Introduction

This is a book about the arguments that lawyers make in support of their clients and that judges make in the course of their opinions. That is not the whole of the law, which extends in every direction and takes many different forms. The pattern of reasoning of those who are engaged elsewhere in the law, in the legislative process or in the regulatory or administrative process, is different. But adjudication, in which lawyers' arguments and judicial opinions hold sway, is typically the place where the law is brought to bear concretely and, to use a current expression, "the rubber hits the road." No effort to understand and explain the law or the legal process can succeed unless the arguments of lawyers and judges are understood. Those arguments, furthermore, are what people have

in mind when they speak about legal reasoning. It is widely believed that legal reasoning is somehow special, not just in its subject matter but in its very form. In a law school class, a professor, intending high praise, may say to a student, "Now you are thinking like a lawyer," as if a legal education equips a person to think in a way unknown to others. And, indeed, a great deal has been written about the nature of legal arguments.[1] Yet it would be odd if legal reasoning were somehow different from reasoning about other subjects. Doctors and engineers also have their special expertise. One does not hear so much talk about thinking like a doctor or thinking like an engineer.

There is a large difference in one respect between the practice of law and other professions, which surely has something to do with the special attention given to legal reasoning. The reasoning of a doctor or an engineer is readily and in the normal course put to the test. The patient's health improves, or it does not; the bridge stands, or it falls. There is no comparable test of legal reasoning. Although we talk about what the law is, as though it is a matter of fact like a medical diagnosis or the weight a bridge will support, the content of the law is normative: it prescribes what is – that is to say, ought – to be done. (Even to say that it declares what will be done is too much, for there are many instances when the law is not followed.) How to address that conjunction of what is and

what ought to be is one of the fundamental problems of jurisprudence. Because the outcome of legal reasoning does not furnish an objective test of its merit, it is unsurprising that we attend more insistently to the process of reasoning itself.

The stakes are large. For law provides an overarching structure within which most human affairs are conducted, and it reaches down to the smallest details. If its demands are not to be felt as arbitrary and oppressive, they must be, and must be perceived to be, reasonable. Whatever may be the grounds for the authority of law in general or of a particular law or body of law on a specific subject, when the law takes hold and determines specific rights and obligations of specific persons, its justification characteristically is found in the arguments of lawyers and judges. On the face of it, the analysis of legal reasoning, which is subjected to close, persistent, and thorough scrutiny, should be straightforward. Lawyers' arguments are rebutted by arguments of lawyers for the other side. When a judge decides a case, he has an opportunity to explain his decision and may be required to do so. The decision ordinarily can be appealed to a higher court, where it is reviewed by a panel of judges, whose decision also is generally explained on the record. Often that decision can be appealed to still another court and another panel. The pattern of such argument, its merits and defects, are, one would think, unusually open to view and, if necessary, correction. Yet the amount

that has been written about legal reasoning and the diversity of views suggest otherwise, as if it is not what it appears to be or is subject to some demand that direct examination does not satisfy.

There is something distinctive about legal reasoning, which is its reliance on analogy. Leaving more precise definition for later, an analogical argument can be described as reasoning by example: finding the solution to a problem by reference to another similar problem and its solution. Reasoning of this kind is by no means unique to the law; on the contrary, it is the way all of us respond to countless ordinary problems in everyday life. Nor do analogical arguments displace other forms of reasoning about law, when they are appropriate. Legislatures and administrative agencies may, for example, rely on extensive empirical studies to develop and defend proposed legislation and regulatory measures. Analogical arguments are, however, especially prominent in legal reasoning, so much so that they are regarded as its hallmark. And, as a hallmark, they are not reassuring. Although the value of an analogy as a figure of speech is acknowledged, the value is commonly thought to belong to the art of persuasion and not to reason, part of the gilding that makes the result attractive but not otherwise of any significance. Analogical arguments are said to be slippery and likely to mislead or, at any rate, not to be firm enough to support a seriously contested conclusion.

They are usually contrasted in this respect with deductive and inductive arguments. A deductive argument is subject to the rules of formal logic. According to those rules, an argument is either valid or invalid, and no more need be said one way or the other. An inductive argument is not formally bound in the same way, but the conclusion can be tested experimentally, and, again, either it is verified or it is not. The similarity at the heart of an analogical argument, on the other hand, does not display its significance, as a deductive argument displays its validity. Things are similar and dissimilar to one another in countless ways.[2] There simply are no rules that prescribe how much or what sort of similarity is enough to sustain analogies generally or to sustain a particular analogy. Nor can an analogy ordinarily be tested experimentally, for the similarity on which it depends may be unquestioned but have nothing to do with the conclusion that is said to follow from it, whether the conclusion be true or false.

