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The Myth of Legal Reasoning

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THE MYTH OF LEGAL REASONING*

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It has become a bromide of contemporary legal educators that one of the most significant goals of the American law school is to teach the student how to think "like a lawyer." The (not very well-hidden) assumption is that lawyers think differently from, perhaps better than, non-lawyers and that the neophyte law student must learn this new reasoning process before he can become a competent lawyer. Yet, it is rare to find a specific course in which this special skill is given explicit recognition. The closest that legal instruction comes to explaining to the student the rules of legal thinking is found in orientation programs or legal method lectures in which the importance of skills such as finding the issues, becoming aware of procedural contexts, sifting out important facts, and spotting court holdings is discussed.

It is rare, however, that there is any meaningful or systematic explanation of how these skills are to be learned or why they are important to the competent practice of law. Nowhere in the typical law school curriculum are principles of "legal reasoning" taught as a separate discipline in the way that principles of substantive law are taught. Indeed, many legal educators believe that it is impossible to identify the principles underlying the process of legal reasoning and to

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* A few words may be in order with respect to the purport of what follows. Any value to be found here is predominantly heuristic. If the result is to move the reader to think seriously on the subject matter — to think about thinking and its relation to the study of law — the major purpose of the piece will be accomplished. All that is presented is the view of one law professor of the purpose of law study (at least the first year of law study) and of some of the ways that purpose might be better accomplished. As such, no citation to authority has been included. Footnotes have been included only where desirable to clarify or to comment on points made in the text. Indeed, even such footnotes have been kept to a minimum in order to avoid the distraction of the reader from the thread of the article.

Although no supporting authorities are cited, it is appropriate to acknowledge the contributions to my own thoughts on these matters. The influence of Nathaniel and Barbara Branden, who first started me thinking about thinking, is obvious throughout. Appreciation is also due J. Joel Woodey of the University of Maryland School of Law Faculty for helping me to see the application of the "rules" of good reasoning to legal education. His identification of the role of doubt in that process, *see* Woodey, *Why Do Law Professors Bark?*, 2 MD. L. FORUM 13 (1972), is valuable insight.

A word of apology to my female colleagues and readers: It is unfortunate that our language contains no sexually neutral pronoun. I have used the masculine form throughout to avoid awkwardness of expression; the reader is invited to make the appropriate substitutions.

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articulate the means by which the skill is acquired. Rather, they believe that legal reasoning is a skill to be learned osmotically in all (at least first year) law courses. They believe that the process is essentially intuitive or the result of natural talent, and that it can be developed through exercise (with the law professor as gym instructor) but that it cannot be explained.

It is the thesis of this article that legal reasoning is nothing more than reasoning — purposive problem solving — about legal materials, that there are articulable principles of effective reasoning, and that law students (and law professors) are better served if made aware of the nature of those principles. Any chore is likely to be done better if one knows the principles underlying one's craft. Because most legal tasks involve problem solving, awareness of the principles underlying the reasoning process should cause students to become more competent lawyers.

It is important to make clear at the outset that legal reasoning *qua* process is no different from just plain reasoning. There is good reasoning and there is poor reasoning and there is a great gulf between them; but there is no separate reasoning process that meaningfully can be differentiated as "legal reasoning." Legal reasoning, at its best, is nothing more than or different from good reasoning applied to legal materials, principally judicial opinions. Given that the process of legal reasoning is not a separate thought process but is merely a manifestation of any purposive problem solving, it follows that, at least during the first year of law study, an important aim of legal education is to teach the student how to reason well — how to think effectively and efficiently about problems and their solutions.[1] Perhaps the "myth" that there is something special about legal reasoning endures because of this focus by legal educators on the reasoning process.

