Introduction

Legal reasoning, meaning reasoning about the requirements and application of law, has been studied for centuries.[1] This is not surprising: legal

[1] Early works include Sir Edward Coke, *The First Part of the Institutes of the Law of England*, §138 ¶97b (1628), reprinted in II *The Selected Writings of Sir Edward Coke* 577, 701 (1639) (Steve Sheppard, ed., Indianapolis: Liberty Fund 2003); Christopher St. German, *Doctor and Student* (1523) (T. F. T. Plucknett and J. L. Barton, eds., London: Seldon Society 1974); Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common-Lawes* (1681) (Joseph Cropsey, ed., Chicago: University of Chicago Press 1971); Sir Matthew Hale, *The History of the Common Law of England* 39–46 (1713) (Charles M. Gary, ed., Chicago: University of Chicago Press 1971); 2 Henry Bracton, *On the Laws and Customs of England* 19–28 (ca. 1230–50) (Samuel E. Thorne and George E. Woodbine, eds. and trans., Cambridge, Mass.: Harvard University Press 1968); *The Treatise on the Laws and Customs of the Realm, Commonly Called Glanville* 1–3 (ca. 1187–89) (G. D. G. Hall, ed., London: Nelson 1965); 1 William Blackstone, *Commentaries on the Laws of England* 38–73 (Oxford: Clarendon Press 1765).

More recent works focusing on legal reasoning include Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (Cambridge: Cambridge University Press 2005); Cass R. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press 1996); Steven J. Burton, *An Introduction to Law and Legal Reasoning* (Boston: Little, Brown 1995); Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and*

decision making is tremendously important to peace, prosperity, human dignity, and daily life. Yet, at least since Sir Edward Coke described the common law as "an artificial perfection of reason," legal reasoning has been surrounded by an air of mystery.[2] More recent works on legal reasoning have produced neither clarity nor consensus on what legal deliberation entails; if anything, they have compounded the problem. Legal decision making is frequently described as a "craft" involving special forms of reasoning that are accessible only to those with long experience in applying law.[3] Seasoned judges and lawyers are said to reason

Application of Law (William N. Eskridge Jr. and Phillip P. Frickey, eds., New York: Foundation Press 1994); Steven J. Burton, *Judging in Good Faith* 35–68 (Cambridge: Cambridge University Press 1992); Oliver Wendell Holmes, *The Common Law* (New York: Dover Publications 1991); Melvin Aron Eisenberg, *The Nature of the Common Law* (Cambridge, Mass.: Harvard University Press 1988); Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press 1986); Ronald Dworkin, *Taking Rights Seriously* 14–130 (Cambridge, Mass.: Harvard University Press 1978); Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown 1960); Roscoe Pound, *Law Finding through Experience and Reason* (Athens: University of Georgia Press 1960); Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press 1949); Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press 1948).

[2] "[T]he common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason. . . ." Coke, *supra* note 1, at 577, 701. *See Prohibitions Del Roy*, 12 *Edward Coke, Reports* 63 (1607), reprinted in I *The Selected Writings of Sir Edward Coke* 478 (Steve Sheppard, ed., Indianapolis: Liberty Fund 2003) (maintaining that the king cannot render legal judgments because he lacks "the artificiall reason and judgment of Law").

For helpful discussions of Coke and of early understandings of legal "reason," see J. W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* 45–52, 148–68 (Baltimore: Johns Hopkins University Press 2000) (suggesting that Coke's term "artificial reason" referred to reasoning skills obtained through special training, reasoning developed through debate among learned persons, or a combination of the two); Gerald J. Postema, *Classical Common Law Tradition, Part II*, 3 *Oxford U. Commonwealth L.J.* 1, 1–11 (2003) (describing artificial reason as pragmatic, public-spirited, contextual, nonsystematic, discursive, and shared); Gerald J. Postema, *Classical Common Law Tradition, Part I*, 2 *Oxford U. Commonwealth L.J.* 155, 176–80 (2002).

