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Non-Analytical Thinking in Law Practice: Blinking in the Forest

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Non-analytical thinking is indispensable to good legal representation. Despite its importance in law practice, it is devalued and neglected in the conventional law school curriculum. Even in clinical legal education, where the potential to teach students to use this mode of thinking is most obvious, the elevation of theory and analysis has stifled the impulse of clinical professors to teach students to "blink." One way law schools can counteract this trend, and thereby better train law students for practice, is to enhance clinical teachers' non-analytical skills through more practice opportunities.

In *Blink: The Power of Thinking Without Thinking*,[1] Malcolm Gladwell illustrates non-analytical thinking with the story of an art museum's purchase of an ancient statue for $10 million. Although the museum based its decision on a fourteen-month evaluation by experts, other art experts identified the statue as fake or at least "wrong" with one glance. Unable to articulate the reason for their rejection of the *kouros*, they knew the statue was not right.[2]

The failure of German scientific forestry in the 1700s also demonstrates the inadequacies of systematic analysis.[3] The state's foresters measured and categorized the trees so as to maximize what they saw as their value: their yield of wood and game. Based on their careful study and narrow goals, the experts cleared the low-growing vegetation and planted at one time even rows of only one or a few types of trees. This logical approach allowed scientific experimentation with fertilizers, rainfall, and weeding. In the short run the forests flourished. German forestry science, "a rigorous technical and commercial discipline that could be codified and taught,"[4] something like law,[5]

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1 MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005).

2 *Id.* at 1-11.

3 JAMES C. SCOTT, SEEING LIKE A STATE 11-52 (1998).

4 *Id.* at 20.

5 Compare the similar deference to law school professors, the legal scientists, that "arises from a pervasive cultural conditioning in our society to have faith in the unique general powers of insight of those who have achieved the status of a university professor." John S. Elson, *Why and How the Practicing Bar Must Rescue American Legal Education From the Misguided Priorities of American Legal Academia*, 64 TENN. L. REV. 1135, 1143-1144 (1997). Elson goes on to note that:

became the world's sylvan standard.

No surprise to the modern reader, the scientific forests failed after the second rotation. The foresters encountered the "dangers of dismembering an exceptionally complex and poorly understood set of relations and processes."[6] They ignored the value of fodder, thatch, fruits, and materials to make medicines, tanning compounds, resins, or bedding. The "social uses of the forest for hunting and gathering, pasturage, fishing, charcoal making, trapping, and collecting food and valuable minerals as well as the forest's significance for magic, worship, [and] refuge"[7] also were irrelevant to the scientists' work. The forests could not withstand the simplification of logic and analysis.

In law, as in forestry, the problems are so rich in uncertainty that formal organization and simplification are inadequate routes to their resolution.[8] A less logical approach that embraces the complexity of clients' problems produces better results. Nevertheless, most law professors would be prouder of a graduate who used the care and logic of the German foresters to evaluate a case or a proposed solution to a client's problem than one who, like the art experts, relied on a more unconscious approach.

Given the preeminence of logical analysis in legal education, these teachers would be alarmed by an intuitive response like that of the art experts. Analysis - separating the whole into its parts - is the means by which lawyers make "complex and unwieldy reality"[9] more legible. The emphasis on analysis in law school is premised on the

> The origin of this deference to academics is not at all clear but probably arises from a variety of factors. Cultural anthropologists have noted that many societies manifest a type of mythological thinking that venerates the powers of insight conferred on sacred wise men or shamans, whose pronouncements serve to relieve the inescapable sense of insecurity that is part of the life of ordinary individuals. A far simpler explanation for the deference many in the practicing bar pay legal academics may be the 'halo effect' phenomenon, which is said to account for the confidence people place in the generalized expertise of those who have achieved prominence in one field, even though they have no special insight in the very different field on which they are expressing judgment, such as occurs when venerated baseball players vouch for brands of coffee makers or cars. . . . Finally, practicing lawyers' wish to be considered part of a profession that derives legitimacy from its academic foundations in 'scientific' principles may also play a role in the bar's unwillingness to hold legal academics accountable for prioritizing scholarship at the expense of their professional educational duties. *Id.*

6 SCOTT, *supra* note 3, at 21.

7 *Id.* at 13.

