Legal Reasoning

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LEGAL REASONING

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Abstract

The legal profession has long claimed that there are process-based differences between legal reasoning – that is, the thinking and reasoning of lawyers and judges – and the reasoning of those without legal training. Whether those claims are sound, however, is a subject of considerable debate. We describe the importance of using categorization and analogy, following rules and authority, and the odd task of "fact-finding", in the legal system. We frame these topics within the debate between two views of legal reasoning: the traditional view – that when deciding a case, judges are doing something systematic and logical that only legally-trained minds can do; and the Legal Realist view – that judges first come to conclusions then go back to justify them and that they are subject to the same reasoning problems as ordinary people.

Keywords: legal reasoning; psychology and law; reasoning; analogy; precedent; jury decision-making

Introduction (h1)

In the 1973 film *The Paper Chase*, the iconic Professor Kingsfield announced to his class of first year law students: "you teach yourself the law. I train your minds. You come in here with a skull full of mush, and if you survive, you'll leave thinking like a lawyer." In claiming to teach students to think like lawyers, Kingsfield echoed the assumptions of centuries of legal ideology. In the seventeenth century, the great English judge Edward Coke glorified the "artificial reason" of the law (Coke, 1628, ¶ 97b), and from then until now lawyers and judges have believed that legal thinking and reasoning is different from ordinary thinking and reasoning, even from very good ordinary thinking and reasoning. Moreover, the difference, as Kingsfield emphasized, has long been thought to be one of process and not simply of content. It is not only that those with legal training know legal rules that laypeople do not. Rather, lawyers and judges are believed, at least by lawyers and judges, to employ techniques of argument, reasoning, and decision making that diverge from those of even expert non-lawyer reasoners and decision makers.

Our chapter begins by describing three important distinctions: between what people typically mean by "legal reasoning" and other types of reasoning that occur in the legal system; between two competing views of how such reasoning is done; and between law and fact. The heart of the chapter deals with four thinking and reasoning processes that are common in legal reasoning: following rules, categorization, analogy, and fact-finding. We then discuss whether legal decision making requires particular expertise and some of the peculiarities of legal decision making procedures generally. We end with some ideas for future research.

The Who, How, and What of Legal Reasoning (h1)

What is meant by "legal reasoning," who does it, how is it done, and which parts of it do we think are unique? We sketch answers to these questions below.

"Legal Reasoning" versus Reasoning within the Legal System (h2)

Legal reasoning, strictly speaking, must be distinguished from the full universe of reasoning and decision making that happens to take place within the legal system. Juries, for example, make decisions in court that have legal consequences, but no one claims that the reasoning of a juror is other than that of the ordinary person, even though the information that jurors receive is structured by legal rules and determinative of legal outcomes. There has been extensive psychological research on jury decision making (for example, Diamond & Rose, 2005; Hastie, 1993), and we discuss some of it in this chapter in the section on fact-finding. But when Coke and Kingsfield were glorifying legal reasoning, they were thinking of lawyers and judges and not of lay jurors. Similarly, police officers, probation officers, and even the legislators who make the laws are undeniably part of the legal system, yet the typical claims about the distinctiveness of legal reasoning do not apply to them. Clearly, the institutions and procedures of the legal system affect decision making, but the traditional claims for the distinctiveness of legal reasoning go well beyond claims of mere institutional and procedural differentiation. The traditional claim is that certain legal professionals – lawyers and judges – genuinely reason differently, rather than employ standard reasoning under different institutional procedures.

Thus, the term "legal reasoning" refers to reasoning by a subset of people involved in the legal system; it also refers to a subset of what that subset of people reason about. Television portrayals notwithstanding, a large part of what lawyers do consists of tasks such as negotiating, drafting contracts, writing wills, and managing non-contested dealings with the administrative

bureaucracy. These lawyers' functions are important in understanding the legal system in its entirety, yet are rarely alleged to involve distinctive methods of thought, except insofar as they are performed with an eye towards potential legal challenges and litigation. Therefore, we focus in this chapter on trials and appeals because that is the domain about which claims for the distinctiveness of legal reasoning are most prominent.

Two Views of Legal Reasoning (h2)

In this chapter we examine forms of reasoning that are allegedly concentrated in, even if not exclusive to, the legal system. But we also address the long history of skeptical challenges to the legal profession's traditional claims about the distinctiveness of its methods. From the 1930s to the present, theorists and practitioners typically described as Legal Realists (or just "Realists") have challenged the belief that legal rules and court precedents substantially influence legal outcomes (Frank, 1930; Llewellyn, 1930; Schlegel, 1980). Rather, say the Realists, legal outcomes are primarily determined by factors other than those that are part of the formal law. These non-legal factors might include the personality of the judge, for example, as well as the judge's moral and political ideology and her reactions to the facts of the particular situation presented.

The Realists' claim that such non-legal considerations are an important part of judicial decision making should come as little surprise to most psychologists. After all, the Realist challenge is largely consistent with the research on motivated reasoning (Braman, 2010). Because decision makers are often focused on reaching specific desired conclusions, the motivation to reach an antecedently desired conclusion will affect their information search and recall, as well as other components of the decision making process (Kunda, 1987, 1990; Molden & Higgins, Chap. 20). Insofar as this research is applicable to judges, then, the Realists would

claim that judges are frequently motivated to reach specific outcomes in specific cases for reasons other than the existence of a relevant legal rule. They might, for example, sympathize with one party in the particular case. Or they might believe, more generally, for example, that labor unions should ordinarily prevail against corporations (Kennedy, 1986), or that the police should be supported in their fight against typically guilty defendants, or that commerce flows more smoothly if the norms of the business community rather than the norms of the law are applied to commercial transactions (Twining, 1973). These non-legal and outcome-focused motivations, say the Realists, would lead judges to retrieve legal rules and precedents selectively in light of that motivation, locating and using only or disproportionately the rules and precedents supporting the result generated by their non-legal outcome preferences in a particular dispute.

Indeed, the same point is supported by the research on confirmation bias (see Nickerson, 1998, for a review). This research teaches us that both novice and expert decision makers are inclined to design their tasks in ways that yield results consistent with their initial beliefs (Fiedler, 2011). In light of what we know about motivated reasoning and confirmation bias, therefore, it is plausible that judges often consult the formal law only after having tentatively decided how the case, all or many things other than the law considered, ought to come out. The judges would then select or interpret the formal law to support outcomes reached on other grounds, as the Realists contend, rather than using the formal law to produce those outcomes in the first place, as the traditional view of legal reasoning maintains.