[3] *See* Anthony Kronman, *The Lost Lawyer* 170–85, 209–25 (Cambridge, Mass.: Belknap Press of Harvard University Press 1995); Llewellyn, *supra* note 1, at 213–35; Brett G. Scharffs, *The Character of Legal Reasoning*, 61 *Wash. & Lee L. Rev.* 733 (2004); Charles Fried, *The Artificial Reasoning of the Law, or What Lawyers Know*, 60 *Tex. L. Rev.* 35 (1981). *See also* Weinreb, *supra* note 1, at 123–46 (suggesting that analogical reasoning depends on a combination of psychological hardwiring and legal training and experience); Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 *Yale L.J.* 253 (1996) (finding support in Heidegger for learned methods of legal reasoning that cannot be articulated); Daniel A. Farber, *The Inevitability of Practical Reasoning: Statues, Formalism, and the Rule of Law*, 45 *Vand. L. Rev.* 533 (1992) (discussing the need for "practical reason," gained from experience, in interpretation).

analogically from one case to another and to discover or construct "legal principles" that differ from the moral principles that govern decision making in other areas of life.[4]

Our own contribution to the subject of legal reasoning is fairly simple: we believe that legal reasoning is ordinary reasoning applied to legal problems.[5] Legal decision makers engage in open-ended moral reasoning, empirical reasoning, and deduction from authoritative rules. These are the same modes of reasoning that all actors use in deciding what to do. Popular descriptions of additional forms of reasoning special to law are, in our view, simply false. Past results cannot determine the outcomes of new disputes. Analogical reasoning, as such, is not possible. Legal principles are both logically incoherent and normatively unattractive. Nor do legal decision makers engage in special modes of interpreting texts. To the extent that judges purport to discern meanings in legal texts that differ from the meanings intended by the authors of those texts, they are making rather than interpreting law.[6]

We recognize that, as a descriptive matter, legal actors purport to apply special decision-making techniques. They study prior outcomes, seek analogies, and search for principles. We offer a limited defense of

[4] Efforts to explain and defend analogical reasoning in law can be found in Weinreb, *supra* note 1; Sunstein, *supra* note 1, at 62–100; Burton, *supra* note 1, at 25–41; Levi, *supra* note 1, at 1–6; Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 *Harv. L. Rev.* 925, 925–29, 962–63 (1996).

Legal principles are analyzed in Dworkin, *Law's Empire*, *supra* note 1, at 240–50, 254–58; Dworkin, *Taking Rights Seriously*, *supra* note 1, at 22–31. *See also* Hart and Sacks, *supra* note 1, at lxxix–lxxx, 545–96 (discussing "reasoned elaboration" of law).

[5] *See* Kent Greenawalt, *Law and Objectivity* 197–202 (New York: Oxford University Press 1992). *See also* Joseph Raz, *Ethics in the Public Domain* 310 (Oxford: Clarendon Press 1994) (application of law does not involve special forms of logic); Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Life and Law* 187 (Oxford: Clarendon Press 1991) ("nothing about precedent-based constraint uniquely differentiates it from rule-based constraint"); Eisenberg, *supra* note 1, at 94 (suggesting that reasoning by analogy is "substantively equivalent" to reasoning from precedent rules).

[6] Our views on these matters are set out in part in a variety of earlier writings. *See, e.g.*, Larry Alexander and Emily Sherwin, *Judges as Rule Makers*, in *Common Law Theory* 27–50 (Douglas Edlin, ed., Cambridge: Cambridge University Press 2007); Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* 98–179 (Durham: Duke University Press 2001); Emily Sherwin, *Judges as Rulemakers*, 73 *U. Chi. L. Rev.* 919 (2006); Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 *U. Chi. L. Rev.* 1179 (1999); Larry Alexander, *The Banality of Legal Reasoning*, 73 *Notre Dame L. Rev.* 517 (1998); Larry Alexander, *Bad Beginnings*, 145 *U. Pa. L. Rev.* 57 (1996); Larry Alexander, *Constrained by Precedent*, 63 *S. Cal. L. Rev.* 1 (1989).

traditional legal methods of this kind. Our defense, however, is indirect, based on the capacity of traditional methods to counteract the situational disadvantages that affect judges as appliers of rules and as rule makers for future cases. We explain these techniques as ingrained practices that may have instrumental value for imperfect reasoners, not as specialized forms of reasoning.

