

LEGAL REASONING

The common law, which is made by courts, consists of rules that govern relations between individuals, such as torts (the law of private wrongs) and contracts. *Legal Reasoning* explains and analyzes the modes of reasoning utilized by the courts in making and applying common law rules. These modes include reasoning from binding precedents (prior cases that are binding on the deciding court); reasoning from authoritative although not binding sources, such as leading treatises; reasoning from analogy; reasoning from propositions of morality, policy, and experience; reasoning from hypotheticals; making exceptions; drawing distinctions; and overruling. The book further examines and explains the roles of logic, deduction, and good judgment in legal reasoning. With accessible prose and full descriptions of illustrative cases, this book is a valuable resource for anyone who wishes to get a hands-on grasp of legal reasoning.

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To Helen

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PREFACE

This preface provides an overture to the chapters of this book.

Chapter 1. An Introduction to the Common Law. One of two legal systems prevails in most developed economies: common law or civil law. In civil law systems the law is found in statutes, executive decrees, and Civil Codes – codifications of the law of obligations, property, and family. In common law systems public law, which concerns such matters as the organization of government, is made by legislatures and administrative agencies while private law, which concerns such matters as the relationship between individuals, is largely made by the courts. The purpose of this book is to explain and analyze legal reasoning in the common law.

Chapter 2. Rule-Based Legal Reasoning. Common law courts have two functions: resolving disputes according to legal rules and making legal rules. A common law rule is a relatively specific legal norm, established by the courts, that requires persons to act or not act in a specified way; enables or disables specified types of arrangements, such as contracts, and dispositions, such as wills, or specifies remedies for designated wrongs. Reasoning in the common law is almost entirely rule-based – that is, based on the application of legal rules to the facts of the case to be decided. Legal reasoning in the common law is occasionally but infrequently analogy-based and is almost never similarity-based.

Chapter 3. Stare Decisis. The foundation of rule-based reasoning in the common law is the principle of stare decisis, a Latin phrase which means to stand by things decided. Under the principle of stare decisis when a court decides a case that is governed by a rule established in a precedent – a prior

case decided by a superior court or by the deciding court itself – the deciding court must apply that rule, subject to the limits of the principle. Without *stare decisis* there would be no common law: precedents would be persuasive but not binding. But there are a number of limits on this principle. The most important limit is that in most areas of the common law if a rule established in a precedent is not even substantially congruent with social morality and social policy the courts can and frequently will overrule it.

Chapter 4. What Rule a Precedent Establishes. Because the common law consists largely of rules established in precedents the question arises, how it is determined what rule a precedent establishes? The answer is that the rule a precedent establishes is the rule that the court stated governed the case before it. This rule is known as the holding of the case. Statements in a precedent about the law other than the holding are known as *dicta*. Holdings establish binding legal rules. *Dicta* are not binding but they are often influential.

Chapter 5. Authoritative Rules. The most prominent type of rules in common law reasoning are rules established in legally binding precedents. The next most prominent types are authoritative although not legally binding rules. These are rules that courts adhere to not because after careful consideration they conclude it is the best possible rule, but because it was adopted in a source, such as a prominent legal treatise, to which the courts give deference.

Chapter 6. Social Propositions. The common law is based on doctrinal and social propositions. Doctrinal propositions are propositions that purport to state legal rules and are found in sources that in the view of the legal profession – judges, practicing lawyers, and legal academics – state legal doctrine. Social propositions are moral, policy, and experiential propositions. The two types of propositions do different work. Doctrinal propositions are legal rules. Social propositions are the reasons for legal rules. The moral propositions that count in common law reasoning are moral propositions that are rooted in aspirations for the community as a whole and have substantial support in the community. The policy propositions that count in common law reasoning are policy propositions that have substantial support in the community, or in the absence of explicit support, can fairly be believed would have such support if the community addressed the policy issues involved.

Chapter 7. Rules, Principles, and Standards. Legal norms can be divided into rules, principles, and standards. Legal rules are relatively specific legal norms that require persons to act or not act in specified ways, enable or disable specified arrangements or dispositions, or set remedies for specified wrongs. Legal principles are relatively general legal norms. Legal standards take several forms. One form is a general legal norm. This form does not significantly differ from a legal principle. The most significant type of legal standard consists of legal rules that are not applicable when they are adopted because they are designed to be further elaborated, often by an administrative agency, when more thought or more information has been developed concerning the way in which the rule should be elaborated.

