method of thinking that requires keen observation, logical reasoning, and a willingness to study matters in depth. It also involves an ability to explain conclusions and reasoning in a logical way.

At the ceremony celebrating the opening of this law school in 1973, then President Dallin Oaks, described part of the analytical and communicative skills that thinking like a lawyer involves. A person who thinks like a lawyer, he said,

is a student of meaningful differences among apparently similar situations, and meaningful similarities among situations of no apparent connection. A person who is keen at spotting differences or similarities, discarding the unimportant ones, fastening upon the important ones, and being prepared to explain the reasons for their importance, is well along toward thinking like a lawyer.
Because it involves a relatively new way of viewing things, thinking like a lawyer can be a challenge. You will be asked to forget some of the habits you have developed and to develop new ones. As one scholar observed, you will be “expected to learn a new language, a new way of looking at the world, and a new and distinct way of expressing [your] understanding.” That is quite a task—one that can be painful at times. But the results can be exhilarating. Karl Llewellyn expressed the process lyrically with the classic poem “The Bramble Bush.”

There was a man in our town  
and he was wondrous wise;  
he jumped into a bramble bush  
and scratched out both his eyes—  
and when he saw that he was blind,  
with all his might and main  
he jumped into another one  
and scratched them in again.

Elder Oaks was a little more direct when he explained:

Learning to think like a lawyer is rigorous and frustrating. But the objective is worth the effort. The study of law has few equals in disciplining the intellect. Properly conceived and executed, there is nothing mechanical or repetitious about it. It teaches its students a new way to think, and that skill is serviceable beyond the limits of the practice of law.

While learning to think like a lawyer is the core component of the study of law, particularly the first year of study, the true study of law requires development of characteristics other than analytical and communicative skills. It requires an ability to understand and deeply care about the human condition. True legal education involves more than abstract analytical thinking because, at the end of the day, law has an impact well beyond its abstract conception. Law matters in the real world. In fact, law matters a lot in the real world, at both a macro and an individual level. Because law matters a lot, its study cannot be limited to mere mental abstract exercises.

At a macro level, law matters because it ultimately provides the framework for determining and protecting basic rights and obligations in a society. The status and destiny of nations is shaped by how law is created and implemented. It is, in my opinion, not a coincidence that in the founding of the most stable and productive democracy in the world, “[t]wenty-five of the thirty-six signers of the Declaration of Independence, thirty-one of the fifty-five members of the Constitutional Convention, and thirteen of the first sixteen presidents [of the United States] were lawyers.” The political structure on which we depend in the United States is largely attributable to the efforts of lawyers who not only thought deeply about the law but also understood its impact on the human condition.
The impact of law at a macro level extends well beyond political rights. A study by the Inter-American Development Bank in 2000 determined that of the more than $10,000 gap between the per capita income of developed countries and that of Latin American countries, approximately $6,000 was attributable not to demographic differences (such as the age of the population) or geographic differences (such as access to transportation and world markets) but to the fact that the public institutions in Latin America—the institutions in which the law plays itself out—were “less effective, predictable and transparent” than those in the developing countries. In other words, if the legal system in Latin America operated differently, each person in those countries could potentially be $6,000 richer. Law truly matters at a macro level.

Perhaps more important, however, law matters a great deal at an individual level. Because of the ubiquity and complex nature of law in our society, people are required to trust lawyers with their hopes, their dreams, their fortunes, their rights, and sometimes even their lives. How lawyers deal with those precious commodities is of extreme importance to those people. And, as lawyers really learn how to think like lawyers, how important it is that they learn to really care enough about the human condition that they will refine and use those skills to improve others’ lives.

Because law matters a lot, it matters a lot that you have chosen to study law. At the dedication of the Law School building in 1975, President Marion G. Romney, who was not noted for hyperbole, stated that one of the reasons he worked to have a law school established here was that he had “long felt that no branch of learning is more important to an individual or society than law.” Given the eternal perspective of its author, that statement is worth considerable contemplation. I repeat: “No branch of learning is more important to an individual or society than law.”

