FREDERICK SCHAUER

THINKING LIKE A LAWYER

A NEW INTRODUCTION TO LEGAL REASONING

This is a book about thinking and reasoning. More particularly, it is about the thinking, reasoning, and argumentative methods of lawyers and judges, which may or may not be different from the thinking, reasoning, and argumentative methods of ordinary people. Whether lawyers think, reason, and argue differently from ordinary folk is a question and not an axiom, but it is nonetheless the case that certain techniques of reasoning are thought to be characteristic of legal decision-making.

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for Bobbie

PREFACE

This is a book about thinking and reasoning. More particularly, it is about the thinking, reasoning, and argumentative methods of lawyers and judges, which may or may not be different from the thinking, reasoning, and argumentative methods of ordinary people. Whether lawyers think, reason, and argue differently from ordinary folk is a question and not an axiom, but it is nonetheless the case that certain techniques of reasoning are thought to be characteristic of legal decision-making. The focus of this book is on those techniques. Its aim is partly to make a serious academic contribution to thinking about various topics in legal reasoning, but mostly it is to introduce beginning and prospective law students to the nature of legal thinking. In the typical law school, especially in the United States, the faculty believes that it teaches legal thinking and reasoning by osmosis, or interstitially, in the process of providing instruction in substantive subjects such as torts, contracts, criminal law, property, civil procedure, and constitutional law. But less teaching of legal thinking and reasoning actually occurs than faculties typically believe, and even if it does take place, there may be a need to provide in one volume, abstracted from particular subjects, a description and analysis of much of what law students are supposed to glean from the typically indirect teaching of legal reasoning. Similarly, although most law teachers think that it is important that students know something about the major figures, themes, and examples in the canon of legal reasoning, much of this material also falls through the cracks in the modern law school, and again there appears good reason for presenting it in one place. This book seeks to address these needs, at the same time giving lawyers and legal scholars something to chew on—and disagree with—about most of the topics it takes on.

It is surprising but true that some of the most significant contributions

to a deep understanding of law have been targeted at beginning law students. Oliver Wendell Holmes's enduring "The Path of the Law" was originally a lecture at the dedication of a building at the Boston University School of Law, where presumably most of those in attendance were law students. Karl Llewellyn's *The Bramble Bush* was intended as a guide to law study for those in their first year of such study. Edward Levi's *An Introduction to Legal Reasoning* had similar aspirations, and H. L. A. Hart explicitly intended *The Concept of Law* as an introduction for English undergraduates. Yet despite aiming in large part at beginners, each of these works, and many others like them, have made such an enduring impression on the scholarly study of law that academics still read, write, and argue about them, even as beginning students continue to learn from them.

It would be presumptuous to compare this book with those, but my goals are similar. On various topics, I seek not only to describe but also to explain and analyze the issues in a way that may prompt new insight or at least fruitful disagreement. And in general I want to present a sympathetic treatment of the formal side of legal thinking, and thus at least slightly to go against the grain of much of twentieth- and twenty-first-century American legal thought. My perspective may seem to slight the creative element in legal thought, but in emphasizing those aspects of legal reasoning that are somewhat formal, somewhat resistant to always doing the right thing in the particular case, and somewhat committed to taking law's written-down character seriously, this book aims to present a picture of legal thinking that accurately reflects the realities of lawyering and judging, while providing an explanation of law's unique contribution to social decision-making.

Some of the topics in this book—rules, precedent, authority, interpretation, and reason-giving, for example—are ones that I have been thinking and writing about for many years. But this book is not a collection of previously published articles, and it has been written anew so that the book will hang together as a coherent whole. Examples and themes will occasionally be repeated, on the assumption that books are often read in relevant chunks rather than from beginning to end, but every sentence and paragraph in this book has been written for this book alone and with the particular goals of this book in mind. Other topics—holding and dicta, law and fact, analogy, presumptions, and Legal Realism, for example—are ones that I have dealt with only in passing in previous writings, but this has seemed the right occasion both to say more about them and

to recognize the way in which they are necessary components of a comprehensive account of legal reasoning.

