LEGAL REASON

Legal Reason describes and explains the process of analogical reasoning, which is the distinctive feature of legal argument. It challenges the prevailing view, urged by Edward Levi, Cass Sunstein, Richard Posner, and others, which regards analogical reasoning as logically flawed or as a defective form of deductive reasoning. It shows that analogical reasoning in the law is the same as the reasoning used by all of us routinely in everyday life and that it is a valid form of reasoning derived from the innate human capacity to recognize the general in the particular, on which thought itself depends. The use of analogical reasoning is dictated by the nature of law, which requires the application of rules to particular facts. Written for scholars as well as students, practitioners, and persons who are generally interested in law, *Legal Reason* is written in clear, accessible prose, with many examples drawn from the law and everyday experience.

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Legal Reason

THE USE OF ANALOGY IN LEGAL ARGUMENT

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Preface

Recent discussions of the use of analogy in legal argument, which measure its use against the standards of deductive and inductive reasoning and find it wanting, prompted me to write this book. Even those who have approved the use of analogical argument in the law, like Edward Levi in his classic study, *An Introduction to Legal Argument*, have thought it is rationally "flawed," although how in that case it could have the benign effects that Levi and others attribute to it is not explained. So also, efforts to reconstruct analogical legal argument as only a slightly disguised form of deductive or inductive argument, or some combination of the two, distort the arguments that lawyers and judges actually make and are evidently dictated only by the conviction that otherwise the arguments are invalid and entitled to no weight.

Views of this kind, which have dominated the discussion about analogical legal reasoning, fly in the face of the indubitable fact that the use of analogy is at the very center of legal reasoning, so much so that it is regarded as an identifying characteristic not only of legal reasoning itself but also of legal education. It is simply not credible that arguments subjected routinely to the closest scrutiny would contain such fundamental error. Studying the matter, I confirmed my belief that the use of analogical argument in law stands up on its own terms and is not different from the reasoning on which we all rely in the affairs of everyday life. Its

use in the law is distinct only in that it is not merely commonplace and useful but is essential to preservation of values that we ascribe to "the rule of law." The effort to displace analogical reasoning by deductive or inductive reasoning responds to a mistaken belief that the rule of law so requires. Analogical reasoning does not undermine the rule of law but rather sustains it.

I intend this book both for those who are interested in the scholarly debate and those who are beginning their legal studies or just entering the practice of law, as well as persons who have a general interest in law. Addressing myself to these audiences, I have not scanted discussion of the issues. I have, however, omitted most of the apparatus – lengthy footnotes about marginally relevant points and extensive citation – that is, excessively I think, common to legal scholarship. I have been generous with commonplace examples and with explanations of matters that will be familiar to legal scholars and experienced practitioners but perhaps not to beginning students, practitioners starting out, and others outside the legal profession.

I am grateful to many colleagues and friends who read some or all of the manuscript and made fruitful suggestions, among whom are Brian Bix, Michael Doyen, Richard Fallon, Robert Ferguson, Morton Horwitz, Daniel Meltzer, Anton Metlitsky, Daniel Weinreb, Mark Yohalem, and Benjamin Zipursky.

Andrew Waterhouse, George Borg, and Marcia Chapin helped me to understand the chemistry of wine stains and talcum powder. I presented some of the ideas in the book at workshops at Cornell Law School, Fordham Law School, and Harvard Law School and was encouraged and stimulated by comments of the participants.

The library of Harvard Law School provided ready access to books and articles about a wide variety of subjects, including many that did not make it into the final manuscript. The library of Fordham Law School was similarly helpful when I was a visiting professor there in 2003. Melinda Eakin prepared and managed many drafts of the manuscript and assisted in the final copyediting. Her help was invaluable. Ed Parsons was a generous and helpful representative of Cambridge University Press.

Lloyd L. Weinreb
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