Part 1 describes the circumstances that give rise to law and sets out our understanding of the most important problems of jurisprudence. This is familiar ground but nevertheless important as background for our analysis of legal reasoning. As will be clear, we owe significant debts to others who have studied the subjects we address here, in particular H. L. A. Hart and Frederick Schauer.[7]

Part 2 addresses legal reasoning in the application and development of common law. We have several aims in this part of the book. We hope to clarify the reasoning methods judges use, to demonstrate that a variety of other supposed methods of legal decision making are illusory, and to explain the different roles judges occupy within the legal system, as adjudicators and as lawmakers. In presenting our view of what common-law reasoning entails, we face a descriptive problem: courts often insist that they are reasoning in ways that we say they are not. To defend our limited view of legal reasoning and at the same time explain the apparent behavior of courts, we propose that a number of time-honored judicial techniques function not as actual decision-making tools but as indirect strategies to avoid the disadvantages that judges face in their dual capacities as adjudicators and lawmakers.

Part 3 takes up the methodology of interpreting canonical legal texts – a vast array that includes constitutions, statutes, administrative rules and orders, and judicially crafted rules, as well as the legally authoritative texts constitutive of private ordering (contracts, wills, trusts, deeds, leases, and so on). Our basic position is that interpretation, properly so-called, consists in recovering the intended meaning of the texts' authors. In defending that position, we explore its many competitors, such as textualism, dynamic interpretation, and the employment of highest-level purposes or concepts; and we also analyze the legal rules that compel departure

[7] *See* Schauer, *supra* note 5; H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press 1961).

from interpretation as we define it and require that algorithms substitute for intended meanings. In addition, we examine the interpreter's predicament when there is no authors' intended meaning, or when that intended meaning is absurd or perverse. Finally, we ask whether interpreting a constitution is fundamentally different from interpreting other canonical legal texts and conclude that in most respects it is not.

Accordingly, as to both the common law and interpretation of legal texts, we find no ground for the claim that judges and other actors employ special methods of reasoning different from the methods employed by all reasoners in all contexts that call for decision making.

PART ONE

Law and Its Function

CHAPTER

I

Settling Moral Controversy

I. Settlement

The need for legal reasoning comes about when members of a community confer authority on certain individuals to settle moral controversies.[1] The controversies that concern us arise in a community whose members agree on moral values at a fairly high level of generality and accept these values as guides for their own action.[2] Individuals who are fundamentally like-minded and well intentioned may nevertheless differ about the specific implications of moral values, or they may be uncertain about

[1] *See* Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* 11–15 (Durham: Duke University Press 2001). *See also* Joseph Raz, *Ethics in the Public Domain* 187–92 (Oxford: Clarendon Press 1994) (defending an "institutional" approach to law); Melvin Aron Eisenberg, *The Nature of the Common Law* 4–7 (Cambridge, Mass.: Harvard University Press 1988) (defending an "enrichment model" of the common law).

[2] *See* Gregory S. Kavka, *Why Even Morally Perfect People Would Need Government*, 12 *Soc. Phil. & Pol'y* 1 (1995).

the best ways to realize shared values. Recognizing that controversies of this kind are inevitable, the community can reduce the moral costs of disagreement and uncertainty by delegating a power of settlement to a chosen authority.

