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Legal Reason: The Use of Analogy in Legal Argument. Lloyd L. Weinreb. New York: Cambridge University Press, 2005, 184 pages + viii, $18.99 paperback.

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Lloyd Weinreb's *Legal Reason: The Use of Analogy in Legal Argument* is the latest contribution to a familiar debate. Since the Second World War, a recurrent theme of Anglo–American jurisprudence has been the desire to explain and justify the process of courtroom adjudication, especially at appellate level. Such explanation and justification has proved extraordinarily elusive. According to the doctrine of separation of powers, the functions of the judiciary must differ from those of the legislature and executive. We therefore need to know the scope of power of each branch of government. Yet, at the same time, judges must be able to declare any inappropriate acts or decisions of either the executive or legislature to be unlawful, illegal and/or unconstitutional. (The appropriate epithet depends on the jurisdiction and factual context.) Such explanation and justification is thus tasked with showing how, in a representative democracy, an unelected judiciary stands as a bulwark against tyranny — even if, as in the early years of German fascism, it is a tyranny of the majority — without at the same time causing it to usurp the legitimate functions of the elected representatives of the people. In other words, a theory of judicial adjudication is required which both denies the judiciary any power to trespass on the legitimate territory of the other branches of government, while still permitting — nay, requiring — judges to hold the legislature and executive to account where the political process is unable to do so. This is, in short, the conundrum of the "rule of law."

The issue as to how to reconcile these demands in a modern democracy has been revisited many times by American and British jurists alike, perhaps most famously in the debate between Hart (1958) and Fuller (1958) in the *Harvard Law Review*. This is to be expected: apart from fighting the common enemy of fascism only a decade or so before that debate, all American jurisdictions bar Louisiana share with the U.K. (other than Scotland) and other former British colonies a common legal heritage known as the "common law." This is a system of law originally developed in medieval England which differs significantly in both form and substance from the "civil law" systems — based on Roman codes — which prevail throughout continental Europe, Japan, China and South America. Even today, despite over 200

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years of independence, the substantive common law of the U.S. is essentially the same as that of the U.K. (although procedural rules are often very different). It might be thought that this common inheritance and continuing similarity of substance would suggest that American and British judges go about their business in much the same fashion. Yet, over the last few years, explanations and justifications for judicial behavior have tended to differ markedly according to whether the scholar concerned is British or American.

Weinreb does not make this observation, but the starting-point for his book is closely related to it. He argues that, while American judges at appellate level routinely justify their decisions by means of analogies, scholars in the U.S. have refused to accept such reasoning at face value. They have sought instead to explain and justify the decisions of appellate courts through a logical process of deductive and inductive inferences. Weinreb takes issue with this re-casting of judicial reasoning in terms of logic not only because it paints a picture of what judges do which does not appear to accord with reality but also because it is both incomplete and incoherent. I would go further than Weinreb: it is also represents a view which is fundamentally antithetical to the whole common law approach.

One of the fascinations of reading Weinreb's book is watching the author struggle to reassert the true colors of the common law. Thus he establishes at the outset that, according to the prominent model of legal reasoning against which he wishes to argue:

> [L]egal reasoning is built of determinate rules linked by logical inference . . . . The model is familiarly represented as a pyramid, decisions in concrete cases . . . being derived from a rule, which is in turn derived from a higher rule and so on, up to the highest of all, from which all the rest are derived. (p. 5)

Although he acknowledges that, "Few people suppose anymore . . . that scrupulous adherence to this model is all that is required to reach the correct result," Weinreb attributes that supposition — correctly, in my view — to a perception that such a limitation reflects practical difficulties with the subject-matter rather than a recognition that the model itself requires revision. Unfortunately, he fails to point out how this dominant account of legal reasoning in the U.S. actually exhibits characteristics more commonly associated with the civil law world than with the common law. The Austrian Hans Kelsen (1967), for example, argued that each legal system must rest on a fundamental, abstract norm — the *Grundnorm* — on which other norms (rules and principles) of somewhat greater specificity depend. A legal system, Kelsen believed, is thus linked both deductively — by enabling more concrete laws to be inferred from more general rules or principles — and inductively, by enabling more general norms (including the *Grundnorm* itself) to be inferred from examples of more concrete rules or adjudications.