Although it would be impossible to thank all of those from whom I have profited over the years in discussion of various topics about legal reasoning, or even those whose comments on previous written manuscripts have helped me immeasurably, it is important to thank them collectively. Some of the ideas in this book might properly be attributable to others in ways I cannot now disentangle, and others are simply better because they have been honed by the comments of generous friends and critics over the years. With respect to this book, however, acknowledging the immediate help of others is more of a pleasure than an obligation. Larry Alexander, friend and collaborator, offered useful written comments on the entire manuscript, as did an anonymous reviewer for the Harvard University Press. Chapter 1 emerged from a conference on "The Psychology of Judging" at the University of Virginia, and a later version formed the basis for a lecture at the Uehiro Centre for Practical Ethics at the University of Oxford. Chapter 2 was presented at a conference on "Defeasibility in Law" organized at Oxford by Jordi Ferrer and Richard Tur. Chapter 3 benefited from the challenging comments of Brian Bix, Jody Kraus, and Bill Swadling, and Swadling also helped considerably with his comments on Chapter 5. Chapter 4, which benefited greatly from the comments of Adrian Vermeule, was presented and discussed at a Faculty of Law Seminar at University College London, at the Harvard Law School Public Law Workshop, at the Cambridge University Forum on Legal and Political Philosophy, and at the remarkable institution of the Oxford Jurisprudence Discussion Group, where the audience was particularly engaged and incisive. Two members of that group, Jorge Oliveira and Noam Gur, also provided helpful written comments on that chapter, parts of which have appeared, in very different form, in the *Virginia Law Review*. The aforementioned Brian Bix, whose knowledge of jurisprudence is encyclopedic as well as deep, also provided valuable comments on Chapter 7, as did the audience at the annual Legal Research Conference and Lecture at Oxford University. Finally, Bobbie Spellman provided characteristically challenging comments on Chapters 1 through 7 and was the source of valuable discussion on almost every topic in this book. She is responsible not only for some of the words that are contained here but, perhaps more importantly, for many of the words that are not.

Most of this book was written while I had the remarkable privilege of serving as the George Eastman Visiting Professor at the University of Oxford, where I was also honored to be a Fellow of Balliol College. Oxford and Balliol provided enormous tangible and intangible support, a congenial and multidisciplinary academic environment, and a unique group of legal academics whose collective interest in legal theory and legal reasoning is unmatched anywhere in the world. This book is vastly better for their support and for their interest.

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INTRODUCTION: IS THERE LEGAL REASONING?

Law schools the world over claim to instruct their students in how to "think like a lawyer." Studying law is not primarily about learning a bunch of legal rules, the law schools insist, for law has far more rules than can be taught in three years of legal education. Besides, many of the legal rules that might be learned in law school will have been changed by the time the students enter legal practice. Nor is legal education about being instructed in where to stand in the courtroom or how to write a will, for many of these skills are better learned once in practice than at a university. Now it is true that both knowing some legal rules and acquiring the skills of lawyering are important to success in the practice of law. And it is also true that some of this knowledge is usefully gained in law school. But what really distinguishes lawyers from other sorts of folk, so it is said, is mastery of an array of talents in argument and decision-making that are often collectively described as *legal reasoning*. So even though law schools do teach some legal rules and some practical professional skills, the law schools also maintain that their most important mission is to train students in the arts of legal argument, legal decision-making, and legal reasoning—in thinking like a lawyer.[1]

But *is* there a form of reasoning that is distinctively *legal* reasoning? *Is* there something that can be thought of as thinking like a lawyer? Of course some lawyers do think and reason better than others, but the same can be said for physicians, accountants, politicians, soldiers, and social workers. And many lawyers think more analytically, or more precisely, or

1. In the 1973 film *The Paper Chase*, the notorious Professor Kingsfield provides a dramatic illustration of the traditional claim, proclaiming in his Contracts class that "you teach yourself the law. I train your minds. You come in here with a skull full of mush, and if you survive, you'll leave thinking like a lawyer."

more rigorously, than many ordinary people, but so do many economists, scientists, and investment bankers. So the claims of law schools to teach legal reasoning must be other than just teaching students how to think more effectively, or more rationally, or more rigorously. And indeed they are. Law schools aspire to teach their students how to think *differently*—differently from ordinary people, and differently from members of other professions. Lord Coke maintained as long ago as 1628 that there was an "artificial" reason to law[2]—a distinction between simple rationality and the special methods of the law, and particularly of judges. Of course Lord Coke might have been wrong. Perhaps he was mistaken to suppose that legal reasoning is distinctive, and perhaps legal reasoning is simply reasoning. Sometimes good reasoning, sometimes bad reasoning, and mostly in between, but nevertheless simply reasoning. But then again, Lord Coke might have been right. After all, the idea that legal reasoning is different from ordinary reasoning, even from very good ordinary reasoning, has been the traditional belief of most lawyers, most judges, and most law schools for a very long time. So although the traditional belief in the distinctiveness of legal reasoning might be mistaken, it comes to us with a sufficiently distinguished provenance that the possibility that there *is* legal reasoning ought not to be dismissed out of hand.

