

TAKING THE "UNDUE BURDEN" OUT OF TEACHING LEGAL REASONING

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Abstract

Instruction in the process known as legal reasoning should lie at the heart of any class whose goal is to teach students about American courts and judges. I have found Edward H. Levi's *An Introduction to Legal Reasoning* to be an excellent guide for students as they attempt to navigate through the complicated terrain of the legal reasoning (or reasoning by example) process. In this paper, I explain how I use the Supreme Court's decisions in abortion cases to illustrate and enhance Levi's basic teachings about how legal reasoning works in the area of Constitutional interpretation.

Taking the "Undue Burden" Out of Teaching Legal Reasoning

I. Introduction

A. The Importance of "Reasoning by Example"

What is it that judges do that makes them distinguishable from legislators? This question ought to serve as a launching point for any class on the American court or judicial system. This is particularly true of any such class that is taught under the auspices of a political science department. After all, political scientists, or at least those who study national political institutions, focus on the three branches of government. Fundamental to an analysis of the various institutions that make up our government, however, is the ability to distinguish between the branches; the ability to describe how they are the same, and how they are different. That is one very basic reason why it is important that students come to understand the reasoning by example process. For, I would argue, it is primarily the self-conscious process that judges go through when making decisions that distinguishes courts from the other branches of government, and therefore justifies a distinct class on courts and judges.¹

'Of course, the manner in which Federal judges are selected, and the length of their term, also helps to distinguish between the branches. This is not true, however, at the state level where most judges are elected and serve for limited terms. It is also interesting to note that Hamilton's justification for life tenure at the Federal level is more tied to process, than to independence. Hamilton writes:

There is yet a further and a weightier reason for the permanency of the judicial offices To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict *rules and precedents*, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. (Federalist 78, emphasis mine).

There is, however, an additional and more subtle reason for teaching the legal reasoning process to students. Students who are not fluent in the language and methods of legal reasoning will not be able to grasp, analyze, and contribute to the debates that go on in this country about how courts and judges actually function, and how they ought to function.

Most students are unfamiliar with terms such as "precedent" and "stare decisis," and therefore do not suspect how these terms and beliefs might guide at least the overt decision-making process of judges. It is not that they have no "beliefs" about the process that judges go through when deciding cases. Generally, they hold some variant of the two polemical positions put forward by politicians on the right and the left of the political spectrum. Either they think that judges simply apply (or should apply) the "plain words" of the law to decide cases, or, alternatively, that judges are merely political actors who decide cases based on their own predispositions.² Therefore, part of the job for those who are teaching students about how judges and courts function, is to somehow get them to step back and consider whether or not their positions, or the positions of others whom they follow, accurately reflect what goes on in courts. Now, this is not to be confused with telling students how judges should behave. As Weber (1946, 146) argued, "the task of the teacher is to serve the students with his knowledge and scientific experience and not to imprint upon them his personal political views." Therefore, our role as professors is to provide students with information about how judges make decisions, and how courts function. As Weber recognized, however, some of what we teach will include

²The latter conclusion was certainly re-enforced by the commentary that surrounded the Supreme Court's decision in *Bush v. Gore* (2000).

"facts that are inconvenient for their party positions" (147).³ These facts, however, will also allow them examine the arguments of others.

To rely on a case that I have already mentioned, there have been many criticisms of the Court's decision in the case *Bush v. Gore* (2000)⁴. Those who argue that the decision was "just political" support their position by noting the prior political affiliations of the Justices who voted in favor of then-candidate Bush. This is not a very strong argument, however, since two of the four dissenting Justices were appointed by Republicans, one by President George W. Bush's own father. What lends credence to the critics, however, is the fact that the per curium opinion is, at least arguably, at odds with the Court's own precedents, particularly in the area of equal protection and federalism. My point is that, for students to be able to critically analyze this case, and the debates that surround the case, they must first be familiar with the legal reasoning process.