As a general rule, people take their thought processes for granted; they rarely consider the method of their own thinking. As a result most people think in ways that they learned haphazardly and unconsciously as children. While the substance of their thought becomes increasingly more complex, their *method* of thinking remains undeveloped. We learn

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1. Law schools are engaged in the enterprise of teaching people to think efficiently and effectively about legal problems and legal solutions. This contains two aspects: reasoning well and applying that method of reasoning to law. While these two are conceptually separable, they cannot, in fact, be separated in the learning process. Axiomatically, it is impossible to think without having something to think about; it is impossible to think well without thinking well about something. In the law school, of course, the something is law.

to speak as children before beginning school. Yet, it is recognized that speaking properly is something that requires the study of rules of language and the application of those rules. Similarly, we learn the mechanical skill of putting words onto paper while recognizing that effective written communication is a separate skill, the underlying principles of which can be and should be learned. When it comes to thinking, however, it is seldom realized that the same process applies: people rarely attend the principles underlying their thought processes.[2] If people do not think about the way they think, it is also the case that they see no reason to attempt to change the way they think. Their attention is rarely called to it and they have little occasion to doubt its efficiency.

The first step in legal education is to raise in the student that doubt. The law student must be made aware of his method of thinking; then he must be made to doubt the validity of that method; of thinking; finally he must be made aware of the necessity of improving it. The dialogue of the law school classroom permits the student to embark on this doubting process by forcing him to attend his own thought processes.[3] When legal educators attempt to teach reasoning without first adverting to its underlying principles, however, the instruction may prove ineffective and the aim of teaching the skill of reasoning often may not be achieved. Because the principles underlying the process of legal reasoning are rarely identified, students may learn to apply some of the principles of reasoning while remaining largely unaware of what they are doing. As a result some principles are never applied and others are applied only sporadically. The student's ability to reason well may improve, but in what way and to what extent remains largely fortuitous. If improvement in a student's reasoning ability is to be more than adventitious, the principles underlying the art and science

2. Perhaps one of the reasons that there is a great deal of awareness of the need for knowledge in communicative skills, while there is little awareness of this need for skill in thinking is that what is written or spoken has an existence in reality external to ourselves. Our thinking, however, has no obvious existence apart from us. Consequently, one can more easily observe and correct errors in the process of communication than in the process of thinking. Indeed, the more concrete is the external existent the more likely people are to observe errors and inefficiencies: editing what is written is easier than correcting the spoken word; either is more easily accomplished than the correction of thinking errors.

3. It is unfortunate that this process generally occurs without identification of what is occurring. The student is anxious and uncomfortable and frequently does not know what it is the professor is seeking or asking of him. Indeed, it is often the case that the more successful our students have been as undergraduates the more difficult is their adjustment to the rigors of law study. They have less reason to doubt their ability to think well, since their existing method has generally served them well enough thus far in their academic careers.

of reasoning first must be identified and then must be applied to the subject matter, in our case, the law.

The rest of what follows is an attempt to identify some of these principles. It is, however, still "early in the game"; much remains to be done. This attempt to adumbrate some of the principles of good reasoning does not purport to be exhaustive. It is, rather, suggestive and will, I hope, encourage others to think about thinking and add to what is here.

The first principle of good reasoning may be termed the rule of purpose. Before one can think well there must be something about which to think; the more clearly defined is the subject matter of the thinking process, the more clear and precise will be the thinking about that subject matter. Before a problem can be solved, the thinker must recognize that the problem exists and, further, what the nature of the problem is. In other words, good reasoning is purposive. The more clearly a problem is posed, the more manageable it becomes, the less is one likely to embark on false trails to solution, and the more precise will be one's thinking about the problem. This rule of purpose, then, can be stated: Define the problem in the clearest possible terms.[4]

The application of this principle in legal education, specifically to case method analysis, should be apparent. Recognition and articulation of the legal issue for decision is one of the first tasks a law student will be asked to perform. Typically, the law professor will not move forward until the issue has been formulated clearly and correctly. If the student fails to do so in the first instance, questions will be put to him until he has reached the point of being able to observe his error and has rethought the case sufficiently to give a clear statement of the issue that the judge who wrote the opinion was called upon to decide. If the issue is not specifically defined, the opinion cannot be understood; conversely, the more clearly stated the issue, the greater the precision and comprehension of the analysis of the case.

The issue in a case is, of course, the statement of the problem to be solved; thus, defining the issue is defining the problem. It follows that the law professor's attempt to impart to his students an issue orientation to legal materials is nothing more than an application of the rule of purpose. Moreover, the nature of judicial opinions is such as to crystalize the importance of this process of issue awareness. The judge

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4. I do not mean to suggest here that non-purposive or associational thinking is valueless; nor do I mean to suggest that serendipity or flashes of insight have not played a significant role in the identification of new knowledge. The proposition is simply that the most efficient method of arriving at a solution to a given problem is first to identify what that problem is.

writing the opinion is explicating his solution to a specific problem. That problem is the issue of the case as he sees it. The formulation of that issue is the first step in its analysis and solution.

