What Have Introductory Books on Legal Reasoning Ever Done for Us?

Geoffrey Samuel
University of Kent*

Abstract

The purpose of this article is to investigate, and to review, a number of recent introductions to law with the emphasis being on those introducing students to legal reasoning. The investigation will have as its focus not just reasoning methodology but equally the ontological and epistemological foundations upon which the reasoning is based. The investigation will be comparative in its orientation; it will examine, in particular, works from common lawyers and French jurists, with references also to books produced by Roman law specialists (Romanists). It will show that many introductions are based on an ontological foundation that emphasizes rules—the rule model—and that, with regard to some of the introductory books, this emphasis has engendered what is arguably a simplistic view of legal knowledge and method. Are such books, it might be asked, epistemologically reliable? To help answer this question, another comparative orientation to be undertaken is to examine some introductory works in the social sciences in order to see not only how these works may differ in their approach to knowledge and methodology but also how methodological discussions in the social sciences could be valuable for lawyers.

Keywords: analogy; epistemology; introductions; logic; ontology; perception; rule model; syllogism.

The recent publication of an introductory book on legal reasoning provides an opportunity to reflect on two fundamental themes. The first, evidently, is the nature of legal reasoning itself. The second is the content and epistemological importance of introductory books: do they, as a genre of books, provide an interesting insight into legal knowledge? This second theme is of course wider than legal reasoning and so deserves a separate treatment in itself, especially from a comparative perspective. Nevertheless, it is a theme that can, and should, be partly embraced by an examination of legal reasoning since introductory works, as opposed

* All translations of foreign language texts quoted in this article are by the author.

to scholarly monographs or detailed textbooks, are claiming to set out for students early in their law programme the fundamentals of a, supposedly, special type of reasoning. Yet what kind of methodological approach should be adopted in the investigation of these two themes? And, just as important, how epistemologically reliable are these introductory books on legal reasoning?

[A] INTRODUCTION: WHAT HAS EPISTEMOLOGY EVER DONE FOR US?

Introductory books to law are, almost by definition, introductions to what it is to have legal knowledge. They thus have an epistemological role even if this role is implied rather than expressed openly (see Altwegg-Boussac 2021). In the past such books would never, or very rarely, have employed such expressions as “epistemology” and it would not be surprising if there remain some lawyers who might find the word pretentious or even a form of intellectual “wokery”. More reasonably, some writers might feel that such a term should not be introduced at an early stage in legal studies. So how is the knowledge issue to be presented to a student at the outset of her studies?

One contemporary introduction to law starts off with a description of a social event—a lively party—within in which a whole range of different, and sometimes unpleasant, incidents occur, each of which is designed as a factual situation which has, or could have, legal consequences (Barnard & Ors 2021: 1-4). Few could surely complain about such an approach, especially as it embraces so many different aspects of public and private law. The same book then goes on to use a definition of law that describes law as a “body of rules” (ibid 4), but immediately suggests that this definition is not as helpful as it may at first seem since “it does not tell us much about what law really is”. Indeed at the end of the book this point is developed in a much more detailed chapter. The substance of this chapter—together with points made in previous chapters—cannot be criticized as being unhelpful or inaccurate in setting out why law is not just a matter of learning and applying legal rules; the authors spend time examining difficult cases and comparing majority and dissenting judgments, concluding, for example, that value judgements are as important as the rules themselves. This prompts the authors to pose a question: “do non-legal considerations and values form part of the law or not?” (ibid 219). The authors do not give a definitive answer to this question; instead, they simply say that it takes one into “difficult debates about the meaning of law and, in particular, its relationship with

morality" (ibid 220). They follow this comment with a brief description of the natural law versus positivism debate, concluding that positivism does not "tell us precisely what is going on when a judge is interpreting a given law" (ibid).

One cannot, surely, criticize this statement or the analysis of those particularly difficult cases used as illustrations throughout the book. But it is asserting a particular epistemological view of law. Law is essentially about rules: "what is the relevant rule here?" (Barnard & Ors 2021: 35). And the authors continue:

> Does it [the rule] apply to this case or can it be distinguished? Should it apply? If not, why not, and what rule should apply instead? All lawyers need to think—logically, clearly and critically. This is what judges have to do, what practising lawyers have to do when giving legal advice to their clients, and what all law students must do too (ibid).

Two general points about knowledge need to be made here. The first is, as indicated, that what might be called the "ontological"—that is "what exists"—basis of law is essentially the rule. Such a rule might be difficult to determine and apply, and it might be very general (a principle) or extremely precise (regulation); but that is what the student needs to be investigating. Secondly, given this rule-ontology, the methodology associated with the discipline of law is reasoning on and around rules. In short, legal reasoning is rule reasoning. And given that there are plenty of other books, both introductory and more substantive, which would equally assert that legal reasoning is about rule-reasoning (see, for example, Alexander & Sherwin 2008; Eisenberg 2022; and note also the French Code of Civil Procedure, article 12), it can probably be said with confidence that what is being asserted by many publications is that legal methodology and epistemology is founded on a particular model, namely the rule model. This, then, is what legal ontology and epistemology seemingly have to say about legal knowledge.

[B] WHAT HAS THE RULE MODEL EVER DONE FOR US?

This epistemological conclusion, were it to be correct, may seem a statement of the obvious. Yet it does have some profound implications both for methodology (which includes legal reasoning) and for epistemology. One profound implication is that rules, and thus the rule model, is most attractive to those who are keen to produce an artificial intelligence (AI) programme aimed at, ultimately, replacing the need for expensive lawyers

and judges—and seemingly for the need for law schools. What has become known as "legal singularity" is essentially about the translation of legal rules, envisaged as a perfectly complete and systematic whole, into a mathematical algorithm. As two authors point out:

> Underlying the project to apply machine learning to law is the goal of a perfectly complete legal system. This implies that the content and application of rules can be fully specified ex ante no matter how varied and changeable the social circumstances to which they are applied. In this world of a "legal singularity" the law operates in a perfect state of equilibrium between facts and norms (Deakin & Markou 2020: 66).

It would be most unjust to accuse Professors Barnard, O'Sullivan and Virgo of promoting, in their introductory book, this kind of vision of law. They are not. Indeed, they emphasize the importance of value judgements and do not shy away from recommending further reading that includes work on the politics of the judiciary. However, despite this more open-minded view of the rule model, in promoting the idea that legal knowledge is essentially a matter of rules they are promoting what might be termed an internal view of law. This is a lawyer's view of legal knowledge. And this internal view is largely a positivistic one even if such positivism is not of a kind that necessarily excludes moral, social and economic values when it comes to reasoning about the rules. Positivism, one perhaps should add, means, in this context, a body of rules enacted and accepted as law in a particular society (Gordley 2013: 195), although, as will be seen, in the civil law world it has a more precise ideological meaning as well.

Another implication—again one that would no doubt horrify the three professors—is that an emphasis on rules can have detrimental effect on legal education. Half a century ago the French jurist and comparative lawyer René David (1906-1990) wrote this about the French law school:

> The lecture course (*le cours magistral*) and the tutorials (*les travaux dirigés*) have as their function, in their eyes, to get students to know what they have to know on the day of the examination; they fill this role well enough and it matters little whether or not they be the tools for a satisfactory legal education. One basically learns, within a positivist perspective, the rules of today's law without preoccupying oneself with what will be the law of tomorrow, what will have to be applied in life (quoted in Orianne 1990: 207).

One might ask if this observation is equally relevant for United Kingdom (UK) law schools. Certainly, those schools which profess to teach whole legal domains such as contract, property, public law and tort in just 10- or 12-week modules might certainly attract such criticism. Yet even those faculties offering the traditional year-long courses could easily fall into the same trap if they insist on emphasizing each subject in terms

of a rule model. There is a message that one just learns the rules for a set of exams in which hypothetical factual problems are presented to the candidates. Indeed, the University of Law internet site, in its tips for passing law exams, repeats a claim that: "Your answer should be more like filling out a very difficult form & less like painting a wall." Law schools, it would appear, are there to teach students how to fill in forms.

There is also an implication for legal reasoning. Another French jurist, Christian Atias (1947-2015) (who was in fact a specialist on *épistémologie juridique*), noted, first, that legal knowledge:

> is based on rules, on classifications and on distinctions between the different domains, on notions and categorisations, on legal dispositions, on the principles formulated by legal decisions considered as being particularly important, on the modes of interpretation, but also on various types of situations, on difficulties (Atias 2011: 174).

And secondly that:

> This knowledge does not of itself permit one to reason in law. It only provides the base. Its effect is to provide a legal framework into which the reasoning can be inserted; the consequence is that it makes the reasoning relevant and constrained, or at least it facilitates its acceptance by the respondent or listener said to belong to the world of lawyers (ibid).

What this insertion into a particular knowledge framework implies is that there are limits to the types of reasons that can be employed within this world of lawyers. There are, as Atias said, certain arguments that cannot be invoked on the ground that they are not legal arguments. And so "philosophical, economic and sociological arguments have little chance of being convincing in themselves". Such arguments must be translated into legal terms (2011: 114). Summing up the contemporary position in France one recent work confirms the Atias view:

> At present, unlike economic approaches to law which have succeeded in gaining a certain visibility in the academic and political field, neither the sociology of law (despite the existence of a journal such as *Droit et Société*), nor anthropology of law (despite the journal *Droit et Cultures*) have managed to achieve a serious presence in the education of French lawyers and rare are, amongst the latter, those who are engaged with these subjects (Audren & Ors 2020: 240).

There may be the occasional exception, but this must not mask "the orientation profoundly positivist of a large part of the legal community little affected by the questions that contemporary social sciences pose" (ibid).

