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Situating Thinking like a Lawyer within Legal Pedagogy

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SITUATING “THINKING LIKE A LAWYER” WITHIN LEGAL PEDAGOGY

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I. INTRODUCTION

The notion that a legal education is meant to convey to students an idea of how to “think like lawyers”² is central to the modern legal academy. Over the past few decades there has been a tremendous amount of scholarship devoted to exactly what

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²As opposed, say, to leaning how to “act like lawyers” or “perform like lawyers.” These ideas would be much closer to how medical students are trained. Medical students are, of course, taught how to “think like doctors,” but this is done in the context of a practical education. Some interesting work has been done on the question of inculcating the analytical skills of “thinking like a lawyer” in the context of practical skills training. See, e.g., Fernando Colon-Navarro, *Thinking Like a Lawyer: Expert-Novice Differences in Simulated Client Interviews*, 21 J. LEGAL PROF. 107 (1996); Nancy L. Schultz, *How Do Lawyers Really Think*, 42 J. LEGAL EDUC. 57 (1992).

the phrase means.³ In the current legal lexicon it may be accurately said that “thinking like a lawyer” is a simulacrum for competing notions of what a legal education is, or should be, all about. As one may suspect, then, there is little agreement as to what exactly “thinking like a lawyer” means.⁴ This lack of precision has led to a widespread ambivalence toward the phrase by students, faculty and the general public. Even with this imprecise use, however, the phrase retains currency with each new generation of law students.

Traditionally, the phrase “thinking like a lawyer” was applied to the sort of instructional philosophy that was the foundation of the law school curriculum. The case law method and the focus on the adversarial process of the American legal system dominated notions of what “thinking like a lawyer” entailed.⁵ This led to a presumption that legal education should, normatively, focus on the reasoning skills involved in the litigation process.⁶ As a result, “thinking like a lawyer” was an encapsulation of the analytical and cultural process that law students encountered in American law schools on their way to becoming practicing attorneys. Everything about the legal academy was tied, in some complex mixture, to the idea of “thinking like a lawyer.”

The trend in recent years, however, has been to view the traditional notion of “thinking like a lawyer” as unduly narrow and restrictive. Legal educators like James Elkins,⁷ Carrie Menkel-Meadow⁸ and Nancy Schultz⁹ have attempted to widen the scope of what constitutes “thinking like a lawyer” to justify the inclusion and acceptance of non-traditional skills courses¹⁰ into the legal academy. These and

³See, e.g., Richard K. Neumann, *Donald Schon, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401, 405 (2000); David N. Yellen, *“Thinking Like a Lawyer” or Acting Like a Judge*, 27 HOFSTRA L. REV. 13 (1998); Kevin H. Smith, *Practical Jurisprudence: Deconstructing and Synthesizing the Art and Science of Thinking Like a Lawyer*, 29 U. MEM. L. REV. 1 (1998); James R. Elkins, *Thinking Like a Lawyer: Second Thoughts*, 47 MERCER L. REV. 511, 519 (1996); Colon-Navarro, *supra* note 2; Gail A. Jaquish & James Ware, *Adopting an Educator Habit of Mind: Modifying What it Means to “Think Like a Lawyer”*, 45 STAN. L. REV. 1713 (1993); Schultz, *supra* note 2; Emily Calhoun, *Thinking Like a Lawyer*, 34 J. LEGAL EDUC. 507 (1984); John O. Mudd, *Thinking Critically About “Thinking Like a Lawyer”*, 33 J. LEGAL EDUC. 704 (1983).

⁴Mudd, *supra* note 3, at 705.

⁵Paul F. Teich, *Research on American Law Teaching: Is there a Case Against the Case System?*, 35 J. LEGAL EDUC. 167, 170 (1986).

⁶As Walter Van Valkenburg has said, “legal culture became increasingly dependent on adjudication as a central component in the American system of law at the same time Langdell and his followers stressed the study of appellate opinions in their teaching and scholarship.” E. Walter Van Valkenburg, *Law Teachers, Law Students, and Litigation*, 34 J. LEGAL EDUC. 584, 594 (1984).

⁷Elkins, *supra* note 3, at 519.

⁸Carrie J. Menkel-Meadow, *When Winning Isn’t Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905 (2000).

⁹Schultz, *supra* note 2.

¹⁰Examples of non-traditional skill courses include Alternative Dispute Resolution [hereinafter ADR], Interviewing, Negotiating and Counseling, and Legal Research and Writing.

other scholars seem to believe that the restrictive notion of what "thinking like a lawyer" entails hinders the full and complete acceptance of what counts as "lawyering."¹¹ This is a complex normative assumption, and one which I believe to be flawed. While I fully embrace the move to incorporate more diverse and varied educational experiences in to the law school curriculum, I am not sure that expanding the concept of "thinking like a lawyer" to include every possible task or skill that a practitioner may need to be acquainted with is as productive as many think.

In what follows, the traditional notion, which is hereinafter referred to as the "narrow notion," will be discussed so as to situate that narrow understanding within the broad field of legal pedagogy. This Article maintains that this narrow notion retains some normative and pedagogical usefulness, especially in the context of introducing entering law students to rudimentary and formalized legal reasoning skills. In a sense, this narrow notion of what constitutes "thinking like a lawyer" helps expose students to a new and distinct ontology. This sort of introduction is necessary, I suggest, in order for students to develop the more textured and mature reasoning abilities and practical skills which Elkins, Menkel-Meadow, Schultz and others rightly identify as vital to the mature practice of law.

This view is then contrasted with the notion, put forth by some, that the sort of cognitive skills and abilities that fall under this narrow notion of "thinking like a lawyer" are really not distinct to legal reasoning at all. This Article ultimately rejects such an argument as not accounting for the distinct epistemological situatedness of legal reasoning. This Article then turns to the idea that the sort of narrow notion of "thinking like a lawyer," which I have developed, is vital to students as they build a domain specific understanding of the context and culture of law in the American legal system. Integrating the narrow notion of "thinking like a lawyer" is important for students as it initiates them into the world of the law in contemporary American society. It is, in essence (and for lack of a better term), an indoctrination into the world of adversarialism and advocacy.

I recognize the limitations of any pedagogical system that utilizes the formalism and rote parroting, which the term indoctrination suggests and the practice invariably yields. Accordingly, this Article moves on to discuss how the narrow notion of "thinking like a lawyer" actually gives students an important backdrop against which they can critically access the limitations of the legalistic and formalist strains of thought, which hinder the abilities of law students and practicing attorneys from developing well honed analytical abilities and practical skills. This Article concludes by suggesting that the sort of mature and expansive notion which many legal educators want to call "thinking like a lawyer" is actually limited by that phraseology. This Article argues that we should really call these broader notions "lawyering," as this term more accurately captures the fact that this more expansive set of cognitive and practical skills is continually honed and developed throughout one's professional career. Also this allows for the obvious fact that many of the skills that proponents of the more expansive notion propose fall outside the scope of traditional legal thinking in the narrow sense. In my view, then, "thinking like a lawyer" is narrower and more simplistic than "lawyering." Both, of course, have a place in legal education; the former is a necessary introduction that helps situate the

¹¹See Schultz, *supra* note 2.

texture and sophisticated nature of the latter for students as they move through their careers as students and attorneys.

II. THE TRADITION OF TEACHING STUDENTS TO “THINK LIKE LAWYERS”

For generations legal educators have impressed upon the students who they have taught, especially first year law students, that the experience they must garner from their studies is to learn how to “think like a lawyer.”¹² What exactly does this mean though? There seems to be no consensus about exactly what we mean when we use the phrase.¹³ Virtually every legal educator imbues the phrase with what they consider to be intuitive understanding,¹⁴ yet, the definitional parameters of the phrase remain slippery and elusive. This gives scholars with widely divergent notions of the proper aims of American law schools latitude to co-opt the phrase.

Does this lack of a consistent or widely-accepted definition of what “thinking like a lawyer” means render the term incoherent and useless? I do not think that it does. Even though the phrase “thinking like a lawyer” is malleable and slippery, there is a serviceable core that retains an important formative element for law students, particularly first year law students. This formative core relates to the initiative effect of legal pedagogy early in a law student’s legal education. In essence, first year law students must be initiated into a professional paradigm. Legal educators do this, often uncritically, by employing a highly stylized and formal analytical regimen in the classroom. This regimen involves molding the analytical abilities of a diverse body¹⁵ of students in order for the entire group to begin to think about the law in a predictable and professionally congruent manner, which is what I take to be the substance behind the phrase “thinking like a lawyer.”

This notion of “thinking like a lawyer” plays on the idea that lawyers have a distinct and particular way of thinking that differs from other professionals.¹⁶ As controversial as this may be, there is something compelling to this argument. Legal professionals do, in fact, have a distinct way of thinking about the world, and perhaps the most fundamental thing that law professors must do is to begin to teach their students to think about problems and fact-based situations in roughly the same ways that lawyers think.¹⁷ Part of what makes the legal profession a profession¹⁸ is

¹²Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F.L. REV. 121, 122-23 (1994); Kenney Hegland, *Quibbles*, 67 TEX. L. REV. 1491, 1516 (1989).

