COMMON LAW THEORY

EDITED BY

DOUGLAS E. EDLIN

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Douglas E. Edlin

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Common Law Theory

In this book, legal scholars, philosophers, historians, and political scientists from Australia, Canada, New Zealand, the United Kingdom, and the United States analyze the common law through three of its classic themes: rules, reasoning, and constitutionalism. Their essays, specially commissioned for this volume, provide an opportunity for thinkers from different jurisdictions and disciplines to talk to one another and to their wider audience within and beyond the common law world. This book allows scholars and students to consider how these themes and concepts relate to one another. It will initiate and sustain a more inclusive and well-informed theoretical discussion of the common law's method, process, and structure. It will be valuable to lawyers, philosophers, political scientists, and historians interested in constitutional law, comparative law, judicial process, legal theory, law and society, legal history, separation of powers, democratic theory, political philosophy, the courts, and the relationship of the common law tradition to other legal systems of the world.

Douglas E. Edlin is an assistant professor of political science at Dickinson College.

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Contributors

LARRY ALEXANDER is Warren Distinguished Professor of Law, University of San Diego.

T. R. S. ALLAN is Professor of Public Law and Jurisprudence, Cambridge University, and Fellow of Pembroke College.

DAVID DYZENHAUS is Professor of Law and Philosophy, University of Toronto.

DOUGLAS E. EDLIN is Assistant Professor of Political Science, Dickinson College.

MELVIN A. EISENBERG is Koret Professor of Law, University of California, Berkeley.

JOHN GARDNER is Professor of Jurisprudence, Oxford University, and Fellow of University College.

JEFFREY GOLDSWORTHY is Professor of Law, Monash University.

GERALD J. POSTEMA is Cary C. Boshamer Professor of Philosophy and Professor of Law, University of North Carolina at Chapel Hill.

EMILY SHERWIN is Professor of Law, Cornell University.

JAMES R. STONER JR. is Professor of Political Science, Louisiana State University.

MICHAEL TAGGART is Alexander Turner Professor of Law, University of Auckland.

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Introduction

DOUGLAS E. EDLIN

The common law is today as fertile a source for theoretical inquiry as it has ever been. Around the English-speaking world, many scholars of law, philosophy, politics, and history study the theoretical foundations and applications of the common law. Nevertheless, these scholars too infrequently speak directly to one another, across jurisdictional or disciplinary boundaries. In an effort to foster that dialogue, and to frame and contribute to the discussion, this book is organized around certain classic common law concepts or themes: common law rules, common law reasoning, and common law constitutionalism. This thematic structure will help to emphasize the book's contributions to our understanding of the common law and to wider debates about rules, reasoning, and constitutionalism. At the same time, the division of this book into its three constituent parts should be understood as heuristically rather than hermetically motivated. Given the nature of theorizing about the common law, these themes inevitably and fruitfully overlap. Where the common law is concerned, it is difficult to write about rules without also writing about reasoning, and it is difficult to write about constitutionalism without also writing about rules. To theorize meaningfully about the common law, we need to see how these different concepts and domains of thought relate to one another. We need to see the wide-ranging theoretical and practical importance of the common law as a mode of legal thought, a body of legal doctrine, and a structural force in the relationships of governmental actors and institutions at a constitutional level.

Common law judges attempt to do "justice in the individual case"[1] while also understanding and, in some sense, proffering the individualized judgment as a statement of a rule or proposition that can be applied through the doctrine of precedent to a generalized category of similar cases. For the common law, judgments are individual statements of normative evaluation placed within an

[1] See, e.g., *Bell v. Thompson*, 545 U.S. 794, 830 (2005) (Breyer, J., dissenting); *Red Sea Insurance Co. Ltd. v. Bouygues S.A.*, [1995] 1 AC 190, 200 (quoting *Chaplin v. Boys*, [1971] AC 356, 378); *Davis v. Johnson*, [1979] AC 264, 311 (Cumming-Bruce, L.J., dissenting).

existing and evolving system, which are claimed as a contribution to ongoing public debate and to the articulation of public standards of governance. If the common law judgment is accepted as correct, it will be instantiated within the legal system as a general rule properly applicable to a range of similar or analogous circumstances. The common law's preoccupation with reason and judgment stems from its public claim of the intersubjective validity of the applications of reason in judgment, for if a particular judgment is valid for a given instance then it should be valid for all like instances.