It is not being asserted that these French descriptions mirror exactly law schools in the common law world. But it may well apply to some (see Priel 2019). However, what does seem to be the case is that when it comes to legal reasoning there is little reference to work in the social or human sciences in general. Legal reasoning, it would seem, can be discussed almost entirely within what has been described elsewhere as the authority paradigm (see Samuel 2009). Accordingly, in one of the latest introductions to legal reasoning in the common law world, the author states that courts in this tradition "have two functions: resolving disputes according to legal rules and making legal rules" (Eisenberg 2022: 5). Thus, he says, legal reasoning "in the common law is almost entirely rule-based, that is, based on the application of legal rules to the facts of the case to be decided". Moreover, he asserts, all those jurists who have claimed that reasoning in the common law is analogous rather than rule-based "are incorrect", for the "common law courts seldom reason by analogy" (ibid 7). In addition, this author goes on to state that commentators who "claim that legal reasoning depends on a finding of similarity between a precedent case and the case to be decided … are also incorrect" (ibid 8-9). If Melvin Eisenberg is right, it would surely seem that the rule is the sole focal point of ontological attention in the law school. In fairness to him, he appears to be implying that this is not the sole focal point of *epistemological* attention. For, Eisenberg sees "good judgment" as an important legal quality and good judgment, while attaching to rules, is a matter of rule application. Such good judgment is, however, something that "cannot be taught and is hard to acquire" (ibid 89).

[C] WHAT HAVE THE RULE THEORISTS EVER DONE FOR US?

Professor Eisenberg is entitled to his opinions of course. But, when viewed from the position of the English common law, could it not be said that he is the one who is "incorrect"? At least it could be said that he is incorrect from a strict authority paradigm position in that his assertions are contradicted by the opinion of a House of Lords judge—Lord Simon—who, in a judgment, took it upon himself to describe the nature of the *ratio decidendi* and the application of a precedent. According to Lord Simon:

> A judicial decision will often be reached by a process of reasoning which can be reduced into a sort of complex syllogism, with the major premise consisting of a pre-existing rule of law (either statutory or judge-made) and with the minor premise consisting of the material facts of the case under immediate consideration. The conclusion is the decision of the case, which may or may not establish new law—in the vast majority of cases it will be merely the application of existing

> law to the facts judicially ascertained (*Lupton v FA & AB Ltd* [1972] AC 634, at 658-659).

It might be worth noting at this point that Eisenberg asserts that "the syllogism is not important in legal reasoning" (2022: 87). However, Lord Simon went on to say:

> Where the decision does constitute new law, this may or may not be expressly stated as a proposition of law: frequently the new law will appear only from subsequent comparison of, on the one hand, the *material facts* inherent in the major premise with, on the other, the material facts which constitute the minor premise. As a result of this comparison it will often be apparent that a rule has been extended by an analogy expressed or implied. I take as an example … *National Telephone Co v Baker* [1893] 2 Ch 186. Major premise: the rule in *Rylands v Fletcher* (1866) LR 1 Exch 265, (1868) LR 3 HL 330. Minor premise: the defendant brought and stored electricity on his land for his own purpose; it escaped from the land; in so doing it injured the plaintiff's property. Conclusion: the defendant is liable in damages to the plaintiff (or would have been but for statutory protection). Analysis shows that the conclusion establishes a rule of law, which may be stated as "for the purpose of the rule in *Rylands v Fletcher* electricity is *analogous* to water" or "electricity is within the rule in *Rylands v Fletcher*". That conclusion is now available as the major premise in the next case, in which some substance may be in question which in this context is not perhaps clearly *analogous* to water but is clearly analogous to electricity. In this way, legal luminaries are constituted which guide the wayfarer across uncharted ways (*Lupton v FA & AB Ltd* [1972] AC 634, 658-659, emphasis added)

Lord Simon would appear to be contradicting much of what Eisenberg asserted. This judge does emphasize the rule model, but he equally emphasized the role of reasoning by syllogism, analogy and similar case facts. Indeed, he paid particular attention to the idea of material facts and their role as acting as the basis for analogical reasoning. Given Lord Simon's status as an authority oracle, this would suggest that Eisenberg's views must, at best, be confined to the United States (US).

Yet, having suggested that Professor Eisenberg is "incorrect", this is, in one sense, a very formalist argument. In substance the professor actually engages directly with this view of Lord Simon since the latter appears to have taken his opinion from Arthur Goodhart (1891-1978) who set out his views in an American law journal (Goodhart 1930). Eisenberg argues that the Goodhart (and thus Lord Simon) description of how the *ratio decidendi* notion functions is itself incorrect for two reasons. The first is that "the courts seldom if ever single out some facts as material and there is no metric for objectively determining which facts a court deemed material" (2022: 25). And secondly, "even if it could be determined what

facts the precedent court deemed material every such fact could be stated at various levels of generality and each level would yield a different result" (ibid). Quite so, one might say. Plenty of introductory courses and books on legal method would undoubtedly confirm both of these assertions by Eisenberg. Many students have been taught in the past—and one imagines are still being taught in some schools—that the material facts in *Donoghue v Stevenson* ([1932] AC 562)—the case employed by Eisenberg to support his thesis—were not ever to be determined in the case itself. The material facts of *Donoghue* would emerge only in the light of subsequent cases interpreting the 1932 precedent and such interpretation would in turn fix the level at which the facts were to be perceived (bottle of ginger-beer, bottled drink, product or act of negligence). So why does the professor think that his reasons prove the Goodhart and Lord Simon thesis is wrong?

Eisenberg's assertion is based on his view that "a precedent stands for the rule established in its holding, that is, the rule the precedent court stated [that] determined the result of the case" (2022: 26). No doubt many English lawyers and law teachers might respond with the observation "well good luck with that one". Determining the *ratio* rule is often notoriously difficult. But Eisenberg's retort is that whatever the position might have been in the past, things have changed. Cases are determined "not so much by analysis of facts, the issue, and the outcome, but by careful scrutiny of the words written in the opinion" (ibid 27). In short, the "courts are beginning to treat the common law as legislation" (ibid). Now, whatever one thinks of this view, it can probably be stated with confidence that most UK senior judges have not yet reached this "beginning" and quite possibly never will (at least before they are made redundant thanks to AI replacements). As Lady Hale noted:

> The common law is a dynamic instrument. It develops and adapts to meet new situations as they arise. Therein lies its strength. But therein also lies a danger, the danger of unbridled and unprincipled growth to match what the court perceives to be the merits of the particular case. So it must proceed with caution, incrementally by *analogy with existing categories*, and consistently with some underlying principle (see *Caparo Industries plc v Dickman* [1990] 2 AC 605). *But the words used by judges in explaining why they are deciding as they do are not be treated as if they were the words of statute, setting the rules in stone and precluding further principled development should new situations arise.* These things have been said many times before by wiser judges than me, but are worth repeating in this case, where we are accepting an invitation to develop the law beyond the point which it has currently reached in this jurisdiction (*Woodland v Swimming Teachers Association* [2014] AC 537, para 28, emphasis added).

In a similar vein, Lord Justice Leggatt has said recently:

> The potential for such interpretation reflects the difference between judicial decision-making and legislation. A court, even the highest court in our legal system, does not have authority to enact rules of law in the form of a canonical text which is to be interpreted and applied like a statute. The doctrine of precedent operates in a more flexible and open-textured way, which recognises that the primary task of any court is to decide the case actually before it, and which gives scope for the law to evolve and adapt as circumstances change or new factual situations are presented (*R v Parole Board* [2019] 3 All ER 954, at para 56).

Clearly, if Eisenberg is right, the common law in the UK is on a different reasoning track than in the US.

One might note, also, how analogy appears to be a perfectly acceptable form of reasoning for the UK judges. Indeed, there are many other analogy examples that could be given. Yet, in fairness to Professor Eisenberg, care must be taken because, however many examples of analogical reasoning that can be drawn from the law reports, the professor would claim that the analogy is always rule based—because there is always *ex post* a rule or principle somewhere in play—and that "rule-based analogical reasoning is a valid mode of legal reasoning" (2022: 85). As for the syllogism, which Lord Simon seems to think is a basic formal element in legal reasoning (even if a complex one), Eisenberg claims that such deductive reasoning is rare and thus not important (ibid 87). Examples of syllogistic reasoning can be found in the law reports, but his comment is a fair one, and of course it has been said often enough that the life of the common law has not been logic but experience (although, as will be seen, what is meant by "logic" is more complex than it might seem). So, should Eisenberg's strict rule model be acceptable as a convincing ontological and epistemological model for legal knowledge and the reasoning associated with it?

[D] WHAT HAVE SOCIAL SCIENTISTS EVER DONE FOR US?

The gap, so to speak, in these rule-model epistemologies is that, as Christian Atias once pointed out, "the passage from the general rule—or the previous decision—to the solution of the concrete case cannot be analysed in a simple deductive process of application" because "the subsuming of a specific case under a rule brings into play multiple circumstances, elements and variables which prevent any claim to predict with certainty its result" (Atias 1994: 119). A good many rules are very general in their formulation—one thinks, for example, of some of the classic

legal maxims—and so any legal reasoning book worth its salt ought to engage in some detail with these "multiple circumstances, elements and variables". Eisenberg does not ignore this gap as such, but what he does is to incorporate these circumstances, elements and variables into both the rule itself and the reasoning about rules by judges. They become part of the rule model. Consequently, unlike say Ronald Dworkin, Eisenberg has no problem with issues of policy and thinks that such policies can be taken into account "in establishing or revising common law rules" (2022: 54). The same can be said of moral ideals and principles. The point is that these issues are part and parcel of rule-based reasoning; they are part of applying, formulating, avoiding or whatever of a legal rule.

This still leaves a gap. There is still the question of the "good judgment" and what amounts to a good judgment rather than a bad one. In the words of Professor Eisenberg:

> The role of the good judgment in legal reasoning is pervasive. For example, good judgment is needed to apply the penumbra of a rule to a given case, to understand when a rule should be distinguished and when exceptions to a rule should be made, to establish new rules where a case is not governed by an existing rule, and to establish transitions in the law (2022: 89).