¹³Mudd, *supra* note 3, at 705.

¹⁴Saunders & Levine, *supra* note 12.

¹⁵Diverse in terms of age, economic background, ethnicity, gender, ideology and race.

¹⁶Saunders & Levine, *supra* note 10, at 122-23.

¹⁷Those of us who teach skills courses are mindful of the fact that thinking as lawyers think, however, is only part of the picture. Being able to think like a lawyer frequently does not translate, for instance, into being able to communicate or write like lawyers. See, e.g., Smith, *supra* note 3, at 7.

¹⁸Neumann, *supra* note 3, at 408.

that initiates must learn a new ontology,¹⁹ a new *Weltanschauung*. The law school experience is, in many ways, similar to other formative (or re-formative, as the case may be) enterprises such as military "boot-camp."²⁰ Initiates learn to think according to new rules and regulations; they are taught a new language;²¹ their creativity and intellectual vigor are channeled into a highly formalized and rigidly controlled continuum of thought and they are instilled with a sense of *esprit de corps* and professional responsibility. Some may go so far as to agree with the sentiments of one of my first year writing students that "[we] are really just trying to brainwash those who have decided to pursue a career in the law." In any event, the nearly universal notion that lawyers think and communicate differently rings true at some important level.

The initiation into thinking like a lawyer has a tremendous formative effect on first year law students. Like most initiation rituals, learning to "think like a lawyer" plays on various psychological and psycho-social insecurities that students bring with them to law school.²² Learning how to "think like a lawyer" in this first year of law school involves immersing students in a world that is alien and, in many ways, frightening. Students are expected to learn a new language, a new way of looking at the world, and a new and distinct way of expressing their understanding. The first year of their studies is a time of great ambiguity and excitement for law students.²³ As James Boyd White stated:

¹⁹Whether the mind-set which is taught to law students is actually an ontology in the truest sense of the word (i.e., whether legal pedagogy cuts to the center of one's being) is certainly debatable. The metaphysical and epistemological complexion of this is interesting in its own right, but is beyond the scope of what I hope to accomplish here. For purposes of this paper, then, I will use the term ontological in a purely descriptive sense to convey the mind-set or world-view that legal professionals share.

²⁰For those of us who have been through both law school and boot camp, the parallels are obvious.

²¹For centuries this language was functionally a private language which kept those who did not have legal training outside the machinations of the legal system. See Dragan Milovanovic, *Postmodern Law and Subjectivity: Lacan and the Linguistic Turn*, in DAVID S. CAUDILL AND STEVEN JAY GOULD, *RADICAL PHILOSOPHY OF LAW, CONTEMPORARY CHALLENGES TO MAINSTREAM LEGAL THEORY AND PRACTICE* 38-44 (1995) (discussing an application of Jacques Lacan's discourse theory of exclusion). But see LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 243-315 (1958). This exclusivity mystified the profession and established social and political power advantages for those who possessed such training. One of the truly important consequences of the so-called plain English movement is to de-mystify the law. Whether this will have the effect of correcting the social and political power imbalances that legal professionals maintain is yet to be seen. A great deal of work has been done on this issue by feminist legal theorists. For a good discussion of this, see B. Arrigo, *Rethinking the Language of Law, Justice and Community: Postmodern Feminist Jurisprudence*, *RADICAL PHILOSOPHY OF LAW*, 88-107. Much of this feminist literature is based in Michel Foucault's work. See, e.g., MICHEL FOUCAULT, *MADNESS AND CIVILIZATION* (1965).

²²For a general discussion of the psychological theories associated with legal pedagogy, see Saunders & Levine, *supra* note 12, at 122-23.

²³James Boyd White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) To Be*, 36 J. LEGAL EDUC. 155 (1986).

From the student's point of view, this year is exciting, often transforming. Pushed by their circumstances and by themselves as perhaps they have never been pushed before, they find resources they did not know they had and discover themselves undergoing a profound change: from bright young students to bright young lawyers ready to go to work in the world.²⁴

It is this transformation, which White so astutely describes, that is the principle aim of the first year of law school, and which is encapsulated in the narrow notion of "thinking like a lawyer." As an initiate, learning how to "think like a lawyer" involves experiencing the world of the law in a distinct and unique way. Experiencing this first entre to the world of American law, while it is in many ways highly stylized and superficial, allows students to acquaint themselves with the verities of this world, introduces them to rudimentary notions about the workings of actors in that world, and allows them to begin their admission process to the profession.

A. Introducing the Ontology of Law by Teaching Students to "Think Like Lawyers"

Virtually all of the things that entering law students are exposed to during their first year of studies relate back to this idea that they must learn how to "think like lawyers." All of the skills they are expected to master (the gathering and culling of facts, issue spotting, rudimentary legal research, application of law to facts, etc.) reinforce the notion that the law, or more properly, the legal profession, is an intellectual world²⁵ distinct from any other. The law is a domain of human inquiry that draws upon the basic cognitive and analytical abilities of the actors within the domain, but which makes interpretive sense primarily in the context of the domain itself.²⁶ When a student undertakes a legal education, she must develop a "legal mind" in order to fully mold her analytical and cognitive capabilities in a fashion that will enable her to think about the law in a way which situates her within the domain.²⁷ While I need not go into the epistemology of this here, it should suffice to say that human cognition is perhaps best understood in the context of particular cultural constructs.²⁸ It is the immersion of actors within a tradition that gives

²⁴*Id.*

²⁵I used to teach logic to upper level philosophy students, and would frequently discuss "possible world" scenarios in the context of the work of Saul Kripke. *See generally*, SAUL KRIPKE, NAMING AND NECESSITY (1980). For a more directly applicable discussion *see* DAVID LEWIS, ON THE PLURALITY OF WORLDS (1986).

²⁶*See* JILL J. RAMSFIELD, THE LAW AS ARCHITECTURE: BUILDING LEGAL DOCUMENTS 7-20 (2000).

²⁷*Id.*

²⁸*See, e.g.*, JOHN MCDOWELL, MIND AND WORLD (1994), 95-99 (stating "[w]hen particular traditions seem ossified or hide-bound, that encourages a fantasy that one should discard reliance on tradition altogether, whereas the right response would be to insist that a respectable tradition must include an honest responsiveness to reflective criticism."). This "fantasy" is what I believe drives the criticism of the traditional understanding of "thinking like a lawyer." In recent years, numerous commentators have criticized this traditional understanding and have attempted to stretch the phrase to include a whole host of analytical and practical skills. *See generally, supra* note 3. While many of these skills and abilities are useful for legal

expression to the cognitive abilities of any actor within that tradition or culture.²⁹ The law, perhaps more so in America than any society or culture before, has a distinct and important tradition that maintains its own mores and modes of understanding.

It is this background in culture and tradition that gives lawyers³⁰ (as actors in the legal system) the context within which their cognitive and analytical understanding of legal issues and problems makes sense. The content of legal thinking, then, depends on having an understanding of shared cultural constructs and traditions.³¹ As the philosopher John McDowell says, "[t]o understand empirical content in general, we need to see it in its dynamic place in a self-critical activity, the activity by which we aim to comprehend the world as it impinges upon our senses."³² The law, like any distinct culture, maintains a set of activities, which the actors employ to give content to their understanding.

When students enter law school, they "enter a discourse community and gradually acquire expertise in [this] new domain."³³ In order for law students to gain the requisite familiarity with this system, they must mold their cognitive abilities in such a way that they can begin to understand and use the "specialized vocabulary and theoretical constructs"³⁴ that actors in the legal system utilize. Jill Ramsfield draws from the linguistic theory of John Swales³⁵ in maintaining that the law is a distinct discourse theory because the profession has:

1. A broadly agreed upon set of common goals;
2. Mechanisms of intercommunication among its members;
3. Ways to use these mechanisms to provide information and feedback;
4. A register that uses particular genres to further its aims and a specific lexis, syntax and phraseology; and
5. A threshold level of members with appropriate expertise.³⁶

Before one can utilize this distinct mode of discourse effectively, she must have mastered its basic elements thoroughly. Complex thinking within the domain, then, is contingent on having the appropriate expertise.³⁷

practitioners, I am not so sure that bootstrapping them into the phrase "thinking like a lawyer" is coherent.

²⁹*Id.*

³⁰Here I do not mean just practicing lawyers, but judges, legal educators and—almost invariably—legislators as well.

³¹James Elkins suggests that when educators use the phrase "thinking like a lawyer" they assume that "lawyers think in a particular and stylized way that is worth passing on as an essential part of legal craft and heritage." Elkins, *supra* note 3, at 512.

³²See McDOWELL, *supra* note 28, at 34.

³³Saunders & Levine, *supra* note 12, at 142-43. See also, RAMSFIELD, *supra* note 26.

³⁴Jaquish & Ware, *supra* note 3, at 1716.

³⁵See JOHN SWALES, *GENRE ANALYSIS* (1990).