Settlement, as we use the term, is not simply choice of a solution. It entails reasoning, by which we mean conscious, language-based deliberation about reasons for the choice ultimately made.[3] The members of our imagined community have not agreed to flip a coin; they have selected a human authority to translate the values that serve as reasons for action within the community into solutions to practical problems.[4] Given the flaws of human reasoning, the solutions the authority endorses may not

[3] The nature of "reasoning" and the degree to which reasoning guides human decision making are much-debated subjects in the field of psychology. *See, e.g.*, Steven A. Sloman, *Two Systems of Reasoning*, in *Heuristics and Biases: The Psychology of Intuitive Judgment* 379–96 (Thomas Gilovich, Dale Griffin, and Daniel Kahneman, eds., Cambridge: Cambridge University Press 2002) (surveying evidence of parallel systems of "reasoning": associative and rule-based).

We do not intend to enter into or comment on this debate. Our definition of reasoning as conscious deliberation is a working definition sufficient to describe what we believe is required by the notion of authoritative settlement. Reasoning, for us, is distinct from intuition or affective response. The point we wish to make is that when a community confers power on an authority to settle moral controversy, it calls on the authority to deliberate – to engage in a process that is at least susceptible to explanation and justification. Whatever the psychology of personal moral judgment may be, a political authority must bring its power of reason, in this sense, to bear in decision making.

For a definition of reasoning that is similar to ours, though offered from a different point of view, *see* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 4 *Psychological Review* 814, 818 (2001) (moral reasoning is "conscious mental activity that consists of transforming given information about people"; [to say that] "moral reasoning is a conscious process means that the process is intentional, effortful, and controllable and that the reasoner is aware that it is going on"). For a philosophical analysis of forms of reasoning, *see* Simon Blackburn, *Think* 193–232 (Oxford: Oxford University Press 1999).

[4] We assume general agreement among members of the community on moral principles (we assume this because the function of rules in resolving moral uncertainty is easiest to see when there is no need to coerce compliance with moral principles). However, we take no substantive position either on the content of moral principles or on the possibility of moral options, moral ties, gaps in moral principles, or incommensurable moral choices. Our analysis is political in the sense that we are concerned not with law as the embodiment of moral truth but with law as a means by which communities seek to implement shared moral values.

We do make at least one substantive assumption, which is that members of the community believe that, at least in some situations, certainty, conflict avoidance, and coordination are of greater moral importance than vindication of their own views about what actions governing moral principles require. This is why they have conferred rule-making authority on certain officials. This assumption leaves room, however, for options and choices that are not governed by legal rules or determined by legal decisions – options that are outside the province of law.

be justified in the sense that they are morally correct. But, because the authority's task is to settle what the community's values require in practice, its conclusions must be susceptible to justificatory argument. They cannot refer to intuition alone.

If the authority chosen to settle controversies could be on the scene whenever a dispute or uncertainty arose, there would be no need for anything more than a series of decisions about what outcome is best in each instance, all things considered. Normally, however, it is neither practical nor desirable for authorities to be constantly on hand; therefore, the community will need a form of settlement that can guide future decision making. The way to accomplish this broader form of settlement is through authoritative rules.[5]

A rule, for this purpose, is a general prescription that sets out the course of action individual actors should follow in cases that fall within the predicate terms of the rule. To settle potential controversies effectively, the rule must prescribe, in understandable and relatively uncontroversial terms, a certain response to a certain range of factual circumstances.[6] It must claim to prescribe, and be taken as prescribing, what all actors subject to the rule should do in all cases it covers. It must also require its subjects to respond as prescribed without reconsidering what action would best promote the reasons or values that lie behind the rule. We call rules of this kind "serious rules," as distinguished from advisory rules or "rules of thumb" that purport to guide but not to dictate action.[7]

For example, suppose that a rule-making authority enacts the rule "No one shall keep a bear within one thousand feet of a private

