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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 law²—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 Indecisus: 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 analogy¹⁰ 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).

legal decision-making can be found in the rules of law.¹² Not only does law of necessity depend on numerous skills other than those explicitly understood to be legal, but law is inevitably and especially subject to the unforeseeable complexity of the human condition. We can at best imperfectly predict the future, just as we continue to be uncertain about what we will do with that future once we get there. As the world continues to throw the unexpected at us, law will find itself repeatedly forced to go outside of the existing rules in order to serve the society in which it exists. Law may well contain within its arsenal of argument and decision-making the resources it needs to adapt to a changing world, but insofar as that is the case, it is even less likely that the image of a totally closed system in which existing rules of law—and maybe even the existing practices of legal argument—will be an accurate picture of what law does and how it does it.

Not only is law not a closed system, but its characteristic methods of reasoning, if indeed there are such methods, are also not ones that are completely unique to law. Perhaps there is little overlap between Estonian and English, or between literary criticism and multivariate calculus, but it is not plausible to deny that even the most characteristic forms of legal reasoning are found outside the legal system. It is true that lawyers and judges frequently make arguments and decisions based on the dictates of written-down rules, but so do bureaucrats, bankers, and every one of us when we observe the speed limit written on a sign. The legal system also seems particularly concerned with precedent—with doing the same thing that has been done before just because it has been done before. But this form of thinking is again hardly unique to law, as is well known to parents when dealing with the argument by a younger child that he or she should be allowed to do something at a certain age only because an older sibling was allowed to do the same thing at that age. And although law is also an institution characterized by authority-based reasoning—taking the source of a directive rather than the reasons behind it as a justification for following it—this too is hardly unknown outside of the legal system. The family is again a good example, and every parent who has ever in exasperation exclaimed “Because I said so!” to a stub-

12. For a well-known denial that law can possibly be seen as a closed and deductive system, see H.L.A. Hart, “Positivism and the Separation of Law and Morals,” 71 *Harv. L. Rev.* 593, 608 (1958).

born child recognizes that appeals to authority rather than reason have their place throughout human existence.

Yet although the characteristic modes of legal reasoning are all frequently found outside the law, it might still be that these forms of reasoning and decision-making are particularly concentrated in the legal system. For however much these various forms of reasoning do exist throughout our decision-making lives, it is important not to forget that they are odd, and odd in a special way. And this special oddness is that every one of the dominant characteristics of legal reasoning and legal argument can be seen as a route toward reaching a decision *other than* the best all-things-considered decision for the matter at hand. Often when we obey a speed limit we are driving at a speed that is not the same as what we think is the best speed given the traffic, the driving conditions, and our own driving skills. Consequently, to obey a speed limit is to do something we do not think best. Similarly, making a decision just because the same decision has been made before—following precedent—gets interesting primarily when we would otherwise have made a different decision. The parent who gives the younger child the same privileges at the same age as an older child feels the pull of precedent only when he or she otherwise thinks there is a good reason for treating the two differently, and so being constrained by precedent is again a path *away* from what had otherwise seemed to be the right decision. And we say we are *obeying* or *following* an authority only if what we are doing because of what the authority has said is not the same as what we would have done if left to our own devices to make the decision we thought best. The soldier who follows an order might well do something else if allowed to make his or her own unguided (or uncommanded) decision, just as the obedient student or child is one who suppresses his or her own desires to do something else.

Once we understand that these admittedly common forms of reasoning and decision-making are nevertheless somewhat peculiar—that they often dictate outcomes other than those the decision-maker would otherwise have chosen—we can understand as well that the substantial presence of these forms of reasoning in the legal system—more substantial, proportionately, than in the totality of our decision-making lives—can provide the foundation for a plausible claim that there is such a thing as legal reasoning. If these somewhat counterintuitive forms of reasoning—forms of reasoning that often lead to results other than what would oth-

erwise seem to be the best all-things-considered outcome for the case at hand—are dominant in law but somewhat more exceptional elsewhere, then we might be able to conclude that there *is* such a thing as legal reasoning, that there *is* something we might label “thinking like a lawyer,” and that there *is* accordingly something that it is vitally important that lawyers and judges know how to do well and that law schools must teach their students. To repeat, this array of reasoning methods is not unique to the legal system, and these are not the only methods that the law uses. The modes of legal reasoning are found elsewhere, and the modes of what we might call “ordinary” reasoning have a large place in legal argument and legal decision-making. But if it turns out that there are indeed methods of reasoning that are found everywhere but that are particularly concentrated and dominant in legal argument and decision-making, then the claim that there is something called legal reasoning will turn out to be justified.