The traditional view of "thinking like a lawyer" does not deny that motivated reasoning and confirmation bias influence the decisions of ordinary people. It does deny, however, that these phenomena are as applicable to expert legal reasoners as they are to lay people. Indeed, it is telling that nominees for judicial appointments, especially nominees to the Supreme Court

testifying before the Senate Judiciary Committee at their confirmation hearings, persistently pretend not to be Realists. They deny that any policy or outcome preferences they might happen to have will influence their judicial votes, claiming instead that their job is simply to follow the law. Fn1 The judicial nominees thus join the claims of Kingsfield and countless others that the forms of thinking and reasoning that characterize human beings in general are exactly the forms of thinking and reasoning that lawyers and judges are trained to avoid. Whether such avoidance can actually be taught or actually occurs, however, are empirical questions, and not the articles of faith they were for Kingsfield. The question of whether lawyers and judges really are better than lay people at avoiding the consequences of motivated reasoning, confirmation bias, and other impediments to law-generated results is one that lies at the heart of the traditional claims for the distinctiveness of legal reasoning. In this chapter, we consequently discuss not only the traditional view of legal reasoning, but also the research examining the extent to which the model of reasoning described by the traditional view accurately characterizes the arguments of lawyers and the decision making of the judges to whom they argue.

The Distinction between Law and Fact (h2)

The distinction between questions of law and questions of fact is crucial to understanding legal decision making. Indeed, questions of fact are primary in important ways, because the initial question in any legal dispute is the question of what happened -- the question of fact. How fast was the Buick going when it collided with the Toyota? Who came into the bank with a gun and demanded money from the teller? Did the shopkeeper actually promise the customer that the lawnmower she bought would last for five years? In typical usage we think of "facts" as things that are known to be true. But in the courtroom, relevant facts may be unknown or in dispute.

Thus, the first thing that the "trier of fact," be it jury or judge, must do is "fact-finding" – that is, deciding what actually happened.

Knowing what happened is important and preliminary, but knowing what happened does not answer the *legal* question -- the question of what consequences flow from what happened. If a prospective employee proves that the company that did not hire him refuses to hire anyone over the age of fifty, has the company violated the law, and, if so, what is the penalty? If the defendant in a murder case drove a getaway car but did not shoot anyone, is he subject to the same criminal penalty as an accomplice who actually did the shooting? If the Buick that someone purchased from a Buick dealer turns out to be defective, is the dealer responsible, or only the manufacturer?

In the United States it is common to think of juries as determining questions of fact and judges as deciding questions of law. However, this simple dichotomy is misleading. Although juries generally do not decide questions of law (though they are required to apply the law to the facts in order to reach a verdict), judges *do* decide questions of fact. In many countries, there are no juries at all. And even though most countries with a common law (English) legal heritage have juries for many criminal trials, only in the United States are there juries for civil lawsuits between private parties.

Even in the United States, juries are far less common than one would suspect from television portrayals of the legal system. Partly because of settlement and plea bargaining, partly because only certain types of cases involve the right to a jury, partly because sometimes the opposing parties agree to have a judge decide the case, partly because of alternative dispute resolution, and partly because many cases are dismissed or otherwise resolved by judges on legal grounds before trial, jury trials are rare. In fact, only about one percent of initiated cases in the

United States reach trial at all, and many of those are tried by a judge sitting without a jury (Galanter, 2004). Often, therefore, the issues of fact as well as law are decided by the judge.

And even when there is a jury, many preliminary factual issues will have been decided by the judge. In criminal cases, for example, factual questions about arguably illegal searches and seizures or confessions – Did the police have probable cause to conduct a search? Was the defendant given the requisite warnings before being interrogated? -- are determined by the judge. In civil cases with a jury, judges decide many issues of fact in determining preliminary procedural issues and making rulings on the admissibility of evidence – Did the defendant answer the complaint within the required 20-day period? Can an expert in automobile design testify as an expert about tire failure?

The psychological issues implicated by decisions about disputed questions of fact are not necessarily the same as those involved in determining what the law is. And thus we deal separately, much later, with the psychology of factual determination in law. For now, however, it is worth noting that many of the claims about a distinctively legal reasoning pertain to the resolution of uncertain questions about the law rather than about what happened. Determining what the law requires, especially when the law is uncertain, involves the kind of legal reasoning that Kingsfield celebrated and Supreme Court nominees endorse. Learning how to make such determinations is a large part of the training of lawyers, and a substantial component of legal practice, especially in appellate courts. It is precisely when rules or precedents are unclear or generate uncomfortable outcomes that the use of rules, precedents, analogies, and authority becomes most important, and these are the forms of reasoning that are central to the alleged distinctiveness of legal reasoning. We turn to those forms of reasoning now.

Rules (h1)

Following, applying, and interpreting formal, written, and authoritative rules, as well as arguing within a framework of such rules, are important tasks for lawyers and judges, and are consequently emphasized in the standard picture of legal reasoning. The psychology literature does not address this kind of rule following per se; however, to a psychologist the processes involved in deciding "easy" cases seem to involve deductive reasoning (see Evans, Chap. 8), whereas those for "hard" cases seem to involve categorization (see Rips et al., Chap. 11) and analogy (see Holyoak, Chap. 13).

The distinction between easy cases and hard cases is widely discussed in the legal literature. In an easy case, a single and plainly applicable rule gives unambiguous guidance and, as applied to the situation at hand, appears to give the right result. Suppose a law says: "If someone does A, then he gets consequence B." Someone comes along, blatantly does A, and then gets consequence B. Rule followed; justice done; everyone (except maybe B) is happy. But what we illustrate below is that not all rules are so simple, nor can they be so simply and rewardingly applied. Several types of difficulties can arise, making the application of the rules uncertain or, perhaps, undesirable. What are those difficulties that create hard cases and how do judges resolve them? It depends whether you ask a traditionalist or a Realist.

Defining Hard Cases (h2)

There are three kinds of hard cases: ones in which the language of an applicable rule is unclear; ones in which it is unclear which of several rules apply; and ones in which the language of a plainly applicable rule is clear but produces what the interpreter, applier, decider, or enforcer of the rule believes is the wrong outcome.

Unclear rules (h3)

Legal rules often do not give a clear answer. A famous example in the legal literature involves a hypothetical rule prohibiting vehicles in a public park (Hart, 1958; Schauer, 2008a). When the question is whether that rule prohibits ordinary cars and trucks, the application of the rule is straightforward. Cars are widely understood to be vehicles, vehicles are prohibited according to the rule, and therefore cars, including this car, are prohibited. That people can and sometimes do reason in such a deductive or syllogistic way when they are given clear rules and presented with clear instances of application is well established (Evans, Barston, & Pollard, 1983; Rips, 2001).

But what about bicycles, baby carriages, wheelchairs, and skateboards, none of which are either clearly vehicles or clearly not vehicles? Faced with such an instance, what would a judge do? One standard view is that the judge would then have discretion to decide the issue as she thought best. Perhaps the judge would try to determine the purpose behind the rule, or perhaps she would try to imagine what the original maker of the rule would have thought should be done in such a case. But whatever the exact nature of the inquiry, the basic idea is that the judge would struggle to determine what the unclear rule *really* means in this situation, and would then decide the case accordingly.