Stepping back from current events and into the academic arena, how is a student who is unfamiliar with legal reasoning to evaluate the "neutral principles" approach of Robert Bork (1971) or the criticisms of that orientation presented by Mark Tushnet (1983)? In the same way, the attacks that Critical Legal Scholars such as Roberto Unger (1984) level at "legal formalism" and even the more moderate defenses of reasoning by example put forward by Hart (1994),

³I tend to view this as a way to teach critical thinking in the classroom. For an interesting commentary on Weber and teaching critical thinking, see Weaver (1998). See also Gardner (1998). Cohen (1993) also writes on this subject, but emphasizes the role of process in critical thinking. Nevertheless, (and as Cohen demonstrates when he has students read past First Amendment cases as they discuss and debate the issue of flag-burning) Critical thinking can not take place in a vacuum. It must be informed by a knowledge of facts.

⁴See, for example, the commentaries contained in Dionne and Kristol (2001).

Dworkin (1993), and perhaps Carter (1994) are only accessible to those who already understand the formal model of legal reasoning.⁵

If the legal reasoning process is important, then it is crucial that we find methods by which to teach this process to our students. The problem that I have found, however, is that legal reasoning appears deceptively simple and can be easily incorporated into the prejudices that students already hold. The task then is to devise a method that captures not only the process of reasoning by example, but also the subtleties and paradoxes that are inherent to the process. Fortunately, Professor Edward Levi has left us with a wonderful text: the aptly titled *An Introduction to Legal Reasoning* (1949).

B, Is Hot Coffee Inherently Dangerous?

I was first exposed to Edward Levi's book as a teaching assistant while in graduate school. The professor for whom I was grading used the book to introduce the judicial process to undergraduates. As I progressed to teaching and eventually designing my own judicial process classes, Levi's book always found its way onto my syllabus. In fact, through the years my affection for this tiny book, and its concise description of the three-step reasoning by example process, has grown. Although the book is scarcely one hundred pages long, it neatly summarizes without simplifying, the legal reasoning process. It is one of those rare books that does exactly

⁵None of these authors would support a mechanistic notion of legal reasoning. Hart (1994, 147) claims that the truth "lies somewhere in between" legal formalism and rule scepticism whereas Carter (1994) and Dworkin (1993) see legal reasoning more as a form of justification. Of course, it is not only legal theorists who are interested in legal reasoning. Spaeth and Segal (1999) and Richards and Kritzer (2002) have each examined legal reasoning from a quantitative perspective (and arrived at somewhat different conclusions).

what the title promises.

Despite the strengths of Levi's book, however, a review of current public law syllabi (provided by the American Political Science Association) indicates that my fondness for this book is not shared by my colleagues at other universities. I think that I know why this is the case. Although Levi's basic description of legal reasoning is deceptively simply - a judge merely identifies a similar case, finds the rule of law inherent in the case, and then applies that legal concept to the case at hand — his description is couched in a legal jargon which is sometimes difficult for undergraduates to understand. Levi was, after all, writing for an educated audience already familiar with legal terminology and methods. Students often complain to me that they must read each paragraph several times in order to understand Levi's argument. My suggestion that the results justify the effort, and that, anyway, it is a short book, are seen as less than empathetic. Nonetheless, I still insist that Levi's prose, though dauntingly concise, are not are opaque.

There is, however, an additional and compounding problem. Levi first published this work more than a half a century ago, and the examples that he uses appear to current undergraduates as just short of fictional. For example, Levi's use of cases involving exploding oil lamps to illustrate the evolution of third party liability rules is bound to seem a bit eccentric to students more familiar with oil spills than oil lamps. Moreover, although the rise and fall of the inherently dangerous rule for determining whether or not third parties will be held financially liable demonstrates one of Levi's axioms ~ that legal concepts are fluid and thus destined to break down — it is simply not a good area of law to use when addressing students raised in society in which liability is generally both assumed and presumed.

On a more positive note, Levi's choice of the Mann Act to show how legal reasoning works to construe vaguely worded statutes remains effective ~ perhaps because it allows the instructor to talk about immoral activity, always a sexy (pun intended) topic. It is also used as an example in other texts (for example, Carter, 1994) and hence allows the student to compare different analyses of the same process.

