



BY JUDGE MICHAEL W. MOSMAN*

TWO CHEERS

FOR THINKING
LIKE A LAWYER

IT USED TO BE THE CASE that one of the main, stated goals of law school was to teach the young acolytes how to “think like a lawyer.” I’m not sure quite as much is made of this in today’s law schools, perhaps because figuring out exactly what that phrase means is not easy, and lawyers tend to abandon projects they cannot explain with precision. Still, the idea endures that we have a way of thinking about things that sets us apart, that can be taught, and that serves us well. And I think there is some truth to it. » I’m not going to attempt a precise explanation today of what it means to think like a lawyer. But I am going to talk about some

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traits of lawyers’ minds and suggest that while they can be useful, they have their downside. For this reason, only two cheers. » I want to discuss three traits of thinking like a lawyer and show their strengths. But then I want to turn these traits on their heads and show their weaknesses.

ASSUME NOTHING



One trait of the lawyer mind is to assume nothing. The classic story that used to be told about this trait was of the senior partner and the young associate traveling on a train together. The young lawyer looks out the window and says, “Look, all the sheep have been sheared,” to which the wise old partner replies, “Well, at least on one side.” While the trait of assuming nothing can be annoying to others and frustrating to young lawyers, it has its uses.

For one thing, it combats groupthink, or commonly held assumptions—the things everybody knows but are actually unexamined; such as the commonly held assumption in a community that John Doe is guilty of some notorious crime or that Jane Doe is incapable of harming a flea. The lawyer approaches such assumptions with an open mind: the task is to break down what we know about what happened into component parts, assume nothing, and examine the facts with care. I once heard Paul Fortino, a partner at Perkins Coie who represented Guantanamo detainees, say it this way: “I felt that as to my client, terrorist is a question, not an answer.”

I remember in my first year of law school when I first realized this was a way of thinking that lawyers knew and I didn’t. I had a criminal law professor named Woody Deem, a former star practitioner with an unorthodox style. One part of his unorthodoxy was the pop quiz. That day’s quiz was on larceny, the taking and carrying away of the personal property of another with the intent to permanently deprive the owner of it. The quiz involved a man breaking in, grabbing the homeowner’s baby, discarding the blanket and pacifier, and running out of the house into the cold night with a baby wearing only a diaper. I thought I had law school figured out; it was clear to me that the trick was that the man had not stolen any personal property, just the baby. Of course, I got the question wrong. In a later phone call to my dad, a lawyer, I complained about the ridiculous question. I explained it to him, and by the time I got to the discarded blanket, he interrupted me and asked, “Was there a diaper? Because that would be larceny.”



This pattern of thinking, of assuming nothing and examining everything, isn’t unique to lawyers. We share it with good economists and with legendary figures like Perry Mason, Sherlock Holmes, Colombo, and Monk.

While we have discussed this as “assuming nothing,” we are really nudging up against a question of epistemology: How do we know what we think we know? And what is the core point of epistemology? As the inimicable Tyler Cowan put it, “You are wrong so, so, so often. This is, or rather should be, the central lesson of epistemology [and, I would add, a good legal education]. It is a lesson which hardly anybody ever learns.”

What would a thoughtful trial lawyer have learned along these lines? Here is my partial list:

1. That eyewitnesses are sometimes dead wrong and are often wrong on important details
2. That honest people can remember the same events differently
3. That the same facts can give rise to very different inferences
4. That in even the most ordinary historical events, it can be very difficult to figure out what happened
5. That in most debates, the best argument has serious flaws, while the worst argument has undeniable strengths
6. That in a tight spot most people will still try to be truthful
7. That you don’t really know something—or even less, know it’s true—just because you read it somewhere
8. That most experts don’t know what they think they know

A mind trained along these lines would approach most issues and disputes with a certain degree of care, of openness to change, of willingness to re-examine, of unwillingness to assume that anyone who disagrees with him or her is an idiot. This does not mean that we never come to know anything. It does mean that we have a highly tuned awareness of the limits on our ability to know. It is captured for me in the words of Learned Hand, in his 1944 Fourth of July speech in Central Park:

What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to the earth unheeded; the spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind the lesson that it has never learned but never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.