That there might be something distinctive about legal reasoning does not flow inexorably from the existence of law as a discrete profession, for it is far from obvious that those who take up some specialized calling must necessarily think and reason differently from those outside that calling. Electricians know things that carpenters do not, and carpenters know things that plumbers do not. But it would be odd to talk of thinking like a carpenter or a plumber. Indeed, maybe it is just as odd to talk of thinking like a lawyer. Yet law schools do not think it odd, nor do most lawyers and judges. Law schools and the lawyers and judges they train suppose that lawyers are characterized by more than knowing things that nonlawyers do not. Knowledge of the law is important, as are skills of advocacy and drafting, but the traditional account of what makes lawyers distinctive is that they have something other than this.

What lawyers have other than their technical skills and their knowl-

2. Sir Edward Coke [pronounced "cook"], *Commentaries upon Littleton* 97b (Charles Butler ed., 1985) (1628). For a modern elaboration, see Charles Fried, "The Artificial Reason of the Law or: What Lawyers Know," 60 *Tex. L. Rev.* 35 (1981).

edge of the law is not so simple to pin down, however. It is relatively easy to say what thinking like a lawyer is not. It is rather more difficult to say what it is, and that difficulty may account for part of why there have been numerous skeptical challenges over the years to law's claim to distinctiveness. Legal Realists (about whom much more will be said in Chapter 7) such as Jerome Frank and (to a lesser extent) Karl Llewellyn insisted that lawyers and judges do not approach problems in any way that differs significantly from the approaches of other policymakers and public decision-makers. Many of the political scientists who study Supreme Court decision-making often make similar claims, arguing that the ideologies, attitudes, politics, and policy preferences of the Justices play a larger role in the Court's decisions than do any of the traditional methods of legal reasoning.[3] Psychologists examining the reasoning processes of lawyers and judges focus less on the supposedly characteristic modes of legal reasoning than on those shortcomings of rationality that bedevil all decision-makers, whether lawyers or not.[4] And as far back as the acid critique of the legal profession ("Judge and Company," he called it) offered by Jeremy Bentham in the early part of the nineteenth century,[5] skeptical or deflationary accounts of legal reasoning have existed. Lawyers and judges may be lawyers and judges, so the common thread of these challenges to the traditional story about legal reasoning goes, but they are also human beings, with more or less the full array of human talents and human failings. And the fact that lawyers and judges are human beings explains far more about the methods of legal and judicial reasoning, it

3. See, e.g., Lawrence Baum, *The Puzzle of Judicial Behavior* (1997); Saul Brenner & Harold J. Spaeth, *Stare Indecisis: The Alteration of Precedent on the U.S. Supreme Court, 1946–1992* (1995); Lee Epstein & Jack Knight, *The Choices Justice Make* (1998); Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (2002); Harold J. Spaeth & Jeffrey A. Segal, *Majority Rule or Minority Will* (1999); Lawrence Baum, "Measuring Policy Change in the U.S. Supreme Court," 82 *Am. Pol. Sci. Rev.* 905 (1988).

4. See, e.g., Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, "Inside the Judicial Mind," 86 *Cornell L. Rev.* 777 (2001); Dan Simon, "A Third View of the Black Box: Cognitive Coherence in Legal Decision Making," 71 *U. Chi. L. Rev.* 511 (2004); Barbara A. Spellman, "On the Supposed Expertise of Judges in Evaluating Evidence," 155 *U. Penn L. Rev.* PENNumbra No. 1 (2007), http://www.pennumbra.com/issues/articles/155-1/Spellman.pdf.

5. Jeremy Bentham, "Introductory View of the Rationale of Evidence," *in* 6 *The Works of Jeremy Bentham* 22–24 (John Bowring ed., 1843).

is said, than anything that lawyers or judges may have learned in law school, mastered in legal practice, or picked up while serving as a judge.