8 Complex casework affects lawyers' status. Those who practice in fields where routinization suffices, such as landlord evictions, are regarded as having low status. This may be an unconscious appreciation for the unpredictable challenges in most law practice. RICHARD L. ABEL, *Revisioning Lawyers, in* LAWYERS IN SOCIETY: AN OVERVIEW 15 (Richard L. Abel & Philip S.C. Lewis eds., 1995); JEROME E. CARLIN, LAWYERS ON THEIR OWN: THE SOLO PRACTITIONER IN AN URBAN SETTING 184-185, 200 (1994).

9 SCOTT, *supra* note 3, at 11.

notion that addressing each piece of the client's problem or of a legal doctrine allows an attorney to control and manipulate the situation.[10] In reality, attorneys cannot control clients' problems so easily. By disregarding the inherent complexity of legal problems, teachers fail to acknowledge the importance of non-analytical problem-solving and thus fail to adequately prepare students for practice.

A simplified, linear approach does not produce the best legal result any more than it stimulates forest production. The impersonal rules of law break down in practice where "transient, shifting, disconcerting and ambiguous, situations"[11] are the norm. More often than not lawyers operate in circumstances of uncertainty where legal precedents offer little assistance. For example, they ask themselves whether including only the strongest arguments or adding weak ones to the brief would help the case, or how to adapt to unexpected facts discovered during negotiation.[12] Lawyers must rely on non-analytical thinking in these situations, thus making it imperative that law schools look for ways to help students understand the role of intuition in legal representation.

There are several overlapping explanations of non-analytical thinking. In actual practice, the finest lawyers, like the intuitive art experts, know in a blink that certain approaches to a legal problem are right.[13] In Gladwell's terms, they rely on their "adaptive unconscious" (somewhat less alarming than pure unconscious when discussing law practice) to quickly solve problems when a logical approach would demand much more time and information. The unconscious mode encompasses much high-level, sophisticated thinking and can be toggled to conscious mode when necessary.[14] Lawyers are suspicious of rapid,

[10] *Id.* *But see* Elson, *supra* note 5, at 1136 ("[T]his argument is that what law schools do best is teach students the fundamental process of legal analysis. Would this were true! What law schools actually concentrate on teaching for three years is, first, how to analyze legal doctrine by defining, contrasting, and systematizing the rules from appellate opinions and, second, how to construct policy arguments for opposing sides of cases.").

[11] MARCEL DETIENNE & JEAN-PIERRE VERNANT, CUNNING INTELLEGENCE IN GREEK CULTURE AND SOCIETY 3-4 (1991).

[12] See SCOTT, *supra* note 3, at 315.

[13] "Discussions with experienced lawyers indicate that for them the valuation of cases or the determination of break-even points is an almost unconscious calculation that incorporates past experience and knowledge of settlements and verdicts and their relationship to the facts of the current case. For this group of lawyers, the valuation process is beyond articulation and is reflected in comments such as 'It's just a gut feeling'; 'It's looking at what I believe a jury will believe'; and 'It's like being pregnant; you just have a feeling.'" Peter Toll Hoffman, *Clinical Scholarship and Skills Training*, 1 CLINICAL L. REV. 93, 116 (1994).

[14] PAUL BREST AND LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT Ch. 1 at 12 (Aug. 4, 2004) (unpublished manuscript, on file with author).

unconscious thinking, but Gladwell argues that quick decisions, while not infallible, can be as good as deliberate ones. The finest litigator following the rule "listen to the witness" is using his or her adaptive unconscious to adjust his or her cross-examination to the testimony on the spot. Gladwell's thesis implies that good lawyers necessarily react intuitively all the time[15] – hardly what is taught in conventional classes.