It’s worth stepping back to ask where this lawerly, careful style of thinking comes from. That is, what has driven lawyers to think this way? In my view, it principally is the product of an adversarial system. It is born in the dualistic dialectic of trials. The caution that is so common to lawyers comes from having your every assertion tested and attacked by an adversary. In the experience of most people, this is unheard of. The average doctor, college professor, TV host, cab driver, or contractor rarely has a highly motivated, skilled adver-

sary try to take apart his every assertion, with the winner gaining a pot of money. And the focus on proof, instead of pronouncement, comes from the requirement of meeting a certain standard of proof as to each element of your case, or you lose.

In any event, this way of thinking—focusing on proof, not assumptions, and carefully linking your proof to your propositions—can be very useful. So I commend to you the trait of assuming nothing.

ELIMINATE IRRELEVANCIES



I want to turn now to a second trait of thinking like a lawyer: the skill of focusing on what's relevant and eliminating irrelevancies. Isn't this, in your own experience, one of the main ways you find yourself silently—or openly—critiquing the comments of others? "Well, that doesn't really support the original proposition." There is probably no other way the casual comments of nonlawyers trying to prove a point are more different from lawyer's comments than in their tendency to rely on irrelevancies. Of course, even lawyers are not immune. Someone in your organization, for example, put out the proposition that you needed an interesting and charismatic speaker. To which somebody responded, "I know a federal judge who will do it." Which, as you can now see, is utterly irrelevant to the proposition.

This ability to eliminate irrelevancies can be very useful in eliminating bias and prejudice. In a recent pleading, for example, in a Fair Labor Standards Act case, the plaintiff's lawyer made sure to mention that the defendant/company owner was a "Russian immigrant and convicted federal felon." Credibility was not an issue in the early pleadings on class certification. It didn't take long for his opponent to point out that the whole comment was completely irrelevant, and, in fact, completely improper.

The lawyer's efforts to eliminate irrelevancies and focus on what actually matters and to get juries to do the same can be a very laudable thing. It means that despite your immigration status, your criminal record, your race, your income, or your political affiliation, you have a shot at justice. So I commend to you the trait of eliminating irrelevancies.

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STRICT APPLICATION OF NEUTRAL RULES



In addition to focusing on the relevant, the law tends to reward and require the strict application of neutral rules. In my work, in particular, I am often called upon to determine the legally “correct” answer and then stop right there. I apply neutral rules, determine what result those rules dictate, and then in many cases my work is done. Maybe sea lions die, maybe a really nice person gets fired, or maybe a business loses the patent it needs to survive. Not always, but often, the law turns a blind eye to the consequences that may flow from the application of legal rules.

While this sounds like a grave weakness to some, it can be a significant strength in the application of the law. For example:

When I am considering the fair and just sentence for a defendant, I will often receive the most heartrending letters from his family, even from his children, begging me not to send their son/husband/daddy to prison, or their lives will be ruined. What use do you think I ought to make of this information? I think the answer, at least in calculating the Sentencing Guidelines, is: very little. Or, to put it another way, how would you feel if you were the very next defendant being sentenced for the same conduct, and you didn’t happen to come from a lovely family who were good at writing letters?

There are all kinds of rules keeping out powerful, relevant evidence: confessions, smoking guns, fingerprints, DNA, and the like. Many nonlawyers think the cost of these exclusions is always too high. I’m not here to defend them always, in all cases. But there is this strength: The exclusions happen according to neutral rules that operate in favor of the least popular group in society, and they get applied with some regularity even in the face of that unpopularity.

So, we focus on proof and don’t make assumptions, we screen out irrelevancies, and we stick with the strict application of neutral rules. This helps us make more accurate decisions, avoid bias and prejudice, and apply neutral rules in an evenhanded way—all in all, not bad. Two cheers for thinking like a lawyer.

But there are costs. Sometimes, those costs can be very high, even catastrophic. It’s worth thinking about the ways we think as lawyers that blind us to a better way. It’s worth examining these same basic traits for their doppelganger, their weaknesses.

AVOIDING ASSUMPTIONS: HALFWAY THROUGH THE BRAMBLE BUSH



Let’s return to the trait of avoiding assumptions. Sometimes, not making assumptions isn’t the path to accuracy. Instead, it is the path to foolishness.

Take, for example, the story of the sheared sheep. How many flocks of sheep in the universe are sheared on one side only? In the real world, the world in which people have to make decisions without perfect information, the answer is, not enough to matter.

So if we are not careful, we can take this mental habit of challenging assumptions and carry it to the point where it does us great harm. If you will bear with me for a minute, I want to put this habit of challenging assumptions—often born in law school—in a very simplified context.