However, he says:

> The importance of good judgment as an element of legal reasoning is frequently overlooked, perhaps because the faculty of good judgment cannot be taught and is hard to acquire. It is a quality, like grace or a discerning eye, that some have and some don't. It differs from intelligence; a person can be very intelligent but still not have good judgment. Good judges have good judgment. Great judges have excellent judgment. It is the quality that makes them great (ibid).

So, it would appear, the gap cannot be filled by jurists—or indeed by the rule-model epistemology. It is beyond the law school. The rule model, in other words, is not adequate to account for the evaluative circumstances, elements and variables—surely fundamental to the good judgment?—in the process of reasoning. Perhaps it would be unfair to say that what he is advocating is analogous to a professor of peace studies claiming that "All You Need Is Love" as a model for the basis of methodology and reasoning in the department of peace studies. Yet "All You Need Is the Rule Model" is unlikely to impress the thoughtful social scientist who would in all probabilities be particularly sensitive to questions of methodology.

This, of course, takes one onto the question of what a social scientist—perhaps a specialist on social science methodology and epistemology—might have to say about Eisenberg's book, or, more likely, about legal

reasoning in general as an object of analysis. There is no shortage of publications on social science methods, and the epistemological issues attaching to them, and so it cannot be claimed that research by lawyers beyond the kind of rule-model books that dominate the law school shelves is somehow impractical or unreasonable. The problem is ideological in the sense that interdisciplinarity has traditionally been seen by lawyers as unnecessary (see Priel 2019; Husa 2022). This is to be regretted because social science epistemology can provide serious insights into the way lawyers and judges reason while, arguably, the doctrinal rule-model introductions will endow, at best, a very superficial knowledge of methodology.

What, then, is meant by methodology in the social sciences? According to Jacques Herman, the analysis of language in sociology will permit one to grasp the main foundational methodological, philosophical and historical currents of the discipline. This will involve drawing on the lessons from the epistemology and philosophy of science while at the same time appreciating the ideological and cultural factors that attach to the discipline of sociology (1988: 3). "Six languages", he says, "are distinguished: Positivism, Dialectics, Understanding (*Compréhension*), Structuro-Functionalism, Structuralism and Praxeology" (ibid). He later explains:

> If methodology is the practical art of scientific research, general epistemology is the study of the conditions of possibility and validity of theoretical knowledge. Epistemological problems are those of the validity of the forms of scientific explanation, the relevance of the rules of inferential logic, the utilisation conditions of the concepts and symbols in the theories. Scientific ontology is the philosophical discipline which deals with the problem of the reality of objects on which knowledge rests. What is the level of reality of social phenomena (individual, group, organisation, class, role, institution, society …)? Has a social group a reality in itself, different from that of the sum of the people who compose it (holism), or is the only reality the individual? Is culture a domain of autonomous symbolic objects (culturalism), or are the significations just phenomena of consciousness (psychologism)? (1988: 6)

Each method, says Herman, "such as Positivism or Structuralism, operates its own specific selection of epistemological schemes, ontological exceptions and methodological devices" (ibid). In other words, there is not just one form of knowledge. There are different forms depending upon which method one adopts.

These are not the only methodological schemes identified by social science theorists. The late Jean-Michel Berthelot (1945-2006) isolated a slightly different set of six schemes of intelligibility. These were:

> [T]he *causal* scheme (if *x*, then *y* or *y* = *f(x)*); the functional scheme (S→X→S, where one phenomenon X is analysed from the position of its function – X→S – in a given system); the *structural* scheme (where X results from a system founded, like language, on disjunctive rules, A or not A); the *hermeneutical* scheme (where X is the symptom, the expression of an underlying signification to be discovered through interpretation); the *actional* scheme (where X is the outcome, within a given space, of intentional actions); finally, the *dialectical* scheme (where X is the necessary outcome of the development of internal contradictions within a system) (Berthelot 2001: 484).

Functional, structural and dialectical schemes of engagement—or *grilles de lecture*—are commonly shared between the two social scientists. In fact, Herman's positivism is essentially equivalent, or at least largely equivalent, to Berthelot's causal scheme. But what Berthelot does add, which is of importance, is hermeneutics. Added to these two works, a recent edited book on ideas in anthropology has chapters on the causal explanation, the functionalist perspective, structuralism and historical models (Descola & Ors 2022).

[E] WHAT HAVE SCHEMES OF ENGAGEMENT EVER DONE FOR US?

What, then, is the methodological importance of these different schemes of engagement or intelligibility? They may be summarized in the following way:

- ◊ A causal approach, which is the principal scheme in the natural sciences, is one where one phenomenon (A) is examined in terms of its cause by another phenomenon (B). A patient arrives at a doctor's surgery with a particular symptom (A): the doctor will try to find the disease (B) which is the cause of this symptom. The relationship between A and B is thus causal.
- ◊ A functional approach is a scheme of importance in the social and human sciences and the focus of this scheme is on the function (B) of the object (a text or some physical object) (A) with which the researcher is engaged. What does this object do? What is its function? One works back from the function (B) to the object (A).
- ◊ A structural *grille de lecture* is a scheme that has enjoyed a transdisciplinary success moving from the natural sciences to the social sciences and into the humanities (see eg Eagleton 2008: 79-

109). It analyses the object of its engagement (A) in terms of the interaction of a number of elements (B, C, D and so on) that are seen to constitute the object (A); B, C, D and so on are regarded as elements in a coherent system whose reciprocal interaction constitutes the object (A).

- ◊ A hermeneutical scheme is one where the object under investigation (A) is merely a sign which points to a deeper meaning (B). It is one of the principal schemes of engagement with texts—especially ancient texts—and with artistic objects and the like. What does this painting (A) mean (B)?
- ◊ A dialectical engagement is one in which the object with which the researcher is engaged (A) is understood as being the result of an internal contradiction or series of contradictions (B and non-B). It is often associated with medieval scholasticism in which a text is examined through an analysis involving division and sub-division (and often sub-sub-division), each class and sub-class category being seen in opposition to its other class and sub-class category. It is at the foundation of the algorithm in which the analysis is a series of either/or alternatives; and is also associated with Marxist philosophy which regards society as being a matter of contradiction between the capitalist and the working classes. Moreover, it underpins the idea of arriving at knowledge through argumentation: knowledge (A) results from two opposing arguments (argument B opposed by argument non-B).

Another *grille de lecture* mentioned by the anthropologists is what might be described as historical models. This kind of engagement can take different forms and involve a variety of different models reflecting different levels and dimensions, but at a general level it raises an important epistemological question concerning approaches. As the epistemologist Robert Blanché (1898-1975) expressed the question: does one study science from a static or synchronic point of view, its actual and present structure, or does one study it in its formation and development in focusing on its diachronic or evolutionary point of view (1983: 33-34)? This is by no means an easy question. Moreover, it is a question of importance for the lawyer and jurist in that the general assumption is, as is confirmed by many introductory books on law and on legal reasoning, that one studies law from a strictly synchronic perspective. One might note that in the Barnard, O'Sullivan and Virgo book there is no chapter on legal history and almost nothing on the 2000-year historical tradition of law. Eisenberg's book is equally entirely synchronic in its approach.

One might start, then, by adopting a synchronic approach. How might the various schemes or *grilles de lecture* be relevant for lawyers and law students wishing to have a deeper understanding of legal reasoning? Take, first, this piece of judgment:

> The trend in the cases, as I see them, is to shift the focus, or the emphasis, from structure and components to function and appearance – what a family does rather than what it is, or, putting it another way, a family is what a family does. I see this as a functionalist approach to construction as opposed to a formalist approach. Thus whether the *Joram Developments Ltd. v. Sharratt* [1979] 1 WLR 928 test is satisfied, i.e. whether there is "at least a broadly recognisable de facto familial nexus," or a conjugal nexus, depends on how closely the alternative family or couple resemble the traditional family or husband and wife in function if not in precise form (Ward LJ in *Fitzpatrick v Sterling Housing Association Ltd* [1998] Ch 304, at 337)

This is, of course, reasoning about a legal (statutory) rule and as such the approach adopted can be regarded, by a strict rule theorist, as ancillary to the rule itself. The judge—who was dissenting—was simply offering a social and moral policy in support of his interpretation of the rule (see eg Eisenberg 2022: 49). He saw the rule as operating in one way while the other judges saw it operating in another way. A social scientist, however, would surely be struck by the different *grilles* or schemes in play: the majority were, it seemed, structuralists while the dissenter was a functionalist.

In fact, it might be worth returning to the Barnard, O'Sullivan and Virgo book on this scheme of intelligibility point. In their section on legal method the authors make some helpful observations for students regarding the handling and applying of precedents and the interpreting and applying of statutory provisions. They follow these observations with a section on "imagination" in which they examine a particular tort case concerning a child in the care of a foster mother who had been badly scalded by hot water from a tap that the child had accidentally turned on (*Surtees v Kingston Upon Thames BC* [1991] 2 FLR 559). The question, in theory, was one of fact: had the foster mother been in breach of the duty of care she owed to the child (in other words had she been negligent)? At first sight, it might well be said that the child had a good case. As the authors say, the "claimant's lawyer had a relatively easy task, detailing why it was dangerous to leave a two-year old child in the vicinity of the hot tap, as it only takes a moment to turn it on". But the authors then go on to observe that "the defendant's lawyer retorted with lots of very imaginative arguments as to why the foster mother had *not* acted unreasonably". They then add more detail:

> These included the fact that she was looking after lots of other children, so if she carried the claimant around everywhere she would have neglected the others; that it is not necessarily a good idea to cushion children from *all* risks, because that way they grow up with no idea of how to assess risks and therefore might end up more seriously injured in the future; that carrying the child out of the bathroom might itself have been more dangerous; and that demanding too high a standard from foster parents might put people off volunteering for the role, which would be detrimental to more children in the long term (Barnard & Ors 2021: 28, emphasis in original).