The skeptics of legal reasoning do not generally believe that lawyers and judges are lying. They do believe, however, that what lawyers and judges think they are doing—their internal view of their own activities—often masks a deeper reality, one in which policy choices and various other nonlegal attributes play a much larger role in explaining legal arguments and legal outcomes than even the participants themselves believe or understand. Insofar as this more skeptical picture accurately reflects reality, legal reasoning may be less distinctive and consequently less important than many have thought. But if instead the traditional account is largely sound, and if lawyers and judges, even though they admittedly share many reasoning characteristics with their fellow humans, possess methods of thinking that are distinctively legal, then it is important to explore just what those special characteristics and methods might be. Consequently, one way of approaching the alleged distinctiveness of legal reasoning is to consider just how much of the reasoning of lawyers and judges is explained by their specialized training and roles, on the one hand, and just how much is explained simply by the fact that they are human, on the other.[6]

The claim that there *is* such a thing as legal reasoning is thus a (contested) hypothesis that lawyers have ways of approaching problems and making decisions that others do not. But just what are these ways? Sometimes people argue that the special skill of the lawyer is a facility in dealing with facts and evidence, coupled with the related ability to understand the full context of a particular event, dispute, or decision.[7] Yet although these are important skills for good lawyers to have, it is not so clear that successful lawyers have or need them to a greater extent than successful police detectives, historians, psychiatrists, and anthropologists. Similarly, others have sought to characterize legal reasoning in

6. See Frederick Schauer, "Is There a Psychology of Judging?," *in* David E. Klein & Gregory Mitchell, *The Psychology of Judicial Decision Making* (forthcoming 2009).

7. See, e.g., Steven Burton, *An Introduction to Law and Legal Reasoning* (3d ed., 2005); Richard A. Bandstra, "Looking Toward Lansing: Could You Be a Lawyer/Legislator?," 89 *Mich. B.J.* 28 (2005); Martha Minow & Elizabeth Spelman, "In Context," 63 *S. Cal. L. Rev.* 1597 (1990).

terms of a heightened ability to see the other side of an argument,[8] or, relatedly, of being empathetic to individuals and putting one's self in the shoes of another,[9] but these too are attributes we expect to see in good thinkers and good people of all stripes. Indeed, even the oft-touted legal talent for reasoning by analogy[10] is hardly distinctive to lawyers and judges, for using analogies effectively may well be what distinguishes experts from novices in almost any field of endeavor.[11] So yes, we would like lawyers and judges to be smart, sympathetic, analytic, rigorous, precise, open-minded, and sensitive to factual nuance, among other things, but because these are also the traits we wish to have in our politicians, social workers, physicians, and investment bankers, it is not yet so clear what skills or characteristics, if any, lawyers are supposed to have that others do not.

The chapters in this book are dedicated to exploring the various forms of reasoning that have traditionally been especially associated with the legal system, such as making decisions according to rules, treating certain sources as authoritative, respecting precedent even when it appears to dictate the wrong outcome, being sensitive to burdens of proof, and being attuned to questions of decision-making jurisdiction—understanding that it is one thing to recognize a correct outcome but another to realize that some institutions might be empowered to reach that outcome while others are not. But we should not at the outset set up unrealistic aspirations for legal reasoning's claim to distinctiveness. In the first place, law cannot plausibly be seen as a closed system, in the way that games like chess might be. All of the moves of a game of chess can be found in the rules of chess, but not all of the moves in legal argument and

8. See Suzanna Sherry, "Democracy and the Death of Knowledge," 75 *U. Cinc. L. Rev.* 1053 (2007).

9. See Katherine Bartlett, "Feminist Legal Methods," 103 *Harv. L. Rev.* 829 (1990).

10. E.g., Edward Levi, *An Introduction to Legal Reasoning* (1949); Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996); Lloyd Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (2005).

11. See, e.g., Kenneth D. Forbus, "Exploring Analogy in the Large," *in The Analogical Mind: Perspectives from Cognitive Science* 23 (Kenneth D. Forbus, Keith J. Holyoak, & Boris N. Kokinov eds., 2001); Keith J. Holyoak, "Analogy," *in The Cambridge Handbook of Thinking and Reasoning* 117 (Keith J. Holyoak & Robert J. Morrison eds., 2005).