Because the study of law matters a lot, it also matters a lot how you choose to study it. What you learn here in the next three years—not just the rules of law, not just research skills, and not just how to think like a lawyer, but the entire spectrum of law in both its intellectual and human aspects—will matter a lot to a lot of people. Thus, I urge you to study law with full intensity.

I urge you to study law the way that Domingo Catricura did. Domingo was a student in an Indian law class I team-taught at the University of Chile Law School a decade ago. Domingo was in his mid-50s at the time and was one of about 25 non–law students who, along with 30 law students, attended the class. The non–law students were invited to attend the course because they were leaders in various Mapuche communities, the Mapuches being the largest indigenous group in Chile. The course primarily covered the history of Spanish and Chilean interaction with the indigenous peoples of Chile and the first comprehensive Chilean Indian law, which had been enacted the year before. I provided a comparative per-
spective, contrasting the Chilean experience with that of the United States. As is typical of law classes in a civil law system, the course was highly abstract and theoretical.

Although not a law student and therefore without any hope of obtaining a law degree, Domingo attended the three-hour once-a-week class every week, occasionally making a 9- to 10-hour bus ride from his small native village of Chiuimpilli in southern Chile in order to attend. He was anxious to learn everything he could about law, even that which I attempted to convey about U.S. law in my somewhat rusty Spanish. Although of limited economic means, he purchased a small tape recorder to make sure that he thoroughly understood and remembered everything covered in the class. He also took copious notes, which he frequently reviewed with his two teenage children, who occasionally attended the class with him. He absorbed the information in class and wanted to discuss it after-hours.

For Domingo the theoretical aspects of the law were as important as the practical ones, because he sensed, early on, that in law the former drives the latter. And to him the latter mattered greatly, because he hoped it would help him maintain the cultural integrity of his native village. Thus, Domingo not only read the materials we covered, he reread them, contemplated them, and wrestled with them. Vivid in my memory is the image of Domingo with his tape recorder and notebooks in hand staying after a three-hour lecture in an unheated room in winter following a long day’s travel in order to further discuss the day’s subject.

Domingo, like you, chose to study law. He understood what that meant. I hope that you, like Domingo, soon discover that there is more to your choice to study law than you initially thought and that there is a lifetime of understanding and fulfillment ahead of you if you pursue it the right way.

Let me now turn to the second thing you have in common with one another: your decision to study law at this Law School. This fact may also be more significant than you originally thought—at least I hope it becomes more significant over the ensuing years. A little historical perspective may help initiate that developmental process.

The initial suggestion that law be part of the curriculum at a school sponsored by The Church of Jesus Christ of Latter-day Saints was first made in 1897 when Joseph Whitely, a teacher of civics and public law at the University of Utah, proposed a law course for the Provo branch of what was then the Brigham Young Academy. The proposal went nowhere, because, in the words of former Dean Carl Hawkins, “the time was not propitious” for such an endeavor—in part because the school was in shaky financial condition. I suspect, however, that part of the Church’s reluctance to commit resources to the study of law had something to do with
the suspicion that many early Church leaders shared about lawyers and the impact the study of law would have on those who undertook it.

When, in 1882, a young man named James Henry Moyle approached his stake president, Angus Cannon, and expressed his desire to go east to study law, President Cannon’s reaction was quite telling. According to Moyle’s biographer, President Cannon “brought his fist down on the counter of the office and said, ‘You are going to hell!’” Fortunately for Moyle, Angus’ brother George, who was a member of the First Presidency, did not have the same misgivings, and he arranged for Moyle to meet with John Taylor, who was then president of the Church. When Moyle informed President Taylor of his desire, President Taylor replied that he too was “opposed to any of our young men going away to study law.” It was, he stated, “a dangerous profession.” When President Cannon pointed out that the Church would always have need to employ lawyers, President Taylor eventually relented and agreed that it might be “all right for Moyle to go,” but only after warning him in a blessing that if he did not constantly seek divine guidance in the endeavor, he would “go down and wither away.” The experience made clear that at least some of the leaders of the Church at that time had severe misgivings about the study of law. They might tolerate it as a necessary evil for a few, but they were not anxious to promote it.