A social scientist reading this argument would no doubt be interested by this piece of legal rhetoric, but one wonders whether she would regard it as that imaginative. Was it not simply a functionalist argument advanced in order to offer a different perspective to the claimant's structuralist "safe system" assertion? The functionalist argument succeeded in front of the judges, yet this, in itself, might well have raised a question in the social scientist's mind. Did the defendant counsel offer any empirical evidence about cushioning children from risks? Did the counsel offer any empirical evidence supporting the assertion that people might be put off from volunteering? Maybe they would be put off from volunteering. But, she might think, mere rhetorical assertion is hardly to be considered as serious, not to mention imaginative, reasoning.

[F] WHAT HAVE IMAGINATIVE ARGUMENTS EVER DONE FOR US?

This is not to suggest that lawyers are incapable of imaginative arguments. One area of law where imagination, or at least perception, has (seemingly) played a role is where one person is sued for damages in respect of a wrong committed by another. In fact, this is an issue that partly arises in Eisenberg's book. In order to illustrate how the common law is a matter of rule-based reasoning, Eisenberg discusses an American case in which a house-building company hired a roofing contractor to install a roof on one of the homes it was building. The roofing contractor was very seriously injured when he fell from a ladder which slipped while the contractor was descending. Was the house-building company to be liable for this injury?

One important rule—or set of rules—that can come into play in this type of situation is vicarious liability. The rule is that an employer will be liable for a tort committed by an employee acting in the course of his or her employment. The rule did not come directly into play in the American case because the roofing contractor did not injure a third party, but it does have something of a relevance in that it raised the question of who is an "employee" (or "servant" as the old common law rule once said).

Tort writers and teachers often use the following illustration to explain the operation of this rule. A company executive is taken to the airport in a company car driven by a company employee; on the way the driver is negligent and injures another road user. The company will be vicariously liable. This is compared to the situation where the executive is taken to the airport in a taxi; in this situation the company will not be vicariously liable because the taxi firm is an independent contractor. These are two poles on a spectrum, of course, and there will be situations where it is ambiguous as to whether the person employed is an employee or not.

In the American case it is clear from the outset that the roofing man was an independent contractor and so the question was whether the house-building company owed a direct duty to the contractor regarding a safe system of work. The US courts held that there was no such duty because the contract did not assign control of the roofer to the house-building employer and there was no evidence that the latter had actual control over him. As Eisenberg illustrates, all this can be reduced, seemingly, to a series of rules (2022: 6-7). Yet, can it? Is not the question of whether a person is an employee (servant) or independent contractor becoming a more difficult one in the light of contemporary employment practices? And, even if a person is deemed an independent contractor, is not the question of a direct (non-delegable) duty equally one that cannot easily be reduced to rule-reasoning?

With respect to the employee question, one judge has certainly indicated that the application of the law seems to involve something more than just looking at the words of the relevant rule. In *Hall v Lorimer* ([1992] 1 WLR 939) Mummery J said:

> In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another (ibid 944).

Does not this "paint a picture" exercise suggest that there is more to legal reasoning than just a rule being applied to the facts of a case? Perhaps

Professor Eisenberg would say that the "painting a picture" is an aspect of the "good judgment" dimension of rule-application and thus is something that cannot be taught in law schools (2022: 89). Professor Barnard and her co-authors might say that it is an example of the "imagination" requirement.

More interestingly, Professor Scarciglia might well argue that this text from Mummery J is an illustration of the importance of perception as a methodological question. This professor discusses what he considers the importance of perception not in the context of legal reasoning as such, but in the context of comparative law methodology. Nevertheless, in his discussion he encompasses the thought processes of judges. Perception, he points out, underlies everything we think, know and believe (Scarciglia 2023: 65); and to support this assertion the author employs visual illusions such as the duck-rabbit and Necker Cube images. With respect to the thought processes of judges, Scarciglia says:

> My short analysis of perception and comparative law also refers to judicial behaviour, based on the belief that judges may make mistakes or that their choices may be influenced by factors such as memory, moral judgement or emotions. The contribution of neuroscience, developed in the early 1980s to study the brain's basis of thought, and its relation to law, especially procedural law, has been decisive in ascertaining how and what factors contribute in the determination of judges' decisions (2023: 75, footnote omitted).

The author then goes on to set out some of these factors:

> Posner identifies, in addition to personal factors, five phenomena that can determine judicial behaviour: (a) conscious falsification; (b) precedents determined by experience, temperament, ideology and other extra-legal factors; (c) cognitive illusions; (d) precedents shaped by irrelevant reactions; (e) distortion of the facts to avoid an alteration of precedents (ibid, referencing Posner 2008).

Needless to say, none of these perception factors are discussed or are even mentioned in Eisenberg's account of legal reasoning. The only object of perception is the rule, together with the extremely vague "good judgment", a notion that has absolutely no epistemological value.

Now, whatever one may think of this perception thesis, an English case concerning the non-delegable duty problem (often associated with vicarious liability) arguably confirms that Professor Scarciglia (and Richard Posner) has (have) a point. A school girl suffered very serious injury as a result of an accident in a swimming pool. The swimming session had been organized by her local (and small) state school but the session itself was supervised by an independent contractor whose negligence was the

cause of the damage. An action was brought by the child against, *inter alia*, the school and the question arose as to whether the school should be liable given that it was an independent contractor who was negligent. The Court of Appeal held that the school was not to be liable. This was an act by an independent contractor and was analogous to a situation where the pupils of a school are taken on a trip to a zoo and a child is injured as a result of the negligence of a zoo employee. In such a situation the school would not be liable. As Tomlinson LJ said:

> Provided that undertaking a trip to the zoo in question did not itself amount to negligence because, for example, of the known incompetence with which the zoo is run, or, possibly, its lack of adequate liability insurance, I do not consider that we have been given any justification for such an outcome [that the school should be liable]. Furthermore, the imposition of such liability would be likely, I think, to have a chilling effect on the willingness of education authorities to provide valuable educational experiences for their pupils (*Woodland v Essex CC* [2012] EWCA civ 239, para 57).

At first sight this reasoning would appear to be based on a very clear rule that found its particular expression in the zoo example. The zoo image was the dominant perception and this perception was transferred by analogy to a swimming trip. Moreover, such a rule would appear to be supported by a policy dimension: to impose liability on the school might well have a chilling effect on education authorities to provide school trips. One gets the feeling that this Court of Appeal decision would provide an excellent example to support Eisenberg's rule-model thesis.

So, why did the Supreme Court disagree with the Court of Appeal? The Eisenberg response would no doubt be that the higher court was taking a broader view of the non-delegable duty rule in tort. It was, in other words, a rule-application decision. Swimming lessons were not like trips to the zoo and thus the rule applicable to zoos and the like were not applicable to schools and school-time swimming lessons. However, the analogy drawn by Lord Sumption was that the school situation was like the situation where a patient in a National Health Service hospital was damaged by the negligent act of an independent contractor surgeon. The hospital in such situations, so the precedents clearly indicate, cannot claim that they owed no duty to the patient (see *Woodland v Swimming Teachers Association* [2014] AC 537, paras 14-16). More interestingly, Lady Hale in the same case justified liability in saying this:

> Consider the cases of three 10-year-old children, Amelia, Belinda and Clara. Their parents are under a statutory duty to ensure that they receive efficient full-time education suitable to their age, ability and aptitude, and to any special needs they may have (Education

> Act 1996, section 7). Amelia's parents send her to a well-known and very expensive independent school. Swimming lessons are among the services offered and the school contracts with another school which has its own swimming pool to provide these. Belinda's parents send her to a large school run by a local education authority which employs a large sports staff to service its schools, including swimming teachers and life-guards. Clara's parents send her to a small state-funded faith school which contracts with an independent service provider to provide swimming lessons and life-guards for its pupils. All three children are injured during a swimming lesson as a result (it must be assumed) of the carelessness either of the swimming teachers or of the life-guards or of both. Would the man on the underground be perplexed to learn that Amelia and Belinda can each sue their own school for compensation but Clara cannot? (para 30).

No doubt it can be said that Lady Hale was applying a rule to the facts. But such an assertion tells us almost nothing regarding the actual legal-reasoning process. The reasoning process of Lady Hale has virtually nothing to do with the rule itself which is simply there in the background rather like the maxim "all you need is love" is there in the background when a professor of peace studies explains the complex reasoning processes in difficult and delicate peace negotiations. Lady Hale could be said to be adopting something of a functional approach in that decisions need, functionally, not to perplex the ordinary person in the street. Yet, arguably, it is more structural in its form. It is setting up a structural pattern of educational institutions and how the perception of this pattern would play out in different ways according to the status of the school. The way this pattern functions, as Lady Hale explained, would lead to a perception of unfairness or a lack of justice if liability was not imposed on the small school. Rules are there, of course, but they do not tell one much about actual legal reasoning.

[G] WHAT HAVE THE ROMANS EVER DONE FOR US?

If one returns to the various schemes of engagement set out by social scientists, one of them is engagement through historical models. Can a diachronic approach to legal reasoning provide important methodological and epistemological insights? This is a dimension often ignored by introductory books to legal reasoning, Eisenberg's contribution being no exception. Yet, modern synchronic thinking about law has not appeared *ex nihilo*; it has built up over two millennia and such a data bank (so to speak) contains a wealth of legal ontological and epistemological information. If one starts with Roman law—or at least the texts bequeathed to later Europe—this is largely a mass of legal-reasoning material and

this material, over the many centuries after the death of Justinian, has itself attracted a vast amount of commentary. Again, of course, the point must be noted that one can be an excellent lawyer without knowing any of this historical material. But what is potentially useful for AI research is that the Roman law texts have been presented to Europe in the form of a closed body (*corpus*) of material that ought to prove more appealing for those attracted by the idea of legal singularity.

