

## *Books*

THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING by Frederick Schauer, Harvard University Press, Cambridge (Ma), 2009, 239pp, ISBN 0-674-03270-5

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It is a safe bet that almost every text on legal reasoning in common law countries emphasises in one way or the other the salience of thinking like a lawyer which is ideally acquired when one is a first year student, and is subsequently polished and perfected throughout the rest of law school and beyond. The authors of these texts usually set about cataloguing the requisite rules of legal reasoning in a fairly mechanical way beginning at *stare decisis* and its complexities and ending on an explication of common law devices which allow lawyers to make sense of complex legal questions. In between the pages of these texts, there are a variety of subjects covered with varying degrees of competency, subtlety and depth; some issues while arguably relevant are omitted in their entirety.

But an inquiring mind should confront and attempt to answer a number of pertinent questions at this juncture. To begin this inquiry, we should ask if indeed there is such a thing as ‘legal reasoning’. And, if so, is this form of analysis so uniquely and incontrovertibly distinct in nature that one can distinguish it easily from other forms of reasoning? And why is it important that the collective ‘we’, law students, lawyers and judges as well as other interested inquisitors, engage in this discourse?

To his credit, Frederick Schauer, David and Mary Harrison Distinguished Professor of Law at the University of Virginia School of Law, does not shy away from addressing these crucial questions at the outset in his new book, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*.<sup>1</sup> In his introduction to the book Frederick Schauer asks the reader to consider what it is to ‘think like a lawyer’, and posits the hypothesis that legal reasoning as a unique form of analytical toolbox is a contested claim.

In an interview about the book, Schauer stated that ‘[i]f there is something that is special about legal reasoning, it is important to [recognise] that it is not totally, entirely hermetically sealed “special.”’<sup>2</sup> Even though he does consider different

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1 Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (2009) 4.

2 Ashley Matthews, *Schauer Charges Students to Ponder Nature of Legal Reasoning* (2009) University of Virginia School of Law <[http://www.law.virginia.edu/html/news/2009\\_spr/schauer\\_lunch.htm](http://www.law.virginia.edu/html/news/2009_spr/schauer_lunch.htm)> at 17 August 2009.

schools of thought, particularly legal realism, at some length, he does not entirely side with their characterisation of legal analysis as he believes that it is a distinct, if not unique, form of analysis.

I should note that while this book is a clearly written and analysed book, it treads a rather conventional path similar to other books in this genre in the United States where the emphasis is placed on explaining the constitutive elements of so called 'legal reasoning', as opposed to a bolder and more comprehensive text which engages with the importance of international law to legal reasoning in the US, as well as lacking sufficient emphasis on the importance of ethical and social obligations of lawyers.

But why should all of this matter? Are there any overarching objectives, which are enhanced or diminished by whether or not lawyers have a unique mode of analysis, or is all of this mostly a scholarly storm in a cup? Are there real world ramifications arising from how lawyers justify their legal conclusions and, if so, is it not important that students are schooled in such intricacies? In other words, is legal education implicated by necessity in this discussion?

These questions matter because, for better or worse, lawyers are integral to the maintenance of the rule of law in our societies, not because of any inherent, intrinsic virtues, but because of their historical prevalence and integration into our systems of government. How lawyers are educated and what they are taught are of public interest principally because the democratic stakes are very high.

To this end, one needs only to think about the active participation of lawyers in a number of illegal activities in the last decade both in the United States and in Australia. Among the former is the so called 'torture memo' drafted by John Yoo (currently a professor at the Boalt Hall School of Law at the University of California, Berkeley) in 2003 while he was employed as Deputy Assistant Attorney-General in the Office of Legal Counsel at the Department of Justice. The recent declassification of this 81 page legal memorandum demonstrates how Yoo argued for a very narrow definition of what constitutes torture so that waterboarding of 'enemy combatants' was redressed as a legal interrogation technique despite the fact that it has traditionally been prohibited under both domestic and international laws.<sup>3</sup> According to Martin Lederman:

So the most important thing to [realise] about this, about this legal theory, is how if one takes it seriously, how truly broad it is, and what it would implicate. The theory would mean that an entire edifice of 20<sup>th</sup> century law — Geneva and Hague Conventions, the Convention Against Torture, the Torture Statute, the Foreign Intelligence Surveillance Act, the War Crimes Act, the Uniform Code of Military Justice and many other quite well established and non-controversial limits on war authority that have been ratified and enacted since the turn of the century — would be called into question. Whenever the president thought that

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3 Memorandum from John C Yoo to William J. Haynes II, 14 March 2003, available at American Civil Liberties Union <[http://www.aclu.org/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf)> at 17 August 2009.

those legal norms impinged on the way he thinks [sic] it is the best means of fighting the enemy. And so it's a theory — whether one thinks it's right or wrong — that is potentially quite groundbreaking, and quite significant in terms of how it would rebalance the powers between the branches of the federal government.<sup>4</sup>

In addition, the involvement of other lawyers such as David Addington in making the case for the illegal invasion of Iraq under international law have been documented.<sup>5</sup>

The above actions by these lawyers as well as many others and countless other documented ethical lapses surely must raise the question of whether we should re-examine 'thinking like a lawyer'.