³⁶RAMSFIELD, *supra* note 26, at 17.

³⁷*Id.* at 7-20.

Law schools are tasked with introducing the complexities of both the distinct discourse and complex domain.³⁸ As James Elkins states,

The story of legal education is the story of how one learns legal discourse, and how the world and its problems can be seen through the prism of linguistic categories and rhetorical strategies known to law. Seeing the world in this way is relatively easy, and with encouragement and time (always a problem) the student begins to learn the skill of legal discourse.³⁹

Legal educators help students take the first tentative and stumbling steps in the direction of a fuller appreciation of the legal domain. The first steps are, admittedly and by necessity, simplistic, highly formal and overly stylized. This basic structure enables students to move from the neophyte to the novice. This move is vital, as it prepares students for the more complex and textured understanding that they will need to develop in order to become fully accepted members of the profession. While these steps are rudimentary and simple, they have profound impact on the education and training which follows.⁴⁰

This simple and beginning stage employs certain stylized and formal activities in order to initiate students to this new world of thinking. Chief among these activities are those related to the representation of the interests of others in an adversary system, which pits advocates against one another in an effort to resolve disputes.⁴¹ The perception that most actors in the American legal system share regarding this system, rightly or wrongly, is that this sort of arrangement best represents the interests of justice and fairness for those represented.⁴² As a result, entering law students must be exposed to, and in turn master, simplistic and untextured analytical and discourse skills that are crude approximations of what fully initiated actors in the domain would exhibit.⁴³ Part of this whole process is the instilling of advocacy skills that are an important part of any lawyer's repertoire. Indeed, much of the first year curriculum in American law schools is aimed at having students dissect legal arguments (largely extracted from appellate opinions) and apply them to shifting factual situations.⁴⁴ These discussions, which usually occur in a Socratic exchange

³⁸Saunders & Levine, *supra* note 12, at 144.

³⁹Elkins, *supra* note 3, at 520.

⁴⁰Elkins, *supra* note 3, at 520. I accept the argument, proposed to me by Rick Greenstein, that this has an important, and potentially troubling, normative effect on the students, in that they may perceive or interpret this simplistic and rudimentary notion of legal thinking as being amoral. As I discuss later in this paper, I think this is why legal educators must urge their students through this initial stage in their legal education. See *infra* section V. For a good discussion of the ethical problems associated with the narrow notion of legal thinking see Jane B. Baron & Richard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 37 (2001).

⁴¹Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 531-33 (1980-81).

⁴²*Id.*

⁴³RAMSFIELD, *supra* note 26.

⁴⁴ARTHUR T. VANDERBILT, II, AN INTRODUCTION TO THE STUDY OF LAW 53-54 (1979).

between student and teacher,⁴⁵ are almost universally in the context of litigation in the adversary system.⁴⁶ This socialization sets the foundation for the students' understanding of the domain specific context which was discussed above.

The main vehicle for this sort of training in law schools is the case law method. The Langdellian case law method is designed to enable law professors to train large classes of incoming students to understand the logic, language and context of legal decision-making.⁴⁷ Law students, especially first year law students, are expected to read, digest and be able to discuss cases, and the concepts that can be derived from these cases, in the so-called doctrinal areas of the law (civil procedure, contracts, property, torts, etc.).⁴⁸ All law schools extensively employ this method of teaching students "how to think like lawyers" in their first year curriculum.⁴⁹ From this experience, law professors expect that they can help mold the thinking of their students to conform to the expected standards of the profession that these students have chosen to enter. The case-law method, along with the Socratic approach of dialogue between students and their professor,⁵⁰ is meant to instill in students the notion of how they need to think if they are to be successful in law school, and in the profession generally.⁵¹ This technique of training lawyers is tried and true. It has, after all, yielded some of the most important legal minds in American jurisprudence.⁵² Countless practicing attorneys, from the largest most prestigious firms in Los Angeles, New York and Washington, DC to the most humble solo practices in Appalachia, have learned their craft in just this fashion. There must be something to the method of teaching law students we have employed for generations is both useful and effective.

At some level, the vast majority of law professors who spend much time thinking about pedagogy would agree the case law method has its strengths.⁵³ While almost every professor would have their own definition of what "thinking like a lawyer" means,⁵⁴ there would be near unanimity that the typical first year curriculum is helpful at some level in getting students there. As one commentator has said:

⁴⁵See *id.* at 53-54. See also RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* (1992).

⁴⁶JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 10, 12-13 (1983).

⁴⁷See, e.g., VANDERBUILT, *supra* note 44, at 53 - 54.

⁴⁸These are, of course, all arbitrary divisions. VANDERBUILT, *supra* note 44, at 52-54.

⁴⁹*Id.*

⁵⁰Robert J. Martineau, *Appellate Litigation: Its Place in the Law School Curriculum*, 39 J. LEGAL EDUC. 71, 72-3 (1989).

⁵¹VANDERBUILT, *supra* note 44, at 54.

⁵²For interesting anecdotes about the law school experiences of notable American jurists see VANDERBUILT, *supra* note 44, at 39-46.

⁵³But see, Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93 (1968). See also, Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970).

⁵⁴Mudd, *supra* note 3, at 705.

Even though lawyers and legal educators use the phrase thinking like a lawyer without great precision, recurrent concepts are associated with it. The first-year law student knows that briefing cases has something to do with it. The training typically found in first-year classrooms would also concern the ability to analyze facts and appreciate the shifting legal results produced by factual nuances, to separate a complicated problem into its component parts, to assemble facts into a meaningful whole; and, in running through it all, a capacity of ferreting out of a problem those features relevant to its resolution. These are at least common themes in first-year courses.⁵⁵

The traditional method of training law students that is employed in the first-year of their studies is specifically designed to yield an environment that exposes them to a distinct experience. The use of this method in the classroom can, for example, expose relatively large numbers of students to doctrinal concepts, help them see how these doctrines are related (often inter-related), and give them a basic working understanding of how the legal process operates. These are all laudable and necessary elements of a rudimentary legal education. This is why the doctrinal case-law method is particularly useful in first-year law classes. These students need to stretch and modify the analytical skills that have placed them into law school. They need to develop the specialized use of these skills in the context of legal analysis and decision-making.⁵⁶ In other words, first year law students are expected to learn a new ontology;⁵⁷ they are expected to see and think about the world in a new way. The narrow notion of “thinking like a lawyer” is an expression of this ontology in the context of the litigation and adversary culture of American law. The case-law method has proven to be a relatively effective and efficient way of assisting students in this process of epistemological transformation.

B. *To Be...or Not To Be*

This narrow conception of “thinking like a lawyer” helps introduce entering law students to the ontology of law. What if no such ontology exists, however? Critics have frequently assailed the sort of ontological conceptualization that is proposed above and maintained that lawyers (and law students) think in essentially the same way that other professionals do. I ultimately reject this argument for the reasons outlined above. Further, I reject this proposition based on the idea that before this sort of epistemological constancy can be discerned, novice actors in any particular domain must be initiated through rudimentary experiences before they can employ their mature reasoning abilities. In short, it may be that mature practitioners in

⁵⁵*Id.*

⁵⁶In the words of James Boyd White, “[t]he student’s mind is trained, of course, in a specific professional context—it is the language of the law, not of medicine or linguistics that the law student learns to understand, to recast, to remake—and this part of her training is . . . important.” White, *supra* note 23, at 161.

⁵⁷As Richard Neumann puts it, “[t]his kind of knowledge is, after all, one of the characteristics of a profession. To a lay person, the knowledge seems magical, but to professional it is part of the state of being, so ingrained that the professional cannot imagine life without it.” Neumann, *supra* note 3, at 408.

medicine, law and the arts think in remarkably similar ways,⁵⁸ but initiates to these professions decidedly do not.

Several persuasive arguments contend that the substance behind what we mean when we say that we teach our students to "think like lawyers" is not a distinct ontology.⁵⁹ Proponents of this position maintain that the analytical skills that we are trying to teach are of a sort that any professional school might teach.⁶⁰ That is to say, that the sort of clear analytical and logical thinking skills which we hope our students will develop during their law school experience is no different than the sort that medical students receive from medical school, or those that managers receive from business school.⁶¹ This seems intuitively correct on at least two levels. First, it should go without saying that we are trying to teach law students to think clearly and critically. The educational process found in law schools, like almost any educational process,⁶² is meant to help students augment and develop their basic analytical skills.⁶³ The sort of analytical and cognitive skills which enable students to think critically are, perhaps, a universal part of human understanding that can be employed in any field.⁶⁴ In this sense, to say that we are trying to teach students how to employ their basic critical reasoning abilities is tautological. As legal education is a species of education, legal educators are, of course, involved in the enterprise of helping students develop and broaden their analytical abilities. This, however, is not saying much.

