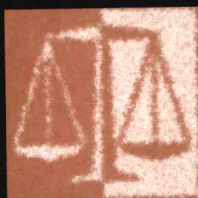


REASON

FOURTH



EDITION

IN LAW

LIEF H. CARTER

Reason in Law

FOURTH EDITION

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Preface

On rereading my preface to the third edition, written six years ago, I detect now a note of unwarranted smugness, as if I thought I had at last “figured it out,” or “got it right.” I wrote then (and still believe) that legal reasoning refers not to the psychology of choosing the judicial outcome but to the political action of justifying the judicial outcome to the polity. Legal reasoning is justification that we can and do evaluate and debate; how we choose is a mystery we cannot and probably need not fathom.

This edition remains more committed than ever to this interpretive position. Law is a language by which we constantly reconstruct our communities. But so much fine scholarship and writing have emerged in the last six years that the former hint of smugness now embarrasses. The full impact of the pragmatic turn in law is now obvious. Particularly in the work of Martha Nussbaum, Richard Rorty, Stanley Fish, and other interpreters of Hans-Georg Gadamer, it is now particularly hard to justify that there is anything to get right in the abstract except as it matters in practice. What *I* have to say about law and theory matters much less than how *we* evaluate the political consequences of what judges say and do, and how we converse about the political act we call adjudication.

Hence this edition, somewhat expanded from the last, expands primarily by adding more examples of law in action. I have increased the illustrations of contemporary legal issues; some issues are highly newsworthy, such as the prospects for the approval of single-sex marriages, and others are delicious because they are obscure, such as the question whether G.I. Joe is a doll or a toy soldier for import duty purposes. And I have added, in the final chapter, an entirely new section on legal rhetoric, contrasting the moralistic rhetoric that surrounded the Mann Act cases near the beginning of this century to the bureaucratic rhetoric of the courts at this century's end.

I was also blessed by HarperCollins' choice of the following outside reviewers, who did two rounds of superbly constructive critical reviews: Lee Weinberg, Preston Thomas, Priscilla Machado Zotti, John Brigham, Peter Lehman, and David Atkinson. Much of the original material, unchanged in substance and crystal clear to me, comes across far more clearly to everyone else now, thanks only to their exceptional efforts. And, as a minor illustration of my conviction that I didn't "get it right" before, I am now convinced of the importance of using the feminine indefinite pronoun.

Two research assistants, Tara Waller and Scott Gissendanner, tracked down many cites and sources and rescued me from a large and embarrassingly diverse number of errors. Elena Garella unintentionally provided me with the material and the

motivation to reach and defend this book's basic conclusion more forcefully. To these named here, those named in former editions, and all the unnamed friends and strangers whose work and play nourish and educate me go my deepest thanks.

Athens Georgia
May 11, 1993

Reason in Law

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the

quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, is the brew. Not a judge on the bench but had a hand in the making.

—Judge Benjamin N. Cardozo,
The Nature of the Judicial Process (1921)

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Chapter I

WHAT LEGAL REASONING IS, AND WHY IT MATTERS

It is not the words of the law but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul.

—John Marshall Harlan (1883)

I have grown to see that the [legal] process in its highest reaches is not discovery, but creation.

—Benjamin N. Cardozo

They ain't nuthin' until I calls 'em.

—Attributed to umpire Bill Clem

AN OVERVIEW OF LAW AND POLITICS

Readers who use this book to explore legal reasoning for the first time deserve some signposts at the start of their journey, for this book does not take some roads you might expect it to travel. First, this is not a “prelaw” book. I have not written it to

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teach people how to be lawyers, how to pass law school admissions tests or bar exams, or how to get rich. Nor will it assist those aspiring to paralegal careers. Second, this book does not exhaustively review all the scholarship on its subject, much of which is technical and geared toward a professional audience of jurists. Instead, underneath this exploration of legal reasoning lies a study of politics and power. Legal reasoning serves simultaneously as the velvet glove covering the fist of judicial power and as the sincerest expression of our ideals of justice and of community.

Because readers need to know what legal reasoning is in order to see clearly its political significance, I leave my main analysis of the political character of law and legal reasoning until the end of the book. But readers should know now that the legal reasoning road goes there. "Politics" refers to those things people do in communities in order to minimize threats to their well being. Political behavior sometimes tries to conserve what is and sometimes tries to change what is. People who thrive because their communities support them tend to do political things that preserve their communities. When people do not belong to communities that support them, they either give up or do political things to change them.