This said, from an Eisenberg perspective, the most interesting point to emerge directly from the Roman texts is the apparent rejection of the rule model. Law was not to be found in rules (*regulae juris*) since these were only mere summaries of the law, said the jurist Paul (D.50.17.1). As Peter Stein put it:

> [A *regula*] is no different from a *definitio*. It is a brief statement of the subject-matter, that is, the existing law. The law is not derived from the *regula*; rather the *regula* is derived from existing law. (It is significant that *sumatur* and *fiat* are both in the subjunctive, which suggests that the writer is not stating fact but putting a point of view.) A *regula* is a convenient means whereby a summary statement of the law can be passed on to others (*traditur*), but it has no more validity in itself than a *causae coniectio*. This was a technical term of procedure … [which] was a short gathering up of the relevant facts (Stein 1966: 69).

Eisenberg might easily refute Paul's view not just in highlighting Stein's point about the use of the subjunctive but also in pointing out that there is plenty of other evidence in the Roman texts seemingly contradicting Paul. A text, that might have been written by Gaius, asserts that it is most important for students to know rules (*regulae*) (Stein 1966: 72). Anyway, he might continue, whatever the position in classical Roman law, the *regulae* were to become central to European legal thinking in post-classical Roman law and in its subsequent history from medieval times onward. In other words, Eisenberg might say, Paul was incorrect.

Yet, even if Paul was incorrect, this does not alter the fact that when one examines the Roman texts themselves, in particular the *Digest*, it is difficult to conclude, except as a very general assertion, that legal reasoning is simply about the formulation and application of rules. There are engagements with the rule text; and these engagements can vary in their methodology. Take this famous rule:

> In Chapter one of the *lex Aquilia* it is set out: "one who unlawfully (*injuria*) kills another's slave or female slave, or a four-footed animal belonging to the class of *pecudes*, let him be condemned to pay to the owner an amount that was the highest value in the previous year" (D.9.2.2pr).

The rule was stated by the jurist Gaius who goes on to engage with the words of this rule by way of interpretation. What is included in the term "*pecudes*"? He says that it embraces animals kept in herds such as sheep, goats, cattle, horses, mules and asses and maybe pigs, but not dogs. However, elephants and camels are included because they are beasts of burden, but not other wild animals such as bears, lions and panthers (D.9.2.2.2). The jurist Ulpian then discusses the word "*injuria*" (D.9.2.3). Yet, while he is no doubt involved in an interpretative engagement, his method is to consider some factual situations in which a killing might be lawful, such as self-defence, before concluding that *injuria* in this rule means some kind of fault (*culpa*) even if the actor did not intend to injure (D.9.2.5.1). Ulpian now continues with a whole range of other factual situations where a person might or might not be at fault: the shoemaker who strikes his apprentice; the person who has overloaded himself and who kills a slave when he throws the load down; the boxer who kills; the person who pushes one person against another; the person who hands a sword to a lunatic; the person who throws another off a bridge; and one or two other cases (D.9.2.7). Gaius follows giving some factual examples, after which Ulpian is back with a mass of factual examples most of which raise causation issues. The whole of this title in the *Digest* is given over to factual situation after factual situation with the result that the rule itself, as a text, is virtually lost from view, the legal emphasis being largely on the question of whether or not, on the facts discussed, an action is available to the victim.

Most of the titles in the *Digest* follow this pattern of moving from one factual example to another. Yet, the method of analysis is not always the same. Gaius, as has been seen, starts by interpreting a word in the Aquilian rule, but the emphasis on facts in the texts that follow means that the actual methodological engagement is not so much with the rule—which, in fairness to Eisenberg, is, of course, there in the background—but with facts. Here several methods other than linguistic interpretation come into play. One is dialectical opposition, where a factual situation is engaged with through a series of either this or either that analysis. Take, for example, this factual situation:

> A boar fell into a trap set by you for hunting; unable to escape, I got it out and carried it off. Does it seem to you that I have carried off your boar? And if you judge it to be yours, if I let it go having taken it into the woods does it cease to remain yours? And, I ask, what action against me might you have if it ceased to be yours, should it be one *in factum*? He [Proculus] has replied: let us see whether the trap was placed on public or private land and, if placed on private land, whether mine or some other's property, and, if some other's property, whether with the permission of the other or without permission of the

> owner of the land. In addition, whether it was so completely trapped the boar could not have extricated itself or whether struggling longer it would have extricated itself. In short, however, I think this, if it comes into my power (*potestas*), it is mine. But if however the boar, being mine, you send it away back into its natural environment, and it ceases being mine, an action *in factum* against me ought to be given, as if (*veluti*), according to an opinion (*responsum*), a cup belonging to another had been thrown overboard from a ship (D.41.1.55).

There is, surely, much going on here in terms of methodological engagement. The most striking is the series of dialectical oppositions which today one might describe as almost algorithmic in method (see D.9.2.52.2 for another example; but see Rabault 2024: 82-84). Yet, note also the use of analogy as a means, not of arriving at a solution, but of justifying the solution once given (again see D.9.2.52.2 for the use of analogy). Underpinning the whole situation is a structural scheme involving the law of property—not just ownership (*dominium*) and possession (implied by *potestas*) but also the nature of things that can be owned and possessed, namely, in this case, wild animals. The facts are not, then, brute facts; they are facts as envisaged through a structural system made up of empirical elements (persons and things) and conceptual elements (ownership and possession).

Another well-known text dealing with the Aquilian rules as applied to a factual situation is one by the jurist Julian:

> So badly wounded was a slave from a blow that it was certain he would die; then, in the time between the hit and death, he was made an heir and following this he died from a blow by another person. I ask whether an action for killing under the *lex Aquilia* can be brought against each of them. He [Julian] replied: in fact it is commonly said to have killed whoever is the cause of death (*qui mortis causam*) by whatever means; but under the *lex Aquilia*, is considered to be held liable only he who applied violence and by his own hand, so to speak, caused the death, that is to say in extending the interpretation of the words “to kill” (*a caedendo*) and “to hit” (*a caede*). Again, however, under the *lex Aquilia*, have been held liable not only those who wound in such a manner to deprive immediately life but also those who as a result of wounding it is certain that life will be lost. Therefore if someone mortally wounds a slave, and another, during the interval, hits him in such a way that he dies more quickly than he would have done from the first wound, it is determined that the two are held liable under the *lex Aquilia* (D.9.2.51pr).

This text is famous in that it appears to contradict an opinion by Ulpian dealing with the same situation (D.9.2.11.3). Indeed, relatively recently, the two texts have been investigated in depth both in Roman law itself and in the second life of Roman law from the 11th century to the present

day (Ernst 2019). However, what is interesting for our purposes is the way in which Julian justifies his decision. He said:

> With regard to this, if anyone thinks that what we have decided is absurd, he should reflect that it would be far more absurd if neither is held liable under the *lex Aquilia*, or one rather than the other [be held liable]; for wrongs ought not to go unpunished and nor is it easy to establish which of the two is to be held liable under the statute. Many are the examples that can be proved in civil law that go against rational reasoning and argumentation (*contra rationem disputandi*) in favour of the common policy good (*pro utilitate communi*). I shall content myself with one example. Where several people with an intent to commit theft carry off a wooden beam belonging to another that no single person could do himself an action for theft lies against all of them, although subtle reasoning (*subtile ratione*) says it would lie against no one of them because in truth no one of them could carry it (D.9.2.51.2).

The engagement with the Aquilian rule here is one that today would be described as functional or a policy engagement (*pro utilitate communi*). It can still be described as an interpretative approach, but it is not an engagement that focuses on the words (*verba*) or on the actual intention of the legislator (*mens legislatoris*) or indeed on the structure and rationality of the text as such (*ratio legis*). This is where Julian's opinion is different from Ulpian's decision.

One might add that Ulpian seems to be treating the two incidents of violence as individual and separate events while Julian is, in effect, seeing the whole situation as a single holistic event. In other words the way the facts are envisaged is actually fundamental to the legal outcome and this is a process that is not dictated as such by the Aquilian rule. It results from the permanent tension to be found in Roman law—indeed in all Western and Western-influenced legal systems—between the whole and its parts, something which finds expression in the old epistemological and ontological debate between nominalism and universalism. Sometimes this tension can be governed by a specific rule—for example in the law of property there are *regulae* about things made up of other things. Can one own a flock of sheep as a holistic *res* or does one own only each animal separately? What if a person builds a house out of bricks owned by another? The same applies to people. Is a college (*universitas*) a separate legal subject from its members? Yet, if there is one lesson to be drawn from the Roman texts it is the way in which society as a factual "reality" is nothing less than a reality that is being constructed. The structure is a legal model in which the empirical elements of people and things are merged with the ideological notions of person (*persona*), thing (*res*), ownership (*dominium*), servitudes, contracts of various types, fault

(*culpa*), risk and so on. Such a model can, in one sense, be reduced to an ontology of rules which then can be employed as the means—a model as one might say today—for viewing the facts. However, what Roman law tells us is that such a rule model has glaring gaps.

One such gap is ownership. This is a fundamental notion in Roman law, yet it is nowhere defined or described in terms of a rule. The usual definition that is attributed to Roman law is not actually Roman; it comes from the medieval jurist Bartolus (1313-1357). How, then, does ownership figure so prominently in the Roman texts? It does so by ricochet and by oblique factual and legal references; it is specifically described as a form of power (*potestas*) (D.50.16.215) and this power is either there in the background or assumed, as is the situation for example in the title on the *rei vindicatio* (D.6.1). Even when there is a statement that appears rule-like, as is to be found in the title on possession (D.41.2.3.1), this statement in itself does not act as a starting point for an analysis of possession. The starting points are factual example after factual example. Often what appear as rule-like statements are in truth just descriptions of what the law is and precede a discussion of various factual examples. Of course, one can project onto these texts normativity; that is to say one can claim the existence of a rule either by turning a descriptive statement into a normative one or by implying a rule into every factual discussion. Yet this is, in effect, to reduce to a two-dimensional plan what is a three-dimensional approach to law. Roman law, at least as set out in the *Digest*, is not to be engaged with as a two dimensional "map"; it is much more of a book of many, many "photographs".