Schauer's book is marketed as a 'primer on legal reasoning aimed at law students and upper-level undergraduates.'<sup>6</sup> He has also stated that 'this book is intended to provide somewhat of a sophisticated introduction and comprehensive look at what it is that law schools claim to do, which is to teach students how to think like lawyers'.<sup>7</sup>

The book is divided into a number of chapters, all of which are well complemented with succinct and informative cases.

Notwithstanding the Introduction noted previously, the first part of the book briefly addresses rules, their literal meaning and how what a rule states is not usually the last word. Schauer deftly introduces the tension between the language of statutes and their purpose and elaborates on statutory interpretation in much more detail and nuance in a later chapter.

The second chapter focuses on the practice and problems of precedent. In introducing the doctrine of *stare decisis*, Schauer highlights its counter-intuitive nature, even if noting its importance in promoting consistency and stability, though at times at the expense of achieving justice. The chapter also discusses the intricacies of a holding (the legal rule that determines the outcome of a case) and dicta (*obiter dicta*). The chapter has a particularly good discussion of the difficulties law students and lawyers encounter when a court does not clearly identify its holding. This can create a number of possible formulations of the holding, which creates confusion both for the readers as well as future courts.<sup>8</sup>

The third chapter focuses on the idea of authority and the kinds of authorities upon which US courts do rely. The concept of authority, he says, is displayed by the Catholic church's view of the Pope. In a subsection on prohibited authorities, Schauer briefly touches upon the reasons of the opponents of the citation of foreign or international law, including Justice Scalia. Their reasons are predicated upon the

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4 Interview with Martin Lederman (Documentary interview, 2 November 2007), edited transcript available at The George Washington University –Torturing Democracy <[http://www.gwu.edu/~nsarchiv/torturingdemocracy/interviews/martin\\_lederman.html](http://www.gwu.edu/~nsarchiv/torturingdemocracy/interviews/martin_lederman.html)> at 17 August 2009.

5 Ibid.

6 Schauer, above n 1.

7 Ibid.

8 Ibid 55.

concern that reference to such authorities would progressively legitimise their use.<sup>9</sup> In contrast to Justice Scalia's views, Schauer notes that in the seminal decision of *Lawrence v Texas*, Justice Kennedy cited comparative laws from other countries that have decriminalised homosexual conduct.<sup>10</sup> It should be noted that, in the United States, the Circuit Courts of Appeal have been divergent in citing international law as an authoritative source in their judicial opinions. This is particularly important in light of the fact that the majority of important legal issues are dealt with at these appellate courts, where less than 100 cases annually are accepted for determination by the Supreme Court. Hence, in light of the continuing importance and relevance of international human rights norms to litigation in national courts in the United States, a much more in-depth and comprehensive discussion is merited with regard to these sources.

Chapters five and six focus on the use of analogies and the provenance of common law respectively. In the former chapter, Schauer deftly navigates the vagaries of analogical reasoning and cautions the readers that the best way to use analogical reasoning is to ensure that only relevant similarities are included in arguments. The latter chapter on common law is unremarkable as Schauer briefly outlines the antecedents of the US legal system, the nature of common law, how it changes and what it represents.<sup>11</sup>

Chapter seven deals with the challenge of legal realism and its empirical claims. Schauer introduces the reader to the essential tenets of the realist thought in the United States by briefly outlining the influential scholars and their contributions. This is a particularly well written section that renders accessible complex ideas for a novice reader. He begins the discussion by framing the question at the heart of the realist inquiry as: 'What factors other than legal doctrine played the major role in determining what judges would in reality actually do?'<sup>12</sup> This chapter ends with a very brief overview of the impact of the critical legal studies movement and its thematic differences and similarities with the legal realists.

The remaining chapters of this book focus on statutory interpretation, the difference between rules and standards, law and fact and legal presumptions. Overall, these remaining chapters are in similar vein to other chapters in such similar books and are not particularly distinctive.

It is logical to assume that a comprehensive book of this kind should also include what facets of legal reasoning, as taught in US law schools, have had shortcomings. To this end, it does not in any substantive way engage with the criticisms levelled at the status quo, which are echoed in a 2007 Report by the Carnegie Foundation for the Advancement of Teaching.<sup>13</sup> The Report, *Educating*

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9 Ibid 80.

10 *Lawrence v Texas*, 539 US 558 (2003).

11 Schauer, above n 1, 103–118.

12 Ibid 127.

13 William M Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law Summary* (2007) 6.

*Lawyers*, is the culmination of a two year study of legal education involving a reassessment of teaching and learning in 16 law schools in the United States and Canada during 1999–2000. *Educating Lawyers* identifies the paradigmatic nature of the ‘legal reasoning’ construct taught at US law schools and identifies its strengths as well as its shortcomings. Regarding what is lacking, *Educating Lawyers* has the final word:

Law schools fail to complement the focus on skill in legal analyses with effective support for developing ethical and social skills. Students need opportunities to learn about, reflect on and practice the responsibilities of legal professionals.<sup>14</sup>

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14 Ibid 6.

