

Larry Alexander and Emily Sherwin

Demystifying Legal Reasoning.

New York, NY: Cambridge University Press 2008.

253 pages

US\$85.00 (cloth ISBN 978-0-521-87898-2)

US\$26.95 (paper ISBN 978-0-521-70395-6)

Demystifying Legal Reasoning is part of a series of introductory books, the Cambridge Introductions to Philosophy and Law. However, it is not a simple survey text. Although it would serve any reader well as a window onto the problem and practice of legal reasoning, it is more than an introduction. In this work, Alexander and Sherwin advance two claims: legal reasoning is not a novel form of reasoning but simply the application of three common forms to legal problems, and with respect to the application of these forms of reasoning restraint ought to be the guiding principle.

There are both benefits and drawbacks to this book's approach. At times, because Alexander and Sherwin are advocating for a particular theory, they can treat the opposition in a cursory fashion and thus give the impression that otherwise formidable counter theories are mere blips on the screen. Although a scholar can easily discern where their treatment has been abbreviated out of necessity given the nature of an introductory text, a novice might misconstrue such brevity as indicative of a dismissive attitude. Even so, this book is quite accessible and useful as an introduction to the myriad issues with which it deals. One point of note, which might seem trivial at first blush, is the massive amount of footnoting throughout. Anybody wanting to do further research could easily use this book as a launching pad to an extensive background of information.

The book's basic question—the issue that frames each particular discussion—is whether the reasoning process utilized by judges is a novel skill possessed only by legal professionals or something more common. Alexander and Sherwin argue the latter: '... we believe that legal reasoning is ordinary reasoning applied to legal principles. 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' (3).

The book is laid out into three parts each tracing out the above thought: 1) a brief introduction that focuses on the function of law; 2) a section on reasoning from cases, and 3) a section on reasoning from canonical texts. These three parts provide the reader with an account of the *telos* of the law and the role of legal reasoning in achieving its goal of settling moral controversy with respect to precedent and past cases, as well as canonical texts.

The first part of the book consists of one chapter, 'Settling Moral Controversy'. The claim is simple: the function of law is to settle moral controversies among members of a system of shared social values, and 'the need for legal reasoning comes about when members of a community confer authority on certain individuals to settle moral

controversies' (9). According to Alexander and Sherwin, if legal reasoning is to serve its purpose as settler of moral controversies it must be predictable, consistent, and not arbitrary. As such legal reasoning cannot be based on intuitions or some non-rational procedure. Adjudication must be the result of a rational process such that there is a fair degree of determinacy regarding how the law will be applied in virtue of what it can reasonably be taken to mean. There is a lot of philosophical baggage in this short chapter, from the debate between positivism and natural law theory, to realism, critical legal studies, and the indeterminacy of the law. Alexander and Sherwin handle these issues in a way characteristic of their style throughout the book; they acknowledge the debate, indicate where the scholarship lies through copious footnotes, take their stand, respond to potential objections, and move on. In terms of an introductory text, they proceed brilliantly. They note the debates without being dismissive, and they avoiding getting bogged down in details that would be distracting and beyond the scope of an introductory text.

Part 2 is devoted to common-law reasoning and to how justices ought to adjudicate cases based on precedent and prior case law. The primary focus of Alexander and Sherwin in the three chapters comprising this part is to dismiss the idea that judges use analogical reasoning or reasoning from principles when they adjudicate. They argue both that these forms of reasoning are not different from other common forms of reasoning, e.g. moral, empirical, and deductive reasoning, and that as common forms of reasoning these particular methods are ill-equipped to handle the moral controversies present in the law. Alexander and Sherwin's objection to analogical reasoning and reasoning from principles is that they fail adequately to constrain judges. In fact, the thread tying most of Alexander and Sherwin's claims together is the need for judicial restraint.

With respect to how one does and ought to reason from precedent or past cases, Alexander and Sherwin juxtapose two different approaches: the natural model and the rule model. These two models are quickly compared and contrasted, with the authors favoring the rule model. They maintain that rules offer greater predictability and consistency than any alternative, and thus restrain judges more effectively. Restraint—that is, removal of discretion from judges—not only secures predictability and consistency, but insofar as it does so limits foreseeable harmful errors. With the rule model's superiority established, the authors face off against their two foils for this section, analogical reasoning and reasoning from principles.

Although reasoning from analogy, i.e., treating like cases alike, is often taken to be a fundamental rule of adjudication, the authors argue that there is in fact no such thing as analogical reasoning. Rather, whatever judges think they are doing when they argue by analogy is nothing novel: it is simply moral or empirical reasoning, or deduction from a chosen rule. The authors also proceed to critique reasoning from principles, of which they take the jurisprudence of Ronald Dworkin to be representative. They argue that reasoning from principles is problematic since the judge is in no meaningful way constrained by past decisions or extent rules. 'Legal principles...are organic rather than fixed, and it is impossible to predict with confidence their content at any time' (102). Their objection to

legal principles is twofold. First, it is not, in fact, a novel form of reasoning: ‘Judges who purport to reason on this basis are either reasoning naturally under the guise of legal principles or reasoning deductively from informally posited rules’ (103). Second, what is being done under the guise of reasoning from legal principles is infelicitous insofar as it offers no real constraint on judges. In the end, the constraint afforded by the rule model is seen as its saving grace. If judges use ordinary reasoning, and this legal reasoning must be able to settle moral controversies in a coherent, consistent, and predictable manner, then it must be rule governed.

Part 3 focuses on reasoning from canonical texts, with some specific focus on Constitutional interpretation. The conclusion is in no way surprising: reasoning from texts, i.e., textual interpretation, does not involve a novel form of reasoning. Rather, we derive meaning from texts in the law the same way we derive meaning from texts in everyday life. Thus, this part is peppered throughout with lines of argumentation advocating two distinct conclusions: reasoning from texts is not a unique form of reasoning, and an intentionalist approach is best when reasoning from texts.

Alexander and Sherwin maintain that intentions are necessary to give a text meaning. In fact, they maintain that authorial intentions are the wellspring from which meanings arise. Without the attribution of intention to an author we are left with mere marks on a page. Thus, intentions are fundamental, and interpretation must begin from here. They then address major competitors to this line of thought including textualism, dynamic, practical reason, and public reason approaches, as well as other ‘non-starters’. From the notion that intentions are necessary they quickly—almost too quickly—dispatch these counter-interpretations and proceed to address various objections to their version of intentionalism.

The discussions in this book are brief, but not superficial. The reader does get a good sense of the contours of the debate, is offered much to consider, and comes away with the requisite tools to explore the issue further. There is a great deal going on here, and as an introduction it serves its function well. Given the brevity of its coverage, the reader is able to manage the debates introduced here. But as this brevity does not distort, it is possible to find one’s bearings in the difficult terrain of legal theory.

Jacob Held

University of Central Arkansas