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# Legal Reasoning: The Evolutionary Process of Law, by William Zelermyer

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LEGAL REASONING: THE EVOLUTIONARY PROCESS OF LAW. By William Zelermyer. Englewood Cliffs, N. J.: Prentice-Hall. 1960. Pp. xv, 174. \$4.35.

Modern law teaching is, at least in part, a method of teaching by example. In the usual law school course, the student is asked to derive that which is legally significant from law materials consisting primarily of compilations of appellate case opinions. The student's primary concern is to discover the substantive law of the legal field at hand.

The student is expected to learn how one discovers the legally significant by emulating the type of reasoning used by judges, lawyers, and especially law teachers. In the usual course, the teacher each day exhibits such reasoning to his students by talking in a lawyer-like way about the cases with which he is concerned. The law teacher often has not the time nor the inclination to sort out and explain the institutional processes which underlie his method of reasoning. Using the so-called Socratic method, he may try to stimulate the student into using the same mode of reasoning by asking him a series of questions which are intended to require the answerer to reason like a man of the law. Unfortunately, the skillful formulation of such questions is a difficult task to undertake during an extemporaneous classroom discussion. And even when well done, the student too often misses the point of the lesson.

Each case opinion with which a student comes in contact is, of course, a little specimen of legal reasoning. To supplement his teaching by example, the law teacher may also make occasional comments on the reasoning exhibited by case opinions. However, casebooks do not classify

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opinions according to the type of reasoning used, but according to the light they shed on the substance of the law. For this reason, the law teacher's comments on legal reasoning are likely to be haphazard and disunified.

In recent years, law schools have been making greater attempts to introduce into their curricula courses concerned with exploration of the institutional processes which underlie legal reasoning. In a number of schools, each student is now required to take at least one such course early in his law school career. Unfortunately, the person undertaking to teach such a course soon finds that most of the writings available on the subject of legal reasoning are not aimed at the beginning law student. Instead they are written for persons already skilled in law and therefore assume the reader has achieved a degree of legal sophistication not yet attained by the beginning law student. Furthermore, materials written specifically for the beginner in the law too often tend to degenerate into compilations of cases and statutes when dealing with the legal reasoning processes most in need of explicit analysis. This paucity of adequate materials is a considerable handicap for anyone trying to teach beginning students about the methods of reasoning peculiar to the law, especially because the teacher's legal training is likely to have omitted explicit analysis of the very processes he is now trying to teach.

For all these reasons, any book which purports to be concerned with an exploration of legal reasoning at a level that will be meaningful to beginners in the law must receive careful attention. In his preface to *Legal Reasoning*, Professor Zelermeyer promises to reorient the student who "feels that his job is to accumulate a set of rules for each subject studied" and instead to provide him with "a proper approach to the law." His intent is to impart an insight into legal reasoning which will assure the beginner "of a delightful journey and everlasting value." He tells us that, "a cursory survey of legal institutions, of legal history and procedure, cannot accomplish this purpose." Instead it must be done by examining "displays" of the work of men in the law and analyzing them to see how they are constructed.

The core of this book is two chapters of such "displays": one devoted to traditional common law case reasoning and the other devoted to the judicial treatment of legislation. The former chapter centers around cases dealing with the problem of causation as it relates to actions for negligence. The latter chapter explores the legislative and judicial treatment of problems raised by the practice of featherbedding.

After some introductory remarks, the chapter devoted to case reasoning states the facts of *Palsgraf v. Long I. R. R.*, 248 N.Y. 339, 162

N.E. 99 (1928), summarizes the procedural history of the case in the trial court, and dwells briefly on the course of the case in the Appellate Division of the Supreme Court of New York. Next we accompany the litigants to the Court of Appeals of New York. Here the author begins by presenting what are essentially briefs of cases cited by the parties in their respective arguments to the court. The remainder, and largest part, of the chapter consists primarily of excerpts from the majority and minority Court of Appeals opinions, interlaced with briefs of cases cited in those opinions.

Between quotes and briefs, the author makes textual comments, most of which consist of restatements of the quoted material. Occasionally these comments add an interesting insight into the workings of our legal system. For instance, at one point, the author asks why a particular case was cited by the attorney for the plaintiff, Mrs. Palsgraf, when the complainant in the cited case had lost. He then points out that, of the seven judges listening to the arguments in the *Palsgraf* case, four had participated in the decision of the case cited. Of these four judges, three had dissented in the prior case on the basis of principles Mrs. Palsgraf's attorney thought favorable to her cause.

A book filled with such insights would be valuable indeed. But too many of the comments in *Legal Reasoning*, and particularly in the chapter under discussion, are of a different caliber: "How strong was Mrs. Palsgraf's case?" Again, "How helpful was this analogy? How much closer did it bring us to the legal meaning of proximate cause? It seemed to draw our sights from a panoramic view to a close-up." Comments of this kind are to be found throughout the two central chapters of this book. Though such comments may have some use in the lecture hall, how helpful are they in a book purporting to explore legal reasoning on a level that will be helpful to beginners in the law? Nowhere in this book is there a self-conscious, explicit attempt to analyze the processes underlying legal reasoning, though they are all touched upon, at least by implication, in different parts of the book. Essentially, Professor Zelsermyer is teaching by example which, combined with the Socratic method, is the teaching technique first-year law students are deluged with day-after-day. A book consisting mainly of broken up portions of case opinions interspersed with briefs of cases and comments of the type mentioned above does not fulfill the student's need for explicit analysis of the legal reasoning processes.

The chapter centering about featherbedding proves to be more interesting than that on the problems raised by the *Palsgraf* case. In the chapter on judicial treatment of legislation, fewer case briefs are inter-

spersed between excerpts from case opinions and the number of restatements of quoted portions of opinions also appears somewhat diminished. Moreover, the social implications of the legal treatment of the problem of featherbedding are more readily discernible and perhaps of more immediate interest than are the implications of the legal treatment of the problem of causation as related to negligence actions. For a beginning student, this chapter may well throw more light on the nature of judicial reasoning than does the one preceding.

In addition to the two main chapters already described, there is an introductory chapter in which Professor Zelermyer touches on the different types of textual legal materials a lawyer deals with. He begins this chapter with some general observations about legal reasoning. For instance, he indicates that legal reasoning is not limited to formal logical reasoning and that an attempt to so limit it would have undesirable results. This is a good point, but it is dropped too quickly and treated too superficially even for a beginner in the law. The book closes with four pages of "parting thoughts" in which the author briefly touches on such significant ideas as law being an outgrowth of culture and law interacting with other aspects of society. The brief mention is barely enough to whet the appetite.

Though this book may not be of much help to a law student who had already undertaken some law school course work, it may be useful in another connection. *Legal Reasoning* could serve as an introduction to what law school work is all about for those who are contemplating the study of law, and perhaps that is what the author really had in mind when he wrote the book. Too many students enter law school with only the vaguest idea of what they are undertaking. Though he may not comprehend everything in this little book, someone who is seriously considering law school may well benefit from reading it. A recommendation to that effect may be of real service to the potential law student.

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