While formulation of the issue of a case is the first step in analysis of the decision of that case, the process to be employed in achieving that formulation rests on a more basic rule of effective reasoning — perhaps the most basic and important such rule because it is inherent in all others: the rule of principle. Good reasoning is based on the formulation of a principle that controls the perceived facts of the problem. Once a controlling principle is established, then the merits of the particular principle and the appropriateness of its application to the facts can be considered. In other words, good reasoning is principled.

The human mind is such that it can focus on only a limited number of specifics at any one time. Consequently, if one's thought process does not rise above the level of the concrete — the level of perception — the range of one's thought will be, of necessity, severely limited. If, however, one's thinking process is raised to the conceptual level, its range is increased immensely. As a very simple illustration: if one is asked to think "apple" without resort to concepts but only on the level of concretes, it would be necessary to think of an infinite number of apples, one, or, at best, a few at a time, until one had thought of every possible characteristic — shape, size, color, variety, and the like — attributable to "apple" and every possible combination of these attributes. One's thinking is much more efficient on the conceptual level: one need only think "apple." The principle which is easily and quickly focused upon subsumes the infinite number of concretes that, if they had to be considered as separate, unrelated entities without reference to the principle, could never be dealt with.[5]

If this be true with respect to so simple a concept as "apple," imagine the increase in efficiency of thought achieved by the employment of principles for other far more complex objects of thought. Obviously, having to deal with every problem without reference to similar problems already solved is far less efficient than applying the previously learned solution to a different manifestation of what may be the same problem, or which may share some of the attributes of the former problem.

A principle, then, can be defined as a more or less complex abstraction that subsumes a class of identifiable concretes. Thinking in terms of the concretes (the peculiar facts) without reference to the

5. For purposes of simplification the notion of concept and the notion of principle are here being used interchangeably. Such usage, of course, is not strictly accurate. The distinction, however, does not bear on the validity of the discussion.

abstraction (the principle) subsuming them violates the rule of principle; thinking in terms of the abstraction without relating it to the concretes which it subsumes is equally a violation of the rule of principle.

In other words, a principle, properly defined, is more than an undifferentiated generality. An abstraction unrelated to reality — to facts — is no aid to reasoning. The use of such pseudo-principles subverts the reasoning process by replacing thought about reality with thought about labels. Indeed, the employment of such counterfeit principles may well be coextensive with what appears on superficial analysis to be its opposite — the *ad hoc* determination on the basis of particular facts. A reasoning process based only on concretes or one based only on undefined abstractions is a poor reasoning process: each violates the rule of principle.[6]

That rule stands as one of the basic notions underlying our legal system. We recognize the inherent injustice of *ad hoc* dispute settling determinations: "A government of laws, not of men." This notion entails the necessity of rules or principles that are to govern the dispute-settlement process. Like cases are to be decided in like ways because the same principle controls the decision. Thus, students are trained to analyze cases by bringing to the analysis more than their subjective notions of fairness with regard to the particular facts of a given case or the particular positions of the parties in that case. Case by case determinations without reference to principles wider than (though, of course, inclusive of) the particular facts of any single case are simply inadequate.

The nature of the judicial opinion facilitates thinking in principles. Because the court must determine the outcome of a concrete dispute not only by reference to rules of law wider than the particular concretes of that dispute but also by application of those rules to the concretes, the operation of the rule of principle is evident in sharp relief. Similarly, the student, in analyzing the judicial opinion, must go through much the

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6. Frequently, these two superficially opposite errors in thinking occur simultaneously. For example, the student who determines that a given plaintiff should prevail over a given defendant on the basis of a given set of facts without reference to any governing principle will, often, when pressed to justify his conclusion, attempt to do so by use of an abstraction such as fairness. When required to relate this abstraction to the facts relied on in reaching the conclusion such a student may well be unable to do so. His reliance on either concrete facts or undefined generality disables him from performing valid analysis to guide the decision, not only in the case before him but in comparable cases bearing greater or lesser degrees of similarity. This is not to suggest that concepts such as fairness may never be an appropriate guide to decision; but, rather, that before they can be so used one must be able to define their content and demonstrate their correct application to the given set of concretes.