The second level involves a more complex epistemological point. I suspect that those who maintain that there are cognitive constants that cut across domains of intellectual endeavor are suggesting something more profound.⁶⁵ On this level, it seems correct to say that there are some analytical and critical reasoning abilities that serve as the foundation of our learning about and understanding of the world.⁶⁶ In this context, Dean John Mudd suggests that "skilled and well trained intellects operate in the same general fashion whether the grist for their intellectual mills be philosophy, law, science, or politics."⁶⁷

⁵⁸Neumann, *supra* note 3, at 404.

⁵⁹Mudd, *supra* note 3, at 705-6.

⁶⁰*See, e.g.*, Mudd, *supra* note 3.

⁶¹*Id.* *See also*, Emily Calhoun, *Thinking Like a Lawyer*, 34 J. LEGAL EDUC. 507 (1984).

⁶²There are, of course, educational environments where the reality is simply that students are expected to memorize and regurgitate information. Ostensibly, however, the educational models employed are in theory at least supposed to develop the analytical abilities of the students.

⁶³Mudd, *supra* note 3, at 705.

⁶⁴*Id.*

⁶⁵In fact, John Mudd, who argues this point persuasively, has taught philosophy as well as law. This fact is enlightening in the present context.

⁶⁶IMMANUEL KANT, *CRITIQUE OF PURE REASON* (1965) ("B" ed. 1787). For a discussion of the *a priori* in Kant's epistemology *see* HENRY E. ALLISON, *KANT'S TRANSCENDENTAL IDEALISM* (1983).

⁶⁷Mudd, *supra* note 3, at 705.

Dean Mudd relies, in part, on the work of the philosopher and scientist Michael Polanyi in making this assertion.⁶⁸ The bulk of Polanyi's work is a meta-theoretical examination of epistemology.⁶⁹ Polanyi maintains that all domains of human intellectual endeavor are formed by an inchoate understanding, which "dwells in" the critical reasoning of each of us.⁷⁰ It is this "dwelling in" that enables us to employ our reasoning in different contexts. This is a sort of intellectual emersion, which enables us to fully utilize the true range of our critical reasoning abilities.⁷¹ Discussing this in the context of mathematics, Polanyi states:

Between the practice of hackneyed exercises on the one hand and the heuristic visions of the lonely discoverer on the other, lies the major domain of established mathematics on which the mathematician consciously dwells by losing himself in the contemplation of its greatness. A true understanding of science and mathematics includes the capacity for a contemplative experience of them, and the teaching of these sciences must aim at imparting this capacity to the pupil.⁷²

Polanyi further states, in attempting to expand this discussion beyond the hard sciences, that:

The task of inducing an intelligent contemplation of music and dramatic art aims likewise at enabling a person to surrender himself to works of art. This is neither to observe nor to handle them, but to live in them. Thus the satisfaction of gaining intellectual control over the external world is linked to a satisfaction of gaining control over ourselves.⁷³

Though he never explicitly states it, we might imagine that this process can take place in the context of the study of law. Dean Mudd certainly thinks so.⁷⁴

Implicit in this argument is the idea that one must have a certain exposure to the domain in question. The language and basic conceptual paradigms of any particular domain must be grasped on at least a rudimentary level before the emersion suggested by Polanyi and Mudd can be attained. A basic working knowledge of the terminology and conceptual frameworks of mathematics and art (and law) are necessary in order for the student to see how their contemplative experience of these domains of study can open up their understanding in this more complete and rich way. Law school, especially the first year, is meant to provide the rudimentary

⁶⁸*Id.*

⁶⁹The most widely noted and frequently cited example of this work can be found in Polanyi's book *MICHAEL POLANYI, PERSONAL KNOWLEDGE* (Chicago: Univ. of Chicago Press, 1958).

⁷⁰*Id.* at 195-202.

⁷¹This position of Polanyi's rests on the Kantian assumption about the adequacy of *a priori* human reason. See KANT, *supra* note 66.

⁷²POLANYI, *supra* note 69, at 195-96.

⁷³*Id.* at 196.

⁷⁴Mudd, *supra* note 3, at 705.

training that will enable those who pass through the experience to attain the currency and understanding that Polanyi and Mudd hope for.

It seems that both the superficial notion of how legal education can (and should) help students build and augment their critical reasoning skills, and the more complex epistemological discussion about how our faculties of understanding feed into our ability to immerse ourselves or "dwell in" our vision of how our world fits together across domains, are true. However, these are not the levels on which the present discussion about teaching law students "how to think like lawyers" must be examined. Between the time that students enter law school and the point at which they may achieve the conscious dwelling-in the law that accomplished practitioners manage, there is a place where neophytes must learn the language, culture and process of the law.⁷⁵ This is the role that "thinking like a lawyer" plays in the legal academy. "Thinking like a lawyer" is, in Polanyi's language, a hackneyed and formalist set of exercises and experiences, which caricature mature practices and abilities, but which introduces students, in rudimentary fashion, to important foundational concepts.⁷⁶ The experiences that law schools provide for the entering student, under the guise of "thinking like a lawyer," are central to their subsequent understanding of and familiarity with the law.⁷⁷ The sort of experiences that law students gain in law school start the process that will ultimately lead to the students' understanding of how this works in the larger context of the American legal system.

As a result, the superficial notion of equating "thinking like a lawyer" with basic analytical and critical thinking skills aims too low. Part of the purpose of legal education is certainly to help students develop stronger and more robust critical and analytical skills.⁷⁸ Basic analytical skills are (or should be) taught and augmented throughout one's education. Education from K-12 and through college focuses on the sort of analytical and cognitive skills to which the superficial notion refers.⁷⁹ We

⁷⁵Elkins, *supra* note 3, at 519.

⁷⁶See POLANYI, *supra* note 69, at 195-96.

⁷⁷OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881). To paraphrase Holmes, students must experience the law. In his seminal treatise *THE COMMON LAW*, Holmes said: The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intentions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a great deal more to do that the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been and what it tends to be. We must assuredly consult history and existing theories of legislation.

Id.

⁷⁸Mudd, *supra* note 3, at 705.

⁷⁹Certainly there are ranges in abilities which must be accounted for. We should, for instance, be conscious of opening the door to the legal academy to those who have not traditionally had access due to economic or societal disadvantage. Every legal educator I know, however, maintains that we cannot teach 16 years of X (fill in the blank) in the first semester of law school. All law students, then, must have a certain level of educational attainment in addition to analytical and critical reasoning potential in order to be successful.

might expect, then, that entering law students will have a basic set of analytical tools from which to begin their journey into the profession.⁸⁰ This is, in fact, the case in the overwhelming number of instances. To continue this process in law school is, arguably, a secondary mission of legal education. If law school were like any other sort of analytical training, students would probably be better served by a year (or two, or three) of instruction in formal and informal logic (as well as rhetoric, political and social theory, and the like). Few legal educators would prefer this method of instruction and training.

On the other hand, the more complex and expansive notion concerning how these critical reasoning skills are in fact utilized by the human understanding aims too high. Entering law students do not yet have the conceptual and contextual abilities to reach this level of emersion.⁸¹ My understanding of this epistemological position suggests that one must have passed through a period of indoctrination in order to “dwell in” an understanding of the law, which is sophisticated enough to utilize all of the pure reasoning capabilities that Polanyi and Mudd suggest can be brought to bear on a legal question (or any other sort of question). It is not that they are wrong; rather, it is simply that the substance of their position presupposes some sort of working knowledge of the context of the domain(s) in which these complex abilities are being employed. This sort of complex epistemological emersion is not for the uninitiated.

Initiation plays a larger role in the process of legal education than most would care to admit.⁸² Before novices in the domain can hope to think and act in ways which we might expect from mature practitioners, these novices must undergo the rudimentary and stylized experiences encapsulated in the narrow notion of “thinking like a lawyer.”⁸³ These experiences help students begin to feel and comprehend the law in a lived way.⁸⁴ Without these experiences, a vital and formative core would be missing. Initiation, then, gives students a foundation upon which more mature and fully formed understanding can be built. This is the level on which we must examine the more common understanding of what we mean when we say we try to teach our students to “think like lawyers.”

⁸⁰This is why admissions committees at law schools examine the college records of applicants, and why aspiring law students must take the Law School Admissions Test [hereinafter LSAT]. The presumption is that these are good indicators of whether any particular student has the requisite analytical and critical reasoning abilities to be successful in law school.

⁸¹Saunders & Levine, *supra* note 12, at 142-43.

⁸²As Ramsfield puts it: “[t]he legal culture puts [students] in specific surroundings and under certain expectations. These circumstances spring from traditions whose origins may be obscure but whose followers are devout.” RAMSFIELD, *supra* note 26 at 7.

⁸³RAMSFIELD, *supra* note 26 at 7-20.

⁸⁴There is something phenomenological about this sort of experience. This idea is a bit beyond the scope of this paper, however.

