

IN PRAISE OF
THINKING
LIKE A
LAWYER

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is really a form of leadership
training and, when properly understood,
is a part of education
for eternity.*

DEAN
JAMES R. RASBAND

On behalf
of my faculty colleagues as
well as the rest of the
administration and staff,
I welcome you to
BYU Law School. Of the
many choices and
opportunities you had,
I am convinced
you have chosen well.





As all of you are surely aware, law schools have received plenty of criticism over the last couple years. But I am convinced you made the right decision to attend law school—and particularly to come to law school at BYU. For reasons I will describe at greater length, I believe the study of law is a profoundly valuable endeavor that will pay great dividends for the rest of your life, not just financially but also in terms of your ability to lead and to serve.

I feel even more strongly about the value of your study at BYU Law. This is an extraordinary institution. While many other law schools are retrenching—or even in retreat—we are moving forward on many dimensions: hiring great new faculty, adding clinics, growing our professional skills curriculum, and remodeling our space.

But new programs and remodeling projects are not the real reason I am convinced you have made the right decision to come to BYU Law. What I know is that BYU would be an extraordinary place to learn the law even if we did it in a hut, because you will be learning alongside a great group of students and with faculty who are dedicated to your education in a way that is unique among law schools.

Almost 40 years ago President Spencer W. Kimball suggested that the goal at BYU should be “education for eternity.” He urged faculty to be “bilingual,” speaking “with authority and excellence to your professional colleagues in the language of scholarship” but also being “literate in the language of spiritual things.”¹ The same injunction applies to you as graduate students. I am convinced that the study of law is truly a form of “education for eternity.” Done correctly—with humility, integrity,

and unstinting effort—the study of law will profoundly change the way you think and enable you to lead and serve in powerful ways far beyond your professional role as a lawyer.

You’ve probably heard many times that the goal of the first year of law school is to teach you to “think like a lawyer.” This goal has been under some criticism of late. But today I’d like to defend the nobility of learning to think like a lawyer, at least in its most virtuous forms. So let me try to explain a few ways in which thinking like a lawyer is really a form of leadership training and, when properly understood, is a part of education for eternity.

In Praise of Learning to Apply Appropriate Deference

I’ll start with a seemingly mundane example. In your classes you will soon be introduced to the concept of “the standard of review.” The standard of review is the level of scrutiny that an appellate court is supposed to give to a decision made at the trial-court level. As a simple example, if an appellate court is reviewing a jury’s conclusion that A ran a red light, the standard of review employed by the appellate court is called “clear error.” The idea is that the appellate court will defer to the jury’s finding unless the jury clearly erred in its determination that A ran the red light. Under a clear-error standard, the appellate judge is not supposed to ask herself if she thinks A ran the red light. She is instead supposed to ask if any reasonable jury could have concluded that A ran the red light. The appellate judge is not supposed to substitute her own judgment for that of the jury, even if she might see the facts differently than the jury, unless the jury’s decision was clearly erroneous.

By contrast, consider the standard of review in a case in which the appeal is from a judge’s decision that a citizen is not under an obligation to stop at a red light in an emergency situation—if, for example, A was driving his sick child to the emergency room. I don’t think this is the law, and that’s part of the point. Does the appellate court need to defer to the trial judge’s legal conclusion about the rule on stopping at a red light in an emergency situation? The answer is no.

Instead of using the clear-error standard of review applied to a fact question, a legal question is reviewed under what is called a “*de novo*” standard of review. *De novo* is simply a fancy Latin phrase meaning that the appellate judge decides the issue anew or afresh.

Sometimes as lawyers I fear we love fancy Latin phrases too much. The reality is that thinking like a lawyer is designed to clarify meaning rather than to obscure it. Still, Latin phrases can sound quite impressive at parties. In fact, you may even be tempted to spring a few at Thanksgiving dinner this fall, although I ought to warn you that statistics have shown that more Thanksgiving dinners are ruined by law students trying out their newfound advocacy skills than by any other single cause.