Similarly, Brest and Krieger contend that intuitive problem solving depends on matching an external stimulus to a mental "schema." The schema provides a "pre-scripted plan of perception, deduction, inference and action" resulting in a seemingly unconscious solution,[16] much like the "blink" phenomenon. A "naturalistic approach to problem solving" permits us to immediately size up a situation, understand its meaning and know what action to take[17] - exactly Gladwell's point. The trial lawyer must use this method to quickly decide whether to object to some witness's testimony. Brest and Krieger, however, warn that lawyers may oversimplify problems so that they fit their expert schemas. An example of this is "premature diagnosis" that leads an attorney to a mistaken understanding of a client's problem. Moreover, oversimplification robs the client of the nuanced, creative problem-solving that all lawyers aspire to.[18]

Scott too fears oversimplification in problem solving.[19] He identifies the origin of non-analytical thinking not in the adaptive unconscious, but in *mētis*, "a wide array of practical skills and acquired

[15] GLADWELL, *supra* note 1, at 10-14.

[16] BREST AND KRIEGER, *supra* note 14 (manuscript at 13, 15).

[17] *Id.* at 12.

[18] "But most of the time, what makes a creative solution effective is that it does not come entirely out of left field. In professional practice, an effective creative solution is most often associated with *some* expert schema, just not the expert schema automatically triggered by habituated patterns of expert thought and action. In this way, creative professional problem solving tends to combine old things in new ways, or new things in old ways, but rarely combines new things in new ways. Along these lines, to function as a creative professional requires more than simple innovation. It requires mastery, a subliminal awareness of the deep structures embedded in and embedding distinct but interconnected bodies of profession-relevant knowledge."

Brest & Krieger, *supra* note 14 (manuscript at 4). Failing to recognize that there are circumstances when lawyers must make decisions deliberatively is another problem with the use of expert schema. *Id.* at 12. This constitutes the frightening practice of "shooting from the hip."

[19] Scott, a political scientist, describes the means that States use to control their subjects and their environment, such as standardized weights and measures and permanent last names. Such rationalizing and standardizing introduced social simplifications that did not represent actual activity of society. SCOTT, *supra* note 3, at 2-3. These state simplifications are destructive schemes that ignore or suppress the practical skills that underlie complex activities. *Id.* at 310-311. It is this point that links Scott's work to that of clinical law teachers.

intelligence [used] in responding to a constantly changing natural and human environment"[20] – a kind of practical wisdom arising from experience.[21] This ability grows out of engaging with the activity itself,[22] not out of abstractions like those mastered in school. Law schools offer students knowledge that is universal, contextual, and that can be taught in logical steps as a formal discipline.[23] *Mētis* is different from that kind of lawyers' knowledge because it does not depend on firm rules, principles, propositions, and logical deductions from them. *Mētis* can not be communicated through books because it can not be simplified, as the foresters who made their calculations learned.

There is no doubt that lawyers use non-analytical thinking to solve clients' problems. Whether labeled adaptive unconsciousness, expert schema, or *mētis*, this kind of thinking arises out of experience with complex, changing yet similar problems. An attorney skilled in this mode of thinking can more efficiently and more effectively solve client problems. Unfortunately few law schools have addressed this mode of learning; most have limited themselves largely to theoretical and analytical skills.

The traditional apprentice system was the ideal way for lawyers to acquire *mētis*, to learn how to blink. A law office is a community of interest holding accumulated information and demanding ongoing experimentation – conditions ideal for the development of *mētis*.[24] In such a situation, the budding lawyer would be exposed to repeated, but varied factual situations and clients. Through direct observation the novice would learn the art of lawyering from a mentor-model who repeatedly acts on implicit and automatic understanding that, like chicken sexing, can not be explained.[25]

Given that law schools are now the almost universal way to learn law,[26] what is their role in preparing students to use *mētis* in practice?

[20] SCOTT, *supra* note 3, at 313. *Mētis* does offer an alternative to the related, but rather informal term "blink."

[21] *Mētis* implies "a complex but very coherent body of mental attitudes and intellectual behaviour which combine flair, wisdom, forethought, subtlety of mind, deception, resourcefulness, vigilance, opportunism, various skills, and experience acquired over the years." DETIENNE & VERNANT, *supra* note 11, at 3-4.