Law does both these things. By the end of the book you will have encountered many examples of legal actions that preserve communities and legal actions that change them. Both legal outcomes and legal methods can affect the quality of communities. When people believe that judges cynically manipulate legal language to reach partisan and self-interested political ends, faith in fairness and equity ebbs, motives for social cooperation falter, and communal life becomes more nasty and brutish. The sense of injustice can cause explosive social damage, as the reaction in Los Angeles to the Rodney King verdict in early 1992 suggests. And when *The New York Times* on its front page quotes conservative judges appearing to lay their political ideologies aside in favor of principles of legal reasoning, in the 1992 *Casey* decision reaffirming a woman's right to choose whether to have an abortion, our trust in the virtue of those who govern increases.¹

¹"Three Who Spoke as One," *The New York Times*, June 30, 1992, p. A1.

Thus for good political reasons judges debate issues of legal reasoning because they take legal reasoning seriously. It is the way judges exert power. The opinions in the abortion case (*Casey*) debated *both* the preservation of the woman's right to choose *and* the methods of legal reasoning. The dominant coalition justified the result by defending the practice of following questionable precedents for the sake of legal stability and integrity. Robert Bork, however, shot back, on a *New York Times* "op ed" page, that "adherence has never been important in constitutional cases, since only the Court can correct its past constitutional mistakes. . . . 'Institution integrity,' turns out to mean the Court must not overturn a wrong decision if there is angry opposition to it."²

Judges, much more than other politicians, take legal reasoning seriously, for it is their language for preserving their authority and trustworthiness.³ Pastor Richard John Neuhaus once wrote:

[T]he law calls life to account. That is to say, the law possesses authority. Without such authority the law is merely a bundle of rules backed up by force; with such authority the law is a power we are bound to acknowledge.⁴

Legal reasoning is a language through which we can debate the rightness and wrongness of what our community is and what we want it to become. Both the best and worst elements of politics pervade all elements of law. We return to this theme at the end of the book.

A DEFINITION OF LAW

Law is a language, not simply a collection of rules. What distinguishes law from other ways of making sense of life? Lawyers

²"Again, a Struggle for the Soul of the Court," July 8, 1992, p. A13.

³Thirty years ago academics thought and taught about law "not as a body of rules to be learned, but as man's chief means of political and social control." Charles Howard and Robert Summers, *Law: Its Nature, Function, and Limits* (Englewood Cliffs: Prentice-Hall, 1965), p. iii. Today's metaphors for exploring law are very different. We instinctively resist the technocratic and mechanistic implications of "social control."

⁴"Law and the Rightness (and Wrongness) of Things," (22 *Worldview* 40 (1979)).

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and judges attempt to prevent and solve other people's problems, but so do physicians, priests, professors, and plumbers. "Problem solving" therefore defines too much. Lawyers and judges work with certain kinds of problems, problems that can lead to conflicts, even physical fights, among people. It is the *kind* of problem with which judges and lawyers work that helps define law.

Contrary to the impression that television drama gives, with its emphasis on courtroom battles, most lawyers generally practice "preventive law." They help people discover ways to reduce their taxes or write valid wills and contracts. They study complex insurance policies and bank loan agreements. Such efforts reduce the probability of conflict. Most lawyers usually play a planning role. They help people create their own "private laws," laws governing their personal affairs and no more.

But, of course, some conflicts start anyway. Why? Sometimes they start because a lawyer did the planning and preventing poorly or because the client did not follow a lawyer's good advice. Sometimes lawyers cannot find in rules of law a safe plan with which to prevent a conflict. Many conflicts, however, such as the auto collision, the dispute with a neighbor over a property line, or the angry firing of an employee, begin without lawyers. Then people may call them in after the fact, not for an ounce of prevention but for the pounding of a cure.

If a battle erupts spontaneously, lawyers may find a solution in the rules of law, though once people get angry at each other they may refuse the solution lawyers offer. If a struggle arises, however, and if the lawyers don't find a solution or negotiate a compromise, then either one side gives up or the opponents go to court; they call in the judges to give their solution.

You may now think you have a solid definition of law: Law is the process of preventing or resolving conflicts between people. Lawyers and judges do this; professors, plumbers, and physicians, at least routinely, do not. But parents prevent or resolve conflicts among their children daily. And parents, perhaps exasperated from coping with family fights, may turn to a family counselor to deal with their own conflicts. Many ministers no