I will mention, but not pursue here, the observation that in this respect common law judgments might be understood to track the form of Kantian synthetic *a priori* judgments.[2] There may be important connections between Kant's work on aesthetic judgment, in particular, and the common law.[3] For Kant, though, the cognitive structure and nature of synthetic *a priori* judgments appear to remain substantially constant across different domains of inquiry (aesthetic, moral, scientific) and when directed toward different intellectual ends (beauty, right, truth). The usefulness of this parallel turns, then, on the question of whether the same could be said for common law judgments in the legal domain that are directed toward, perhaps, justice.

The claim of intersubjective validity touches upon the three sections of this book in different ways. Some theorists approach the issue of intersubjective validity by studying the use of precedent in the formulation of legal rules, which are binding (*vel non*) under certain conditions and in accordance with preexisting legal practices and standards. Larry Alexander and Emily Sherwin examine the ways in which prior case decisions function as rules when guiding the decisions of later judges, and John Gardner explores the positive nature of legal norms produced by courts, legislatures, and otherwise within the common law tradition. Other theorists concentrate on the range of instances in which a prior judgment should be deemed to possess precedential force. In other words, these theorists examine the scope of precedent by asking when and why cases are relevantly like prior decisions so that analogical reasoning may be deemed an appropriate method for understanding a later case in light of an earlier

[2] Cf. Immanuel Kant, *First Introduction to the Critique of Judgment* (Irvington Publishers, 1965), 15 ("[T]he faculty of judgment . . . is not simply a capacity of subsuming the particular under the universal whose concept is given, but also the converse, of finding the universal for the particular"); Ted Cohen and Paul Guyer, eds., *Essays in Kant's Aesthetics* (University of Chicago Press, 1982), 12; Paul Guyer, "Introduction" in Paul Guyer, ed., *The Cambridge Companion to Kant* (Cambridge University Press, 1992), 20–1; Paul Guyer, *Kant and the Claims of Taste* (Harvard University Press, 1979), 1–10, 68–9, 110–16, 133–7, 143–7.

[3] See generally Michael Denneny, "The Privilege of Ourselves: Hannah Arendt on Judgment" in Melvyn A. Hill, ed., *Hannah Arendt: The Recovery of the Public World* (St. Martin's Press, 1979), 263 ("If Kant had been an Englishman he might have noticed that the same sort of reflective judgment [operative in aesthetics] seems to work in the common-law tradition . . . a sense for justice develops through case precedents much as a taste for beauty develops through the appreciation of exemplary models of artistic excellence").

one. These questions, and others, are addressed in the contributions of Melvin Eisenberg, Gerald Postema, and David Dyzenhaus and Michael Taggart. The final group of scholars, James Stoner, T.R.S. Allan, and Jeffrey Goldsworthy, consider the ways that common law principles and rules structure and limit the government and its citizens in common law nations with varying norms of legislative supremacy and varying forms of fundamental rights.

Whether in the form of precedential rules, legal reasoning, or constitutional principles, the common law's claims of intersubjective validity also help to explain why the essays in this book address issues of justification and authority, in one fashion or another. The common law method requires judges to defend as well as define the normative standards that are formulated and refined in the course of resolving legal disputes. The reasoned judicial opinion is a form of public discourse that articulates – to the litigants whose case is decided, to the individuals who will be bound precedentially by that case in the future, to the range of actors to whom the opinion may be applied analogically, and to the government that may be constitutionally required to respect that opinion – a legal result, a legal rule, and a legal rationale for every decision supported by a justificatory opinion. In terms of legal authority, the justification for a common law norm is as important as the norm itself, because in an important sense the justification of the common law norm *is* the source of its ongoing authority. Common law judges do not just say what the law is, they explain why the law is that way. Those public explanations and justifications demonstrate, or attempt to demonstrate, to the public and to the government the law's claims of legitimacy and authority.