[22] SCOTT, *supra* note 3, at 313.

[23] *Id.* at 320.

[24] *Id.* at 334.

[25] Chicken sexing is the classic example of a skill that cannot be taught. See Mark Heyrman, Address at the University of Chicago "Chicago's Best Ideas" lecture series (Feb. 6, 2003), *at* http://magazine.uchicago.edu/0304/campus-news/; *see* Richard Horsey, *The Art of Chicken Sexing*, 14 UNIVERSITY COLLEGE LONDON WORKING PAPERS IN LINGUISTICS 107, *available at* http://cogprints.org/3255/01/chicken.pdf.

[26] Law schools offer many benefits over apprenticeships: generalized knowledge (albeit bereft of a rich context) is more democratically available, thereby offering opportunities to women and those not well connected. See SCOTT, *supra* note 3, at 335.

Adaptive unconscious can be "educated and controlled;"[27] it is more than mere intuition. Unconscious reactions may not be seen, but one can learn to interpret what underlies his or her quick judgments and first impressions.[28] Like basketball, legal decision-making depends on much structured practice,[29] which is a different kind of learning from acquiring information, analyzing, and articulating the logic of a judicial opinion.[30] Unfortunately, most law schools lack basketball courts and do not offer years of work with clients as do medical schools. Classroom study does little to help students build their adaptive unconscious into a tool that assists clients despite the fact that law practice should be a necessary objective of professional education.[31] These inadequacies in preparing students for law practice led law schools to develop client representation clinical courses,[32] a small start in the acquisition of expert schema. Yet, even clinical courses give short shrift to non-analytical thinking.

According to one theory popular in the early days of clinical legal education, students' education would flow automatically from interactions with clients, students, lawyers, judges, and others involved in the legal system.[33] Thus, the pedagogy was to put students and teachers together representing clients, somewhat like an apprentice system. Of late, however, most clinical educators have moved away from this dependence on practice towards a more analytical approach.[34] These

[27] GLADWELL, *supra* note 1, at 15.

[28] GLADWELL, *supra* note 1, at 183.

[29] *Id.* at 114.

[30] *Id.* at 121, 137, 141.

[31] "[T]oo many members of the law school community are either indifferent to or hopelessly naïve about the problems of legal practice." Harry T. Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL. EDUC. 285 (1988). Preparing students for practice also should influence legal scholarship.

> "I suggest that a logical argument can be made for the social utility of legal scholarship of four particular kinds. First is scholarship that addresses the operation and needs of the legal system, and suggests reforms that would make that system more fair and efficient. Second is scholarship that compiles and systematizes or categorizes legal doctrine, such as Moore's *Federal Practice* and *Corbin on Contracts*. Third is scholarship that analyzes and suggests effective practice techniques and strategies such as Mauet's *Trial Techniques*. Fourth is scholarship that gathers empirical data and generates from that data predictive, testable hypotheses. . .. [However] the bulk of legal scholarship is what some critics have termed normative scholarship, which is scholarship that prescribes courses of action to resolve controversial socio-legal issues."

Elson, *supra* note 6, at 1139.

[32] Hoffman, *supra* note 13, at 99; *see* Larry Kramer, *The Necessity of Clinical Education,* 72 STANFORD LAWYER 2 (Spring 2005).

[33] Richard A. Boswell, *Keeping the Practice in Clinical Education and Scholarship*, 43 HASTINGS L. J. 1187, 1191 (1992).

[34] Stephen Wizner, *Walking the Clinical Tightrope Between Teaching and Doing*, 4 MD. L. J. OF RACE, RELIGION, GENDER AND CLASS 259, 261 (2004); Gary Palm, *at* http://maga-

teachers have absorbed the intellectual values and practices of the academy into their own work: "theory emerges from practice and practice then informs and reshapes theory."[35] Institutional culture may have stimulated this trend.[36] Hoffman describes this phenomenon:

