

“Think Through” in the Law

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What do the following situations have in common?

1. Earl.

When I was in college, I worked briefly as a night watchman for the college. My first night, I was trained by Earl, who had been a watchman for many years. As we went on our designated rounds, at one point Earl suggested we explore an adjacent building. “Why?” I asked. “JDLR,” Earl responded. I had to ask Earl what JDLR meant. He gave me one of those looks that put me in my place as an ignorant fool. “Just Don’t Look Right,” he replied.

2. State v. Reynolds, 899 P.2d 540 (Mont. 1995).

“At approximately 9:00 p.m., on December 22, 1991, Deputy Sheriff David Peterson observed a pickup driven by Reynolds, traveling down a dead-end street. Deputy Peterson thought the vehicle was ‘bordering on traveling too fast’ for the conditions (traffic and darkness) and drove to where he thought the vehicle would reappear. When it did not reappear, he moved to see Reynolds make a u-turn in a city park. Deputy Peterson then met Reynolds at an intersection where Reynolds had the right-of-way. After approximately 7 to 10 seconds, Reynolds proceeded through the intersection. Deputy Peterson then pulled Reynolds over to make an investigatory stop.” Reynolds was then cited for driving under the influence.

The issue was whether the circumstances created a “particularized suspicion” that the person was committing an offense and the court held that it did not.

3. Mark Twain, Life on the Mississippi, Chapter 9 “Continued Perplexities.”

Twain, learning to be a pilot, maneuvers the boat away from a reef that he spots and is questioned by the experienced pilot, Mr. Bixby:

“Why, what could you want over here in the bend, then? Did you ever know of a boat following a bend up-stream at this stage of the river?”

"No, sir, and *I* wasn't trying to follow it. I was getting away from a bluff reef."

"No, it wasn't a bluff reef; there isn't one within three miles of where you were."

"But I saw it. It was as bluff as that one yonder."

"Just about. Run over it!"

"Do you give it as an order?"

"Yes. Run over it."

"If I don't, I wish I may die."

"All right; I am taking the responsibility."

I was just as anxious to kill the boat, now, as I had been to save her before. I impressed my orders upon my memory, to be used at the inquest, and made a straight break for the reef. As it disappeared under our bows I held my breath; but we slid over it like oil.

"Now don't you see the difference? It wasn't anything but a *wind* reef. The wind does that."

"So I see. But it is exactly like a bluff reef. How am I ever going to tell them apart?"

"I can't tell you. It is an instinct. By and by you will just naturally *know* one from the other, but you never will be able to explain why or how you know them apart."

4. A law school instructor tells students to "read the contract."

5. A law school states that its goal is to have students "think like a lawyer" and after three years announces that the goal has been reached.

Earl, Officer Peterson, and Mr. Bixby are all experts in their fields, and they all have a very difficult time articulating what it was that led them to the conclusion that something just didn't look right, that they had a particularized suspicion, or that a wind reef and not a bluff reef lay ahead.

I am the guilty party in the last example. For years I told students to read the contract, and was somewhat surprised to find that they didn't do it very well. It took me a long time to have the epiphany that they weren't doing it well, not because reading contracts didn't fascinate them, but because they didn't know *how* to read a contract. We read contracts differently from how we read a newspaper, a poem, or a novel. It is not enough to say "read it." It is not good pedagogy to watch them do it badly and then correct their errors, showing them how little they know and how much we know. We have to teach them *how* to read it. That is the focused performance they can practice.

The problem was, *I* didn't know how to read a contract. I was considered an expert in doing it because I could perform the skill well. But I couldn't tell anyone else how to do it. I was finally able to teach them how to do it after reflecting on how I did it. I used the technique that de Groot used with chess players, asking them to think aloud as they selected their moves. This is the practice known as "think through" and it is not easy to do. Once you become an expert, like Earl, Officer Peterson, Mr. Bixby, and me, you tend to forget the steps you used to get from A to Z, but you have to reconstruct them to help someone else get there.

Do you recognize your law school in my last example? Is its goal to get students to "think like a lawyer"? How do students practice that? Competence in lawyering consists of mastering a series of skills that can be taught and evaluated. Think about that the next time you tell students to "read the case" or "apply the statute" or "make a policy argument." How *do* you do that?