The Dimensions of Legal Reasoning

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Developing Analytical Acuity from Law School to Law Practice

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This book, like everything else I do, is dedicated to my wife, Mary.

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Preface

Integrating the Strands that Produce the Rule of Law

This book is about a complex form of reasoning, usually labeled "thinking like a lawyer," to which I heard general allusions in my first days of law school. Although I remember being impressed by the idea, I didn't understand it then, nor could I pin it down by the time I graduated. It remained a mystery even when I began teaching law myself. Now, much later than I care to admit, I think I have a better perspective on this phenomenon, and on why it is such a perplexing challenge to grasp. This book is my effort to unpack this mental process so that others might appreciate it, and indeed exploit it, earlier than I did.

But who are these "others" to whom this book is addressed?

A very wide range, as it turns out. Although the analysis of legal reasoning to be developed here is indeed ambitious, the topic is approached in stages of intellectual and professional growth. These are the "Parts" identified in the Table of Contents. Initially, the story is about early experiences in law school, but we progress step-by-step to encompass the full range of complex legal issues confronting practicing lawyers and judges.

The ultimate purpose of the book follows from this surprising breadth. The text seeks to improve the analytical perspectives at both ends of this professional spectrum. Law students ought to be given a better chance to appreciate earlier than they usually do the mental agility, rather than memorization prowess, that law practice will actually expect of them. Concomitantly, experienced lawyers ought to have a more explicit understanding of the professional acumen they bring to bear when they analyze issues and construct arguments, so that they can deploy that skill more effectively and explain it more clearly as they train their younger colleagues.

But one group of legally experienced readers deserves special attention: my academic colleagues, who are the bridge between law students and law practitioners. They present a special challenge for this book because any of them

who have labored in and around the topic of legal reasoning will have a rational concern about the breadth of the project here.

The range of topics to be developed in these pages is indeed quite wide. We will engage, describe, and sometimes critique several areas of "legal theory" that have their own separate bodies of respected literature. These include abstract inquiries into "What is law?" as a social and philosophical matter; more practical examinations of legal reasoning as a professional activity; theories of language and interpretation of constitutional and statutory texts; some specific legal doctrinal areas, such as landlord-tenant law, privacy law, and so on. As a consequence, one could argue that there is not one book here, but several—each of which is insufficiently developed. For my purposes, however, this breadth is both justified and important.

My animating thesis is that a proper appreciation of legal reasoning requires that all these lines of scholarly inquiry be integrated rather than separated. Each must take account of all the others. Thus, the challenge for this book is to address each of these underlying intellectual strands *enough* to bring to light their inherent and necessary overlap. I do not consider myself alone or unique in this regard: A quintessential example of this kind of analytic ambition is the body of work produced by Prof. Ronald Dworkin,[1] in which he made claims to comprehensive descriptive and normative accuracy across a swath of legal issues as he developed his theory of adjudication. I hope to use and extend aspects of his academic agenda.

Given this simultaneously broad and deep pedagogical ambition, two caveats must be quickly acknowledged to limit, and make more reasonable, the book's scope.

First, the purpose of this book is *not* to improve anyone's "knowledge" of the law in the sense of making legal rules or doctrines more certain, less complicated, less contentious, or anything of that sort. I seek instead to explain better *why* the legal world is unavoidably uncertain, complicated, and contentious. Concerning the law's substance, then, this book does not intend or hope to explain why, for example, there is an exception to the several exceptions to some general rule. I more modestly intend to explain why such complexities arise.

Second, this book has no intention of being a work of psychology, trying to capture all the thoughts and motivations of all (or any subset) of lawyers and judges. The legal system is populated, after all, with humans rather than robots, so personal idiosyncrasies like bias, animus, and ignorance can certainly be important elements in "explaining" any specific legal argument or opinion.[2] However, these "imperfections," if you will, will not be directly ad-

dressed in the analysis here. My interest is instead in unpacking the elements of what might be characterized as a kind of idealized psychology: the most comprehensive examples of legal analysis in controversial situations.

This level of thoughtfulness can nevertheless involve very different understandings of facts and social values, leading to conflicting conclusions. But this inconsistency is not a failing. The underlying justification for legal reasoning is *not* based in any of its *results*, compatible or otherwise, welcome or otherwise. It is instead grounded in the *process itself* that precedes the results. What we mean by the guiding principle of the "rule of law" is, then, actually neither rules nor law, but the sophisticated thinking that leads to them.

Although this may seem perplexing, the key to understanding legal reasoning, I will contend, is to appreciate legal complexity—in fact, to revel in it—rather than to try to eradicate or soften it. This book will not help someone find "Rule X" in a legal source that then easily and clearly resolves a legal question. (For example, how many witnesses does local law require for a valid will?) Most anyone could do that. Instead, the book is intended to help a lawyer confront the situation where no "Rule X" seems to exist to fix things, and thus must be invented; or, more troubling, where you have found that decisive "Rule X" but you don't like it, and thus must do what you can to avoid or overcome it. (Back to the example: The will you want to challenge has two witnesses, but one of them was age 16, and local law has never considered this situation.) That's hard, particularly when you nevertheless claim to be paying homage to the rule of law.

As a consequence, despite the abstract nature of much of the book's analysis of legal reasoning, the ultimate success of this enterprise will be assessed quite practically: Does the analytic model developed here make you, the reader, better able to understand and then employ legal material more effectively in complex circumstances, whatever result you are trying to achieve?

We'll see. You have the right to remain skeptical.

Notes

1. We will review much of Prof. Dworkin's work in Chapters Three, Six, and Seven. *See infra* ch. 3, 6, 7.

2. This observation is prompted by the discussion of such factors in many sources analyzing legal and judicial reasoning, and in particular that found in Judge Richard Posner's important book, How Judges Think, and the numerous responses that text has provoked. *See* Richard Posner, How Judges Think (2008). This point is developed further in Chapters Three and Six. *See infra* ch. 3, 6.

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