Rules

Beginning with common law rules, Larry Alexander and Emily Sherwin examine the definitive place of precedent in the decision making of common law judges. Their work touches upon the role of precedent in relation to the common law itself and to the normative aspects of rules and rule-oriented decision making. They consider a range of views about the role of precedent in judicial reasoning and argue that common law judges should treat prior judicial decisions as rules that bind their instant decisions just as their instant decisions should be treated as binding rules by future judges. As Alexander and Sherwin see it, if judges always reasoned perfectly, precedent would be binding solely in proportion to its moral correctness. But because judges sometimes make mistakes, precedent minimizes the risk of judicial error while maintaining doctrinal and systemic stability. Moreover, Alexander and Sherwin argue that one commonly accepted rationale for the doctrine of precedent – providing equal treatment for litigants – actually does not hold up in practice, because no two litigants are ever identically situated. The decision whether to follow precedent always, inevitably, turns on a judicial determination of when and whether to

decide that two litigants are, for precedential purposes, similarly situated. That determination cannot accurately be described as the decision to follow or reject precedent.

Alexander and Sherwin argue for a rule model of precedent. The rule model provides judges with a reasonably definite and workable standard from which to begin their reasoning in a later case. Although less ideal than perfectly executed all-things-considered moral reasoning in every case, the advantage of the rule model for human judges is that fewer or less significant mistakes will be made systemically than if every judge attempted to engage in her own independent moral evaluation in every case.

Assuming broad social and political consensus on the need to resolve coordination problems as well as possible, along with disagreement about how best to achieve these resolutions, Alexander and Sherwin focus on the place of the judicial process as an authoritative public forum for concluding interpersonal disputes in a plural society consistent with widely shared societal commitments to fairness and equal treatment. In this context, Alexander and Sherwin believe that judicial decisions should meet requirements of publicity (via published, reasoned opinions), reliance (in binding the litigants to the result and achieving finality for their dispute), and consistency (in guiding future actors by the results achieved in prior cases).

Alexander and Sherwin conclude by reaffirming that precedent rules are rules and they examine some further advantages of and challenges for the rule model of precedent. First, they ask whether the rule model would require that precedents establish rules explicitly and concretely or whether precedent rules could be gleaned implicitly from prior decisions. Implicit precedent rules sacrifice many of the advantages of coordination and legitimate expectation provided by explicit rules, and implicit rules may not force courts to consider the consequences of their decisions as carefully as they would when self-consciously promulgating a rule to govern later decisions. Nevertheless, Alexander and Sherwin argue that there are sufficient limiting forces within common law methodology to permit the formulation of precedent via implicit rules. Most fundamentally, to function as a precedent rule, an implicit rule cannot simply be extracted from a case or cases by later courts reading a rule back into those decisions; the rule must have been intended as a normative statement when it was written. In other words, Alexander and Sherwin argue that the rule/principle distinction obtains when locating precedent statements, and these statements must possess the form and function of rules, not principles.

While later courts cannot simply interpolate precedent rules into decisions that cannot fairly be read to contain them, later courts do serve an important role in determining the contours of a precedent rule and the appropriate occasions for its application. In the absence of any precedent rule, Alexander and Sherwin note the conventional view that judges may employ analogical reasoning to reach an outcome that, even if not governed by a precedent rule, might at least be guided

by and consistent with existing precedent rules. They question whether this view is accurate. If the later outcome is fully consistent with existing precedent, then the outcome was, in fact, an application of that (perhaps implicit) precedent rule. If no precedent rule exists, then the later court may engage in abduction of a principle from the case law, but as an example of precedent formulation this process would suffer from the defects of the model of principles. Alexander and Sherwin believe that a presumption in favor of a precedent rule is the best way to achieve balance between doctrinal stability and substantive development in the common law (a point to which Melvin Eisenberg will return in his chapter).

Like the common law, legal positivism originated in England. Curiously, given their shared birthplace, there is a widely held suspicion that legal positivism cannot fully account for the various ways in which legal rules are formulated within the common law tradition. In particular, the claim is sometimes made that positivism cannot account for common law rules created by customary and judicial processes. This view tends to see the common law as problematic for positivism's commitment to a rule of recognition,[4] and this view tends to claim that positivism's commitment to a domain of authoritative legal sources restricts and distorts our understanding of judicial decision making.[5] Some contemporary legal theorists have attempted to rebut, or circumvent, these criticisms of positivism through the development of more sophisticated articulations of the rule of recognition and the sources thesis.[6]

[4] See, e.g., Richard A. Posner, *The Problematics of Moral and Legal Theory* (Harvard University Press, 1999), 93 ("Hart's book [*The Concept of Law*] does not even contain an index reference to 'common law.' The common law is an embarrassment to his account. . . . The common law cannot be fitted to the idea of a rule of recognition."). The lack of an index reference notwithstanding, Hart apparently believed that his version of positivism could accommodate the common law. See, e.g., H.L.A. Hart, *The Concept of Law* (2nd ed.) (Oxford University Press, 1994), 265 ("[S]ome legal principles, including some basic principles of the Common Law, . . . are identified as law by the 'pedigree' test in that they have been consistently invoked by courts in ranges of different cases as providing reasons for decision . . ."). See also Hart, *The Concept of Law*, 95–7, 116–17, 134–5, 145–6.