III. HOW "THINKING LIKE A LAWYER" INITIATES NOVICES TO THE WORLD OF THE LAW

Most people who have had any exposure to modern legal education would agree that law schools do not teach students everything they need to know to be lawyers.⁸⁵ Instead, the pedagogical model employed by legal educators is designed to give students a set of experiences that will prepare them to adequately and effectively identify, classify and address legal problems once they pass the bar examination and enter professional practice.⁸⁶ This is what we might call a "domain specific" educational model.⁸⁷ In other words, this model is designed to initiate bright and active intellects in to the world of the law in contemporary American practice. While students who enter law school have, on the whole, the type of analytical and critical reasoning skills that would enable them, if they were so inclined, to be successful in other professions, these students have chosen to attend law school. It should be no small wonder, then, that these students must mold their analytical abilities in a way that is particular and distinct.⁸⁸ Indeed, the terminology, culture and expectations of the legal profession are particular and distinct.⁸⁹ In order to understand this, entering law students must learn how to think in ways that are common to others in the profession.⁹⁰ This is what most legal educators mean when they say that law students must "learn to think like lawyers."⁹¹

This initiation process is designed to give entering law students a broad exposure to the language and logic of the legal profession. In short, law school, especially in the first year, is designed to indoctrinate aspiring attorneys into a distinct world-view⁹² or ontology.⁹³ It is not that law students must somehow develop unique or different analytical capabilities than their peers in other fields; rather, that they must learn to employ them differently.⁹⁴ As former Dean of the New York University School of Law Arthur Vanderbilt once said:

The reasoning of the lawyer, it will be seen from the elements with which he deals, is not the reasoning of the logician, the mathematician, the scientist or the philosopher, though there is much he may learn from them. His reasoning differs from each of theirs, as theirs, in turn, differs from that of the historian, the biographer, the economist, the sociologist, the

⁸⁵Saunders & Levine, *supra* note 12, at 123.

⁸⁶See Schultz, *supra* note 2.

⁸⁷Saunders & Levine, *supra* note 12, at 142-43.

⁸⁸See Schultz, *supra* note 2, at 68.

⁸⁹Elkins, *supra* note 3, at 519-20.

⁹⁰See Schultz, *supra* note 2, at 68; Elkins, *supra* note 3, at 519-20.

⁹¹See Neumann, *supra* note 3, at 405.

⁹²See Elkins, *supra* note 3, at 525, 529.

⁹³See Neumann, *supra* note 3, at 408.

⁹⁴See White, *supra* note 23, at 160-62.

accountant and the statistician, from each of whom the law student may also gain much.⁹⁵

It is “the elements with which a lawyer deals” that sets the profession apart. The most vital part of a law student’s education, in many respects, is the introduction and assimilation of how these elements operate within the framework of the American legal system.

In all practical terms, “thinking like a lawyer” means gaining experiences in and about the operation of the American legal system.⁹⁶ Law school, especially the first year curriculum, is designed to give these experiences. Dean Vanderbilt recognized this when he stated:

The first year at law school is the year with the greatest formative effect on the professional life of a young lawyer. It is then that he should acquire the lawyer’s ability to absorb facts and rules accurately and quickly, to search for the controlling reasons for a rule of law, to employ these rules in hypothetical situations, to acquire the capacity for hard, prolonged intellectual labor, and to develop a genuine interest in the law as an important aspect of life.⁹⁷

This formative experience is important in that it prepares aspiring lawyers for the culture they are about to enter. It is, in this sense, a rite of passage. As my property professor in law school, Jerome Shuman, stated, “law school is a crucible which transforms students into lawyers.” While this philosophy may have been overstated, the point is well taken; in order to understand the expectations and cultural mores of the legal profession, students should be exposed to a common educational experience (common to both their fellow students and to those who have gone before them).⁹⁸ It is from this experience that students will gain their respect for and working knowledge of the law.

This is such an important part of a neophyte lawyer’s training because she must have this foundation on which to build as she augments her analytical and critical skills in the context of her professional life.⁹⁹ A lawyer may use the same sort of reasoning skills that mathematicians or artists or philosophers use, but it is the context in which these reasoning abilities are employed that give them expression.¹⁰⁰ The only way to build this foundation is by being initiated into the culture of the

⁹⁵See VANDERBILT, *supra* note 44, at 19.

⁹⁶See Smith, *supra* note 3, at 10 (“[a] deeper understanding of what it means to think like a lawyer requires an understanding of the context within which the practice of law occurs.”).

⁹⁷Smith, *supra* note 3, at 7.

⁹⁸I do not mean “common” in the sense of “identical” or “standardized”. Anyone familiar with legal education knows that there is very little in the way of standardized content, even across sections in a law school which use the same case book. In this context, I believe that a common educational experience suggests more in the way of tone or approach rather than content.

⁹⁹Neumann, *supra* note 3, at 408.

¹⁰⁰Smith, *supra* note 3, at 10. See also, *supra* notes 25 and 26, and accompanying text.

domain.¹⁰¹ Entering law students are expected to learn more about the culture of the law than they are about the formal logic and epistemology behind their reasoning process¹⁰² or the reasoning process of other actors in the legal system.¹⁰³ It is the culture that gives students' thinking abilities tangible expression. This is why professors at virtually every law school in America employ essentially the same method¹⁰⁴ to expose entering law students to a culture that other members of the profession share by common experience. The common educational experiences of professional attorneys are necessary to both define who they are as professionals, and give them a point of departure from which to develop their own voice.¹⁰⁵ The most consistent experiences of this "cultural education," especially early in a law student's career, are the combined array of persuasive traits known as advocacy skills.¹⁰⁶

Legal pedagogy in America rests on the principle that our system is an adversary system.¹⁰⁷ This adversary system is based on the opportunity of competing parties to push their positions on a legal problem to a resolution in which one party wins and another loses. Since lawyers act as advocates for the parties in these disputes, law students need to learn the nature and extent of this sort of representation. As interpreted, the phrase "learning to think like a lawyer" is almost invariably linked (at least in the law school context) to a notion of advocacy played out by competing lawyers who represent adversaries with competing interests.¹⁰⁸

The majority of law professors concentrate on the idea that American lawyers work within an adversary system.¹⁰⁹ This is the litigation model that is an implicit, but necessary, part of the Langdellian case law method.¹¹⁰ The method of discourse

¹⁰¹Smith, *supra* note 3, at 10.

¹⁰²There are notable examples of those who do try to reduce legal reasoning to a more or less formal logic. See, e.g., SHELDON MARGULIES & KENNETH LASSON, *LEARNING LAW: THE MASTERY OF LEGAL LOGIC* (1993); ALDISERT, *supra* note 46; PIERRE SCHLAG & DAVID SKOVER, *TACTICS OF LEGAL REASONING* (1986).

¹⁰³Nor are they explicitly taught about "the political and moral philosophies that accompany various approaches to legal thinking." Elkins, *supra* note 3, at 516.

¹⁰⁴The level of effectiveness with which individual professors employ this method varies widely. See VANDERBILT, *supra* note 44, at 53.

¹⁰⁵According to Stanley Fish, "[a] professional must find a way to operate in the context of purposes, motivations, and possibilities that precede and even define him and yet maintain the conviction that he is 'essentially the proprietor of his own person and capacities.'" STANLEY FISH, *Anti-Professionalism*, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1992). From my point of view, the common ground in the legal profession that enables initiates to carry out this task is the advocacy system.

¹⁰⁶VANDERBILT, *supra* note 44, at 9.

¹⁰⁷Van Valkenburg, *supra* note 6.

¹⁰⁸Schultz, *supra* note 2, at 59.

¹⁰⁹For an interesting discussion on the art of persuasion in this context see Joseph W. Singer, *Persuasion*, 87 MICH. L.R. 2442 (1989). See also, Van Valkenburg, *supra* note 6.

¹¹⁰See Saunders & Levine, *supra* note 12, at 126. See also William J. Woodward, Jr., *Clearing the Underbrush for Real-Life Contracting*, 24 L. & SOCIAL INQUIRY 99, 103 (1999).

and instruction in law classes, especially in first year courses, drives home to students the idea that judicial opinions (invariably from appellate courts) are the principle form of legal thinking which should be emulated. Walter Van Valkenburg describes this clearly when he states:

From the curriculum, the student learns that the law consists of how courts deal with disputes between private parties, and to a lesser extent how courts deal with disputes between private parties and the state. . . . Other functions of law and other ways in which disputes might be resolved are not perceived to be an important part of law study, at least during the first year.¹¹¹

Nancy Schultz says this even more bluntly when she states that “law schools send the message that law is litigation.”¹¹² This is true even in the face of overwhelming evidence that a vast majority of disputes settle before they even get into the litigation stream.¹¹³

By pushing the notion that the study of law is best accomplished by reading and discussing appellate cases, law professors set in place and continually reinforce the notion that our conception of law is essentially a zero-sum game.¹¹⁴ By employing this method as extensively as we do, we are teaching our students that arguing a cause (any cause which they are assigned) as fervently and competently as they can is what being a lawyer is all about.¹¹⁵ “Thinking like a lawyer,” then, requires law students to think strategically and competitively, always calculating the best possibilities for winning given the complex factual and legal variables with which they have been presented.¹¹⁶ By and large, it is a law student’s ability to think in this manner that we are attempting to evaluate in traditional law school exams. In this model, lawyering, and hence “thinking like a lawyer,” is characterized by the ability of students to read, understand, digest and be able to discuss the arguments they find in judicial opinions.¹¹⁷

Van Valkenburg calls this the “judicialization” of conflict.¹¹⁸ This disposition, he says, leads legal educators to focus “excessively on borderline cases which might

¹¹¹Van Valkenburg, *supra* note 6, at 598.