Returning to the hypothetical, when the appellate judge decides *de novo* the appropriate rule on running red lights in an emergency, she does not give any deference to the trial court’s conclusion but instead decides anew or afresh what the legal rule should be.

Why the different standards of review? In the first case, the question is factual: What actually happened? Did A run the red light? For this factual question, it makes sense to defer to the jury. The jury heard all of the evidence, and the jury had a chance to observe the witnesses and get a feel from body language as to the truthfulness of what they were saying. Such observations simply aren’t possible on the paper record viewed on appeal. By contrast, the question about the appropriate rule for red lights in an emergency is one that involves a policy judgment that will apply beyond the facts of this particular case. When it comes to saying what the law is, there isn’t a particular reason why the appellate judge should defer to the trial judge. The trial judge doesn’t have more legal expertise.

So what does any of this have to do with thinking like a lawyer or with how thinking like a lawyer has implications that extend far beyond deciding a particular legal case? Think for a moment about the number of circumstances you will face in your life in which you will be asked to evaluate or judge the actions of another or in which you will need to seek approval from someone with

stewardship over you. It might happen in your family; it might happen in a community or church setting. If you are asked to evaluate an individual’s decision that involved a detailed factual inquiry and unique local circumstances, shouldn’t you be quicker to defer to the individual’s judgment rather than substitute your own?

The basic point is that applying a correct standard of review is a critical leadership question. How do you feel when a leader, without knowledge of particular circumstances, overrules or criticizes your judgment? By contrast, how do you feel when a leader understands that your intimate knowledge of the facts entitles you to deference? Thinking like a lawyer is thinking about this sort of decision.

Of course, when to defer and how much to defer is not always easy, and we won’t always get it right. I certainly don’t. But in my experience, the chance that you get right the appropriate level of deference is greater if you actually think about the question. Studying standards of review, therefore, isn’t just learning a series of rules for what types of trial-court decisions merit what levels of deference on appeal. Studying standards of review is a form of leadership training.

Another facet of thinking like a lawyer on which you will spend a lot of time during your first year of law school is understanding the importance of precedent—prior decisions in similar cases. Again, the idea is not to simply memorize precedents but to have deeply embedded in your thinking the idea that like cases and similarly situated individuals should be treated alike, which is a core principle of fairness. Considering past precedent and the possibility that your decision creates a precedent for future situations is also the trait of a leader. Of course, thinking about precedent is not exclusively a lawyer’s domain—ask any parent who has given a bigger Christmas gift to one of their children, or ask any employer who has considered the implications of providing a particular perk to only one employee. But worry about precedent is something that lawyers should be—and, in my experience, are—quicker to recognize because of their training.

In Praise of Learning to Make Wise Judgments

Learning to think like a lawyer is like changing your perception of an issue from black-and-white TV to color TV, to HD, and then to 3-D. You may be looking at the same thing, but you see the issues so much more clearly. And when we see and understand the issues, the chance that we will wisely balance justice and mercy increases significantly.

The metaphor of vision is useful in explaining another characteristic of the study of law. If you pause to consider the nature of most graduate education, the pur-

This speech was given to BYU Law School entering students on August 21, 2013.

pose is to narrow your field of vision, to train you as an expert in a particular field—the classic example of which is the dissertation on a narrow subject on which no one else has written. The study of law, by contrast, is designed to broaden your field of vision and to give you the tools to make judgments across the full range of human experience. This understanding of law is

likewise something that is lately under pressure: there has been a push to develop legal expertise earlier, particularly with the idea of improving employment prospects. I don’t want to criticize expertise. All of us benefit from medical, engineering, and other expertise that are gifts to us from other disciplines. Moreover, there are some benefits of deciding earlier on a legal career path. But movement in that direction should not overtake or devalue the traditional broadening task of legal education. It is precisely that broadening that makes lawyers particularly adept as leaders and problem solvers.