[5] This criticism of positivism is contained in Ronald Dworkin's classic exchange with Hart over the "rule/principle" distinction. See generally Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), 22–31. Although the two points are closely related in certain respects, the rule/principle criticism and the rule-of-recognition criticism are conceptually distinct. See Dworkin, *Taking Rights Seriously*, 71–2.

[6] See generally Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979), 45–52, 68–9; David Lyons, *Principles, Positivism, and Legal Theory*, 87 Yale Law Journal 415, 423–4 (1977); Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 Michigan Law Review 473 (1977); Jules Coleman, *Negative and Positive Positivism*, 11 Journal of Legal Studies 139 (1982). These efforts by positivists to respond to Dworkin and other critics led to more nuanced distinctions between so-called exclusive and inclusive positivists, which are best left for another time, except to say that Hart himself expressly endorsed inclusive positivism (also known as "soft" positivism or incorporationism) in the Postscript. See Hart, *The Concept of Law*, 250. In fact, Hart's position on this point was fairly clear long before he wrote the Postscript. See, e.g., Hart, *The Concept of Law*, 204 ("In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral

John Gardner approaches these explicit and implicit criticisms of positivism from a different direction. Rather than accept that modifications to the rule of recognition or the sources thesis must be made, Gardner explains that, if we properly understand the three modes by which common law rules are created, we will see that H.L.A. Hart's positivism is quite capable of explaining their creation and recognition as legal sources. Gardner analyzes legislated law, customary law, and case law by considering how each category of law is made. More specifically, Gardner examines the creation of law in each category according to whether it is expressly made, whether it is intentionally made, and whether it is made by one or more agents. This taxonomy allows Gardner to demonstrate that legislated law is made expressly, intentionally, and through the acts of an agent while customary law is not made expressly, intentionally, or through the acts of an agent. Case law occupies a middle ground: It is not expressly made, it may be intentionally made, and it is made through the act of a single (individual or institutional) agent.

Gardner then considers the relationship of the common law (as a type of law) with the Common Law (as a legal tradition). On this analysis, Gardner explains, common law is an amalgam of case law and customary law. Using the doctrine of *stare decisis* as an example, Gardner demonstrates that the common law consists of case law together with judicial customary law. In Common Law systems, Gardner suggests, case law exists as an autonomous source of law, which need not be (and is not) devoted solely to statutory interpretation; case law in Common Law jurisdictions often importantly involves the development and interpretation of prior case law. Case law can usefully be related to customary and statutory law, as Gardner does, but Gardner also points out that in Common Law systems case law also exists as a categorically distinct source of law.

Gardner concludes by explaining that all three categories of law – legislated, customary, and decisional – are forms of positive law. The fact that customary and case law are not legislated sometimes leads people to conclude, mistakenly, that they are not positive or posited law. The error here, as Gardner points out, is that customary and case law are still made by someone, even though they are not always made expressly or intentionally. Indeed, as Gardner emphasizes, all law is and must be positive law. Throughout his analysis, Gardner applies the work of positivists such as Bentham, Austin, and Hart. In doing so, Gardner exposes the errors of certain theorists (some of whom are positivists) who assume that all law must be understood on the model of legislation. He likewise

values . . ."); H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983), 361 ("[A] constitution could include in its restrictions on the legislative power even of its supreme legislature not only conformity with due process but a completely general provision that its legal power should lapse if its enactments ever conflicted with principles of morality and justice") (first published in 1965).

offers a response to those who have asserted that positivism cannot reconcile the common law with a rule of recognition that delineates a domain of authoritative legal sources.