¹¹²Schultz, *supra* note 2, at 59.

¹¹³Miller & Sarat, *supra* note 41, at 536-46.

¹¹⁴See Schultz, *supra* note 2 at 64-65. This is beginning to change, however. The authors and editors of some first-year case books are lessening the emphasis on appellate cases, and introducing students to a wider range of practice and non-litigation materials. An interesting example is STEWART MACAULAY, ET AL., *CONTRACTS: LAW IN ACTION* (1995).

¹¹⁵Elkins, *supra* note 3, at 519. See also, Paul T. Wangerin, *Skills Training in “Legal Analysis”: A Systematic Approach*, 40 U. MIAMI L. REV. 409, 420 (1986); Anthony Kronman, *Forward: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 959 (1981).

¹¹⁶Richard Neumann identifies this as a “heightened form of skepticism.” See Neumann, *supra* note 3, at 405.

¹¹⁷Elkins, *supra* note 3, at 521-22.

¹¹⁸Van Valkenburg, *supra* note 6, at 586.

reasonably be decided either way."¹¹⁹ This has a profound effect upon a student's understanding of what "thinking like a lawyer" means. The context which students use to make sense of their new and expanding cognitive and practical skills abilities revolves around litigation and advocacy in the adversarial system.¹²⁰ This allows students to see the malleability and ambiguity of law,¹²¹ illustrating for them how argumentation, persuasion and sagacity can literally form opinion and reality.¹²² It teaches them, in short, to understand the value of thinking in what Robert Condlin calls "persuasion mode."¹²³

The idea that "thinking like a lawyer" translates to understanding conflict in the context of the litigation system is widespread throughout the profession.¹²⁴ This is true throughout popular culture as well.¹²⁵ These perceptions are related to the fact that the American legal system is, like it or not, litigation driven at some level.¹²⁶ As a result, advocacy is certainly a core skill that any aspiring attorney needs to learn,¹²⁷ as are the corresponding set of skills associated with the litigation process.¹²⁸ The law school experience is the student's first introduction to this environment. Since these skills are so central to the widespread perceptions of what it means to be a lawyer, it should be no surprise that the early initiation into the profession which is encapsulated in the first year of law school revolves around the themes of advocacy and the adversary process.¹²⁹ As James Elkins has said, the law school curriculum is designed to give students:

[t]he ability to ground legal pronouncements in the "facts" the ability to discern fact and opinion that is significant for judicial decision-making, the ability to argue a position and urge an outcome based on selection of

¹¹⁹*Id.* at 603.

¹²⁰*Id.*

¹²¹*Id.*

¹²²*Id.*

¹²³Robert J. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223, 231-234 (1981).

¹²⁴Much of the literature on "thinking like a lawyer" uses litigation or advocacy themes as examples. See, e.g., William H. Simon, "Thinking Like a Lawyer" About Ethical Problems, 27 HOFSTRA L. REV. 1 (1998); David N. Yellen, "Thinking Like a Lawyer" or Acting Like a Judge?: A Response to Professor Simon, 27 HOFSTRA L. REV. 13 (1998); Smith, *supra* note 3.

¹²⁵A cursory review of virtually any television program or motion picture which deals with the legal profession drives home this impression.

¹²⁶Van Valkenburg, *supra* note 6.

¹²⁷See Martineau, *supra* note 50.

¹²⁸These are clearly identified as core skills in the McCrate Report. See ABA SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 138-39 (1992).

¹²⁹Walter Van Valkenburg goes so far as to say that "[o]ther functions of law and other ways in which disputes might be resolved are not perceived to be an important part of law study, at least during the first year." Van Valkenburg, *supra* note 6, at 598.

facts and interpretation of legal opinion, and the belief that judicial opinions establish the “law.” These abilities bring with them the sense that the student has deepened her ability to reason, advocate, counsel, defend, and legislate. When this education takes hold, the student feels more sensible, objective, rational, and purposeful. The student believes she has become a person capable of “legal thinking.”¹³⁰

This introduction is a necessary part of becoming a member of the profession. One must pass through this period of artificial, compartmentalized and stilted thinking before the more complex and sophisticated reasoning abilities that are the mark of the mature practitioner can take bud and flourish.¹³¹

This position has been frequently criticized by thoughtful commentators,¹³² who maintain that the litigation focus ingrains in students a combativeness and unidimensionality that blinds them to the subtle and complex textures of actual law practice.¹³³ While discussing this criticism in more detail below, I believe that it makes a bit too much out of the lessons that law students can take away from this initial focus on litigation and the adversary system. It is certainly a problem if law students fail to move beyond the sort of hackneyed adversarialism and superficial advocacy that characterizes the narrow notion of “thinking like a lawyer.” It is the job of legal educators, however, to make sure that this does not happen. Gutting the narrow notion of “thinking like a lawyer” which is advanced here, and replacing it with a more ungamed and expansive notion, which includes a whole host of things that law students (at any level) would be hard pressed to understand,¹³⁴ is counterproductive. Before discussing this in more depth, however, a few things must be said about why it is important to focus, even if for the comparatively short time of the first year of law school, on this litigation and adversary context. The next section, sets forth several reasons why concentrating on the traditional litigation focus serves an important formative purpose for first year law students.

IV. THE ROLE OF ADVOCACY, LITIGATION AND THE ADVERSARY SYSTEM IN TEACHING STUDENTS HOW TO “THINK LIKE LAWYERS”

Law students need to learn the extent to which legal problems can and should be dealt with in an adversarial way, and how the litigation process deals with these problems.¹³⁵ There are at least three reasons why this sort of indoctrination is useful

¹³⁰Elkins, *supra* note 3, at 521-22.

¹³¹See Colon-Navarro, *supra* note 2, at 110.

¹³²See, e.g., Mudd, *supra* note 3; Schultz, *supra* note 2; Elkins, *supra* note 3; Neumann, *supra* note 3; and Menkel-Meadow, *supra* note 8.

¹³³Schultz, *supra* note 2, at 65.

¹³⁴Many of the critics of the conception which I advance here suggest that we include high level analytical and practical skills in a more expansive definition of “thinking like a lawyer.” See Schultz, *supra* note 2; Elkins, *supra* note 3; Neumann, *supra* note 3; and Menkel-Meadow, *supra* note 8. The problem with this, as I see it, is that such a move would diffuse the initial and formative impact of the sort of lessons I have discussed above. It is my fear that legal educators might focus on these high level skills in situations where students do not have an adequate analytical and conceptual foundation with which to support them.

¹³⁵See ROGER S. HAYDOCK, ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION (2d ed. 1992).

in the educational process of those who wish to be lawyers. First, since litigation and the adversarial process are such a central focus of the American legal system anyone even remotely connected to that system needs substantial exposure to the process. Secondly, the litigation process is a discrete and structured process that can introduce the entering student to fundamental contextual and procedural concepts in a way which is reasonably rational and understandable.¹³⁶ Finally, by working through the legal doctrines that they are expected to master in the context of the adversary process, law students can see firsthand how blunt the law is as a mechanism of social control.

The American legal system is, at its base, an adversarial system that employs (or uses the threat of employing) litigation to resolve conflicting claims.¹³⁷ Though many students who go to law school will not primarily work in situations that utilize the litigation process, and a substantial percentage may never even work in the law *per se*, their understanding of this system and how it operates is central to their being a member of the profession.¹³⁸ In fact, this seems to be one of those domain defining understandings that was discussed above. At some level, it makes little sense to think of one as having a working knowledge of the legal domain if they do not have a thorough understanding of the adversarial litigation system.¹³⁹ In this sense, such an initiation to the litigation context of the adversary system seems to be a threshold beyond which one must pass before she can credibly be considered a member of the profession. In essence, as one develops the cognitive skills which will develop over time into the ability to "think like a lawyer" it seems vital that this development take place in the context of the adversary system.¹⁴⁰ This is, after all, the vital core of the American legal system.¹⁴¹ Understanding, and being initiated into, the adversary system, then, (or being able to operate in "persuasion mode" as Richard Neumann states¹⁴²) is an important part of learning to "think like a lawyer."

The elements of the litigation process in the adversary system are also useful as illustrations of how the doctrines and jurisprudential concepts extant in the American legal system operate. While law may not be the science that Langdell and others argued,¹⁴³ it is useful for students to be exposed to the *grundnorms* of the American adversary system, as this system illustrates clearly and often starkly the capabilities of our conception of law when it comes to resolving difficult and intractable

¹³⁶In terms of the first year of law school, I believe that this cuts across the artificial lines drawn between "skills" and "doctrinal" classes. Both sorts of classes (if a division in fact needs to be made) invariably focus on problems in the adversary or litigation context.