The view that judges are searching for guidance from even unclear rules is part of the standard ideology of the lawyers and judges. But that view may be at odds with psychological reality. Freed from the strong constraints of a plainly applicable rule, the research on motivated reasoning suggests that the judge would be likely to decide how, on the basis of a wide range of political, ideological, personal, and contextual factors, she believes the case ought to come out (Braman, 2010). Having come to that conclusion, a conclusion not substantially dependent on the legal rule at all, the judge would then describe that result is being the one most consistent

with the purpose behind the rule. And if the judge then looked for evidence of the purpose behind the rule, or evidence of what the rule-maker intended in making the rule, much of what we know about confirmation bias (Nickerson, 1998) would suggest that the judge would not engage in the search for purpose or intent with an entirely open mind, but rather would be likely to find the evidence of purpose or intent that supported the outcome the judge had initially preferred.

The latter and more skeptical explanation is entirely consistent with the Legal Realist view about rules. In 1929 Joseph Hutcheson, a Texas-based federal judge, wrote an influential article (Hutcheson, 1929) challenging the traditional picture of legal reasoning. He claimed that it is a mistake to suppose that in the typical case that winds up in court the judge would first look to the text of the rule, the purpose behind the rule, the evidence of legislative intent, and the like in order to decide the case. Rather, Hutcheson argued, the judge would initially, and based largely on the particular facts of the case rather than the law, come up with an initial "hunch" about how the case ought to be decided. Then, and only then, would the judge seek to find a rule to support that result, or seek to interpret a fuzzy rule in such a way as to justify that result. Subsequent Realists (e.g., Frank, 1930) reinforced this theme, albeit rarely with systematic empirical research.

Thus, the debate between traditional and Legal Realist view about rule-following might also be cast in the language of the contemporary research on dual process methods of thinking (Evans, 2003, 2008; Sloman, 1996; see Evans, Chap. 8; Frederick & Kahneman, Chap. 17; Stanovich, Chap. 22). Fn2 System 1 reasoning is quick and intuitive, whereas System 2 reasoning is more logical, systematic, and deliberative (Stanovich, 1999), and the traditional view of legal reasoning relies heavily on a System 2 model of decision making. The Realist

perspective, as exemplified by Hutcheson's reference to a "hunch," sees even judicial reasoning as having heavy doses of quick, intuitive, and perhaps heuristic System 1 decision making. (These are sometimes viewed as two separate reasoning systems and sometimes as the ends of a reasoning continuum.) The question remains as to which method of decision making more accurately reflects the reality of judging. Several legal scholars have suggested that judges, just like ordinary people, often come quickly to an intuitive decision but then sometimes override that decision with deliberation. They state: "the intuitive system appears to have a powerful effect on judges' decision making" (Guthrie, Rachlinski, & Wistrich, 2007, p. 43) and then suggest various ways in which the legal system should increase the likelihood that judges will use System 2 reasoning in deciding cases. Note, however, that when the systems are in opposition it is not always the case that the intuitive system is wrong and the deliberative system is right; it can also turn out the other way (Evans, 2008).

When rules proliferate **(h3)**

The second type of hard cases consists of those to which multiple but inconsistent clear rules apply. Is a truck excluded from the park by the "no vehicles in the park" rule, or is it permitted by another rule authorizing trucks to make deliveries wherever necessary? Such instances of multiple and inconsistent rules make the Realist challenge to the conventional picture especially compelling in a legal system in which many rules might plausibly apply to one event. In countries with civil law systems fn3, legislatures attempt to enact explicit and clear legal rules covering all conceivable situations and disputes. Such rules are collected in a comprehensive code, therefore the existence of multiple and inconsistent rules applying to the same event is, at least in theory, rare. Even the outcome-motivated judge might well find that the

law plainly did not support the preferred outcome, and that would almost certainly be the end of the matter.

The situation is different in English-origin common law countries fn4, where much of the law is made by judges in the process of deciding particular cases. Law-making in common law systems is less systematic than in civil law countries, and common law judges and legislatures are less concerned than their civil law counterparts with ensuring that new rules fit neatly with all of the existing legal rules. As a result, it is especially in common law countries that multiple and inconsistent rules may apply to the same event, allowing for more decisions that seem to be based on motivated reasoning. Moreover, even when a judge does not have a preferred outcome, when there are multiple potentially applicable rules the judge's background and training, among other things, will influence which rules are retrieved and which are ignored (Spellman, 2010). In addition, if judges, like other people, seek coherence and consistency in their thinking, they may well select legal rules and sources that are consistent with the others they have retrieved, and ignore those that would make coherence more difficult (Holyoak & Simon, 1999; Simon, Pham, Le, & Holyoak, 2001).

When rules give the wrong answer **(h3)**

Although there can be problems with vague rules and multiple rules, as described above, typically the words of a plainly applicable rule, conventionally interpreted, do indicate an outcome, just as the "no vehicles in the park" rule indicates an outcome in a case involving a standard car or truck. But leading to an obvious outcome is not the end of the story. Because rules are generalizations drafted in advance of specific applications (Schauer, 1991), there is the possibility, as with any generalization, that the rule, if strictly or literally followed, will produce what appears to be a bad result in a specific situation. In *Riggs v. Palmer* (1889), for example, a

case decided by the New York Court of Appeals, the pertinent statute provided clearly, and without relevant exception, that anyone named in a will could claim his inheritance upon the death of the testator (i.e., the person who wrote the will). The problem in *Riggs*, however, was that the testator died because his grandson, the beneficiary, had poisoned him, and did so precisely and intentionally in order to claim his inheritance as soon as possible. Thus the question in *Riggs* was whether a beneficiary who murdered the testator could inherit from him. More generally, the question was whether the justice or equity or fairness of the situation should prevail over the literal wording of the rule.

Cases like *Riggs* are legion, and the issues they present raise important issues about the nature of law and legal decisions (Dworkin, 1986). But they also implicate equally important psychological questions. When a rule points in one direction and the all-things-considered right answer points in another, under what conditions, and how often, will people – be they legally-trained or not -- put aside their best moral or pragmatic judgment in favor of the what the rule commands?

If the traditional story is sound, we would expect those with legal training to attach greater value to the very fact of the existence of a legal rule, and thus to prefer the legally-generated but morally or pragmatically wrong result more often than those without such training. It turns out, however, that very little research has addressed precisely this question. On the one hand, research has found that law students (Furgeson, Babcock, & Shane, 2008b) and federal law clerks (recent law school graduates) working for federal judges (Furgeson, Babcock, & Shane, 2008a) are affected by their policy preferences in drawing conclusions about the law. On the other hand, there are data indicating that judges are better able to put aside their ideologies than law students in evaluating evidence (Redding & Reppucci, 1999). Most relevantly, legally-

trained experimental subjects tend to prefer formal rules of justice more often than those without legal training (Schweizer et al., 2008). Still, the research can best be described as limited, presumably owing to the difficulties in securing judges and lawyers as experimental subjects. And, of course, any study finding differences between groups along the law-training continuum (lay people, law students, law clerks, lawyers, judges) must consider not only legal training and experience but also selection and self-selection effects (e.g., who chooses to go into law; who is chosen to become a judge) when drawing causal conclusions.