Given that history, the decision of the Church leaders to establish this law school at this university, as well as President Romney’s observation about the importance of the study of law, may take on new significance. Clearly something had happened to change the Church leaders’ views about the study of law in the years between their interchange with James Moyle and the establishment of this school. While there were undoubtedly a number of things that contributed to that change, I believe one of the most significant was their close association with J. Reuben Clark Jr., the international lawyer and former member of the First Presidency for whom the Law School is named. Indeed, when explaining why he championed the cause to establish a law school at this university, President Romney (who was also a lawyer) indicated that one of his main motivations was “to have perpetuated on this campus the memory and influence” of President Clark.

Thus, we owe more than we may think to J. Reuben Clark Jr. He not only provided a name for this law school, he also provided a model of the positive impact that the study of law could have on those with deep religious faith, and he did it in a way that I believe altered the view of many in the Church.

J. Reuben Clark was a man of enormous intellect. When he left Utah to study law at Columbia University in 1903, Reuben, stated Elder James E. Talmage, “possessed the brightest mind ever to leave Utah.” President Clark was also one who loved learning. “The eighth grade was the highest
level [of schooling] available in [his hometown of] Grantsville, so after he finished it once, he repeated [it] two more years because he wanted” so much to learn. He also understood that intellectual curiosity achieved its maximum impact when accompanied by hard work. “I have learned,” he said in later years, “that work, more work, and more work is the only way in which one may acquire knowledge.” The result of this combination was evident in his law school years. In the words of one of his biographers:

When given an assignment, [Reuben] did far more than brief a case or two in the customary fashion; he hounded the errant problem back into its past, rooting through precedents, commentaries, ancillary discussions, and anything else he could find. Then, amid a chaos of notes, citations, and open books piled high, he observed step by step how the matter came into being.

In other words, J. Reuben Clark pursued the study of law with the same enthusiasm and energy that Domingo Catricura did. Thus, it is not surprising that President Clark excelled in law school to such an extent that upon graduation he was offered a position as assistant solicitor in the State Department in Washington D.C., thus commencing an illustrious career of public service that culminated in his work as U.S. ambassador to Mexico some 25 years later. J. Reuben Clark personified the qualities of intellect, love of learning, and hard work that make for a successful law student and lawyer.

Yet, I suspect it is not just the combination of these qualities but the presence of others not commonly associated with lawyers that most impress those who so fondly remember President Clark. One incident from his life provides an example. Many members of the Church are familiar with President Clark’s statement “In the service of the Lord, it is not where you serve but how.” Fewer, however, are familiar with the circumstances under which he made that statement.

From 1934 to 1951, President Clark was the First Counselor in the First Presidency of the Church, serving both Heber J. Grant and George Albert Smith. In 1951 when President Smith passed away, President David O. McKay became President of the Church, and, as was his right, chose his counselors. Many were surprised when he selected Elder Steven L. Richards as First Counselor and President Clark as Second Counselor. While they fully supported the decision, even some of the members of the Quorum of the Twelve were caught somewhat off-guard. President Spencer W. Kimball, then a member of the Quorum of the Twelve, wrote in his journal that he was “stunned” when he first heard the news. Given his prominence in both the world and the Church, it may have been possible for President Clark to have been upset at what some perceived to be a “demotion.” Instead, he himself presented the names of the counselors for a sustaining vote, and then, in his subsequent remarks, set forth his famous statement that “in the service of the Lord, it is not where you serve
but how.” President Kimball recorded in his journal his view of that particular conference session: “[T]he congregation was breathless . . . [and] there were many tears throughout the congregation. . . . No one could tell if Pres. Clark carried any scars or injuries. . . . No complaint, no self-pity neither in act nor attitude.” President Kimball then added that J. Reuben Clark’s “perfect reactions . . . did more . . . to establish in the minds of this people the true spirit of subjection of the individual to the good of the work . . . than could be done in thousands of sermons.”