C. Editing Levi

When one moves to the final section of Levi's book, which address the legal reasoning process as applied to constitutional interpretation, a different problem arises. Although Levi's basic thesis — that courts have more freedom to disregard prior precedents when practicing constitutional, rather than statutory or case law adjudication -- is an important one, I do not assign this section of the book to my students. Levi uses Commerce Clause cases to illustrate his point. As anyone familiar with the past 60 years of Supreme Court decision-making knows, however, this is probably not the best place to turn if one is looking for examples of the Court reevaluating constitutional doctrine⁶. Although this may be changing,⁷ the changes are too few and too recent to allow for discussions of overall themes.

Instead of reading the last section of the Levi book, I have students read, discuss, and write about the major abortion cases decided by the Supreme Court beginning in 1973. I then use

⁶ Of course, if one is emphasizing Court history or teaching a course in Constitutional Law and interpretation, Commerce Clause cases might be exactly what one would choose. My remarks are aimed at those who are instructing students in basic, rather than more advanced, public law classes.

⁷See *U.S. v. Lopez* (1995) and *U.S. v. Morrison* (2000).

these cases to illustrate not only the three step process known as reasoning by example, but also the three stage process - the development, application, and breakdown of legal concepts - that Levi identifies.

There are several advantages to using abortion cases to demonstrate how the legal reasoning process works to structure constitutional decisions. First, during the period between 1973 and 1992, when the Court was most active in this area of law, one can identify almost two dozen cases that deal directly with the abortion issue. Therefore, abortion cases provide a good "sample" of Supreme Court decision-making over time. Second, within the decisions themselves, the Justices have spent quite a bit of time discussing the importance of precedent. Third, like the general public, many students have passionate feelings about the abortion issue. Asking students to apply a form of logical reasoning to an issue about which they may feel intense emotion is a lesson in itself.⁸ Finally, until the Court helped to settle the presidential election of 2000, the abortion cases stood out as the most obvious example of political decisions; that is, decisions which brought courts under the scrutiny of voters, and made judicial selection a matter of great political concern. As political scientists teaching judicial process classes, our role is to explain the third branch of government in the context of the remaining two branches. Abortion cases provide a link to the more political branches of government, while a discussion of legal reasoning gives to students a way of distinguishing "law and politics."

⁸I do not want to overstate my point here, because one of the lessons that a student might learn is that it is simply not possible to completely divorce one's feelings about subject of abortion, from one's analysis of the legal issues involved in these cases. Of course, if the passion that a student feels for this issue stems from his or her religious or moral beliefs, than an examination of these cases might serve to precipitate a debate about the intersection between law and religion, and law and morality.

II. Using Abortion Cases in Class A.

Assignment

Although I do not review the abortion cases until the last two weeks of class, I assign abortion cases to students during one of the initial class sessions. The assignment is quite straightforward: Students are asked to draft a short paper, which they will eventually present to the class, explaining the Supreme Court's decision in a particular abortion case.⁹ I do not ask them to "brief the case, because I want to encourage them to include a bit more information (particularly about concurring and dissenting opinions) than would be in a typical brief. Nevertheless, I outline for them how to "brief a case, and tell them to be sure that their papers cover all the material that would be in a brief. As mentioned, they are also told that they will be expected to make an oral presentation of their case to the class. During this presentation, they will have to be prepared to field questions from both the class and the instructor.¹⁰ The assignment concludes with the warning that they are not to present their "opinion" of the decision of the Court.

During the final weeks of the semester, and after the students have completed a number of readings on the nature of law and courts, judicial selection, and the United States Supreme Court", I present a lecture to the class on the history of abortion law and reproductive rights in

⁹Of course, I also spend some time with the students explaining how to locate cases using the website www.fnidlaw.com. I also review some of the terminology used by the Court.

¹⁰The oral presentation requirement encourages the students to gain a thorough grasp of their cases, while allowing me to instruct the class through my questions.

¹¹ Readings on these subjects from Shapiro (1981), Hart (1994), Murphy, Pritchett, and Epstein (2002) and O'Brien (2000) are assigned to the students.