Deciding Hard Cases (h2)

It is important to understand the types of difficulties generated by hard cases because litigation, and especially litigation at the appellate stage, is disproportionately about hard cases. Easy cases are plentiful, at least if we understand "cases" to refer to all disputes or even all instances of application of the law (Schauer, 1985). But if the law is clear and if the clear law produces a plausible or palatable outcome, few people would take the case to court in the first place. Only where two opposing parties each believe they have a reasonable chance of winning will the dispute actually arrive in court, and so too, to an even greater extent, when disputants decide whether to appeal or not. As a result of this legal selection effect (Lederman, 1999; Priest & Klein, 1984), the disputes that produce litigation and judicial opinions will disproportionately represent hard cases, with the easy cases – the straightforward application of clear law -- not arriving in court at all.

This selection effect is greatest with respect to decisions by the Supreme Court of the United States, which can choose the cases it will hear. It is asked to formally decide about 9000 cases per year but considers only about 70 per year with full written and oral arguments. And with respect to these 70 cases, the existing research, mostly by empirical political scientists,

supports the conclusion that the political attitudes of the Justices – how they feel about abortion and affirmative action, for example, as a policy matter – is a far better predictor of how they will vote than is the formal law (Segal & Spaeth, 2004). This research is not experimental; rather, it involves coding Justices on a variety of attributes and coding cases on a variety of attributes and then analyzing what predicts what. For example, Justices are coded on such things as age (at the time of the decision), gender, race, residence, political party at the time of nomination; cases are coded on such things as topic, types of litigants, and the applicability of various precedents and legal rules. The conclusion of much of this research is that we can better predict legal outcomes, at least in the Supreme Court and to some extent in other appellate courts, if we know a judge's pre-legal policy preferences than if we understand the applicable rules and precedents. To the extent that this research is sound, therefore, it may support the view that the Supreme Court, ironically to some, is the last place we should look to find distinctively legal reasoning (but see Shapiro, 2009, for a critique of these analyses).

Categorization (h1)

Questions about rule-following obviously implicate important issues of categorization. Do we categorize a skateboard as a vehicle or as a toy? Do we categorize Elmer Palmer, the man who murdered his grandfather in order to accelerate his inheritance, as a murderer, as a beneficiary, or possibly even as both?

Because legal outcomes are determined by something pre-existing called "the law," those outcomes require placing any new event within an existing category. When the category is specified by a written rule with a clear semantic meaning for the pertinent application, as with the category "vehicle" when applied to standard automobiles in the "no vehicles in the park"

rule, the freedom of the decision maker is limited by the plausible extensions of the specified category. Often, however, there is no such clear written rule that is literally applicable to the case at hand, sometimes because the rule is vague (consider the Constitution's requirement that states grant "equal protection of the laws" and the constitutional prohibition on "cruel and unusual punishments"), sometimes because a case arises within the vague penumbra of a rule (as with the skateboard case under the "no vehicles in the park" rule), and often because in common law systems the relevant law is not contained in a rule with a fixed verbal formulation but instead is in the body of previous judicial decisions. In such cases the task of categorization is more open-ended, and decision makers must make less constrained judgments of similarity and difference in order to determine which existing legal category best fits with a new instance.

Legal Categories (h2)

The view that legal reasoning and legal expertise is a matter of using and understanding the categories of the law rather than the categories of the pre-legal world is one whose iconic expression comes from an apocryphal anecdote created by Oliver Wendell Holmes:

> There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant (Holmes, 1897, pp. 474-75).

The point of the anecdote derives from the fact that a justice of the peace would have been a lay decider of minor controversies, not a real judge with legal training and legal expertise. And thus Holmes can be understood as claiming that only an untrained bumpkin could have imagined that

"churn" was the relevant legal category. That this is Holmes's point is made clear shortly thereafter, when he says that

> [a]pplications of rudimentary rules of contract or tort are tucked away under the heads of Railroads or Telegraphs or . . . Shipping . . ., or are gathered under an arbitrary title which is thought likely to appeal to the practical mind, such as Mercantile Law. If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy (Holmes, 1897, p. 475).

For Holmes, "railroad" and "telegraph" are lay categories, and "contract" and "tort" are legal categories, and one mark of legal expertise and legal reasoning is the ability to use legal rather than lay categories. This is still not a very strong claim about the distinctiveness of legal reasoning, for the difference that Holmes identifies is one of content and not of process. The lawyer does not think or reason differently from the layman, Holmes might be understood as saying, but thinks and reasons the same way, albeit with different categories and thus with different content (Spellman, 2010). If legal reasoning does not involve substantially different processes from ordinary reasoning, the strongest claims of the traditional view of legal reasoning are weakened. But if legal reasoning employs the distinctive categories and content of the law, and if these categories in fact determine many legal outcomes, the strongest claims of Legal Realism are weakened as well. By applying substantially (even if not completely) ordinary reasoning to substantially (even if not completely) law-created content and categories, legal reasoning may turn out to have its own special characteristics, but not in ways that either the traditionalists or the Realists maintained.

Relational Categories (h2)

We believe that the categories that the law uses tend to be relational categories – categories created on the basis of the relations that one item has with another, rather than on the basis of the attributes of single items taken in isolation (i.e., involving predicates that take at least two objects). That law is principally concerned with the way in which one person or thing is connected or related to another should not be surprising. After all, the law is about regulating interactions and exchanges among people – that is, relations. Take the category of "contract". Suppose someone wants to know whether Judy and Jerry have entered into a contract. Nearly all personal details about Judy and Jerry are irrelevant, as are nearly all details about what they have contracted for. What *is* relevant is whether Jerry owned the property, whether Judy made what the law defines as an offer, and whether Jerry responded with what the law defines as acceptance. Similarly, suppose that Beth has done something to Brian. Whether it is hit, libeled, or kidnapped, it is again typically the relation of what one did to the other that matters. And so too with the questions involved in a finding of negligence: Did John harm James? Did John have a duty of care towards James? Again, relations are key. Note that sometimes it does matter whether the person is under 18 (and so can't sign a contract) or over 35 (and so is eligible to be President of the United States). And sometimes it matters whether a person is male or female, black or white, famous or non-famous. But most of the time it is only the relations between the parties that matter.

Despite the large psychology literature on categorization, there has been relatively little work on relational categories (see Gentner & Kurtz, 2005). However, we do know that just like category members from standard categories prime other category members, category members from relational categories prime other category members (e.g., "bird-nest" primes "bear-cave" by activating the relation "lives-in"; Spellman, Holyoak, & Morrison, 2001). We also know that

relations are generally more important than attributes for analogical reasoning. Thus, when someone is trained on which relations exist and matter, analogical reminding can be useful for retrieving analogies that can help make a legal argument. How analogy is used in legal reasoning is the topic of the next section.

Precedent and Analogy (h1)

In common law systems much of the law is not to be found in the explicitly written rules enacted by legislatures or adopted by administrative agencies, but in the decisions of judges. And because when judges reach decisions and thus make law they are expected to take account of previous decisions – precedents – the interpretation of precedents is an important part of common law decision making. In common law systems, and increasingly in civil law systems, law develops incrementally as decisions in particular cases build on previous decisions. Understanding how to use previous decisions to make an argument or decision in the current dispute is consequently a substantial component of legal reasoning. Previous decisions play a large role in legal reasoning, but they do so in two very different ways (Schauer, 2008c).