For all the prominence of analogical arguments in the actual reasoning of lawyers and judges, they are largely disregarded in the theoretical model of legal reasoning that, explicitly or implicitly, pervades legal analysis. According to that model, legal reasoning is built on determinate rules linked by logical inference, the correctness of which can, at least in principle, be ascertained. The model is familiarly represented as a pyramid, decisions in concrete cases at the base being

derived from a rule, which in turn is derived from a higher rule and so on, up to the highest of all, from which all the rest are derived, at the apex.[3] Alternatively, the most fundamental rule forms the base of the pyramid, each rule above resting on the one beneath, up to the decision in a case at the apex.[4]

Few people suppose anymore, as was once maintained, that scrupulous adherence to this model is all that is required to reach the correct result; indeed, whether there is, in that sense, a correct result is contentious.[5] But our inability to demonstrate the truth of a judicial decision as if it were a mathematical proof is commonly perceived as a practical limitation attributable to the fractious subject matter, rather than a flaw in the model itself. The proper method of arriving at a decision is said to be to set forth the relevant rules, resolve any inconsistencies among them, and bring them collectively to a coherent focus on the facts of the case. Ronald Dworkin, for example, has forcefully defended the thesis that in order to reach the right answer, a judge has to bring his decision "within some comprehensive theory of general principles and policies that is consistent with other decisions also thought right"; it must be "consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in the hypothetical circumstances."[6] Evoking the familiar image of a pyramid, Dworkin says that this comprehensive theory must have "a vertical and a horizontal

ordering": vertical, inasmuch as a justificatory principle must be "consistent with principles taken to provide the justification of higher levels," and horizontal, inasmuch as it "must also be consistent with the justification offered for other decisions at that level."[7] Elsewhere, he has described the process of decision as a "justificatory ascent."[8] Dworkin does not suppose that a judge will often accomplish so arduous a task or even that he will often be tempted to try. Famously, he named his exemplary judge "Hercules."[9] Many scholars, furthermore, without denying that a judge is obligated to decide according to the law, have questioned whether the full scope of that obligation can be contained in articulable principles. The resort to principle, however, so far as it goes, and the model of legal reasoning as a hierarchical order of rules subject to a requirement of vertical and horizontal consistency are not generally questioned, practically or theoretically.[10] It is evident that analogical arguments do not conform to this model. Rather than composing a pyramid of rules held together by deductive inference, the arguments of lawyers and judges resemble a Tinkertoy construction, one case being linked to another by factual similarities that are deemed to warrant application of the same rule.

Confronted by this discrepancy between the theoretical model and the evident fact that analogical arguments abound, legal scholars have drawn a variety of conclusions.

Some affirm a hierarchy of rules as the officially correct model but urge that room be made for analogical arguments as well. Despite their logical weakness, or, indeed, because of it, these scholars urge, analogical arguments serve a useful function by promoting the settlement of difficult cases. In his classic study of legal reasoning, Edward Levi observed that analogical argument is "imperfect" and contains a "logical fallacy."[11] Nevertheless, he said, it is the "basic pattern of legal reasoning" and is "indispensable to peace in a community," because it is the means by which the law grows and changes in conformity with the community's views, even as it is being applied.[12] Levi's confidence that the adjudicative process helps to preserve "peace in a community" may seem misplaced today, when judicial decisions on issues like abortion, gay rights, and affirmative action are as likely to divide the community as to unite it and judicial appointments are a potent political issue. But in any case, his concession that analogical reasoning is logically flawed leaves one to wonder whether peace is not obtained at too high a price. Others are more skeptical of the virtues of analogical arguments and believe that they are used a great deal too much. Richard Posner has commented that the reason lawyers find analogical arguments "irresistible" is that they enable lawyers "to reach conclusions without reading much beyond what is in law books," and he suggests that judges' reliance on them

similarly reflects an unwillingness to look outside their chambers.[13] "It is no surprise," he says, "that 'real' reasoning by analogy – going from an old to a new case on the basis of some felt 'similarity' – has been a source of many pernicious judicial doctrines."[14]

The most common assessment of analogical arguments in the law goes beyond praise or blame and asserts bluntly that there is no such thing. There can be no reasoning "by example" from one concrete instance to another, it is said, except by way of a general principle that subsumes them both. So, if someone observes that Socrates is a man and is mortal and reasons that Alcibiades, being a man, is (by analogy with Socrates) also mortal, the correct way to frame her reasoning is: All men are mortal. Alcibiades is a man. Therefore, Alcibiades is mortal. If not, she does not, properly speaking, *reason* at all; if her conclusion is correct, it is only by happenstance. Without some general statement that relevantly associates Socrates and Alcibiades, there is no basis for ascribing the mortality of the former to the latter. So-called analogical argument as a distinct form of argument, Larry Alexander concludes, is a "phantasm"; "it does not really exist."[15]

For all the differences among these views, there is broad agreement that, possibly benign political effects aside, the law could and would do better not to rely on analogical arguments – "logically flawed," "pernicious," a "phantasm" – at all.

This agreement is the more remarkable because, despite their own insistent attention to the grounds for a legal outcome, lawyers and judges seem entirely unaware of any such problem. If, as Posner says, lawyers find analogical arguments irresistible in their own work, it is hard to understand why they are unable to resist them in the briefs of opposing counsel. Although particular analogies are often at the center of contention between lawyers on opposite sides and between majority and dissenting judges, there is scarcely a trace of criticism of analogical argument generally. On the contrary, the importance that is usually attached to the choice of analogy suggests quite the opposite.

Not only do analogical arguments figure prominently in briefs and opinions, but they are also a standard feature, one might almost say defining feature, of legal education; the content of Socratic dialogue, on which law school classes are typically built, is mostly an exercise in reasoning by analogy.[16] Students are likely to be introduced to analogical argument and to begin to reason analogically themselves in their first days at law school, as they are asked to consider whether the rule of some case applies or should apply to other cases that are more or less similar. Such questioning is not an invitation into an arcane professional ritual, as a bewildered student may sometimes suppose. It is, rather, a more cautious and deliberate version of a kind of problem-solving with which