Law’s seemingly counterintuitive methods are not simply a historical peculiarity. Rather, they are a function of law’s inherent *generality*. Although disputes, in court and out, involve particular people with particular problems engaged in particular controversies, the law tends to treat the particulars it confronts as members of larger categories. Rather than attempting to reach the best result for each controversy in a wholly particularistic and contextual way, law’s goal is often to make sure that the outcome for *all* or at least most of the particulars in a given category is the right one. Once again Lord Coke is illuminating: “It is better saith the Law to suffer a mischief (that is particular to one) than an inconvenience that may prejudice many.”¹³ In other words, for Coke it was better to reach the wrong result in the particular controversy than to adopt a rule that would produce what would seem to be the correct result for this case but at the cost of producing the wrong result in many others.

Coke’s lesson can be observed in the traditional ritual of Socratic dialogue¹⁴ that takes place between student and teacher in the first year

13. Sir Edward Coke, as quoted in J.R. Stoner, *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* 25 (1992).

14. There is scant connection between the question-centered methods of teaching employed by Socrates in the Platonic dialogues and the type of questioning that has traditionally taken place in the law school classroom. Even apart from the enormous advantage that Plato had over the rest of us in being able to write the answers as well as the questions, Socrates’ goal was to extract from his interlocutors some latent but nonspecialized insight, rather than to inculcate in them a special-

of law school. After eventually being coaxed into accurately reciting the facts of some reported case, the student is asked what she thinks should be the correct result for the present case. Typically, the student then responds by announcing what she believes to be the fairest or most just outcome between the opposing positions of the particular parties. At this point the student is asked by her interrogator to give the rule or principle that would support this outcome, and here the characteristic pattern of Socratic inquiry begins. By a series of patterned and well-planned (and often well-worn) hypothetical examples, the professor challenges the student's initially offered rule, with the aim of demonstrating that the rule that would generate a just or fair or efficient outcome in the present case would generate less just, less fair, or otherwise less satisfactory results in other cases. And in taking the chosen victim through this series of uncomfortable applications of her initially selected rule, the professor attempts to get all the students in the class to understand, just as Coke argued, that the best legal rule may at times be one which will produce an unjust result in the present case but which will produce better results in a larger number of cases, the result in the present case notwithstanding.

This form of Socratic inquiry is not restricted to the law school classroom, and it is noteworthy that it is the common form of judicial questioning in appellate argument. Because appellate courts often see themselves as pronouncing rules that will control other and future factual situations, and as writing opinions that will serve as precedents in subsequent cases, appellate judges are often concerned as much with the effect of their immediate ruling on future cases as with reaching the best result in the present case. As a consequence, appellate advocates frequently find themselves asked in oral argument how the rule or result they are advocating will play out in various hypothetical situations. Just as in the law school classroom, judges pose these hypothetical scenarios to the lawyers who argue before them because of the belief that what seems initially to be the right result in the particular dispute before the court will wind up

ized skill that they hitherto did not possess. Now it may be that the ability to engage in reasoning focused not simply on this case or this dispute is latent in virtually everyone, but if it is sufficiently latent that it takes a squadron of law professors and three years of law school to extract it for most people, then there is no difference of consequence between what we might label the inculcation and the extraction models of legal education. In either case, the purpose of legal education is to develop in the student an ability actually to *do* something he or she could not do before.

as the actual outcome only if it can be justified in a way that will not produce the wrong outcomes in too many expected future cases.