> No doctrine or theory underlies many lawyering skills, but instead only a collection of anecdotal suggestions about how to accomplish particular tasks. While such suggestions may be helpful to a practicing lawyer or law student, they cannot be accorded the status of a theory or doctrine. The nature of law school faculties and legal education is such that, until a subject matter can be presented in the guise of a theory, it will receive little respect or recognition from law teachers, it will not readily be taught as part of the curriculum, and there will be little writing about it in the law reviews. Recognition and acceptance are accorded only to what can be translated into some form of theory suitable for study.[37]

Yet theory can limit observations of practice by "render[ing] 'obvious' facts nearly invisible, by denying them a sensible context."[38] This is the trap the foresters fell into; it is the danger of over-simplifying legal problems to fit one's schema. Theory-oriented clinics have not fulfilled their potential as places for students to begin to acquire a lawyer's adaptive unconscious.

Given that non-analytical problem solving is necessary for excellence in law practice, why are law schools uncomfortable with this thinking? First there is cultural resistance. Scott captures this by comparing *mētis* to scientific knowledge:

> One major reason why *mētis* is denigrated . . . is that its 'findings'

zine.uchicago/9706/9706Law4.html.

[35] Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 604 (1986); see also DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS 78-79 (1987) (discussing the desirability of reflective conversation between theory and practice).

> "The degree of abstraction from which a subject is approached can range from the concrete and wholly particular to the purely theoretical. The best scholarship about skills should partake of both extremes, by providing a theoretical underpinning for the analyses being presented and also discussing and presenting the application of the theory in practice. Theory is necessary for understanding and for the expansion and extension of the analysis, but it is not alone sufficient."

Hoffman, *supra* note 12, 114; *see also* Robert D. Dinerstein, *A Meditation on the Theoretics of Practice,* 43 HASTINGS L.J. 971, 984 (1992); Boswell, *supra* note 32, at 1188-1189.

[36] Obviously the standards for tenure, including publication of scholarly writing, press clinical professors towards theory, but tenure and status issues are not the subjects of this essay.

[37] Hoffman, *supra* note 13, at 105.

[38] STEPHEN JAY GOULD, BULLY FOR BRONTOSAURUS: REFLECTION IN NATURAL HISTORY 292-293 (1991).

> are practical, opportune, and contextual rather than integrated into the general conventions of scientific discourse . . . . The litmus test for *mētis* is practical success.[39]

Practical success is not the goal of most law school education.

Another inhibitor may arise from the fact that students can not acquire *mētis* or expert schema in three years of school because this form of intelligence requires many years of practice. Therefore, some argue that schools should not waste resources on a fruitless effort to teach non-analytical problem solving.[40] However, in no subject area do schools complete the education of law students. Law schools plant seeds and offer students tools to assist their professional gardening. Law schools can teach students that good lawyers do blink and can show them how that is done.

Third, most present-day clinic teachers had formal, analytic training in lawyering skills when they were students. They became committed to the idea that theory and practice are linked. Like the German kings and law professors, these younger practitioners value "scientific foresters," those who teach the theory of law practice, more than they value older, experienced attorneys with *mētis*. Even those teachers who had extensive practice experience before entering the academy must "talk the talk" of theory and analysis to fit into most clinical programs. Given the education and acculturation of most clinical educators, they themselves may be uncomfortable with a move towards law school training in non-analytical problem solving because they see it as a move backwards.

Finally, it is difficult to hire attorneys with *mētis* to teach because, by definition, they are successful practitioners unlikely to abandon their work for the low pay and status of a clinical teaching position.[41] Those who can develop students' analytical unconsciousness are a rare breed because they must have both *mētis* and, with the current em-

[39] SCOTT, *supra* note 3, at 323.

[40] One reason "why students, the bar, and the public should be content with such a limited ambition for legal education [is] the panoply of professional skills lawyers need is best left to be learned in the early years of practice." Elson, *supra* note 5, at 1136. Clinical teachers must be able to translate their non-analytic thinking so as to discuss the underpinnings of their intuitive judgments with students. In explaining their decisions to clients, associates, adversaries, or students, the lawyers process the matter through their conscious rational mind. This translation makes the "analytic unconscious" conscious. Studies show that articulating one's reasons for an action impairs the quality of that action, GLADWELL, supra note 1, at 120, 182; BARRY SCHWARTZ, THE PARADOX OF CHOICE: WHY MORE IS LESS 137 (2004)), so only the most expert can do what the clinical educators are asked to do.