same process as the judge who wrote it. Focusing on the concretes without reference to the abstraction or on the abstraction without reference to the concretes will not yield comprehension of the case. It is only by thinking in principles that true understanding can be achieved.[7]

The efficacy of such a thought process, however, is not limited to so-called legal reasoning; it is the foundation upon which all efficacious reasoning rests. It is, simply, more easily taught through the legal case method than otherwise. Efficient problem solving in general requires thinking in principles for precisely the same reasons that make such thinking essential for legal problem solving.

In fact, of course, it is impossible for a sane human being not to think in principles or concepts at all. It is also true, however, that principled thinking is accomplished to very different extents by different individuals and by the same individual at different times. Moreover, the identification and formulation of principles may themselves be efficient or inefficient, correct or incorrect. Just as there are articulable rules of reasoning, there are rules for the identification and formulation of the principles that are the tools of such reasoning. To the extent that these rules of principle formation are followed, the principles formed will have greater validity; and, of course, it is only to the extent that the principles are valid that they will increase the effectiveness of the thought process. The case method of legal education is successful in training minds to formulate principles properly as well as to think in principles once formulated.

If it is true that principles are the components of the effective reasoning process, it follows that the process can be no more effective than the principles that it employs. That is, to reason effectively it is necessary to formulate correctly and precisely the principles one uses. Before a principle can be applied it must be identified. Moreover, the more clearly the principle is understood, the more precisely it is formulated, the more effective will be the thinking which is dependent upon it. Essentially, if it is important for a person to know what he is talking about, it is at least as important that he know what he is thinking about.

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7. There is, quite plainly, an interaction in the typical legal problem between the operations of the rule of principle and the rule of purpose. The process of establishing the purpose of the inquiry — the issue of the case — employs the rule of principle. That is, the issue is rarely stated as whether plaintiff is entitled to relief; rather its correct statement normally encompasses the appropriate principle of law, on some level of abstraction, in interrogative form. Its transformation into declarative form on either the same or on some different level of abstraction is a statement of the principle of law that governs resolution of the controversy.

Thus, it is crucial that we seek to establish guidelines for the correct formulation of principles. Here again the case method is of especial utility. In determining the principle(s) of law for which a given case stands, it is necessary to determine the facts upon which the decision rests. Indeed, one of the most important skills of good legal analysis is the selection, from the myriad of facts present in any given case, of those that are relevant, important, or essential to the decision. Each fact or possible combination of facts must be examined to determine these characteristics with reference to the particular case. Those found irrelevant should be discarded. This immediately simplifies the task of principle formation, if for no other reason than because there are then fewer concretes to which one must attend. Those facts considered relevant must then be examined in an effort to determine their relative importance to the particular decision, and hence to the formulation of the controlling principle of law. Until one has determined which facts are necessary to the decision and which are sufficient, the formulation of the appropriate principle cannot occur.

Typically, a good deal of law school class time is engaged in just this sort of exercise. Each fact of a given case that a student may have selected as relevant, important, or crucial in his presentation of the case is subjected to a searching inquiry to determine the reason(s) for its inclusion. A similar inquiry often takes place with respect to facts the student may have elected to exclude as irrelevant or unimportant. As this process is repeated the student eventually develops this discriminatory skill.

This skill, however, has importance not only in the formulation of legal principles, but also in the formulation of all principles. Moreover, this is true for precisely the same reasons that it holds true for efficacious legal analysis. If, as has been suggested, a principle is an abstraction that subsumes an infinite number of concretes, those concretes must have some common characteristic(s) or attribute(s) which makes them subsumable by the principle. Until those common attributes are identified, the principle cannot be formulated; to attempt to formulate a principle without awareness of the concretes that it subsumes would result in the formulation of an abstraction unrelated to reality and, therefore, of no aid in the resolution of real problems.