[H] WHAT HAVE THE ROMANISTS EVER DONE FOR US?

This said, there is one book among the *corpus* of Roman laws that is more map-like. This is the Institutes, a book that can be regarded as one of the first introductions to law. The *Institutes* (*institutiones*) that arrived (actually rediscovered) in Europe in the 11th century, and thus came into the hands of what might be called the Romanists, was Justinian's, but he said that it was based on the apparently very successful predecessor, namely the *Institutes of Gaius* thought to have been first published in the middle of the second century AD (see Birks & McLeod 1987). In fact it is evident from the *Digest* that other jurists also wrote *Institutes* and so it would appear that introductions to law were seen as an important aspect of legal education. What is notable about the Romanists—that is the generations of jurists and philosophers who studied and wrote

commentaries and other texts on Roman law from the 11th century to the present day—is that they not only transformed the laws through their own interpretations but also reduced them to the kind of two-dimensional "map" that was characteristic of the *Institutes*. They laid the foundations for, and later brought to fruition, legal singularity.

The process started with the medieval jurists who were increasingly influenced by the translation and circulation of the works of Aristotle in the 12th and 13th centuries (Errera 2006). The syllogism provided the means both for extending the Roman factual cases to new situations that were not faced by the Roman jurists and for underpinning the authority of legal decisions by a methodology that seemed to guarantee "truth" of outcome (Gordley 2013: 28-81). The syllogism was founded upon universal principles (major premises) and one thus finds the jurist Baldus (1327-1400) famously stating that he who wishes to know things must first know its principles (*principia*) (Comment on D.1.1.1). One of the first Romanist introductory works to law, reflecting both the work of the medieval jurists and the new humanist ideas, by Mattheus Gribaldi (1505-1564), equally asserted that *regulae*, which he described also as *axiomata*, were fundamental for students (Gribaldi 1541). In fact the 16th century saw some of the humanist jurists not just asserting that the *regulae iuris*—that is the maxims to be found in the last title of the *Digest* (D.50.17)—were an actual source of law (Stein 1966: 162-170) but systemizing the whole of the *Digest* along the taxonomical scheme of Gaius' *Institutes*. This movement towards Roman law's two-dimensional singularity was completed by the French jurist Jean Domat (1625-1696) who, in his *Loix civiles* (1644/1735), reduced the whole of Roman law to a series of *principia* or *regulae* with the aim of aiding students and professionals to comprehend Roman law without having to go through the painful process (*si difficile et si épineuse*) of trying to make sense of the Roman texts themselves. Roman law was now simply a book of *principia*, all supported by references to Roman texts, but, seemingly, it was hardly Roman law as conceived by the Romans themselves. Domat's project, with the help of subsequent jurists (especially those jurists who saw law as analogous to mathematics), was finally to result in the French *Code civil* of 1804, which was, arguably, the ideological triumph of two-dimensional legal singularity. As Alan Watson pointed out, this code was also, in effect, an elegant introductory book—an elegant "nutshell" (Watson 1994).

Did the influence of the Romanists extend into the world of the English common law? Perhaps not so much in the 16th century, but, as many legal writers and historians have noted, William Blackstone's *Commentaries on*

the Law of England (1765-1769) was a Domat-like project to re-present English law not just in terms of generalized statements but arranged in accordance with the Roman *Institutes* plan (Watson 1994: 12-13). It offered a two-dimensional view of English law. Blackstone's work was lauded as an introductory book to the foundations of law, but it did not have that much impact on legal practice which was still rooted in the system of thought based on the forms of action (Lobban 1991: 47). Indeed, even in the middle of the following century, an introductory book to English law was entitled an "analysis of pleading" (Garde 1841) which, to a contemporary student, would seem to be a work devoted almost entirely to different types of action and to pleading procedure. Nevertheless, what is interesting about this small introductory book is its preface where the author states:

> There is nothing more necessary in all sciences than to possess a thorough knowledge of their first principles … The law, like every other science, has its first principles, which must be understood before any progress can be made in the study of it. This was, indeed, the opinion of those celebrated writers on Jurisprudence, the President Domat and the Chancellor D'Aguesseau among the French; and our own no less distinguished countrymen, Lord Coke and Lord Bacon (Garde 1841: vii, 'Preface').

Despite the use of the terms "principles" and "axioms" by the author, the book sees English law simply as a code of procedure. There is little or nothing about substantive law—that is to say about the law of property, contract, tort and the like. Indeed, in 1841 these categories had not fully established themselves in English legal thought and so the book is revealing about what constitutes the "scientific" axioms necessary to become a barrister.

Five years after the publication of the "analysis of pleading", a report from a Parliamentary Select Committee on the state of legal education in England, Wales and Ireland was somewhat pessimistic, to say the least. The Committee concluded:

> That the present state of Legal Education in England and Ireland, in reference to the classes professional and unprofessional concerned, to the extent and nature of the studies pursued, the time employed, and the facility with which instruction may be obtained, is extremely unsatisfactory and incomplete, and exhibits a striking contrast and inferiority to such education, provided as it is with ample means and a judicious system for their application, at present in operation in all the more civilized States of Europe and America … That it may therefore be asserted, as a general fact to which there are very few exceptions, that the student, professional and unprofessional, is left almost solely to his own individual exertions, industry, arid opportunities, and that no

> Legal Education, worthy of the name, of a public nature, is at this moment to be had in either country (1846: lvi).

The result was, said the Committee:

> That amongst other consequences of this want of scientific Legal Education, we are altogether deprived of "a most important class, the Legists or Jurists of" the Continent; men who, unembarrassed by the small practical interests of their profession, are enabled to apply themselves exclusively to Law as to a science, and to claim by their writings and decisions the reverence of their profession, not in one country only, but in all where such laws are administered (1846: lvii).

One of the recommendations, then, was that there should be a "scientific" legal education. In terms of legal knowledge substance, the Committee recommended:

> That it would be advisable to begin with the great branches only of the Law, but highly desirable, as the system advanced, to add such other Chairs as in the first instance the exigencies of the Profession itself required, and, in the next, as might be of utility to the Profession and to the Public generally, such as Chairs of International, Colonial, Constitutional Law, Medical Jurisprudence, Municipal, and Administrative Law, &c. &c. In this view also, and for the purpose of giving more extension, and at the same time more energy and efficiency to the plan, a system somewhat analogous to that in use in Germany might be adopted, namely, lectures might be given (1846: ix).

The importance of this Select Committee report was to suggest a new direction in the approach to legal knowledge. It should be more continental (civil law) in a "scientific" or jurisprudential sense, and it should see legal knowledge in terms of the kind of categories that were to be found in 19th-century Romanist thinking. One might have thought that the report would have been quietly ignored, but this was not the case. "There was", said Peter Stein, "an immediate reaction to the Report, and efforts were made to remedy the calamitous state of affairs which it had revealed" (1980: 79). One effect was to be the creation of an English corps of Romanists whose influence on introductory law books was, for a time, definitive, and perhaps remains in some ways influential.

[I] WHAT HAVE COMMON LAW ACADEMICS EVER DONE FOR US?

Peter Stein has shown how Roman law became an established part of the legal education curriculum in England through the appointment to academic positions of Romanists such as George Long (1800-1879) (Stein 1980: 79-82). Stein also noted how English law, while strong and

independent in terms of its legal rules, was "weak on its legal theory" and so while it "has remained relatively free of Roman influences, English jurisprudence has traditionally turned for inspiration to the current continental theories, necessarily based on Roman law" (1980: 123). This Romanist influence became evident in the introductions to law published in the second half of the 19th century and well into the 20th century.

One of the first notable introductions to law to be published in England after the 1846 report was by William Markby. In his *Elements of Law* (1st edition 1871) the author states in the introduction:

> Being told that the law contains such and such a rule, it will be his [the student's] business to examine it, to ascertain whence it sprung, its exact import, and the measure of its application. Having done so, he must assign to it its proper place in the system; and must mark out its relations with the other parts of the system to which it belongs. This will require a comparison with analogous institutions in other countries, in order to see how far it is a deduction from those principles of law which are generally deemed universal, and how far it is peculiar to ourselves (1871: xii).

Markby then adds:

> For this purpose some acquaintance with the Roman Law will be at least desirable, if not absolutely necessary; because the principles of that law, and its technical expressions, have largely influenced our own law, as well as that of every other country in Europe (ibid).

One might note that, for Markby, the ontological foundation of law seems to be rules, but that some of these rules have their ultimate source in universal ones and these universal rules in turn have their roots in Roman law. Another introductory book from the early 20th century similarly emphasizes both the rule and the system ontology:

> The laws of a country are thought of as separate, distinct, individual rules; the law of a country, however much we may analyse it into separate rules, is something more than the mere sum of such rules. It is rather a whole, a system which orders our conduct; in which the separate rules have their place and their relation to each other and to the whole; which is never completely exhausted by any analysis, however far the analysis may be pushed, and however much the analysis may be necessary to our understanding of the whole. Thus each rule which we call a law is a part of the whole which we call *the* law. Lawyers generally speak of law; laymen more often of *laws* (Geldart 1911: 7-8).