[41] "Law schools cannot afford to teach those [practice] skills. . . . [L]aw schools' role as university research institutions precludes significantly shifting funding and staffing priorities from scholarship to professional education." Elson, *supra* note 5, at 1136.

phasis on theory, *techne*,[42] unlike doctrinal teachers who need only *techne*. For example, some states, such as California, recognize the importance of practical wisdom and require two years experience before a lawyer may supervise a certified law student doing client work.[43] However, in light of the difficulty of attracting experienced attorneys, law schools find ways to evade this costly requirement.[44]

One way law schools can improve the teaching of *mētis* is to encourage clinical teachers to use their sabbaticals, not for writing about theory, but to increase their professional experience in breadth, depth, or both. For example Stacey Caplow, a criminal specialist teaching at Brooklyn Law School, practiced civil law during her sabbatical;[45] Paula Galowitz, a clinical professor in the N.Y.U. Civil Legal Services Clinic practiced international law at the United Nations High Commissioner for Refugees in Geneva;[46] Terry Player from University of San Diego practiced in new areas of law – civil law firm work, criminal prosecution, and as a judge pro tem;[47] and Cookie Ridolfi of Santa Clara University refreshed her practice skills in her criminal law specialty.[48] Such projects enable less experienced teachers to increase their own *mētis* and enrich their teaching.[49]

"The great failure of rationalism is 'not its recognition of technical knowledge, but its failure to recognize any other.'"[50] A law school full of logical German foresters will soon be as unproductive as a scientific forest. Law schools should support the efforts of faculty who can blink to enhance their non-analytical abilities. A legal education that "excludes or suppresses the experience, knowledge, and adaptability of *mētis* risks incoherence and failure; learning to speak coherent sentences involves far more than merely learning the rules of grammar."[51]

A law school must clearly and consciously commit to teach *mētis*/

[42] Those with *techne* ask why and how a solution works in an effort to contribute to wider knowledge. In contrast, one uses *mētis* to solve concrete problems and invent new solutions to problems. SCOTT, *supra* note 3, at 323-324.

[43] Cal. Rules of Court, Rule 983.2 (2006).

[44] In California this is done by having an experienced lawyer sign the official student certification forms while less experienced lawyers actually supervise student work.

[45] Prof. Caplow describes the influence of this experience on her teaching in Stacy Caplow, *A Year in Practice: The Journal of a Reflective Clinician*, 3 CLIN. L. REV. 1 (1996).

[46] Email from Paula Galowitz, Clinical Professor of Law, New York University, to Kandis Scott, Professor of Law, Santa Clara University (Aug. 8, 2005) (on file with author).

[47] Telephone interview with Teresa Player, Professor of Law, University of San Diego (Aug. 11, 2005).

[48] Email from Kathleen Ridolfi, Professor of Law, Santa Clara University, to Kandis Scott, Professor of Law, Santa Clara University (Aug. 23, 2005) (on file with author).

[49] CAPLOW, *supra* note 45.

[50] SCOTT, *supra* note 3, at 430 n. 88.

[51] *Id.* at 319.

expert schema/blinking because institutional formal education is not naturally hospitable to subtle, contextual, experience-dependent thinking. Most law teachers who now recognize the necessity of clinical training remain uncomfortable with non-analytical thinking. Even clinical education, ensnared in the culture of legal analysis and theory, has moved away from using a more purely experiential teaching method. Yet clinical education is the most obvious place for developing *mētis*. To enhance this potential, law schools should provide more opportunities for clinical faculty to cultivate their *mētis*.

Nonetheless, lawyers cannot work by only blinking. Legal education need not suffer the failure of rationalism: it must teach both analytical and non-analytical thinking. And, as the experiences of Professors Caplow, Galowitz, Player, and Ridolfi show, institutional support of practice opportunities for clinicians will undoubtedly inure to the benefit of both clinicians and their students.