"Vertical" Precedent (h2)

First, and possibly of less significance in hard cases, is the obligation of a judge to follow the decision of a higher controlling court (hence "vertical") even if she disagrees with that decision. This is the strong form of constraint by precedent, and it resembles the constraints of an explicitly written rule. When there is a previous decision on the same question (just as when there is an explicit rule plainly covering some application), the law *tells* the judge what her decision should be. Consider, for example, the obligations of judges with respect to the Supreme Court's decision in *Miranda v. Arizona* (1966), the case in which the Court required police

officers to advise a suspect in custody of his rights to remain silent and have a lawyer prior to questioning. *Miranda* was controversial when it was decided and has remained controversial since. Many citizens, police officers, and even judges believe that *Miranda* was a mistaken decision. Nevertheless, a judge in a court below the Supreme Court is not permitted to substitute her judgment for that of the higher court. If the question arises in a lower court as to whether the statements of a suspect who was not advised of his rights can be used against him, the lower court judge who thinks that the answer to this question ought to be "yes" is obliged by the Supreme Court's decision in *Miranda* to answer "no." Obviously there will be difficult cases in which it is not clear whether the defendant was in custody, or whether he was being interrogated, or whether he waived his *Miranda* rights. Fn5 In such hard cases a judge's views about *Miranda's* wisdom will likely influence her decisions about the application of the precedent. But in the easy cases – the cases that present the *same* question that the Supreme Court decided in *Miranda* – the lower court judge is obliged by the system to decide the question as it has already been decided even if, without the constraint of precedent, she would have reached a different decision.

"Horizontal" Precedent (h2)

The constraint of precedent, at least in theory, applies horizontally as well as vertically. That is, judges are obliged to follow previous decisions of their *own* court even if, again, they disagree with those decisions. In theory, a Supreme Court Justice who in 2010 disagrees with the Court's 1973 decision in *Roe v. Wade* (1973) is obliged by what is known as the doctrine of *stare decisis* – "stand by what is decided" -- to follow that decision. At least with respect to the Supreme Court, however, the data indicate that the constraint of stare decisis is a weak one, having little force in explaining the votes of the Justices (Brenner & Spaeth, 1995; Schauer,

2008b; Segal & Spaeth, 1996). Unlike the obligation to follow the ruling of a higher court, which is largely respected when the decision of the higher court is clear, the obligation to follow an earlier decision of the same court appears to be perceived by judges as weak.

The obligation of a judge to follow a precedent that is exactly "on point" is an important aspect of legal reasoning and the self-understanding of the legal system, but its effect is rarely seen in appellate courts. When it is clear that some dispute is the same as that which has already been decided, the dispute will usually be resolved prior to reaching the appellate court. The cases that do end up being decided on appeal, again by virtue of the selection effect, are overwhelmingly ones in which past decisions do not obviously control the current dispute, but exert their influence in a less direct way. Because the idea of following precedent so pervades the legal consciousness, drawing on and arguing from past decisions even when they are not directly controlling is a ubiquitous feature of legal reasoning, argument, and decision making.

The Role of Analogical Reasoning (h2)

Using previous decisions that are not exactly like the current question in order to guide, persuade, and justify is a process that is heavily dependent on, or perhaps identical to, analogical reasoning (Spellman, 2004). Understanding the legal system's use of analogical reasoning is accordingly vitally important for understanding the methods of legal reasoning and argument. Consider, for example, the decision of the New York Court of Appeals in *Adams v. New Jersey Steamboat Company* (1896), a case frequently discussed in the literature on analogical reasoning in law (e.g., Spellman, 2010; Weinreb, 2005). The case concerned the degree of responsibility of the owner of a steamboat containing sleeping quarters to an overnight passenger whose money had been stolen when, allegedly because of the company's negligence, a burglar broke into the passenger's stateroom. No existing legal rule controlled the case, and no previous decision had

raised or decided the same question. And it turned out that two different bodies of law – two different lines of precedent – were each potentially applicable. If the law pertaining to the open sleeping compartments ("berths") in railroad cars applied, the steamboat company would not be liable to the passenger. But if the law about innkeepers' responsibility to their guests was applicable, then the passenger could recover.

The *Adams* case presents a classic case of analogical reasoning in law. Although some prominent skeptics about analogical reasoning argue that judges, like the judges in *Adams*, simply make a policy-based choice of a general rule (Greenawalt, 1992, p. 200) and mask it in the language of similarity (Alexander, 1996; Posner, 2006), such an approach is inconsistent with what we know about analogical reasoning (see Holyoak, Chap. 13). Applying the research on analogy to the *Adams* case, we can understand how each side was trying to get the judges to apply a different well-understood source – either the law of innkeepers or the law of railroads – to a less well-understood target – a stateroom on a steamboat.

So, is a steamboat more similar to an inn or a train? We suspect that most people would answer "train", but that is not the relevant question. How about: is the stateroom on a steamboat more similar to a room at an inn or to a sleeping berth on a railroad? That is a tougher question, and one might be tempted to ask (as one should when dealing with categorization generally; see Ch. 10), "Similar with respect to what?" Here the answer might be, "With respect to how much the plaintiff had the right to expect security of his possessions while he slept." Given the situations – that one can lock one's room at the inn and one's stateroom on the steamboat but not one's berth on the train; given that the room at the inn and the stateroom are more private than the sleeping berth on the train; and, perhaps, given that one paid extra for a room and a stateroom (the court's decision did not include many details) -- it is easy to argue that the steamboat and inn

are similar in that the owner gives the traveler an implied guarantee that he and his possessions will be safe while sleeping.

In fact, the court applied the law of innkeepers rather than the law of railroads, and such a decision might be explained in terms of a distinction between surface and relational similarities (Holyoak & Koh, 1987; see Holyoak, Chap. 13). The successful analogy – between the steamboat and the inn -- was not the one in which the objects were similar, but rather the one in which the legal relations between the relevant parties were similar. Developing expertise in law, which we assume the judges possessed, means seeing through the surface similarities and understanding which relational similarities matter. Fn6 Note that in saying that the relevant legal category in *Adams* was a category that connects inns and steamboat accommodations (the category of those who offer sleeping accommodations, perhaps) rather than one that connects steamboats and railroads (means of transportation), the court based its categorization decision on a legal rather than a lay category.

Is this kind of reasoning substantially different between those who are legally trained and those who are not? Consider an experiment that compared law students to undergraduates (Braman & Nelson, 2007, Exp. 2). The subjects (96 undergraduates and 77 law students) read an article summarizing the facts of a target case, but did not know the result, and they also read one version of a potentially relevant previously decided case – which varied between-subjects on two factors of possible legal relevance. The undergraduates rated the precedent as more similar to the target case than did the law students. The law students perceived similarity and difference between the cases in light of legal and not lay categories. Although the determination of similarity and difference is likely to be domain-dependent (Medin, Lynch, & Solomon, 2000), it does not follow from the fact that particular similarities that are important in one domain are

unimportant in another that the very process of determining similarity varies according to domain. Thus, although there may be differences between legal reasoners and ordinary reasoners, the differences, insofar as they are a function of knowledge attained in legal training and practice, may be better characterized as content-based rather than process-based.