These introductory books—or at least Markby's book (1871)—are introductions not only to what might be said to be the positive law of England but also to jurisprudence, that is to say to legal theory and philosophy. No doubt this was a reaction to the 1846 criticism that legal

education lacked a scientific dimension. However, this is in contrast to some of the contemporary introductions to the common law. The jurisprudential aspect is equally evident—more so in fact—in Frederick Pollock's *A First Book of Jurisprudence* (1st edition 1896), yet the book is nevertheless aimed at "readers who have laid the foundation of a liberal education and are beginning the special study of law" (1896/1929: v). It also places great stress on the rule ontology, summarizing law as the "sum of such rules as existing in a given commonwealth" (ibid: vii). Indeed, in a later edition, Pollock (1854-1937) writes that "the safest definition of law in the lawyer's sense appears to be a rule of conduct binding on members of the commonwealth as such" (ibid: 29). One might, in fairness, object to the implication here that Pollock was a Romanist; he is not known as a specialist in this subject. But he does say in the preface to his *First Book* that his greatest debt is to Savigny (ibid: vii) and this debt is discussed in some actual detail by Neil Duxbury in his masterful history of the jurist (Duxbury 2004: 23). One might add that the influence of Gaius is in evidence in the arrangement of the positive law in Pollock's introductory book (persons, things and obligations).

This rule-ontology is to be found in other introductory books of the time. For example, Paul Vinogradoff (1854-1925) in his *Common-Sense in Law* (1914) defined law "as a set of rules imposed and enforced by a society with regard to the attribution and exercise of power of persons and things" (1914: 59). Moreover Vinogradoff, who can certainly be considered as having been a Romanist, saw legal reasoning, even in the common law, as fundamentally based on the syllogism. "The principles formulated in precedents", he wrote, "correspond in a system of case-law to the clauses of a statute in enacted law." And in "both cases the problem for the judges may be compared to the process of logical deduction which leads to a so-called syllogism" (1914: 182). It is a question of bringing a case within the major premise of the common law (1914: 186). This, of course, echoes, to some extent, the view of Eisenberg about a common law rule arising from precedent now being treated, at least in the US, as equivalent to a statutory rule, although the two jurists differ about the role of the syllogism. Interestingly, Vinogradoff's view of case law reasoning can be compared to Markby's account. This latter author thought that the "nature of the process of reasoning which has to be performed in order to extract a rule of law from a number of decided cases by the elimination of all the qualifying circumstances, is a very peculiar and difficult one" (1871: 29). He thought that the process was a "competition of opposite analogies" and that what counsel does when arguing a case is to urge different analogies with the object being to determine the stronger

analogies from the weaker ones (1871: 29-30). The judges thus "determine the law only *by applying it*" (1871: 30, emphasis in original).

This seems a quite different approach from the logical process advocated by Vinogradoff, but not one with which Eisenberg would agree since he asserts, somewhat forcibly, that the "common law courts seldom reason by analogy" (2022: 7). The reason why they seldom reason by analogy, says Eisenberg, "is simple: a court will never reason by analogy if the case before it is governed by a binding legal rule and the common law is rich with binding legal rules" (2022: 8). Markby would no doubt take issue with this assertion. He thought that "English judges are absolved from the necessity of stating general propositions of law" and, when they do make them, "they are always read as being qualified by the circumstances under which they are applied" (1871: 28). Indeed, he goes on to say:

> Whether it would be found possible to combine our practice as to the generally unquestionable authority of prior decisions, with the practice of laying down in every case abstract propositions of law separate from and independent of the particular facts, is an experiment which, as far as I am aware, has not yet been tried (ibid: 29).

Eisenberg might respond in noting that Markby was writing about the common law well over 150 years ago and that things are rather different today. But, for English law, are they? Writing just over a century after Markby, Lord Diplock asserted:

> In a judgment, particularly one that has not been reduced into writing before delivery, a judge, whether at first instance or upon appeal, has his mind concentrated upon the particular facts of the case before him and the course which the oral argument has taken (*Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192, 201).

Even in the Court of Appeal this factual dimension must not be lost from view:

> The primary duty of the Court of Appeal on an appeal in any case is to determine the matter actually in dispute between the parties. Such propositions of law as members of the court find necessary to state and previous authorities to which they find it convenient to refer in order to justify the disposition of the actual proceedings before them will be tailored to the facts of the particular case. Accordingly, propositions of law may well be stated in terms either more general or more specific than would have been used if he who gave the judgment had in mind somewhat different facts, or had heard a legal argument more expansive than had been necessary in order to determine the particular appeal (ibid).

And he went on to add:

> Even when making successive revisions of drafts of my own written speeches for delivery upon appeals to this House, which usually involve principles of law of wider application than the particular case under appeal, I often find it necessary to continue to introduce subordinate clauses supplementing, or qualifying, the simpler, and stylistically preferable, wording in which statements of law have been expressed in earlier drafts (ibid).

If Lord Diplock is right, and he was speaking from a position of legal authority, it would seem that Markby might be a more useful introduction to legal reasoning than Eisenberg.

[J] WHAT ARE INTRODUCTORY BOOKS IN GENERAL DOING FOR US?

Whatever the position concerning Markby's book, are some introductory law books more useful than others, at least with respect to legal reasoning? Are there considerable variations between introductory books, not only in respect of different legal cultures but also regarding books within a single legal culture? Or are introductory books epistemologically beholden to the standard type of doctrinal syllabus that is characteristic of most Western law schools? A book that does not inform the incoming law student about what she will in all likelihood encounter over the next three years might well be considered by many as not fulfilling its stated purpose. One should, of course, make the point once again that general introductions to law may not be the same as introductions to legal reasoning, although, as has been seen, many such general books do cover the topic in greater or lesser depth.

On general introductions to law, there has been an increasing interest in France witnessed by the publication of two books of conference papers, one some years ago (Cabrillac 2017) and one more recently (Altwegg-Boussac 2021). The book edited by Professor René Cabrillac is useful in the way that it is not restricted to French law; the editor invited contributions from England, Germany, Italy, Spain, Belgium and Luxembourg and this endows the work with a certain comparative flavour. Similarly, the collection edited by Professor Altwegg-Boussac also contains contributions looking at various legal cultures, namely British common law, German law, Spanish law and Italian law. However, this latter book is more theoretical and philosophical in its orientation and, in addition, it has a concluding section containing a discussion by the contributors of their individual experiences in teaching introductory courses.

What emerges from these books is a mixed picture. Professor Cabrillac, in the preface to his edited collection, notes that the contents of his book display great uniformity in the development of introductions to law, mainly consisting of the notion of law, sources, evidence and procedure, an outline of the contents of the categories of positive law via the notions of legal rights and objective laws. He equally concludes that the book is dominated by a positivist approach (2017: XI). One learns, however, that in Germany and Italy the emphasis has traditionally been less on introductions to law and more on introductions to legal science (Schulze in Cabrillac 2017)—which, in Germany at least, stresses amongst other things legal method itself centred around the syllogism (echoing Vinogradoff, discussed earlier). One writer offers something of a general conclusion in stating that these introductions offer on the whole—at least in the civil law tradition—an image of law's unity as a science, which more specially breaks down into historical-philosophic, general theory and conceptual elements (Deumier in Cabrillac 2017: 93). John Cartwright (in Cabrillac 2017) offers an English perspective where he makes the point that the very different history of legal education in England, together with the lack of any requirement of a law degree to become a professional lawyer, means that the various introductory courses to be found in English universities do not speak with a single voice. He alludes, also, to the role that first-year Roman law courses once played in providing an introduction to law.

Professor Céline Roynier, in the Altwegg-Boussac's collection, offers a different perspective to Cartwright. She examines introductions to English law in the 17th and 18th centuries and one of the key points she makes is that, thanks to the introductory books of this period, the methods of the civil law were absorbed into the common law. What she says is by no means particularly original—Alan Watson had highlighted the importance of introductions to law ("nutshells") many years before (Watson 1994)—but she adds a little more detail to the period covered and reiterates the point that this was a time when there were some serious attempts to structure the common law along Roman institutional lines. However, the lack of university law schools teaching the common law during this period—and even when it was taught, it attracted few students—meant that the civil law influence made little headway in the world of the common law practitioners. This said, the importance of Watson's and Roynier's contributions lies in the type of books that were being written. It could be argued that during the 17th and 18th centuries it was these introductions to law that were attempting to advance, in England, legal knowledge in a context when legal education was at a low

ebb. Yet, where was one to look for such advances? One obvious answer was to look at works from the civil law.

Other contributions in the Altwegg-Boussac collection confirm Cabrillac's view that introductions, at least in France, are both uniform and positivistic (or at least doctrinal) in outlook. In the 19th century, Roman law remained of considerable influence, but this was a Roman law that had been fashioned into a rationalized and ideal model suggesting not just a French law but a *science pure* or *jurisprudence universelle* (Richard in Altwegg-Boussac 2021: 29-30). There was an increasing German influence as well, often accompanied by an evolutionary view of legal history. Indeed, of particular value is Richard's reproduction of a number of course plans from the middle of the 19th century (2021: 38-40). Of course, in the civil law tradition, the codes (including constitutions) dominated the conceptual structure of legal knowledge and its methods. Law was not just a matter of rules, but an independent structural and coherent form; unity and autonomy were what dominated introductions to legal science in Germany (Corre-Basset in Altwegg-Boussac 2021: 80). And this "specificity would be such that only the jurists could be the appropriate people to write on these matters, and without having to preoccupy themselves with the state of the literature in the other disciplines" (Corre-Basset 2021: 85). One might think that this epistemological outlook would now be something that belongs to the past, but this would appear not to be the case, even within the common law world (Priel 2019). One can see why one contributor to the collection argues that introductions to law tend to reflect what the law was rather than what it actually is today given the changes of epistemological outlook during the last half century (Libchaber in Altwegg-Boussac 2021). Are introductions to law, in other words, a kind of nostalgic view of a supposed knowledge?

[K] WHAT HAS LOGIC EVER DONE FOR US?