America. I begin with the common law notion of post-quickening abortions, and end with a discussion of the movement to repeal abortion laws in the early 1970's. Along the way, emphasis is placed on the role that various religious groups and professional associations played in enacting and repealing abortion regulations.¹²

After looking at the political and statutory history of abortion, I move to a parallel review of the legal and constitutional facts relevant to the abortion cases. I start with a very broad review of the basics of Constitutional Law. A discussion of "Liberty of Contract" and FDR's Court Packing Plan is followed by a more detailed explanation of footnote four in *U.S. v. Carolene Products* (1938) and the concept of substantive due process. This leads into a discussion of the evolution of the strict scrutiny/rational basis approach to Due Process and Equal Protection Analysis under the Fourteenth Amendment. I also take this opportunity to explain the concept of the selective incorporation of the Bill of Rights. This helps the students to grasp the importance Justice's Harlan's sweeping discussion, in *Poe v. Ulmann* (1961), of the scope of protected liberty under the Due Process Clause of the Fourteenth Amendment

B. A Review of the Cases

When addressing constitutional interpretation, Levi explained that reasoning by example works over time to develop "satellite" legal concepts which, in a sense, orbit around the ambiguous clauses in the Constitution. As I have already suggested, Levi also believes that, as in case law and statutory interpretation, the legal concepts used in constitutional law proceed

¹²There are several good sources for this history including Mohr (1978), Tribe (1990, 27-50), and the opening sections of Justice Blackmun's opinion in *Roe v. Wade* (1973).

through three roughly identifiable stages. At stage one a legal concept is developed, often out of the decline of previously used concept. During stage two, the concept is fairly settled, and is simply applied by judges to similar fact situations. Stage three arrives when reasoning by example can no longer adequately justify a decision in a new case as being consistent with the existing line of cases. At this time the former concept is replaced (gradually) by a new concept, a: the process moves full circle.

In order to capture the three stage process that Levi identifies, I have the students present their cases in the order that they were handed down by the Court. I begin the process by summarizing for them the Court's decision in *Skinner v. Oklahoma* (1942).¹³ Although this case is not technically about reproductive rights, Justice Douglas, who wrote for the majority in the case, announced that that the Court was "dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." (541). Later Douglas will rely on this case when drafting his opinion in *Griswold v. Connecticut* (1965, 485). A description of the Court's failure to reach the merits in *Poe v. Ulmann* (1961) serves as my introduction to *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972), the first two student presentations. After reviewing the establishment of the concept of individual right to privacy in reproductive matters, the students are ready to discuss the assertion of abortion rights in *Roe v. Wade* (1973).

With the Court's decision in *Roe*, the first of the three stages that Levi identifies is completed. The students then proceed to the many cases over the next decade in which the Court

¹³ In *Skinner v. Oklahoma* (1942), the Court found that an Oklahoma statute calling for the sterilization of "habitual criminals" ran afoul of the Equal Protection Clause of the Fourteenth Amendment

attempted to apply the trimester test established in *Roe* to a diverse set of facts and laws. The trek begins with *Planned Parenthood of Missouri v. Danforth* (1976) where the Court declared unconstitutional nearly every section of Missouri statute designed to regulate abortion within the confines established by *Roe*. There is much that is of interest in the multiple opinions drafted by the Justices in this case. I emphasize Justice Stevens' partial dissent, where he argues that the parental consent provision in the Missouri statute ought to be upheld because the "State's interest in the welfare of its young citizens justifies a variety of protective measures" (102). As O'Brien (2000, 43) notes, Stevens was recommended to President Ford by his Attorney General, Edward Levi. It is interesting to note the strong role that precedent plays in Stevens' decision making. Three years later, faced with a near identical Massachusetts statute, Stevens drafts a concurring opinion where he explains that the Court's decision in *Danforth* "required" that the Massachusetts provision be overturned (*Bellotti v. Baird*, 1979, 652).