I fear I am like the proverbial carpenter with a hammer, but let me suggest a couple more examples of how thinking like a lawyer is a profoundly important leadership skill and not some technical skill or shiny intellectual bauble. Later this semester in torts, you are likely to encounter cases involving injury to drivers at railroad crossings. You will learn that railroad companies, in an unsurprising effort to avoid liability, claimed that the drivers were at fault for not paying careful attention to whether or not a train was coming. Now, we could spend hours on even this sort of seemingly simple problem with questions like, Should



railroads be liable for any injuries, regardless of the negligence of the driver? or, What would such a rule cause the railroads to do?

THE STUDY OF LAW . . . IS DESIGNED TO

Build fewer railroad crossings, erect expensive signals and gates, or move the rail lines—any of which could increase the cost of rail traffic for consumer goods?

Law teaches us to think about the consequences and incentives created by particular decisions. This too is a trait of wise leadership.

What is critical to understand is that if you think you are learning about the rules for railroad crossings, you are missing the point. Let me take one more example from these railroad cases. In response to the railroad companies' claims of contributory negligence by drivers injured at railroad crossings, two different rules developed. One was a rule that drivers would be considered contributory negligent if they failed to stop, look, and listen before crossing the tracks. This stop, look, and listen rule was what we'd call a "bright-line rule"—it was quite clear and easily administered. As another example, think about a rule prohibiting felons from voting or people under 18 years of age from drinking.

With the bright-line rule—stop, look, and listen—courts and railroad crossers knew quite clearly which rule applied for injuries at rail crossings. The other rule, by contrast, did not insist that a driver stop, look, and listen. The rule simply demanded that a driver act reasonably in the circumstances.

In theory, the rule of reasonableness will produce the fair result more often than a bright-line rule because we can account for specific circumstances in which stopping, looking, and listening doesn't make sense. Imagine the case, for example, in which looking requires exiting one's vehicle to look around a building adjacent to the tracks. In such a case, stopping and looking creates more risks than slowly driving ahead because the time it would take to get out, look, and then walk back might be just enough time for a speeding train to arrive.

On the other hand, a squishier rule of reasonableness has its own costs: greater

uncertainty for drivers about what they should do at crossings; more lawsuits in which drivers and railroads argue about

BROADEN YOUR FIELD OF VISION.

who was really at fault; and inconsistencies in application because of differences among drivers, judges, and juries about exactly what counts as reasonable behavior at a railroad crossing. Thus, understanding the relative merits and risks of bright-line rules is not about railroad-crossing cases; it is instead training in leadership and judgment.

Think outside the law context. For example, what are the risks and benefits in an employment context to a rule limiting employees to one continuing education trip per year? This is easily administrable and seems quite fair in treating all employees the same, but what if some employees need more training? What if some take better advantage of the training available? Is it better, then, to adopt a rule that all employees may travel for continuing education whenever it serves an important purpose? This seems more fair and tailored to individual situations, but it takes more time to judge the merits of each individual request and it's quite hard to say no. Thus, might we decide that given the available administrative resources and the stakes associated with a mistaken application, it's okay to have a bright-line rule that will occasionally produce results that chafe?

Your law training won't give you easy answers to such questions, but it will, I hope, help you recognize the risks and benefits associated with the decision. It also will allow you to communicate any decision you make as one in which you were mindful of the costs and benefits of these two approaches to rule setting.

Again, the point of studying these railroad-crossing cases is not to become an expert in railroad law or even tort law, nor is it the point to simply engage in the fun and intellectual exercise of spotting the flaws and benefits of bright-line rules and rules of reasonableness. If spotting problems is all we learn to do—if issue spotting is all that it means to think like a lawyer—our training will have all the import of a shooting game

at a county fair, in which we busily plink passing rabbits, squirrels, and raccoons just to show our prowess with a BB gun.

I don't think I learned this until after law school. My first job after law school was clerking for Judge J. Clifford Wallace on the Ninth Circuit. I remember turning in my first memo and feeling rather proud. I thought I had spotted all of the issues associated with the particular case. If I'd been at the county fair, I would have taken home a large stuffed panda. The judge, however, called me into his office and kindly noted that the role of a court, and indeed the role of a good lawyer, was not issue spotting; it was exercising wise judgment. There would be tough decisions, and there would be tensions between some precedents, but my job, he said, was to use the tools I had been given to offer my best resolution of the case.