Among other things, J. Reuben Clark was, for those who established this law school, living proof that the study and practice of law at the highest levels does not necessarily lead to arrogance and pride, nor to a weakening of faith or character.

At the dedication of this building in 1975, President Romney expressed a desire that “all faculty and student body members . . . familiarize themselves with and emulate [the] virtues and accomplishments” of J. Reuben Clark. This and other charges given by Elder Oaks and President Romney at the establishment of the Law School and the dedication of this building provide a helpful perspective on the significance of your decision to study law at this law school. I commend those and other “foundational documents” for your reading and discussion in the coming year.

As important as was the impact of the life of J. Reuben Clark on the establishment and direction of this law school, I am convinced that the decision of the leaders of the Church to start this school and to continue to support it so generously did not rest solely on the view that it is okay, or maybe even desirable, for members of the Church to study law at a good law school. Having now become more familiar with the budget figures and the generous subsidy we receive from the Church, I can assure you that if the Church leaders’ only goal was to provide a good legal education to 150 students of faith every year, they would have been money ahead simply to provide generous scholarships to deserving individuals, who could then attend one of many outstanding law schools that exist throughout the country. What the founders had in mind, as President Romney stated at the opening ceremony, was the establishment of “an institution”—“an institution in which [students could] . . . ‘obtain a knowledge of . . . [the] laws of . . . man’ in the light of the ‘laws of God.’” What they saw—or at least what I envision now—is not just a group of individuals studying law but a community of scholar saints—or to particularize it somewhat more and to put my individual spin on it—an intellectually and spiritually invigorating community in which the law can be studied and lawyers and leaders of diverse backgrounds can be shaped in an atmosphere of faith.

Let me briefly tell you what I mean by this. I envision—and ask you to help create—a community that is both intellectually and spiritually invigorating. On the intellectual level, I envision—and ask you to contribute to—a place where the classrooms, carrels, and hallways are
filled with lively discussion about important topics, involving a wide variety of informed viewpoints. That will require that you fully prepare for class everyday, a task that will become more difficult as the months and years roll on. It will require that you attend and participate in academic symposia that occur at the Law School. It will require that you seek out and respect the views of others who disagree with you. It will also require that you be willing to not assume that you already know everything. For some that may be a real challenge. However, experience has shown that you are more likely to advance in knowledge if you approach topics with a good deal of humility. Justice Byron White, for whom I had the opportunity to clerk, noted on more than one occasion that the law clerks were “rarely in doubt and often in error,” while the justices were “often in doubt and rarely in error.” There is a great deal of wisdom in that observation, wisdom that can hold the key to a truly invigorating intellectual climate.

On the spiritual level, I envision—and invite each of you to contribute to—a community in which we can help one another work through and consider fully the very real spiritual challenges that the study and practice of law bring to the surface, a community in which we can help one another discover the soul-satisfying aspects of the study and practice of law, aspects whose absence in the modern bar causes so much disillusionment among lawyers today. More specifically, I invite you to take part in the professional seminar courses that are offered, the Spirit of the Law discussions that take place here, and the devotionals sponsored by the university. I also urge you to find ways to be of real service to others around you, both inside and outside the Law School and both inside and outside your faith. If you do that, not only will you improve spiritually, you will also help create a spiritually invigorating environment in which all can be edified.