Possession of legal knowledge may thus explain the difference between legally trained and non-legally trained reasoners. But given that most judges are legally trained, and given that both sides present the potentially relevant cases supporting their sides to the judges, why are there disputes over the appropriate analogy to use? The Realists would say that the judges have a desired outcome and then pick the appropriate analogies to justify their decisions. But perhaps people (and judges) choose relevant analogies (or precedents) as better or worse, applicable or inapplicable, not because of any particular desired outcome but rather because of their own preexisting knowledge and the way they frame their questions (Spellman, 2010; Spellman & Holyoak, 1992, 1996).

Fact-finding (h1)

As described earlier, an important type of decision-making in legal proceedings is "fact-finding" and most of the factual determinations in legal proceedings are made by judges. Many of these determinations are made in the course of preliminary proceedings and many are made in trials in which there is no jury. Yet although fact-finding is done far more often by judges than by juries, most of the research about fact-finding has been done on juries. One reason may be that juries feature prominently in television and movie trials, and as a result researchers may believe they are more prevalent in non-theatrical legal proceedings than they really are (Spellman, 2006). Another reason might be that lay jurors are far more likely to resemble the

typical experimental subjects used by psychology researchers. Using findings based on experiments with university undergraduates to draw conclusions about the decision making practices of judges may involve significant problems of external validity, but the greater similarity between lay undergraduates and lay jurors significantly lessens these problems (Bornstein, 1999).

Fact-Finding by Juries (h2)

Perhaps the most important dimension of jury fact-finding is the way in which the information that juries receive is carefully controlled by the law of evidence. Evidence law is based on the assumption that jurors will overvalue or otherwise misuse various items of admittedly relevant information, and the rules of evidence thus exclude some relevant evidence because of a distrust of the reasoning capacities of ordinary people. There is a general rule of evidence (FRE 403) that a judge may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury…." More specifically, for example, the information that the defendant in a robbery case has committed robbery in the past is typically excluded from jury consideration, even though a rational decision maker would recognize that such evidence, even if hardly conclusive, is far from irrelevant. Fn7 Similarly, the exclusion of hearsay evidence – evidence of what someone else (who is not now testifying) said was true, rather than what a witness perceived as true – is based on the notion that juries will give too much weight to what was said by a person who is not appearing in court. Yet, this fear entails excluding from consideration evidence that ordinary decision makers would consider relevant to the decision to be made. In ordinary life, people rely frequently on hearsay to inform themselves about what happened, and often make judgments about ambiguous or unknown current behavior based on past behavior. The fact that the law of

evidence excludes so much of what figures prominently in everyday reasoning is accordingly perhaps the most important feature of evidence law.

When jurors are the fact-finders, they may receive two types of instructions from the trial judge. The first are immediate instructions during the trial: to forget information they have heard or to use some information for one purpose but not for an (obvious) other one. For example, a witness might blurt out that he knew the defendant because they had been in prison for robbery at the same time. If the defense lawyer objects and makes a motion to strike, and the judge sustains, she will immediately instruct the jury to disregard that evidence. There is much data supporting the conclusion that jurors typically do not disregard such evidence (Steblay et al., 2006). The jury is still out, however, on the question of whether it is that jurors *cannot* disregard or *choose not* to disregard. There is strong evidence that under some conditions the failure is intentional (e.g., Sommers & Kassin, 2001) but it is likely that under other conditions jurors are simply unable to disregard what they already know.

The second type of instructions comes just before jurors deliberate: they are instructed about both the content of the law specific to the case at hand and about general procedures they should use to decide the case. The latter include the mandate that they decide the case in accordance with the instructed law, and not on the basis of what they think is the right result. Thus, an important question, about which there has been considerable research, is the extent to which jurors actually understand judge's instructions (see Diamond & Rose, 2005, and Ogloff & Rose, 2005, for reviews).

Although considerable recent efforts have aimed at making instructions more comprehensible, the research suggests that jurors typically do not understand very much of the judge's instructions, including specific instructions about elements of the crime and general

instructions about the burden of proof (Ogloff & Rose, 2005). Some of this gap between instructions given and instructions comprehended may be a function of the fact that judges are more concerned with legal accuracy in language of the instruction (so the case will not be overturned on appeal) than they are with maximum comprehension by the jury. But much of the gap may follow from the difficulty that experts in general have of understanding the perspective of non-experts in their own field.

Although jurors often do not understand the judge's instructions, at least in detail, that is not the same as delivering an erroneous verdict. It turns out that juries tend to deliver the correct verdict, at least where the measure of correctness is what the judge would have decided were there no jury. Various studies over the years, using different methodologies, have shown that a judge's and jury's decisions about the same cases are typically in accord (see Diamond & Rose, 2005). However, each one of these studies has at least one serious methodological flaw. Still, overall, it seems that even though jurors may not appreciate the nuances of the applicable law, they are reliable in getting a general sense of who ought to prevail. (As far as we can tell, none of the research has focused explicitly on the decisions of jurors who do not understand the instructions in cases in which the justice of the situation and the law point in opposite directions, and thus it would be a mistake to assume that juror incomprehension of judicial instructions is largely inconsequential.)

That jurors who at best imperfectly understand the judge's instructions nevertheless reliably reach the correct verdict is related to what we know about just how juries determine what happened. Much of the structure of a trial and much of the law of evidence is premised on an incremental and Bayesian model of fact-finding, in which jurors with prior beliefs about some state of affairs adjust the probability of those beliefs upwards or downwards as additional pieces

of evidence are presented (see Griffiths & Tenenbaum, Chap. 3, for a discussion of Bayesian inference and Hahn & Oaksford, Chap. XX, for applications to the jury decision making). This is a plausible model of how information is received and processed at trial, yet it is not a model that appears to track the reality of juror decision making.

The prevailing psychological model of juror decision making is the Story Model (Pennington & Hastie, 1991), which suggests that juror decision making is more holistic than incremental. The Story Model proposes that jurors evaluate the evidence based on which story (i.e., prosecution, defense, or some other) best explains all or almost all of the evidence they have heard, as opposed to making a preliminary determination on the basis of some evidence and then continually revising that determination as additional pieces of evidence are presented. In seeking the story that best explains the evidence they have heard, therefore, jurors' reasoning is largely devoted to determining which of the two (or more) competing stories at a trial is more coherent and complete. Indeed, another holistic model of reasoning, Explanatory Coherence (Thagard, 1989), has been applied to reasoning about legal cases (Simon et al, 2001; Thagard, 2003), scientific reasoning, and other types of reasoning (Thagard, 2006; possible cite to Ch. 14). Thus, that these models explain ordinary reasoning as well as jury decision making provides still further support for the view that legal decision making, whether by judge or by jury, is less different from ordinary decision making than lawyers and judges have long believed.