The broad trend of political philosophy, at least since the early modern philosophers, has been to re-examine the legitimacy of the state and its coercive power through binding law. I suppose this is simply part of the eternal quest of philosophy to wonder about the nature of things, to ask, for example, how we can even know if we exist.

I have the greatest respect for notable philosophers who have struggled with these difficult questions. The problem, as I see it, is that most of us only get a passing introduction to the philosophical method. They stare into the abyss; we blithely jump over a ravine. That’s just part of the overall schizophrenia of the law, which is really two things operating simultaneously. On one hand, at the level of abstraction, the law is an idea and is bound up in the whole question of who we are, what is society, and how, if ever, the law acquires coercive power. It is an offshoot of philosophy and is concerned with deeply serious and difficult questions about the nature of law and the state.

But at another level, law is an exercise in pragmatism, a glorified trade that for its operation depends on a host of assumptions that keep the day-to-day machinery of the law moving. I don’t mean this pejoratively. I loved practicing law, and it’s a great way to do a lot of good. But at the level of implementation and action, most lawyers are not very concerned with questions about whether we can even know what constitutes an external world. As the authors of *Plato and a Platypus Walk into a Bar* put it, “These are questions that are better examined over coffee and cigarettes in a small Parisian café than over an assembly line in Detroit,” or for that matter, a box of documents in an associate’s office.

We see these two types coexist in the legal world even today: the abstract legal theorist, usually a law professor, who understands law as a branch of political philosophy and the no-nonsense lawyer entirely occupied with the work of individual clients and cases. Sometimes, as in Abraham Lincoln, we get both types in one lawyer. But not often.

Most of you, I suspect, will be wholeheartedly engaged in the business of law. But the philosophical tradition of questioning assumptions that you were mildly infected with in law school can still affect you in unhelpful ways. First, because you were introduced to skepticism but never really came to grips with it, you may become leery of declaratory statements. You have this ill-defined notion that it’s hard to know anything, or maybe just dangerous to make any claim to knowledge, so you constantly hedge your bets. This hedging is different than the spirit of liberty that Judge Hand described. Instead of care or even caution, it is cowardice. It seems premised on the idea that the law is built entirely on shifting sands, with no solid foundation, and the best a poor lawyer can do is avoid getting trapped in a categorical statement. I’m sure that for the new law student, or for the sloppy one, the central lesson of law school may seem to be that there are no rules and no right answers. But that’s stopping too soon, without paying the price for discerning the underlying solidity of law. The disillusionment of *its* is supposed to “dis” only the “illusions,” not the whole. Professor Karl N. Llewellyn used a nursery rhyme to teach the process of first getting blinded by the law and then seeing again more clearly:

*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.*

[*The Bramble Bush: On Our Law and Its Study*
(New York: Oceana Publications, 1951), 4]

Llewellyn's main point is one that some of you need to hear: just being blinded by the law, that is, abandoning all your prelaw assumptions and being willing to question the truth and reality of everything, is only half the journey. The rest of the journey is to carefully figure out what is real, true, stable, and reliable. You won't learn this in law school. But you can learn it on your own through the dint of hard work. And even setting aside for a moment your access to revelation as a source of truth, you can, as lawyers,

still come to know things to be true. The law was once populated with a host of serious-minded lawyers who understood this and struggled with it—now, not so much.

My challenge to you is to do one of two things: either recognize that this whole philosophical skepticism enterprise is just not your thing, back out of the bramble bush, and have at it in the business of the law; or finish the journey. Study, think hard, and rediscover a solid foundation for the law. It is the work of a lifetime.



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ELIMINATING IRRELEVANCIES— BUT WHOSE?



The second trait I mentioned earlier was eliminating irrelevancies. It, too, has its dark side. We can mistakenly assume that analytic purity—and by that I mean focusing only on facts or statements that tend to prove the proposition—is the best, or even the only, path to truth. In doing so, we can end up discarding other, equally valuable ways of figuring out what is real, or true, or correct.

For example, sometimes we focus on what a person is saying, testing it for its internal coherence, but don't focus enough on who the speaker is. This was driven home to me in an experience I had during a summer clerkship. My firm was representing a bank whose customers had been swept up in a sprawling real estate scam. During the summer, I helped interview six or seven of those couples, who had lost everything. The scam involved the developer visiting people in their homes, trying to get them to take out a second mortgage and invest the money with him. He had the 1980s equivalent of a PowerPoint presentation, and it was a beauty. All the numbers added up to support his promise of great returns, and it was backed up by high-profile endorsements and proven past performance. Of course, it was all a lie. After his show he'd gather up his materials and leave.