¹³⁷See Miller & Sarat, *supra* note 41, at 531-33.

¹³⁸See Wangerin, *supra* note 115, at 420; and Kronman, *supra* note 115, at 959.

¹³⁹See McCRATE REPORT §§ 8.1 - 8.3, ABA SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 138-39 (1992) (identifying an understanding of the adversarial litigation system as a core value and skill).

¹⁴⁰See VANDERBUILT, *supra* note 44, at 9.

¹⁴¹See Wangerin, *supra* note 115, at 420; and Kronman, *supra* note 115, at 959.

¹⁴²Neumann, *supra* note 3, at 410.

¹⁴³See VANDERBUILT, *supra* note 44, at 52-54.

disputes. In effect, the litigation context provides a framework within which “thinking like a lawyer” makes sense.¹⁴⁴ To a large extent, the sort of strategic and competitive mentality that we drill into our law students is helpful in showing them how the paths of the law operate. Law students endlessly search for structure. The legal structure found in the adversary process is an artificial one, but it is nonetheless helpful in that it provides an epistemological tether for those who are adrift in the maelstrom of a new ontology. As James Boyd White has said, introducing students to the law in this way can be transforming and empowering.¹⁴⁵ This would suggest, then, that the very structure of the adversarial system is formative in the sense that it is itself a constituent part of the ontology of the law. This does not mean to suggest that the adversarial process and the litigation adjuncts which go along with it should be reified. It is simply that as the conceptual framework of the adversary system is a prerequisite to an understanding of the domain of the law, it may reasonably be said that the usefulness of that very framework is formative.

The final reason why the adversary process is used as a backdrop for legal education is that this process is instructive in the weaknesses in the legal system as a whole. The American legal system, like any legal system, is largely inadequate to the task of guiding and controlling social interaction.¹⁴⁶ Many students arrive at law school assuming, like most citizens, that the legal system is a comprehensive and complete tapestry which can help members of the society attain justice and fairness. A cursory exposure to the actual workings of the system, however, reveals an ineffectual (and sometimes even retrograde) social structure that simply can not effect the sort of wide-spread social control that most people tacitly assume.¹⁴⁷ This is a vitally important lesson for aspiring attorneys, as knowing the limitations of one’s profession is as important as knowing its capabilities. An extensive and comprehensive knowledge of the adversary system is the best way to achieve this background knowledge. Only by working through the doctrines that collectively comprise the corpus we expect law students to be familiar with will the limitations that were hinted at become evident. A thoroughgoing appreciation of the advocacy system, then, is a central and important part of any law student’s education.

For these reasons (and quite probably many more) an exposure to and understanding of the adversary system is an absolutely vital and central part of what it means to “think like a lawyer.” All law students, on their way to becoming full-fledged members of the profession, must understand how thinking in these competitive and adversarial ways drives the litigation system. They must learn to argue all sides of an issue, and to take the perspective of one party and push that concern as fully as possible.¹⁴⁸ Law students must be able to view these skills in the

¹⁴⁴Miller & Sarat, *supra* note 41, at 531-33.

¹⁴⁵See White, *supra* note 23, at 155.

¹⁴⁶An interesting discussion of this can be found in Raymond A. Belliotti, *The Legacy of Marxist Jurisprudence*, in *RADICAL PHILOSOPHY OF LAW: CONTEMPORARY CHALLENGES TO MAINSTREAM LEGAL THEORY AND PRACTICE* (David S. Caudill & Steven Jay Gould eds., 1995).

¹⁴⁷See generally, ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 47-133 (1976).

¹⁴⁸See generally, JAMES E. MOLITERNO & FREDERIC I. LEDERER, *AN INTRODUCTION TO LAW, LAW STUDY AND THE LAWYER’S ROLE* (1991).

context of a zero-sum game.¹⁴⁹ This ability is so important, in fact, that it might reasonably be said that this way of "thinking like a lawyer" is a necessary foundation for later skills and reasoning abilities that students will be exposed to throughout their student and professional careers. Before one can adequately envision alternatives to litigation, they must fully understand the modes of thinking which lie behind the litigation system and our adversarial culture.

A working knowledge of the advocacy system is what we might call an epistemological precursor. In order for one to be successful in the domain of the law, i.e., if law students are to achieve that level of emersion that Polanyi and Mudd maintain is a sign of competent understanding, they must learn to think of the law through the lens of the advocacy system. This is what most legal educators implicitly refer to when they say that our task is to teach law students to "think like lawyers."

The importance of this educational initiation, then, can not be overstated. Nor should the value of its importance, however, be over-emphasized. To take the sort of narrow analytical perspective identified as "thinking like a lawyer" too far can be disastrous. As James Elkins states, "[w]hen thinking like a lawyer is invested with crude meaning, as a syndrome, a map, a miniature worldview, or a simplified amoral adversarialism, the result is injustice."¹⁵⁰ Taking this ontology too far instigates what Elkins calls a mentality of "legalism."¹⁵¹ This is, he notes, decidedly not a compliment.¹⁵² The mentality of legalism "make[s] a fetish of rules and [leads students to] view with suspicion those ideals and beliefs rules can never fully embrace."¹⁵³ The problem with legalism is that it prohibits moral, political, and social discourse.¹⁵⁴ While learning to "think like a lawyer" is a vital part of any law student's training, getting trapped at that juncture can have serious consequences to the student's continuing development.

This is where the work of Polanyi and Mudd comes into play. Once a student has been initiated into the domain of inquiry, she must then move beyond the hackneyed exercises of mere formalism in order to further develop. The true complexity and subtleties associated with the actual practice of law require that new lawyers move beyond the period of legalism to become competent professionals.¹⁵⁵ A mature understanding of law and the legal system cannot focus on the use of litigation as a primary means of resolving disputes, and the advocacy model employed in the context of an adversary culture must ultimately be seen as a superficial and retrograde disposition. In other words, as students move from novice to more expert

¹⁴⁹See STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION § 3.8 (2001).

¹⁵⁰Elkins, *supra* note 3, at 522.

¹⁵¹*Id.*

¹⁵²According to Elkins, "[s]tudents feel a wonderful sense of achievement when they learn to think the way their teachers think, the way they have been asked to think, but it is not, as [one] student reflects, 'always a compliment' if what one learns is to think like a lawyer." Elkins, *supra* note 3, at 523.

¹⁵³*Id.* at 529.

¹⁵⁴*Id.*

¹⁵⁵See Schultz, *supra* note 2, at 65.

modes of thinking and doing, they must move beyond “thinking like lawyers” to becoming lawyers. The more mature understanding that students and young practitioners attain when they make this move is better described as “lawyering,” as it incorporates both legal and non-legal analytical and practical skills in a more comprehensive and normatively useful package. The next section discusses why this move is important, and why maintaining the narrow notion of “thinking like a lawyer” does not inhibit the effect of those who want lawyers to have a more pragmatic and utilitarian set of cognitive and practical skills. In fact, retaining the narrow conception of “thinking like a lawyer” frees up conceptual room for a more expansive notion of what should follow the narrow conceptualization.

V. SEEING BEYOND ADVERSARIALISM

“Thinking like a lawyer” is only effective as a step in the eventual development of a professional maturity. While thinking in this way is an important step in a student’s development, it is vital that they not get trapped in this mode of thinking. This narrow notion of “thinking like a lawyer” is largely unreflective and uncritical, and can numb students to social and political concerns that non-lawyers generally think are important and relevant.¹⁵⁶ Maintaining this narrow worldview can significantly diminish the ability of (new) lawyers to adequately and competently represent the interests of clients.¹⁵⁷ James Elkins states it poignantly when he says that by reifying the sort of narrow notion of “thinking like a lawyer” it “becomes the basis for a legal world view that crowds out other perspectives and ways of speaking, seeing, experiencing, and understanding the world.”¹⁵⁸ This is what Elkins calls “legalism.”¹⁵⁹ Since this narrow notion of thinking is highly stylized and formal, much the way mathematical or logical proofs are for students of mathematics or philosophy, it is stripped of any real moral or ethical content.¹⁶⁰ “Thinking like a lawyer” has its applications in the context of learning about the law and its uses, and may even be helpful in those situations where students (or lawyers) need to be able to think legalistically. While this worldview is certainly helpful as a stage in the development, then, it is a stage that students must be urged to work through.¹⁶¹ Students who remain at this level of development fail to see that there is more to modern legal practice than adversary relationships and a zero-sum calculus.¹⁶²

Ontologizing legalism has serious implications in terms of students’ abilities to look beyond the litigation context of the adversary system. The worldview that new law students adopt because of the educational process they are subjected to forces

¹⁵⁶Elkins, *supra* note 3, at 527.

¹⁵⁷Jaquish & Ware, *supra* note 3, at 1715.

¹⁵⁸See Elkins, *supra* note 3, at 529.

¹⁵⁹*Id.* at 529-30.

¹⁶⁰*Id.* at 525.

¹⁶¹See Neumann, *supra* note 3, at 411.