Reasoning

Like the formulation, interpretation, and application of its rules, another of the central and abiding aspects of the common law that has always commanded the attention of its scholars is its mode of reasoning. The uses of precedent and analogy, as well as the common law judicial obligation to provide reasoned decisions for legal rulings, are vital to the workings of the common law system and to the methods and results of practical reasoning more generally. These issues arise in the context of several related sets of debates: whether precedent is truly a legal standard or a social practice, the normative justifications for precedential constraints, whether legal reasoning by analogy actually exists, whether analogical reasoning differs from deductive reasoning, the role of analogical reasoning in justifying judicial determinations, the relationship between analogical and precedential reasoning, and the relationship between analogical reasoning and the creation or presupposition of rules. Moreover, some writers contest the claim that there is anything especially unique or valuable about legal or judicial reasoning.

Melvin Eisenberg addresses several of these issues in his chapter. Eisenberg arranges his study of the principles that can and should inform common law legal reasoning around four claims. The first is that courts should make law in the absence of legislated rules. Institutionally, the common law judiciary resolves private disputes and, in doing so, formulates and refines the legal principles that regulate private acts. Given the legislature's preoccupation with public law matters as well as the functional differences between codification and adjudication, Eisenberg argues that courts fulfill an important social role by generating binding legal norms as a by-product of resolving legal disagreements among citizens. A crucial link between rule making and reasoning according to Eisenberg is that, when generating legal norms, courts must engage in a form of legal reasoning that is familiar to and may be reproduced by the legal profession. This allows lawyers to advise clients with some confidence and success about the state of the law and the legality of clients' actions.

Eisenberg's second claim balances the formulation of legal doctrine against the principles of political morality upon which social norms have developed. Legal sources recognized as authoritative, which Eisenberg calls doctrinal propositions, must be considered in relation to the moral, political, and empirical commitments and understandings of the society in which the law operates, which Eisenberg calls social propositions. In other words, we cannot fully apprehend the meaning of a legal rule without also contemplating the reasons for that legal rule.

This point relates directly to the third prong of Eisenberg's argument. Eisenberg emphasizes the distinction between the existence of a legal rule and the justification for that legal rule. The recognition that a particular rule is identified as a legal rule through some authoritative source does not justify ongoing deference to that legal rule. Only social propositions, according to Eisenberg, can justify doctrinal propositions.

Finally, Eisenberg argues that consistency in the application of legal rules depends upon the consistent recognition and realization of the underlying social propositions that animate their attendant doctrinal propositions. In Holmesian fashion, Eisenberg notes that the determination of when two cases are sufficiently alike such that they should be treated alike does not depend upon syllogistic reasoning. Instead, this determination depends upon a sensitive appreciation of the social propositions that inform evaluations of salient likeness or difference in comparing the two cases.

Eisenberg develops these four foundational concepts in an effort to address a recurring common law dilemma: How can the law remain stable and yet not stand still?[7] For Eisenberg, this dilemma is phrased as a tension between the ideal of doctrinal stability and the ideal of social congruence. This tension is cast on a spectrum from rules that comport perfectly with social propositions on one side through imperfect correlations in the middle and over to rules that completely disconnect from social propositions on the other side. Eisenberg attempts to resolve this tension by formulating his basic principle of legal reasoning: Doctrinal rules should be applied and extended where they are substantially consistent with social propositions, but doctrinal rules should not be applied and extended if they are not substantially congruent with social propositions.

Eisenberg then evaluates different modes of legal reasoning – use of precedent, distinguishing, and analogy – to analyze the invocation and evaluation of these concepts and principles in reported case decisions from various jurisdictions. In the end, Eisenberg finds that social propositions are always operative in common law legal reasoning, implicitly where doctrinal rules are congruent with underlying social propositions and explicitly where judges determine that a doctrinal rule must be modified because it deviates significantly from underlying social propositions.

Gerald Postema begins his examination of analogical reasoning by grounding historically what he calls the classical common law conception of this mode of legal thought. As Postema explains, three elements characterize the classical conception of analogical reasoning at common law: (1) this process has a *prima facie* claim to legitimacy in practical reasoning, (2) the method involves drawing inferences from decided cases (or source analogues) to a novel case (or target

[7] I am, of course, paraphrasing Roscoe Pound here.

analogue) to determine the basis for deciding the novel case in the same way as the decided cases, (3) the determination that a sufficient resemblance exists between the novel case and the decided cases, which would justify deciding the latter case in conformity with the precedent cases. In other words, if a rule can be divined by locating the rationale that unifies the resolution of the novel case and the precedent cases, that rule is extrapolated from the cases rather than applied to them.