Weinreb opens his book by rehearsing Scott Brewer's ostensible defense of the place of analogy in legal reasoning (Brewer, 1996), though it soon becomes apparent that Brewer's account actually bears a striking resemblance to Kelsen's approach. Brewer argues that, when the rule to be applied in a given case is unclear, a lawyer will draw an analogy with some undisputed proposition to "abduct" (i.e., create) an hypothesis which then needs to be tested. Such testing is carried out by examining policy and efficiency arguments so as to discover whether the abducted rule can withstand serious scrutiny. If it cannot, another potential rule must be abducted. When an apparently satisfactory rule has been discovered, it can then

safely be applied logically to the case at hand. This effectively means, as Weinreb emphasizes, that analogy has no role either in the justification of a rule or in its application. Justification, according to Brewer, is a matter of "policy," whilst application is a matter of logic. In this account, moreover, the role of analogy is essentially mystical — somehow, through the ether, an idea "pops" into a lawyer's mind in a manner that defies rational explanation. The apparent lack of rationality does not worry Brewer because, in the end, the justification and application of the particular rule of law which was originally "abducted" lies not with that process of abduction but in considerations of policy and logic.

But that has never been the common law approach. As Oliver Wendell Holmes (1881, p. 5) pointed out over a century ago, "The life of the law has not been logic, it has been experience." Weinreb does not cite this well-known aphorism of Holmes's. No matter — in *Legal Reason* Weinreb sets himself the task of explaining how a theory of adjudication which has no place for the use of analogy is incomplete and incoherent precisely because analogy is the primary means through which experience is fed into legal reasoning. Although policy arguments may sometimes be entertained by appellate courts, Weinreb makes the incontrovertible point that it is far more typical for judges to justify their decisions simply by reference to precedent — that is, by drawing analogies with past cases — while the role of logic, if any, is minimal. This reality is entirely overlooked by Brewer, who would presumably have to dismiss courts' apparent reliance on analogous precedents as judicial self-delusion. To sustain his point, Weinreb presents in chapter 2 three studies of cases where courts have employed analogy rather than either logic or policy to explain and justify their holdings. As he observes (p. 61): "Absent from all of them is a clear statement of a general, fully dispositive principle that the court is applying." Instead, it is analogical reasoning which forms the basis for the court's whole argument. Even those on the bench who dissent from the majority opinion do so on the basis that the analogy drawn is inappropriate because there is a better analogy to be found — which, if followed, would lead to the court's deciding the instant case in a different way. Moreover, courts in subsequent cases can themselves draw on the analogies utilized by the majority so as to help identify the scope of the legal principle laid down in the precedent case. Once again, no logic or policy arguments justify such judicial behavior. On the contrary, it is justified precisely because reasoning by analogy is what courts do and forms part of the precedent laid down in the previous case. As Hart (1994) might have said, reasoning by analogy which is carried out in an appellate court is authoritative not only because of the place in the judicial hierarchy which the court occupies but also because, by reasoning in such a fashion, the court is demonstrating compliance with the rules for adjudication which are at work in a common law system.

In a passage which amounts to the nub of his case, Weinreb points out (p. 104) that the notion of law as simply a hierarchy of rules "lacks means for deciding a concrete case." We may know what the rules are, and how they relate to one another, but we have no means of knowing whether and when a particular fact-pattern falls within the ambit of one legal rule or another. (It might also be added that it is by no means unknown for the rules themselves to be controversial.) Weinreb acknowledges that if the facts of the instant case seem to be "on all fours" with those of a prior case, our intuition camouflages the fact that this model of "law as rules" gives us no guidance as to which set of rules apply. But many cases are simply not like this, especially at the appellate level which is where the use of analogy within legal reasoning is most prevalent. In a case which has reached appellate

level, it is almost axiomatic that there must be a dispute as to which legal rule or principle pertains, or the extent to which it is relevant. It is through analogy that a court can decide both which rule or principle is to be applied and in what fashion. In other words, analogy is the intellectual process by which legal rules and principles are brought together with concrete facts so as to enable a rational adjudication to be made. Of course, some analogies are better than others. But, just as social experience allows each human being to categorize things in a useful way, depending on context, experience of both life in general and of the law enables judges to select appropriate analogies. In other words, they learn which facts are relevant to the case at hand, and what other things upon which the law has already ruled might be categorized as similar. It is this shared experience of judges and litigators (and, to a lesser extent, of the general population) which tends to ensure that analogical reasoning in courtrooms does not become arbitrary, but on the contrary leads to a general regularity and predictability.