¹⁶²See, e.g., Jacquish & Ware, *supra* note 3, at 1715 (pointing out the deficiencies in the communications skills of lawyers who function solely in the legalistic mentality).

them to view law and legal practice in a narrow and largely uncomplicated way.¹⁶³ This creates a tension between their rudimentary understanding of law in the larger context of society and the standards of competent and adequate practice.¹⁶⁴ Elkins describes the effect of this tension:

[Legalism] distorts and deforms the lives of students (and no small number of law teachers) in enough ways to make it less than the whole truth about becoming a lawyer. Students of law know firsthand the cost of their initiation of learning to think like a lawyer. In their underground, antinomian narratives, students articulate what traditional legalists deny: legal thinking is not the final prize. When we break through the dominant ideology, we find stories that put legal discourse in a new light.¹⁶⁵

As I am not a "traditional legalist," I agree with Elkins' argument that the sort of unreflective legalism associated with taking the narrow notion of thinking like a lawyer too far puts students in an ideological and conceptual bind. It creates a disjunction between their incomplete conceptual understanding of the law and how it works in society and their responsibility as practitioners.¹⁶⁶

This disjunction is particularly acute when it comes to skills training and practical learning experiences.¹⁶⁷ Students who are exposed to practical skills training (for example, ADR, clinical experiences, counseling, interviewing, etc.) after they have integrated the legalist mentality often find it difficult to change hats and become non-adversarial.¹⁶⁸ This is a problem that all members of the legal academy must address. As professional education is ideally an ongoing enterprise, we must show students how they can continue to add to their conceptual and practical knowledge throughout their careers.

It has been argued that legal educators should expand the notion of what it means to "think like a lawyer."¹⁶⁹ The advocates of this position note that the restrictive and narrow view about what counts as legal reasoning gives a limited and unrealistic

¹⁶³The full integration of this mentality causes what Richard Neumann calls "diminished reflectiveness." Neumann, *supra* note 3, at 409 (building upon the work of Donald Schon and Chris Argyris).

¹⁶⁴See Elkins, *supra* note 3, at 514.

¹⁶⁵*Id.* at 529.

¹⁶⁶See Neumann, *supra* note 3, at 408-10.

¹⁶⁷A good illustration of what I mean here is the ambivalence and confusion that law students (and a good many law school administrators) have concerning where their legal research and writing classes fit into the curriculum. Generally speaking, most legal research and writing classes do reinforce the adversary system in the sort of assignments invariably assigned. Because the typical legal research and writing class is structured differently than traditional doctrinal classes from a pedagogical point of view, though, students often find the transition a difficult one to make.

¹⁶⁸See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1981).

¹⁶⁹This point was brought home to me in discussions with Scott Boone, Melanie Jacobs and James McGrath. For thorough discussions of this more robust notion of what it means to "think like a lawyer." See Mudd, *supra* note 3; and Schultz, *supra* note 2.

perception as to the role lawyers play in society.¹⁷⁰ As Nancy Schultz says, “[t]hinking like a lawyer is a much richer and more intricate process than collecting and manipulating doctrine.”¹⁷¹ While this is undoubtedly true at some level, the real point that Schultz and others who argue for a more robust notion of what “thinking like a lawyer” means lies in their belief that skills training should be an accepted (and valued) part of the law school curriculum.¹⁷² Indeed, she explicitly notes this when she says that legal educators and administrators “need to acknowledge the importance of a much broader range of skills than has traditionally been the focus of the law school curriculum.”¹⁷³ This approach suggests that we define “thinking like a lawyer” to include all approaches to a problem that a lawyer may take, and that we expand the notion of lawyering to encompass whatever a lawyer does in the course of her work.¹⁷⁴

While I support the idea that lawyers should be able to employ a wide variety of skills, defining all of these skills as “thinking like a lawyer” simply because lawyers use them is not coherent.¹⁷⁵ Defining the sort of “people skills” that are involved in a more robust notion of conflict resolution as “thinking like a lawyer,” for instance, does not seem to make much sense. In fact, we could probably even say that one would be better at resolving many conflicts if she were to not “think like a lawyer.” In my view, then, lawyers need to have several sets of skills; some legal, some non-legal.¹⁷⁶ Knowing when to employ each, and in what measure, is a subtle and delicate balance that only comes with experience and practice.¹⁷⁷ It seems to me that we ought to adopt a wider notion of professional “lawyering” that encompasses both legal skills (on the narrow advocacy scale) as well as non-legal people and interactive skills (that focus on wider sorts of extra-legal/judicial problem solving).

The upshot of Schultz’s position, then, is vitally important. Law students need to be exposed to much more than just the narrow mentality of “thinking like a lawyer.”

¹⁷⁰Schultz, *supra* note 3, at 57.

¹⁷¹*Id.*

¹⁷²I could not possibly agree with this more. I am of the opinion, however, that we need not bootstrap vital and important practical skills training into a narrow notion of “thinking like a lawyer” in order for those skills to be valued in the curriculum. I would rather see a conceptual division between classes that focus on the advocacy/litigation model and those that take as their focus on larger practice and problem solving skills.

¹⁷³Schultz, *supra* note 2, at 59.

¹⁷⁴This is, strictly speaking, tautological.

¹⁷⁵Schultz, for example, maintains that lawyers must have good interactive and communicative skills, as well as an understanding of sociology and psychology, in order to be effective representatives of their clients. Schultz, *supra* note 2, at 61. While I am sure that most of us would heartily agree with her assessment of this, I am not persuaded that because lawyers should have these skills that this makes them “lawyering skills.” These seem to be more appropriately termed “people skills.” In fact, as Schultz notes throughout her article, these skills are decidedly not of a piece with the analytical training and reasoning skills that a legal education offers to law students. *See id.*

¹⁷⁶*See* Menkel-Meadow, *supra* note 8.

¹⁷⁷*See* Colon-Navarro, *supra* note 2, for an excellent application of this concept.

Law schools should have skills classes—both legal and non-legal skills—as a core and central part of the curriculum.¹⁷⁸ In Schultz's words, "law schools should adjust their curricula to acknowledge the increasing complexity of the world of legal practice and to focus on what students must know to function in that world..."¹⁷⁹ As students move past the superficial legalism of "thinking like a lawyer," they must develop professional identities that incorporate all of their skills and focus them on their responsibilities as professionals.¹⁸⁰ If we do not force students to move through the initial stage of their professional development, which is characterized by the narrow legalism that we call "thinking like a lawyer," students will be ill-equipped to open their minds to non-legal or extra-legal resolutions to problems that their clients face.¹⁸¹ Students (and many lawyers) too often view this retrograde legalism as a default that can be employed without discrimination.¹⁸² As Van Valkenburg suggests, not moving beyond the legalism of their initial training causes law students to "take an aggressive, non-conciliatory posture with respect to individual disputes, fosters a tendency in lawyers to overestimate the merits of their positions, and encourages them to view disputes in the abstract, without regard to the social and personal costs of litigation."¹⁸³ This causes them to yield a blunt instrument in situations which are better handled with more delicate instrumentalities.

VI. CONCLUSION

The phrase "thinking like a lawyer" maintains as much relevance to today's legal academy as it ever has. In the face of recent criticism that the ideas connected with the concept of "thinking like a lawyer," e.g., the case law method with its focus on the adversarial litigation process, the fact is that legal educators must still teach their students to "think like lawyers." Critics have complained that the narrow focus of this traditional concept unduly restricts the ability of law students to develop refined analytical and practical skills which go beyond the adversarial context.¹⁸⁴ In one sense these critics are correct. New lawyers need to move beyond the narrow focus that the set of skills which the term "thinking like a lawyer" entails. This does not mean, however, that entering law students should not be exposed to the traditional methods of analysis and reasoning that the law school curriculum has been designed to highlight. On the contrary, it is vitally important that all law students be exposed to the narrow notion of "thinking like a lawyer." This ensures a conceptually and professionally congruent entre to the community they chose to join. It is, in a larger sense, a lived experience which all lawyers share in the acting out of their professional being. In essence, the notion of "thinking like a lawyer" that law school professors have traditionally inculcated is an ontology that lawyers need in order to become a member of the community of practitioners. After students are initiated in

¹⁷⁸ See, e.g., Van Valkenburg, *supra* note 6, at 609.

¹⁷⁹ Schultz, *supra* note 2, at 66.

¹⁸⁰ See Elkins, *supra* note 3, at 530.

¹⁸¹ See Schultz, *supra* note 2, at 65.

¹⁸² See Menkel-Meadow, *supra* note 8, at 906.

¹⁸³ Van Valkenburg, *supra* note 6, at 606.

¹⁸⁴ See, e.g., Schultz, *supra* note 2.

this ontology, they are prepared to more critically assess the strengths and weakness of the traditional adversarial method of problem solving. Once this is done, the more expansive skills of “lawyering” can be developed. In other words, the set of skills which are inherent in the traditional concept of “thinking like a lawyer” are a necessary foundation for the more robust and developed skills and analytical abilities that practicing lawyers need to be effective practitioners.