Postema then responds to claims that analogical thinking (and legal reasoning more generally) is neither autonomous nor distinctive. In defending the viability of classical common law reasoning by analogy, Postema distinguishes two types of argument that the critics of analogical reasoning mistakenly attribute to the proponents of the classical conception of analogical reasoning (or that proponents sometimes mistakenly advance in an effort to defend analogical reasoning).

The first type of argument skeptics sometimes impute to the advocates of analogical reasoning is particularism. Particularists are thought to argue that practical reasoning requires the identification of shared particular qualities between two cases. On this account, analogical reasoning involves a relationship between shared characteristics of different cases (the substantive thesis) and our recognition or apprehension of this relationship (the epistemological thesis). We may apprehend the relationship between shared particulars through intuition or disposition or in some other way. However this relationship is ascertained, skeptics of analogical reasoning respond to the particularist defense in the same fundamental manner. The substantive thesis cannot sustain analogical reasoning as a viable method of practical reason, because shared particular characteristics can never serve as a basis for judgment or action without some more general principle or rule to guide the determination that these are the characteristics that matter for purposes of rendering judgment or determining appropriate action. In other words, particularism fails as a defense of analogical reasoning precisely because the particulars themselves cannot aid practical reasoning without some prior standard for determining which particulars are dispositive.

What distinguishes particularism from the classical conception of analogical reasoning, properly understood, is the failure of particularism's epistemological thesis. The method of determining germane similarities between cases is neither intuitive nor dispositional; it is, in Postema's terms, discursive. Determining relevant similarities between cases depends, in the classical common law conception, upon reasoned argument rather than on a feeling or a perception. Postema helps us see that particularism is not part of the genuine theoretical framework of analogical reasoning.

Next Postema turns to the other theoretical argument often offered (or assumed) as undergirding analogical reasoning. He calls this rule-rationalism. Rule-rationalism avoids the problems of particularism by noting from the

beginning that analogical reasoning is not merely about detecting similarities between cases; it is about detecting relevant similarities between cases. And the determination that similarities are relevant can be reached only through a preexisting norm that classifies certain qualities as significant. But ultimately rule-rationalism presents a problem of infinite regress for analogical reasoning. If the judgment that two cases are relevantly similar necessitates a preexisting rule to guide that judgment, then there must also be another rule that tells us which rule to apply when determining the relevant similarity between cases. And this goes on forever.

Postema counters the rule-rationalist account of analogical reasoning by noting that the rationalist account is committed to a deductive, top-down conception of reasoning. But as Postema explains, common law analogical reasoning is not committed to this account of reasoning. Overemphasis on deduction often leads people to confuse logical reasoning with correct reasoning. The fact that a conclusion follows from premises does not necessarily mean that the conclusion is correct. Through analogical reasoning, the common law has always, at least implicitly, understood this. As a result, common law analogical reasoning demands constant evaluation of an argument's premises and conclusions. Considered judgment in the common law tradition is reflective and reflexive. For this reason, the rule-rationalist account of analogical reasoning is inapposite.

Having distinguished particularism and rule-rationalism from the classical conception of analogical reasoning, Postema then defends the authentic mode of analogical reasoning in the common law tradition. In doing so, Postema separates analogical reasoning into two interrelated levels that he calls analogical reasoning and analogy assessment. Analogical reasoning is the level at which potential analogues are identified, and analogy assessment is the level at which these analogues are evaluated. These stages of reasoning may occur sequentially or they may occur simultaneously, in a sort of *gestalt* shifting between identification and evaluation of potential analogues.

Analogical reasoning is not unique to law. Indeed, as Postema emphasizes, analogical reasoning is fundamental to myriad areas of human cognition. For Postema, though, this is the point. A core feature of analogical reasoning is the formation of judgments through a discursive process in which judgments are defended as a result of the articulate or implicit claim by the judgers (or judges) that their judgments are correct. Postema highlights the Kantian notion that judges are responsible for their judgments and that errors of judgment (as conclusions reached or reasons given) are considered to be mistakes that may be criticized, rather than mere aberrations that should be disregarded (a notion that Hart expressed in a related context as the "internal aspect of rules seen from their internal point of view"[8]). These general features of analogical

[8] Hart, *The Concept of Law*, 90. See also id. at 55–7, 137–8.