I hope you will learn this principle sooner than I did. The real value of a lawyer lies in her judgment and in her ability to give wise counsel. As you study cases every day during this first year of law school, remember that what you are really learning is not a compendium of rules but, by studying example after example, the way to make wise judgments in hard cases.

In Praise of Learning to Act in Humility

Someone who thinks like a lawyer knows that rule choices are serious business and require careful thinking. Perhaps even more important, thinking like a lawyer means understanding that rules are rarely perfect in design or application. Thus, although it may seem paradoxical, being trained to think like a lawyer should mean being trained to think and act with humility. The skill of dissecting arguments and proposals may seem like a handy pin to stick into others' balloons, but if that is primarily what you learn in law school, you haven't really learned to think like a lawyer. Thinking like a lawyer means that you deploy your shiny pin on your own balloon.

Another part of your training to think like a lawyer will be the Socratic method in the classroom, under which you are intended to learn by responding to questions. The Socratic method can feel a bit scary because faculty may persist in asking

you questions, posing counterarguments, and raising additional hypotheticals until your initial position starts to break down under the onslaught of contrary ideas or slightly altered facts. It's no fun to see our arguments shot through with holes and our preferred-policy ship take on water or even sink. (As an aside, let me just say that the Socratic method may feel painful, but please don't worry about making mistakes. If you leave your intellectual ship safely in the dock and never attempt to sail it, it will do you little good. It is the sailing that gives you the experience. Be willing to take risks in class. Be willing to talk to your professors outside of class. It is one of the great privileges of a legal education at BYU, and I hope you take advantage of it.)

The Socratic method is a part of your legal education that many do not understand and that some criticize because it appears designed to teach that every argument has a counterargument and that one argument is just as good as another. Even more discouraging, one can come away thinking that all truth is up for grabs or even, in some cases, that the law is simply what the person or party in power says it is. I am convinced that law is not simply a function of power; it is instead a constraint on power.

But, you might say, what about those most difficult and controversial cases—the ones you have read about in the news and will now study at this law school? Don't they show that law is merely an extension of politics? You will spend plenty of time debating this in your classrooms over the next three years. And you will learn about how language can be interpreted differently by persons of different experiences, backgrounds, and preferences. But even in these most difficult cases in which language is uncertain or the social stakes are so high, I hope you will also learn that law still serves to bank and curb the impulse to make decisions based on power and preference.

The requirement, for example, that judges explain their decisions in writing is a powerful constraint on arbitrary conduct. Likewise, the language of constitutions, statutes, and cases, while occasionally indeterminate, at very least creates boundaries for a reasonable range of potential



IT IS THE SAILING THAT GIVES YOU THE EXPERIENCE.

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meanings. In the same way, the need to justify decisions in terms of past precedent is a constraint on capricious conduct. I could add to this list, but my point is that even on the far margins of interpretive challenges, the rule of law is a powerful bulwark against arbitrary government action.

The law is not perfect, but it is a majestic device for ordering society. As then BYU president and now Elder Dallin H. Oaks said to the very first class to enter this law school:

[Lawyers] *must understand and help others to understand that despite all the imperfections of law and of lawyers, there is no better system for preventing and settling disputes than the rule of law. . . .*

*The rule of law stands as a wall to protect civilization from the barbarians who would conduct public affairs and settle private disputes by power, position, or corruption, rather than by recourse to the impartiality of settled rules of law. Lawyers are the watchmen on that wall.*²

BE WILLING TO TAKE RISKS IN CLASS.

I hope that during your time here you will come both to respect law's power and to reverence its function in our social fabric. I also hope that as you study so many controversial cases and learn about how seemingly simple language can have different meanings, you will remember there are certain fixed stars and immutable truths by which you can guide yourself: God exists and loves His children, the primary manifestation of which is the Atonement of His Son, Jesus Christ.