Most of all, I envision—and ask you to contribute to—a community in which faith is an integral part of all we do. I have pondered much President Romney’s charge that we create an environment in which the laws of man can be learned in light of the laws of God. Just how does the light of the laws of God help us as we study the laws of men? The full answer to that question will take years to discover, but I encourage you to begin that process now. Let me suggest two simple initial responses, by way of example of what President Romney may have had in mind.

First, the laws of God teach us that we are all children of heavenly parents and that each has divine potential within. That one truth ought to alter fundamentally the way in which you approach the study of law. It ought to provide more incentive to study earnestly so that you might be prepared to truly help those sons and daughters of God. It also ought to shape the way you interact with others both inside and outside the Law School as you engage in what is often a stressful process. As your patience
wears thin at arguments that seem annoying or at actions that seem indifferent, the laws of God can remind us that, as C. S. Lewis has noted:

It is a serious thing to live in a society of possible gods and goddesses, to remember that the dullest and most uninteresting person you can talk to may one day be a creature which, if you saw it now, you would be strongly tempted to worship. . . . There are no ordinary people. You have never talked to a mere mortal. . . . [I]t is immortals whom we joke with, work with . . . snub, andexploit.30

While the traditional study of law emphasizes the utilitarian importance of tolerating the views and differences of others, the laws of God require it as a manifestation of our love for God and His children.

Second, understanding the laws of God can help us see that the study of law is even more intellectually engaging and profoundly important than we might have ever imagined. Consider, for example, this provocative statement in Doctrine and Covenants, section 88, verse 34: “That which is governed by law is also preserved by law and perfected and sanctified by the same.” I suggest that the unpacking of that statement could involve years of intellectual struggle and produce a plethora of soul-satisfying insights, a process, again, that I hope you begin at this school.

Operating in an atmosphere of faith also means that we create space to share spiritual feelings with one another from time to time. That will usually happen in private conversations. However, I want to follow the pattern set by Dean Hansen in his last public decanal pronouncement at graduation last spring and let you, my friends, know in my first public decanal pronouncement of my faith in our Heavenly Father. I believe with all my heart that He lives and loves each one of us with a love more profound than we can imagine. I believe with all my being that we are literally His sons and daughters, that He has placed us on earth to allow us to experience the things we need to experience in order to eventually enjoy the fullness of joy that He enjoys, and that because of the atoning sacrifice of His Son Jesus Christ, we can experience that joy despite our current imperfections. I also firmly believe that He has had a hand in the establishment of this Law School and that He cares about what each one of us does with the opportunity we have to study here.

What you do here in the next three years matters a lot. It matters to me. It matters to you. It matters to your families. It matters to countless others. It matters to God.

May we all be blessed as we go forward in this important and wonderfully joyous endeavor is my prayer in the name of Jesus Christ, amen.

This address was given to entering law students at BYU Law School on August 18, 2004. Reprinted from the Clark Memorandum, fall 2004, 32–40.
Kevin J Worthen received his JD from BYU Law School in 1982. He clerked for Judge Malcolm R. Wilkey of the U.S. Court of Appeals for the D.C. Circuit 1982–83 and for Justice Byron R. White of the U.S. Supreme Court 1983–84. He has served as a law professor since 1987 and was associate dean 1999–2004 and dean 2004–08 of J. Reuben Clark Law School. He is currently Hugh W. Colton Professor of Law and advancement vice president at Brigham Young University in Provo, Utah.

Notes

1. Thanks to Eldon Bott for relating this and numerous lawyer jokes to me.
5. Id.
8. ButleRitchie, supra note 6, at 33.
12. Inter-American Development Bank, Development Beyond Economics: Economic and Social Progress in Latin America, at 26 (and Fig. 1.48).
15. Id.
17. Id., at 130.
18. Id., at 132.
20. Marion G. Romney, Becoming J. Reuben Clark’s Law School, Clark Memorandum, Fall 1993 at 8.
23. *Id.*, at 34.
25. *Id.*, at 122–23.
26. *Id.*, at 124.
27. *Id.*