Note, however, that the above describes the prevailing model of *juror*, not *jury*, decision making. Often left out of studies of legal decision making is the fact that jurors, always, and judges, often (on appeal but not at trial), make their final decisions as a group. Research on group decision making is thus very relevant to legal decision making (see Salerno & Diamond, 2010).

Fact-finding by Judges (h2)

The law of evidence provides an interesting window into the legal system's traditional belief in the superior and distinctive reasoning powers of those with legal training. In countries that do not use juries there is rarely a discrete body of evidence law, and judges are comparatively free to take all relevant information into account. And in the United States, when judges sit without juries, they often tell the lawyers that many of the rules of evidence will be disregarded or interpreted loosely to allow more evidence to be considered than would be allowed were there a jury (Schauer, 2006). Underlying this practice is the belief that only those with legal training can be trusted to evaluate evidence properly (Mitchell, 2003; Robbennolt, 2005), but it turns out that there is less data than unsupported faith lying behind this belief (Spellman, 2006).

Should judges be better at fact-finding than juries? There are many differences between jurors and judges (as we discuss in the next section), but there is certainly nothing about law school training that seems likely to affect this type of reasoning: it is not at all like what Professor Kingsfield had in mind with his version of training in the Socratic method whereby he would press students with question after question about the meaning and implications of the decision in a case. Perhaps, however, either judges' repeated experience listening to cases (versus jurors doing it rarely) or their desire to do the right thing in following the law (where jurors might not take that mandate as seriously) would make judges better. In terms of repeated experience, because there never is real feedback regarding what the true facts of a case were, it is doubtful that practice makes one better. And in terms of wanting to follow the law, there is research supporting the view that judges are barely better than lay people at ignoring information they are supposed to disregard (Wistrich, Guthrie, & Rachlinski, 2005). Thus, the data that exist

about judicial fact-finding supports the conclusion that, when acting as fact-finders and not as legal interpreters, judges are less different from lay jurors than many people – and many judges – commonly believe (Robinson & Spellman, 2005).

Judges' Expertise and the Authority of Law (h1)

There is, as we have emphasized, a running debate between the traditional and Legal Realist accounts of legal reasoning, and one way of framing the question of the distinctiveness of legal reasoning is in terms of the traditional claim that lawyers and judges are experts. That was clearly Kingsfield's claim, for example, but it leaves open the question of what kind of experts lawyers and judges might be. More particularly, is it possible that there are at least some process-based differences between legal and lay reasoning? Consider again the task of analogical reasoning in law. Perhaps lawyers and judges simply become *better* analogical reasoners by virtue of their legal training and experience. Perhaps judges, and to some extent lawyers, are experts at analogical reasoning in ways that lay people are not.

Judges (and typically lawyers) differ from non-judges and non-lawyers on a variety of dimensions (see Stanovich, Chap. X). On average, they have higher IQs than, say, jurors. They have more formal schooling. They may differ on some personality variables. They have chosen to go into, and stay in, the legal field. They are repeat players – doing the same thing time after time. And, as a result, they are likely motivated to "get it right", or at least not to "get it badly wrong", because their decisions become public and their reputations and even their jobs could be at stake. They also have their years of law school training. There is research showing that judges fall prey to the same standard reasoning biases as other mortals (e.g., anchoring, hindsight bias, etc., even when the problems are framed in a judicial context; Guthrie, Rachlinski, & Wistrich,

2001). But those were not actual legal tasks. Maybe what Kingsfield was driving at was the notion that law students can be trained to be better at the central reasoning tasks that engage lawyers and judges.

Expertise and Analogy (h2)

That lawyers and judges are better at analogical reasoning than lay folks seems like a plausible claim, but it is not borne out by the research. Just as there are no data to support the belief that judges are expert fact-finders (Robinson & Spellman, 2005) or experts at weighing evidence (Spellman, 2006), there are no data to support that judges' ability to use analogies transcends the domains in which they normally operate. And if they are not experts at using analogies outside of the law, then the expertise they have is an expertise that comes from their legal knowledge and not from any increased ability in analogical reasoning itself. Thus, when law students in their first and third years of law school were compared to medical students and graduate students in chemistry and psychology (Lehman, Lempert, & Nisbett, 1988), the law students had initially higher scores on a verbal reasoning test (which included verbal analogies) than the others, presumably partly a function of self-selection and partly of the selection criteria of law schools. After three years of schooling, however, the law students showed only a statistically non-significant increase in verbal reasoning while the others improved to a greater extent. If these findings are generalizable, they might be thought to provide further support for the view that legal reasoning expertise, if it exists, is a content-based and not process-based expertise.

Expertise and Authority (h2)

But as described above, particularly in the sections on rules that give the wrong answer and on precedent, there is more to legal reasoning than using analogies. Understanding the

traditional view of legal reasoning, and even the nature of law itself, requires appreciating the role that authority plays in legal decision making. Just as citizens are expected to obey the law even when they think it mistaken, so too are lawyers and judges expected to follow the legal rules and legal precedents even when they disagree with them. In this sense the law is genuinely authoritative – its force derives from its source or status rather than from its content (Hart, 1982). Just as the exasperated parent who, having failed to reason successfully with her child, asserts "Because I said so!," law's force derives from the fact that the law says it rather than the intrinsic value of the content of what the law is saying.

The nature and power of authority has been the subject of psychological research, primarily by social psychologists, but the effect of an authority, even an impersonal authority like the law, also has cognitive dimensions. For example, authoritative sources may provide arguments and reasons that the decision maker would not otherwise have thought valid and relevant. On the other hand, sometimes an authoritative legal source will tell a decision maker to ignore what she thinks is a relevant fact (Raz, 1979), and sometimes it will tell a decision maker to consider what she thinks is an irrelevant fact. As an example of the former: The relevant Supreme Court free speech cases make irrelevant the fact that a speaker is a member of the American Nazi Party or the Ku Klux Klan and wishes to publicly espouse Nazi or racist sentiments. The law not only demands that these factors be disregarded, but it also demands that they be disregarded even by a decision maker who disagrees with this aspect of the law. As an example of the latter: In determining whether a will is valid, a judge must determine whether the will contains the requisite signatures applied according to various other formalities, absent which the will is invalid even if there is no doubt that it represents the wishes of the deceased. And the judge is obliged to take this into account even if the judge believes it would produce an unjust

outcome in this case, and even if the judge believes that the law requiring the formalities is obsolete or otherwise mistaken.

Thus, an important question is the extent to which legal decision makers can suppress their best judgment in favor of an authority with which they disagree. The traditional view of legal reasoning is that decision makers can be trained to do just that, and indeed much of the training in law school is devoted to inculcating just this kind of distinction between obedience to legal authority and taking into account that which otherwise seems morally and decisionally relevant (Schauer, 2009). Indeed, because the inherent authority of law often requires a decision maker to ignore what she thinks relevant, and consider what she believes irrelevant, it may be useful to understand part of legal reasoning as not being *reasoning* at all. It is, to be sure, decision making, but part of legal decision making is the way in which authoritative law makes legal decision makers avoid reasoning and even avoid thinking. For the legal decision maker just like the legal subject, the authority of law is the mandate to leave the thinking and reasoning to someone else.