Although we know there are certain immutable truths, there is, of course, a wide range of social ordering in which we are left to our own devices to learn by hard experience what is the wisest and best policy. It is thus not a cause for panic that, in classroom Socratic dialogue, your argument gets shot with a few holes and takes on some water. Most policies and rules involve trade-offs and have imperfections. When you think like a lawyer, you understand that. This ought to encourage humility about our own ideas and a willingness to consider ideas advanced by others.

In Praise of Learning to Become Influential Leaders

In sum, my hope is that when you hear criticism of thinking like a lawyer, you will not shrink or studiously study your shoelaces. Understood in its fullest sense—and I think I have only scratched the surface—learning to think like a lawyer is the noblest of endeavors, with far-reaching, even eternal consequences. There is no need to apologize for learning to listen empathetically to opposing views, for learning to treat like cases alike, for recognizing that deference to the decisions of another depends upon the nature and circumstances of that person's decision, for understanding that straightforward bright-line rules work better in some situations than in others, and on and on and on. Learning to make wise judgments and to solve challenging problems is desperately needed, and your legal education will give you the ability to share those gifts.

This morning I have focused on learning to think like a lawyer because it will be the project of much of

your first year of law school and because I want to defend what I believe has too often been criticized of late. I'll have to leave for another day the important role of professional skills training, which attempts to pair leadership and judgment with experience exercising those attributes. Like any important trait, exercising judgment and making wise decisions takes a lot of practice to learn to do well.

As I close I want to touch briefly on one idea from the DVD we showed this morning about the life of President J. Reuben Clark, after whom this law school is named. The idea is one that I hope will echo in your minds during your time in law school—partly because I will repeat it—and that is President Clark's plea to remember those in the last wagon.³ When you leave this law school, you will be those riding in the lead wagons of society. It may not feel like that today, and it certainly won't feel like that when you are on the proverbial Socratic hot seat in your classes, but your legal education will give you significant power and influence in society, indeed, in almost any group of which

you are a part. As dean of this law school, that is precisely what I want; I want you to be influential leaders. But as you wield your influence, remember that worthy influence can be maintained “only by persuasion, by long-suffering, by gentleness and meekness, and by love unfeigned.”⁴ This is what thinking like a lawyer ought to mean.

Of course, foregoing the impulse to wield unworthy influence is surely a lesser law. The more ennobling course is that you use your legal training to aid those who need your help, particularly those who cannot pay for legal services. This injunction to help “the least of these”⁵ should not be surprising, but it is easy to forget in the rush and busyness of life.

I'd like to conclude by quoting from what President Marion G. Romney, then a counselor in the First Presidency of the Church, said to the very first class of students at this law school in 1973. His challenge is no less compelling today than it was 40 years ago this month. President Romney said:

*You have been admitted for your superior qualifications. Appreciate your opportunities; make the best of them. Set a high standard for your successors to emulate. You know why you are here, what your school, . . . your own loved ones, and yes, your Father in Heaven expect of you. Don't let any of them nor yourselves down. . . . Be your best. Society needs you, your country needs you, the world needs you.*⁶

To his words of challenge I add my words of welcome. We are excited that you have decided to join us at J. Reuben Clark Law School, and we look forward to playing a part in your education.

NOTES

1. Spencer W. Kimball, “The Second Century of Brigham Young University,” BYU devotional address, 10 October 1975; see also Kimball, “Education for Eternity,” address given at the BYU annual university conference banquet, 12 September 1968.
2. Dallin H. Oaks, in *Addresses at the Ceremony Opening the J. Reuben Clark Law School*, 27 August 1973, 8.
3. See J. Reuben Clark Jr., “To Them of the Last Wagon,” *Conference Report*, October 1974, 154–60.
4. D&C 121:41.
5. Matthew 25:40.
6. Marion G. Romney, in *Addresses at the Ceremony*, 27 August 1973, 27.