In seeking to demonstrate to the hapless student or the struggling advocate how the best legal outcome may be something other than the best outcome for the immediate controversy, the prototypical Socratic interrogation embodies law's pervasive willingness to reach a result differing from the one that is optimally fair or maximally wise, all things considered, in the particular case. In *United States v. Locke*,¹⁵ for example, the Supreme Court dealt with a case in which a renewal of a land claim that had been filed on December 31, 1982, had been rejected by the Bureau of Land Management because the relevant statute required that such filings be lodged "prior to December 31" of any given year. Although it seemed obvious to the Court and to virtually everyone else that the language of the statute was defective, and that what Congress really meant to say was "on or prior to December 31," Justice Thurgood Marshall and five other Justices concluded that the particular rights and wrongs of Locke's own claim were less important than the larger question whether the Supreme Court should be in the business of rewriting even obviously mistaken federal statutes, especially ones dealing with deadlines and filing dates. Here and elsewhere, law is typically concerned with the full array of applications of some general rule and principle, and as a result the law often pursues that concern at the cost of being less worried than nonlegal decision-makers might be with a possible error or injustice or unfairness in the particular case. When the Rule of Law is described, as it traditionally was, in contrast to the rule of men, the idea was that the Rule of Law was a principle that was wary of individual judgment and reluctant to rely too heavily on the unguided judgments and whims of particular people. So although it may sometimes seem unfair to take the existence of a clear rule or a clear precedent as commanding a result the judge herself thinks wrong, following even a rule or precedent perceived by the judge to be erroneous is what, under the traditional understanding, the law often expects its decision-makers to do.¹⁶

15. 471 U.S. 84 (1985).

16. Consider, for example, Justice Louis Brandeis's famous observation that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas. Co.*, 285 U.S. 393, 412 (1932) (Brandeis, dissenting).

It is important to understand that the belief that there is a moderately distinct form of reasoning we can call “legal reasoning” is in the final analysis an empirical claim. Most people can describe a unicorn, but our ability to describe a unicorn is not inconsistent with the crucial fact that there are no actual unicorns in the world. Similarly, most of us can point to examples of genuine self-sacrificing heroism, but even as we do so we recognize that such behavior is highly unusual. And so the lesson we should draw from these examples is that our ability to describe legal reasoning, and even to point to actual examples of its use, says less than is commonly supposed about how often such reasoning is an important component of what lawyers and judges actually do. To point to one or a few instances of genuine constraint by precedent, for example, says almost nothing about the frequency of such constraint throughout the universe of legal decisions. And to identify real cases in which rules or authority have made a difference is itself not strong evidence that rules and authority make a difference very often. Still, if it turns out that we can identify large numbers of real-world examples of genuine legal reasoning, the burden of proof will shift to those who would say that such reasoning is rare or that it is all or mostly imaginary. The skeptical position that distinctively legal reasoning is unusual rather than typical in actual legal practice may in the final analysis be sound, but the premise of this book is not only that legal reasoning does exist, even if it is not all that lawyers and judges do, but also that its actual existence is sufficiently widespread to say that there is, descriptively, something we can accurately characterize as “thinking like a lawyer.”

Even if we conclude that there *is* such a thing as legal reasoning, that is not necessarily to conclude that legal reasoning is a good thing. Indeed, maybe the Rule of Law is not such a good thing. Plato notoriously proposed a society that would be governed by philosopher-kings, and it is hardly self-evident that in such a society the wise and good philosopher-kings should be bound to follow rules that will lead them away from their own best judgment, or should be constrained by precedent to decide things the way they had been decided in the past when the previous decision seems mistaken, or should be commanded to obey authorities whose judgment may very well be flawed. In a society governed by the wise and the good, legal reasoning is likely simply to get in the way. And in such a society, were such a society ever to exist, the Rule of Law would be at least superfluous, and quite possibly pernicious.

Of course, we do not live in Plato's utopia,¹⁷ and thus we understand that the values of legal reasoning and the Rule of Law may serve important goals in constraining the actions of leaders lacking the benign wisdom of Plato's hypothetical philosopher-kings. But even when we leave Plato's utopia and find ourselves in the real world with real leaders and their real flaws, the same dilemma persists. Legal reasoning in particular and the Rule of Law in general will often serve as an impediment to wise policies and to the sound discretion of enlightened, even if not perfect, leaders.¹⁸ When and where the Rule of Law might turn out to serve the wrong interests, or simply to be so concerned with preventing abuses of individual discretion that it impedes sound discretion, is not the focus of this book. Evaluating law and assessing the Rule of Law is the work of a lifetime, and indeed not just the lifetime of any one person. The far more modest goal of this book, therefore, is to identify, describe, analyze, and at times evaluate the characteristic modes of legal reasoning. Determining, in the aggregate, whether and when those modes are worth having, a question whose answer is far from self-evident, is best left for other occasions.

17. Nor did Plato, as he well recognized.

18. See Morton J. Horwitz, "The Rule of Law: An Unqualified Human Good?," 86 *Yale L.J.* 561 (1977) (book review).