Another skill essential to the proper formulation of principles is fostered by law school teaching techniques and tools. Often, once a particular principle of law has been formulated from a single case, the law professor will suggest several hypothetical fact situations that differ in one or more respects from the given case. The purpose of these hypothetical cases, of course, is to determine the outer limits of the principle, to suggest its refinement or to test its validity.

Indeed, even absent the presentation of such hypothetical problems in class, the student will be called upon to perform a similar mental process by the structure of most casebooks. It is rare for a law school casebook to be arranged so as to present only a series of single unrelated cases with each leading to the formulation of a separate and independent legal principle. Virtually every casebook is structured so that a series of cases are presented that refer, to a greater or lesser extent, to a single legal principle (whether in the form of a single principal case followed by note cases, or a series of principal cases, or some combination of the two). The purpose of so structuring a casebook is the same as the purpose of the hypothetical cases suggested by the law professor: to test the principle formulated and to synthesize it with related principles so that the end product is a well-integrated corpus of knowledge.

There are times, of course, when two cases are presented that stand in contradiction to each other. The law student should not be entitled to assume that this is so, however, until every conceivable effort has been made to reconcile the two cases by resort to a principle which comprehends both. It is relatively infrequent that totally irreconcilable cases are presented. More often two cases which appear to stand for conflicting principles can be synthesized under a refined principle that subsumes both.

That this process is part of a student's legal training is obvious. What is somewhat less obvious is that the same process of synthesis must occur in every efficient problem-solving activity. Reality is such that contradictions cannot exist. Consequently, the individual engaged in problem-solving activity, if he is to check the principles that he has formulated or the solutions at which he has arrived, must examine the principle or solution in the light of his past knowledge. If, in so doing, he arrives at a contradiction he then knows that his thinking has been faulty, either with respect to the present problem or with respect to principles at which he has previously arrived. Just as it is true that the law is a seamless web and that the same basic legal principle may have application in different doctrinal areas, so it is the case that reality is a seamless web and that all knowledge must be integrated (or, at least, capable of integration) without contradiction before its validity can be assumed.[8]

In this respect, however, law differs from life. In law, contradictions can exist; it is possible for different decision-makers to come to opposite

8. Although it is certainly possible to achieve a fully integrated system that is completely false, it is not possible to achieve entirely correct knowledge in a system containing contradictions. Thus, while integration cannot assure success, its lack is symptomatic of failure.

solutions to the same problem, thereby yielding two contradictory principles. Nonetheless, the felt need to reconcile apparently conflicting cases is valuable in building the integrative skill so important to effective problem solving.

If it is true that good reasoning skills can be developed through training in law study — and the assumption that it can seems to be at the base of much of contemporary American legal education — it should be obvious that these skills would be more quickly and effectively imparted if law teachers would set out the principles upon which these skills depend. To suggest that there are such principles and that they are capable of articulation has been one of the aims of this paper. Quite plainly, the principles of sound reasoning suggested here are both gross and incomplete. There are, undoubtedly, many more rules of thinking that can be discovered and common errors in thinking that can be identified so that they can be overcome. Much experimental and theoretical work is needed to analyze the reasoning process through examination of its components, and to demonstrate the myriad ways these components can be combined to provide different modes of thought.

If the idea to which so much lip service is paid — that law schools teach "legal reasoning" — has any validity, it is incumbent upon teachers of law to attend far more to this portion of legal education. I am not suggesting, of course, the abandonment of teaching doctrine (that is, the informational component of the law) but rather that efforts be increased to match action to words with respect to the skills or reasoning component of law study.[9] The first-year curriculum is referred to as containing the building-block courses of legal education — Torts, Contracts, Property, etc.. Where are the building blocks of good reasoning upon which refinements may later be built? Indeed, where is the reflection of the professed concern for either the basic analytic skills or their more sophisticated refinements? I submit that time devoted to the discovery and articulation of the principles of reasoning is time well spent. Such an investment results in law students becoming better thinkers and, hence, better lawyers, and in law professors becoming more effective teachers and, perhaps, more effective in their own reasoning abilities.

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9. It is interesting to note, for example, the number of casebooks organized about the doctrinal components of the law when compared with the paucity (non-existence) of casebooks organized around the analytic or reasoning component. *Cf.* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (1975).