As the students move forward into the abortion funding cases (*Maker v. Roe*, 1977 and *Harris v. McRae*, 1980), the notion of poverty as a suspect classification may be raised, and tied into other lines of precedents (particularly *San Antonio v. Rodriguez*, 1973). Justice Powell's opinion in *Maker* is of particular interest, since in arguing that the right recognized in *Roe v. Wade* only "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy" (1977, 474), Powell is sowing the seeds for what will, some fifteen years later, become the legal test applied by the Court to all abortion regulations.

The case of *Akron v. Akron Center for Reproductive Health* (1983) offers yet another opportunity to teach students about reasoning by example, and about how it might fit into the type of court politics discussed in Murphy (1964). According to Schwartz (1990, 14), Chief Justice Burger was guilty of joining majorities with whom he disagreed in order to maintain

control of the majority opinion. In *Akron*, Burger voted with Justices Brennan, Marshall, Blackmun, Stevens, Powell to overturn all five sections of challenged law. Had Burger not joined with these five Justices, the majority opinion would have been controlled by Brennan. Instead, the Chief Justice assigned the opinion to the more moderate Justice Powell who, as one would suspect, drafted a rather narrow opinion. By encouraging students to be cognizant of the "politics" inherent in the assignment of the opinion in *Akron*, one is also demonstrating to them the subtle ways in which reasoning by example influences judicial behavior. Granting the former Chief Justice the benefit of any doubts, one might argue that, by 1983, the precedential weight of *Roe* was such that it altered the Chief Justice's prior reservations about abortion rights. The more plausible explanation, however, is that Burger was engaged in a form of damage control. Not liking the outcome of the case, Burger was using Powell to limit the scope of the decision so that it might not serve as a precedent for expanding the Court's holding in *Roe*. Once they come to understand Powell's role as a swing vote, students can also make more sense of the controversy over President Reagan's 1987 nomination of Robert Bork to fill the retiring Justice Powell's seat.

Now, given the incremental nature of legal reasoning, it is difficult to identify, even in retrospect, the precise case which signals that a court is in the process of discarding a legal concept. At this point, the students who were not assigned *Planned Parenthood of 'Southeastern Pennsylvania v. Casey* (1992) are not aware that, within about nine years, the Court would jettison the traditional strict scrutiny approach which formed the foundation for *Roe*'s trimester formula, replacing it with an "undue burden" standard that would in many ways eliminate strict scrutiny of all by the most onerous abortion regulations. Next, therefore, I introduce them to the

concept of the undue burden standard (going back to Justice Powell's opinion in *Maker v. Roe*) and demonstrate the uncertainties of the reasoning by example process by asking them to pay careful attention to Justice Blackmun's (joined by Justice Powell) reaffirmation of *Roe v. Wade* in *Thornburgh v. American College of Obstetricians* (1986), followed by his prediction of *Roe's* demise in *Webster v. Reproductive Health Services* (1989).

The students' presentations end with *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). As we discuss the opinion of Justices O'Connor, Souter, and Kennedy, the students are able to see how the legal concepts developed in *Roe* have changed. Indeed, this generally leads to a very interesting debate about whether or not the Court was honest when it insisted that *Roe* had not been overturned. It is also useful to have the students think about the Court's refusal to explicitly overturn *Roe* in the context of Justice Souter's analysis of the importance of stare decisis. This, of course, returns to the class to a more general discussion of the reasoning by example process, and the nature of courts.

III. Summary and Conclusion

I have found Levi's *An Introduction to Legal Reasoning* (1949) to be a valuable tool for teaching the reasoning by example process to undergraduates. Levi emphasizes that reasoning by example allows the law to change while remaining somewhat constant. In his words, under a process of reasoning by example, "the classification is changed, as the classification is made. The rules change as the rules are applied." (Levi 1949, 3). Obviously, this can be a difficult concept for undergraduates to understand. This paper explains how one might use a review of the abortion cases decided by the Supreme Court between 1973 and 1992 to enhance Levi's lessons

number of cases. I have been using this method in my judicial process classes for the past nine years and have found it to be a very effective means for communicating this difficult yet necessary lesson, while giving students additional insight into a controversial issue.

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