Then the husband and wife would be alone. Six or seven times, I heard a tearful man who'd lost his life savings say something like this:

I told her I thought it was a great opportunity, and we should do it. She seemed very reluctant. I asked why, and she couldn't really give me a reason. She just said there was something about the guy that she didn't trust. I told her that wasn't really a valid reason, and so we went ahead. Boy, do I wish I had listened.

I hope the point of this story is clear. Malcolm Gladwell, in his book *Blink*, makes the same point. There are ways of knowing that can't be reduced to a structured argument. You ignore them at your peril.

NEUTRAL RULES: A BRIDGE TOO FAR



The last trait I mentioned earlier was following neutral rules. I have tried to point out that following the same rules the same way for everybody is part of the genius of Western law. Now I'd like to look at the downside of rulemaking. For over a century, law has had an identity crisis about the certainty and neutrality of the rules of law. It started with the so-called "realism" of Justice Oliver Wendell Holmes. In 1881, while still a law professor at Harvard, he suggested that the law was not, after all, neutral or certain but depended on the life experiences, views, and personal prejudices of judges and juries. "General propositions do not decide concrete cases," he said, and more famously, "The life of the law has not been logic: it has been experience." The more provocative description of this new realism was by Professor Robert Hutchins: "What a judge has for breakfast is more important than any principle of law."

The law—and lawyers—were both horrified and fascinated by this new way of seeing things. To say there was an overreaction is an understatement. To summarize a century of development: we took refuge in written rules. We decided that to avoid the idiosyncrasy and partiality of the broad but neutral rules, we would just have a written regulation that would clearly cover everything and be basically self-executing. The law has generally turned away from heuristic answers and now seeks algorithms. I hope you will agree with me that the idea that enough regulations can be written clearly enough so that the answer to every legal question is clear and requires no judgment or debate has been a complete and total disaster.

If I can make up my own distinction here: I believe in neutral, predictable rules that apply evenly to everyone but that are written at some level of generality. But I don't believe in regulations that cover every aspect of life. Even if the enterprise were possible, it would vastly reduce liberty. And as Justice Benjamin N. Cardozo recognized, the whole idea is a mistake:

No doubt the ideal system, if it were attainable, would be a code at once so flexible and so minute, as to supply in advance for every conceivable situation the just and fitting rule. But life is too complex to bring the attainment of this ideal within the compass of human powers. [The Nature of the Judicial Process (New Haven: Yale University Press, 1921), 143]

I don't mean to suggest that we dispense with all regulation. The certainty and clarity that some degree of regulation provides is essential to taking action. Before I go to the airport, for example, I don't want to guess what I can take on the plane. But I think they can go ahead and quit explaining to me how to buckle a seat belt.

We've all experienced the same thing—some rigid bureaucrat applying a senseless regulation in ways that do some harm and no good.

So I commended to you the beauty of neutral rules. But I hope you will think about the pervasive harm and lost liberty that can come from overregulation.

THINKING LIKE A LAWYER: HOW TO LOSE FRIENDS AND ALIENATE PEOPLE



So far I've looked at the strengths and weaknesses of three traits of thinking like a lawyer. Now I want to step back and look at the phenomenon of thinking like a lawyer in terms of how it can ruin your life.

Rigorously analytical thinking is only a tool—and just one tool among many—for arriving at the truth. I should point out that being analytical has, in my experience, served the purposes of liars and self-deceivers almost as often as it has aided truth seekers. Please listen carefully, for we have come to the place in my remarks that represents the entire reason I have driven to Eugene. Your friends and families want you to hear this. Being illogical is not necessarily the same thing as being wrong. Or, to be more precise about it, stating your position or views in an illogical way is not the same thing as being wrong. I hope you caught the difference. Your friends and family know this, and they

get mad when you act like your orderly statement of your position, coupled with your rhetorical skills, makes you right.

You make this worse when you use a calm, rational demeanor and tone of voice as a weapon. Many of you have done this already. You have two false assumptions: first, that the person who speaks more analytically is right, and second, that the person who speaks slowly and calmly is right. So, when you are arguing with a loved one or friend and you use calm speech as a weapon, knowing it will prod him or her to even greater emotionality, you have done doubly wrong.