Are people willing and able to do that? Recent research by Schweizer and colleagues (Schweizer et al., 2007; Schweizer et al., 2008) indicates that law students are more willing than laypeople to follow rules even when the result produced by following a rule conflicts with the just result, suggesting that the difference between legal reasoning and ordinary reasoning may involve some process- and not content-based skills. Yet Schweizer and colleagues also found no differences between first year and third year law students, possibly indicating that the process-based dimensions of legal reasoning are more a matter of self-selection and law school admissions selection than of anything that is actually taught and learned during the study or practice of law. Perhaps, therefore, lawyers and judges are different from lay people, but those

differences may be more a function of knowledge, experience, and self-selection than of actual training in distinctively legal reasoning.

Legal Procedures (h1)

In this chapter, and indeed in much of the research on legal reasoning, great emphasis has been placed on the legal decision maker. Who makes legal decisions, how might legal decision makers resemble or differ from other decision makers, and what differences, if any, might these similarities and differences make (see LeBoeuf & Shafir, Chap. X)? But the law is not only a domain of decision makers with unique abilities, training, and experience, it is also a domain in which the procedures and structures for making decisions differ from those commonly found elsewhere. Controlling for differences in decision maker characteristics, therefore, might decision-making procedures by themselves produce important differences in the thinking and reasoning of those who are making the decisions?

The structural and procedural differences of the legal decision are manifested in numerous ways. Consider, for example, the all-or-nothing nature of much of legal decision making. Legal decisions are typically binary, with the parties winning or losing, and legal rules or precedents being applicable or not. Probabilistic determinations are the exception and not the norm in law. A plaintiff who suffers $100,000 damages and proves her civil case to a 60% certainty does not recover $60,000, as expected value decision theory would suggest, but rather the entire $100,000; and if she established the same case with 48% certainty, she would get nothing at all. A defendant who is charged with first-degree murder (which includes a finding of premeditation) cannot be found guilty of manslaughter (which does not) if he was not charged with manslaughter but the jury thinks he indeed killed the victim without the requisite intent. Fn8

Similarly, it is rare for a judge to say that a rule or precedent is almost applicable or partly applicable, and even rarer for an uncertain judge, at least explicitly, to split the difference in a legal argument. There has been little research how the all-or-nothing character of legal decision-making might create or explain some of the differences between legal and non-legal decision-making.

The binary character of legal decision making is merely one example of the procedural peculiarity of legal decision making, but there are many others. Judges are typically expected to provide written reasons for their decisions, but how does the requirement of formal reason-giving affect the nature of the decision? Fn9 Conversely, juries are typically prohibited from explaining the reasons behind their decisions, and how might this prohibition influence their decisions? The appellate process commonly produces redundancy in decision making, but how is the decision of an appellate court influenced by the knowledge that the judge below has already reached a decision about the same questions? Finally, and perhaps most obviously, legal procedures are especially adversarial, and it would be valuable to know the extent to which decision makers – whether judges or jurors – think differently in the context of adversarial presentations than they would were the same information and arguments presented to them in a less combative or more open-ended manner. In these and other respects, it may well be that considering legal reasoning solely as a matter of content- or process-based differences (or not) is too simple, and that a psychological account of legal reasoning must be conscious of how these distinctively legal procedures and structures affect the decision makers.

Conclusion and Future Directions (h1)

We have noted at various places that most of the research on judicial decision making has been based on assumptions rather than data about the similarity between judges and lay decision makers. There are obvious problems with trying to use judges and even experienced lawyers as experimental subjects. Still, insofar as the central questions of legal reasoning from a psychological perspective are the questions of whether people can be selected (or self-select) for a certain kind of legal reasoning ability, or whether they can be trained for a certain kind of legal reasoning ability, further research on the differences between lawyers, law students, and judges, on the one hand, and lay people, on the other, remains an essential research task.

A related agenda for research is one that would distinguish the task of fact-finding from the task of interpreting, applying, and, at times, making law. The traditional claims for legal reasoning are largely about these latter functions, and thus the evaluation of the traditional claims will need to focus more on the application of rules and precedents than has thus far been the case. Only when such research has been conducted in a systematic way will we will be able to approach an answer to the question of whether Kingsfield was right, or whether he was just the spokesman, as the more extreme of the Legal Realists claimed, for a longstanding but unsupported self-serving ideology of the legal and judicial professions.

Endnotes

[1] In three recent Supreme Court nomination hearings, for example, now-Chief Justice Roberts insisted that Supreme Court Justices were like baseball umpires, simply calling balls and strikes with no interest in the outcome; now-Justice Sotomayor claimed that her past decisions as a judge were based solely on the law and not on her personal views, and that her future decisions would be the same; and now-Justice Kagan, even while acknowledging that Justices must exercise substantial discretion, said that good Supreme Court decisions were still based on "the law all the way down."

[2] The difference between this formulation of the Realist view and the earlier one is – did the judge first consciously decide what she wanted the outcome to be (e.g., Bush has to win in *Bush v. Gore,* 2000) and then try to justify it (strong Realism) or did the decision come unbidden, as a "hunch"? This latter version sounds a bit like the Moral Intuitionist version of moral reasoning (Haidt, 2001; see Ch. 19) – in which people make moral judgments from quick intuitions then strive to justify them -- but they are different. The Moral Intuitionist view is vague about what intuitions are and how they arise; we believe that intuitions arise from knowledge, and, thus, an experienced judge's intuition about a case will reflect her knowledge of other similar cases. She may arrive at the opinion consistent with her values not because she consciously decided which way to rule, but because her previous knowledge and beliefs gave her a justifiable intuition (Spellman 2010; see Kahneman & Klein, 2009).

[3] Civil law countries are those whose legal systems emanate, for example, from the Code of Justinian in Roman times or the Napoleonic Code two thousand years later.

[4] Common law countries include the United States, the United Kingdom, and Australia. The type of legal system tends to vary with whether or not the country has juries, with common law

countries using them more and civil law countries using them less, but the covariation is not a necessary one.

[5] The key is to argue that these differences make it not the "same" question.

[6] Or, perhaps, because the court believed as a policy matter that they *ought* to be treated as similar, and decided accordingly. Similarity judgments may be guided by pragmatic relevance (Spellman & Holyoak, 1996).

[7] The rule keeping out such evidence seems concerned with people making the Fundamental Attribution Error (Ross, 1977).

[8] This all-or-none nature of a probabilistic verdict provides the backdrop for pre-trial settlements and plea bargains. It also affects how much money a plaintiff might ask for in a civil case and which criminal charges a District Attorney will bring.

[9] It is in vogue to believe that not thinking about a complex decision is best (Dijksterhuis, Bos, Nordgren & van Baaren, 2006), but there is concern about those findings (e.g., Payne, Samper, Bettman & Luce, 2008; see also McMackin & Slovic, 2000).

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