[5] We have made the case for rule-bound decision making at length elsewhere. *See, e.g.*, Alexander and Sherwin, *supra* note 1, at 17–21, 53–122; and *see* Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Life and Law* 53–54 (Oxford: Clarendon Press 1991). We offer an abbreviated form of our argument in favor of deductive reasoning in Chapter 2; for the most part, however, our strategy in this book is to debunk the alternatives to deduction from rules that are commonly attributed to judges. We conclude that legal reasoning is ordinary reasoning applied to legal subject matter. Ordinary reasoning, for us, includes empirical analysis, moral reasoning, and deduction from serious rules. *See* Chapter 2, *infra*.

[6] On the need for determinacy to accomplish settlement, see Alexander and Sherwin, *supra* note 1, at 30–31; Schauer, *supra* note 5, at 53–54.

[7] For further discussion of the nature, function, and problems of "serious" authoritative rules, *see* Alexander and Sherwin, *supra* note 1, at 53–95; Schauer, *supra* note 5, at 42–52, 77–134; Joseph Raz, *The Morality of Freedom* 57–62 (Oxford: Clarendon Press 1986); Joseph Raz, *The Authority of Law* 16–19, 22–23, 30–33 (Oxford: Clarendon Press 1979).

residence."[8] The motivating reason for this rule may be to protect the safety and peace of mind of the inhabitants of residential neighborhoods. At a deeper level, the rule may reflect the assumptions that human interests rank higher than the interests of bears and that the liberty of property owners to use their property as they wish is subject to a duty not to inflict harm on others. In some situations, the rationale for the rule may not apply with its ordinary force: the bear may be a gentle, declawed former circus animal, kept in a sturdy double cage. But the rule makes no exceptions: its upshot is that bear owners must keep their bears elsewhere, irrespective of the underlying purpose of the rule.[9] Rule subjects therefore need not consult the rule's purposes in order to determine what the rule requires of them.

We use the term "rule" in a fairly inclusive way.[10] The rules we are interested in are posited by human beings; in this respect, they differ from nonposited moral principles. The rules' prescriptions are serious in the manner we have just described. Aside from these characteristics, the rules we are concerned with may be quite general or fairly specific, so long as they are general enough to settle some range of future cases. They may be posited in canonical form or implicit in material such as judicial opinions, as long as they are traceable to human decision making and determinate enough to guide action without the need for further assessment of the reasons that motivate them.[11]

Communities designate authorities to make rules because and to the extent that they deem authoritative settlement to be superior to

[8] This rule could take the form of a public regulation, such as a zoning ordinance; a private land use regulation, such as a covenant; or a judicial ruling that a bear in a residential setting is a nuisance per se. *Cf.* Lakeshore Hills, Inc. v. Adcox, 413 N.E.2d 548 (Ill. App. 1980) (preliminary injunction for removal of a 575-pound pet bear based on subdivision covenants).

[9] *See* Alexander and Sherwin, *The Deceptive Nature of Rules*, 142 *U. Pa. L. Rev.* 1191, 1192–93 (1994) (suggesting that rules deceive their audience by implying that the conduct they prescribe is the right course of action in all cases to which they apply).

[10] For a careful analysis of the variety of forms rules can take, *see* Schauer, *supra* note 5, at 1–16.

[11] We discuss canonicity and the possibility of implicit rules in Chapter 2, *infra* text at notes 45–46. On canonicity as a criterion for authoritative rules, *see* Frederick Schauer, *Prescriptions in Three Dimensions*, 82 *Iowa L. Rev.* 911, 916–18 (1997). We agree with Schauer that authoritative rules need not be posited in explicit terms. Because we believe the meaning of rules is a function of the rule maker's intent, we do not agree that rules can come into being without being created by a rule maker. *See* id. at 916–17. For us, rules must have authors; they may, however, have multiple authors, and interpreters of rules may become authors of rules. We take these matters up in detail in Chapters 5 and 6, *infra*.