Particularly in a family setting, there is another, perhaps more fundamental problem: you can actually be right and still be dead wrong. For example, if I have a discussion with my younger children, perhaps they will stake out some position that is, in fact, patently silly, readily demonstrable as untrue and unwise. I might quickly show that in ways that are, for the sake of argument today, objectively irrefutable. Yet every word I speak in so doing will be deeply wrong.

Why? Because in the name of getting the right answer on this issue, I am destroying the fragile bridge between me and her. Please work hard never to hear the words I have heard: "I can't talk to you about things, Dad, because I just feel trapped by your arguments."

I mentioned earlier that one of the things we do is to note irrelevancies in the speech of others. My advice is: Don't. Hear what is being said. Better yet, hear what is meant by what is said. I've heard lawyers in personal arguments say, "I'm just going by what you said," as if that answered everything. In a deposition, it might. But in life, go by what is meant in the context of who they are. Learn to hear in more than one language, more than just the language of law. Initially, you may have to translate, but try to learn to seamlessly see the world through more than just the prism of the law. Right now you are immersed in the law. But soon, if you want to be happy, you must come up for air.

This is really just about being humble. Trust me, most of us have a lot to be humble about. Ask yourself: Do lawyers generally live better lives than other people?

Are they happier? More successful? Better parents or spouses? Better lovers? Are they even better politicians and legislators? The answer to each question is, of course, no. So maybe, just maybe, you still have a lot to learn from those around you, and you should pay attention.



FAITH

Finally, thinking like a lawyer can get in the way of living with faith. By that I mean *faith* with both a small and a capital F. I don't mean to suggest that faith and reason are antithetical to each other. I see them as Venn diagrams, with substantial overlap. But most of the important endeavors in life require faith to act.

1. Faith to act. Let's start with the business world. The most common complaint people in business have about lawyers is that they gum up deals and get in the way of making things happen. There is an element of risk, of the unknown, in most transactions, and many lawyers can't seem to get over that. They obsess over what might go wrong or what cannot be known. Most CEOs have to learn, at some level, to ignore their own lawyers in order to succeed.

2. Faith in personal relationships. Of course, the same risk and uncertainty that exists in the business world exists to an even greater degree in personal relationships. The foundation of every romance, every deep friendship, every family, is trust, faith, and perhaps a little fear, but not logic, not counting the cost, not rigorous analysis.

*The sense of danger must not disappear:
The way is certainly both short and steep,
However gradual it looks from here;
Look if you like, but you will have to leap.
.....
The worried efforts of the busy heap,
The dirt, the imprecision, and the beer
Produce a few smart wisecracks every year;
Laugh if you can, but you will have to leap.
.....*

*A solitude ten thousand fathoms deep
Sustains the bed on which we lie, my dear:
Although I love you, you will have to leap;
Our dream of safety has to disappear.*

[W. H. Auden, "Leap Before You Look"]

3. Faith in God. My own view is that God is not illogical; in fact, He is the Author of logic. But He is possessed of vastly more truth and knowledge than we are. So He speaks in what seem like mortal ironies: Cast your bread upon the water, and it shall return to you; he that will lose his life shall find it; he that is greatest let him be the servant of all; if ye have done it unto the least of these, ye have done it unto me. Well, thinking like a lawyer simply won't bring you the happiness and light found in these truths. But trust will. Faith will. A suspension of skepticism will.

Still, this sort of faith and reason can coexist. I have always taken heart from the version of the Golden Rule found in Luke 10:25–28 (see also Mark 12:32):

And, behold, a certain lawyer stood up, and tempted him, saying, Master, what shall I do to inherit eternal life?

He said unto him, What is written in the law? how readest thou?

And he answering said, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy strength, and with all thy mind; and thy neighbour as thyself.

And he said unto him, Thou hast answered right: this do, and thou shalt live.

As far as I know, this is the closest any lawyer has ever gotten to actually being praised by any major religious figure. But what he had done was worth praising: he had glimpsed the synthesis of the law and life.

CONCLUSION

My assurance, my message to you is that if you will treat thinking like a lawyer as a brilliant and effective tool, but only a tool, with limits on its usefulness, and stay open to other tools for living your life, then your life as a lawyer—no, as a person with a law degree—can be satisfying and whole.

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