Indeed, as Weinreb observes (p. 124) using a populist phrase: "The evidence is convincing that the capacity for analogical reasoning is hard-wired in us . . . and develops at a very early stage — within the first twelve months." Analogies rely on an ability, developed over time and through experience, to sort things into appropriate categories. This requires two distinct skills. The first is the ability to recognize which characteristics are relevant to the categorization process in a given set of circumstances. In legal reasoning, this means focusing on those issues which will be factors in determining the legal rule or principle under which the present dispute falls. The second skill is the ability to distinguish similarity from dissimilarity. For a lawyer, this means deciding, on the basis of the relevant facts, which branch or doctrine of the law is germane (e.g., contract or tort; offer or invitation to treat, etc.). Because analogy relies on the interplay of these two skills, Weinreb adopts Brewer's (1996, p. 32) terminology in saying that a successful analogy depends on the "requirement of *relevant similarity*." There is of course no rule for determining whether a particular analogy satisfies this requirement. But this does not mean that Edward Levi (1949) was correct in his assertion that analogical argument is "imperfect" and contains a "logical fallacy." On the contrary, such a statement has no greater validity than saying either that "logical argument is a flawed form of analogy" or that "a dog is an imperfect form of cat." Just as dogs and cats are not flawed forms of each other but are simply different types of animals, logic and analogy are different types of reasoning. One is not a flawed form of the other. Logical syllogisms are true or false (or at least capable of being true or false), while the currency of analogy is plausibility, judged by experience. Analogy is not a putative form of logic; on the contrary, both analogy and logic are sub-types of the general category of reasoning or rational thought. Analogy plays such a significant role in legal reasoning because it is both natural and rational.

The strange thing is that Weinreb is himself a partial prisoner of the very type of thought from which he self-consciously wishes to escape. For example, he makes the following, troubling statement, which is oddly relegated to a footnote:

> In the absence of a settled rule that prescribes an outcome, it may appear that the judge must fill the gap by exercising her discretion, informed by considerations outside the law. It is true that a judge has more discretion in such a case. Nevertheless, her obligation is to decide according to the law. The method of analogical reasoning enables her to do so. (p. 81)

What precisely does Weinreb mean when he asserts that "her obligation is to decide according to the law"? It is axiomatic that the decision made by a judge in such a case cannot involve her simply applying an established, substantive legal rule, because it is the very lack of any such settled rule which brings about the whole scenario. An alternative reading of Weinreb's comment is that the rules of process for judicial adjudication require the judge to reason analogically in order to find some solution to the dispute in front of her (because she cannot "throw up her hands and tell the litigants to fight it out"). But if this is what he intended, he seems to have over-stated it in a manner whose inelegance is strangely out of place in this otherwise skillfully-written book. Moreover, it seems odd that this comment is not included as part of the argument in the main body of the text, since it is not a side-issue but is actually precisely on point. A clearer — and surely unexceptionable — explanation is provided on page 94, where Weinreb says that drawing "an analogy to prior cases in quite different areas of the law . . . [shows] that such reliance is legally grounded and not *ad hoc*." Yet he goes on to say later (p. 103) that: "throughout, the task remains the same: to *apply the law as it is*, however narrowly or broadly conceived, to the concrete facts of the case, in all their particularity" [my emphasis]. This simply will not do. The conclusion to which the argument of the whole book inexorably leads is that analogies allow judges to *make new law* by extending previous trains of thought to new areas and issues. This power to make law is not unlimited; it relies on a plausible analogy with a past case or other authoritative legal source. But it exists nonetheless, and judges exercise it all the time. That is why, for example, the law of torts is so different now from how it was two hundred years ago — even though there has been relatively little statutory intervention in the area.

Weinreb can hardly be unaware of the history of the law of torts, or of the rest of the common law, and the argument in his book provides a convincing explanation as to how such extensive legal change (on both sides of the Atlantic) has come about. It is therefore tempting to wonder whether he felt compelled for political reasons to say that judges simply apply the law; perhaps he did not wish to be taken as constructing a theory of legal reasoning which might offend "conservatives" because the idea of judge as law-maker has recently — but absurdly — come to be heavily associated in the United States with a more "liberal" political viewpoint. The British do not have this problem. As long ago as 1968, a senior British Law Lord (Radcliffe, 1968, p. 215) was simply re-stating what had already become the conventional wisdom in the U.K. when he wrote: "[T]here never was a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help it?" Indeed, the assertion that judges in a common law system should not make law is self-evidently ridiculous: the very definition of the "common law" is that it is law *made by judges*. The real question to a true common lawyer, therefore, does not focus on whether judges can or should make law, but on the extent and basis of such power. In a lecture which Judge Ipp of the New South Wales Court of Appeal in Australia has called (Ipp, 2003) "a refreshing antidote to the anodyne invocation of existing authority," Lord Reid, a contemporary of Lord Radcliffe, stated candidly (Reid, 1972, p. 22):

> There was a time when it was thought almost indecent to suggest that judges make law — they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open

Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more.

One of the reasons that Weinreb's account of the use of analogy in legal reasoning is important is precisely because it helps to explain how judges can make law in novel or controversial areas so as to hold the executive or legislature to account without usurping their functions. Weinreb's argument is concise, cogent, and generally persuasive. It also benefits from an exceptionally clear style of prose. The author is to be congratulated not only on having written a book which reasserts so powerfully the centrality of analogy in common law reasoning, but on having done so with a clarity and brevity which leaves no serious student of the common law with a legitimate excuse for failing to read it. It is just a pity that the author does not quite muster the courage of his own convictions.

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