Chapter 8. The Malleability of Common Law Rules. Legal rules are either canonical or malleable. A canonical rule is fixed. It may not be expressed in different ways, cannot evolve, and cannot be made subject to exceptions. Statutes are the paradigm form of canonical rules. In contrast a malleable rule can be expressed in different ways, can evolve, and can be made subject to exceptions. Common law rules are the paradigm form of malleable rules. They can be expressed in different ways, can evolve, and can be made subject to exceptions.

Chapter 9. Exceptions and Distinctions. A court faced with an established legal rule that seems applicable to the case to be decided has several choices. The court can and usually will apply the established rule. Or the court can make an exception to the established rule or draw a distinction between the established rule and the case to be decided. Exceptions and distinctions fall into several categories. They may be fact-based, that is, based on a material difference between the facts of the precedent that adopted the established rule and the facts of the case to be decided. They may be rule-based, that is, based a conclusion that an established rule that plausibly applies to the case to be decided does not do so when the applicability of the rule is more carefully considered. They may be socially based, that is, based on a conclusion that the social propositions that underlie the established rule do not apply to the case to be decided, or that the case to be decided involves social propositions that were not applicable to the established rule. Alternatively, the court can hive off a new rule to govern a subclass of the cases to which the established rule applies. In that case the

established rule and the hived-off rule live side-by-side. Finally, the court can overrule the established rule.

Chapter 10. Analogy-Based Legal Reasoning. Courts occasionally reason from analogy rather than by rule. In most fields outside law reasoning by analogy is based on a similarity between the characteristics of a given state of affairs or state of facts and the characteristics of a new state of affairs or state of facts. Law, however, is based not on characteristics but on rules. Accordingly, when a court reasons from analogy usually the analogy is to rules rather than to similar cases. In rule-based analogical reasoning a court begins with an established rule that is not literally applicable to the case to be decided, and extends that rule to cover the case to be decided on the ground that the established rule and the case to be decided cannot be meaningfully distinguished as a matter of social propositions. Courts seldom reason by analogy because a court would never reason by analogy when an established rule governs the case to be decided and the common law is rich with established rules.

Chapter 11. Logic, Deduction, and Good Judgment. Logic. There are a great many schools of formal logic, but in law the term logic is usually used to mean sound reasoning rather than reasoning that satisfies the criteria of formal logic. *Deduction* is a reasoning process in which a conclusion necessarily follows from stated premises. Deduction normally takes the form of a syllogism. A syllogism consists of a general statement, known as a major premise (as in, All men are mortal), a specific statement, known as a minor premise (as in, Socrates is a man), and a conclusion that necessarily follows from the two premises (as in, Socrates is mortal). But as the great English legal philosopher H. L.A. Hart pointed out, “deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model . . . for what judges should do in bringing cases under general rules.” *Good judgment.* In contrast to formal logic and deduction, good judgment is an important element of legal reasoning. Good judgment consists of the ability to make sound and well-rooted decisions based on established legal rules and principles, together with a breadth of vision and an understanding of how the law can advance the common good. Good judges have good judgment. Great judges have excellent judgment.

Chapter 12. Reasoning from Hypotheticals. This chapter analyzes reasoning from hypotheticals. The term hypothetical means a fact that is assumed rather than actual. The term reasoning from hypotheticals means a scenario consisting of hypotheticals. Reasoning from hypotheticals is employed throughout the law – in adjudication, in oral arguments, and in law school teaching. Chapter 12 explores and illustrates the modes of reasoning from hypotheticals in the common law. In the most important mode a court employs reasoning from hypotheticals to view the case to be decided in a broader form to help decide the case.

Chapter 13. Overruling. This chapter concerns overruling, which occurs when a court overturns – abolishes – a rule established in binding precedents. Overruling can be explicit or implicit. Explicit overruling occurs when a court explicitly abolishes an established rule and replace it with the opposite rule. Implicit overruling occurs when a court undoes a rule but does not purport to do so. At first glance overruling may seem inconsistent with the principle of stare decisis. In fact it isn't, because stare decisis is subject to several exceptions, the most important of which is that if a rule established in precedents is not even substantially congruent with social propositions it can be overruled. Furthermore, overruling is itself governed by a principle: a common law rule should be overruled if it is not even substantially congruent with social propositions, is inconsistent with other soundly based rules, has been riddled with inconsistent exceptions, or is manifestly inequitable or unjust, and the value of overruling the rule exceeds the value of retaining it.

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