Professor Altwegg-Boussac's book does not, however, limit itself to this descriptive aspect of introductions to law in their historical and conceptual setting. One of the most interesting aspects of the collection is a section devoted to the "theories of introductions to law". This section brings one back to the epistemological aspect that attaches to these introductions. What is the phenomenon that they are supposed to be describing? If the phenomenon is a model or indeed a science, what is the object that is being modelled? Why has law as a body of knowledge seemingly been able to resist its critics? Is this resistance the result of a more general epistemological issue concerning the dividing-up of knowledge into distinct

disciplines? Is law simply a fiction? This last question is by no means a novel one since fictionalism can be seen as one important trend in the history of legal theory (Jones 1940: 164-186). Indeed fiction theory, it has been argued elsewhere, might still be the most viable epistemological model for understanding legal knowledge and legal reasoning (Samuel 2018: 229-257), although such a thesis has attracted fierce criticism (Penner 2019).

One way in which an introduction to law can avoid any confrontation between fiction and reality is to focus on method rather than theory. Is law a matter of logic, asks one very recent introductory book? One can understand neither a range of problems in law nor law's fundamental concepts, says the author, if one fails to take into account the logical structure of law (Rabault 2024: 1). Logic is a topic that has already been touched upon since Eisenberg, as has been seen, rejected the syllogism as being important in common law legal reasoning. One should add that in French law the role of the syllogism, while central to the French "official portrait" of reasoning, loses its status, according to one American specialist on French law, the moment one examines the "unofficial portrait" (Lasser 2004). Such an unofficial portrait is to be found in the reports and opinions of the reporting judges and advocate-generals within which are to be found reasoning schemes and *grilles de lecture* well beyond the syllogism. However, Professor Rabault offers a more nuanced view of legal logic; legal rules or norms contain conditions and it is the presence and absence of these conditions when applied to factual situations that determine the outcome of cases. This explains, he says, "the profound relationships between the legal mind and the mathematical mind" (2024: 7).

By way of example, Rabault takes article 311-1 of the French Criminal Code which states that "theft is the fraudulent taking (*soustraction*) of another's thing". The conditions in this rule are, he points out, "taking", "thing" belonging to "another" and where the taking is "fraudulent". If these four conditions are to be found in a factual situation, then there is "theft". If they are not, then there is no "theft". This methodological approach is one of logic: if p, then q. This perspective on law, says the author, "puts the emphasis on the logical dimension of the law and establishes a parallel between the processing of legal situations and the computer processing of data" (2024: 60). Rabault, drawing inspiration from the sociologist and system theorist Niklas Luhmann (1927-1998), considers that the law is largely constituted by a *programmation conditionnelle* and it is this *programmation* that provides the dominant structure of modern law (2024: 61). And this leads him to assert that his starting point is

the structuration of law by the *programmation conditionnelle* which provides the conceptual basis for a logic by implication (2024: 64). Yet, what kind of logic is in play in legal reasoning? Rabault says that it is largely founded on a binary logic (*une logique bivalente*) which, at its highest level of abstraction, is a matter of legal/illegal (2024: 77). Either something is legal or it is illegal. At lower levels of abstraction one finds, as with the rule on theft, the same kind of dichotomy: either there is theft or there is no theft; there is nothing in between. Again one is back to the analogy with computer processing: there is, he says, "a striking similarity between legal methodology and computer algorithms" (2024: 81).

This binary logic is in turn founded on a system of legal classification. Professor Rabault says that the kind of classifications to be found in law—he gives the example of the division of things (*biens*) into moveable and immoveable property (French *Code civil*, article 516)—constitutes a reduction of complexity permitting a standardized processing of problems. In order to illustrate this point in more detail he turns to the *Institutes of Gaius* in which social complexity is reduced to the threefold scheme of persons, things and actions, each of which in turn contains sub-categories and sub-sub-categories. Here is a system of information processing, he asserts, that is relatively simple and consists (as has already been seen earlier in this article) in a series of questions reflecting the various categories and sub-categories into which a factual situation must be analysed. This is why, he says, that in certain legal systems Roman law is still taught, not as a historical subject, but as a practical model made up of a logical rigour. "The *Institutes* of Gaius", he concludes, "show how litigation disputes appear, across the legal classifications, as a pathway determined by the tree-like structure, which offer the alternatives, the possibility of bifurcation and so on, and which allows one to set out the problem to be submitted to the judge" (2024: 83).

It might at this point be useful, by way of comparison, to return to Professor Eisenberg's book since he, as has been seen, seems to be offering a rather different view about legal reasoning and problem solving. According to this introductory book to the common law, logic and the syllogism are "not important" (2022: 87). However, this professor is focusing on common law rules—rules emerging from precedents—rather than statutory ones which are at the basis of civil law thinking. Some of the reasons that he offers to support his legal reasoning view—for example that a common law rule cannot often be stated with certainty or that the rule itself has a penumbra of uncertainty (2022: 88)—might not be so relevant when it comes to legislation (although this is not to suggest that there are not ambiguous statutory texts). But he offers little or nothing on

the methods of statutory interpretation, an area of legal reasoning that is actually more relevant given that the great majority of cases that come before the courts in common law jurisdictions involve a legislative text. This said, on a closer reading, one finds that Eisenberg does not actually dismiss deductive reasoning; what he dismisses is formal syllogistic reasoning by judges in the sense that their judgments do not openly display this methodological form. Instead "most or all common law cases involve implicit informal deductive reasoning". He says that this "is partly because the law is concerned with truth but formal deduction is not" (2022: 87).

It is not entirely clear what the professor means here by "truth". Certainly, Rabault would probably not contest the idea that the binary logic underpinning the judicial syllogism is founded on fictions; for the reduction of the legal model to an either/or structure is simply a process that permits the reduction of social complexity to a state where binary logic can operate (2024: 72-73). The model is not a reflection of the real world; the law just wants to exclude as far as possible "fuzzy logic" (*floue*) and this comes at a "reality" cost. Eisenberg, in contrast, would seem to suggest that the common lawyer wants to get beyond this kind of surface binary structure with a reasoning model that embraces the facts and the application, and justification, of the rule to the facts as found by the court. Such an exercise, while evidently rule-based, is by its nature, he might say, a complex process because it embraces far more than just formal logic; legal reasoning does, and ought, to be supported by social morality, social policy or both (2022: 41-59). Indeed, for this writer, functional arguments are just as valid as formal ones (2022: 55-57)

What Eisenberg does not do, however, is to spend time on the internal structure of the common law in terms of classification and binary categories. Yet, there are many precedent decisions whose "logic" was dependent upon a re-categorization of a factual situation—from, say, defamation or contract to the tort of negligence—with the result that a litigant succeeded in situations where, before the re-categorization, the existing law suggested that he or she would not. There are, equally, endless legislative texts that display a binary category logic: one thinks of the distinction between consumer and business contracts or between animals belonging to a dangerous species and animals that do not (Animals Act 1971, section 2). Both of these latter binary category choices bring into play different liability rules. Sometimes, particularly in statutory interpretation cases, it is the judges themselves who use a binary category method to solve a problem. For example, in order to avoid holding a local authority liable for a statutory nuisance with regard

to the "state" of one of their premises, the majority established a binary choice between "state" and "layout", the latter not being covered by the legislative text (*Birmingham CC v Oakley* [2001] 1 AC 617). Are these, as Rabault would say, examples of logic in law? Is there an underlying conceptual structure to the common law that permits legal reasoners to apply binary logic?

Rabault may well respond that they are such examples. But he would also emphasize the historical point he makes in his book that the judicial syllogism is the result of the move towards positivism—what he calls the "positivisation of the law"—which he associates in particular with the Italian jurist Cesare Beccaria (1738-1794) and with a new way of writing about law. "The judicial syllogism", says Rabault, "is explained by the emergence of the primacy of positive law, by the rise of a law decreed by the state, which liberated law from the tradition of Roman law" (2024: 40). The primary form of this state-enacted law was the code which acted as a body of major premises to be applied neutrally by the syllogism; and "codification is in itself the logic project of a formalisation and of a systematisation of the law" (2024: 43). Rabault considered, therefore, that the 18th and 19th centuries saw a radical transformation of law and legal reasoning. It was "an historical evolution" that consisted "of an effort to take control, by the political authorities, of the application process of the law, and that this evolution had been able to deal with the tension that opposed the political authorities against the corporation of lawyers" (2024: 110). As for the new writing, this emerged, notes Rabault, in the 17th-century writings of the natural lawyers such as Jean Domat (1625-1696) and Samuel von Pufendorf (1632-1694) who, inspired by the methods of geometry and mathematics, wanted to endow law with a logico-axiomatic coherence (2024: 111).

Beccaria, Domat and Pufendorf were not unknown in England and indeed Beccaria was an influence on Jeremy Bentham (1748-1832) who himself was an advocate of a positivist conception of law and codification (Lobban 1991: 120). This said, Bentham's criticism of Beccaria and others was, as Michael Lobban has pointed out, that "while they began with general principles, they failed to work them out in practical detail" (1991: 157). And so, despite his particular interest in classification and arrangement, Bentham "showed no interest in discussing the nature and function of the syllogism or logical reasoning". Rather, his method was one of "acquiring knowledge … through induction and observation—and then arranging it correctly" (1991: 163). It was the dialectical scheme of bifurcation rather than the syllogism that mattered for Bentham (1991: 164), for he had an "empiricist epistemology" that "would not lead to

a deductive code" (1991: 168). How influential, then, was Bentham on English law thinking? Michael Lobban concludes that it is mixed, but that his greatest contribution was that common lawyers "did take on board Bentham's ideas on the nature and form of the law, seeing law as a set of rules" (1991: 222). Bentham, in other words, helped establish the rule model as the ontological and epistemological foundation of the common law, yet he did not shift it from an inductive stage to a deductive one.

This does not mean that deductive reasoning is irrelevant in common law legal reasoning, despite Eisenberg's assertion that syllogistic deduction is not important. There are plenty of examples where a legal conclusion can be seen to follow necessarily from logical premises (MacCormick 1978: 19-52). The important point that Rabault makes with respect to deductive reasoning and the syllogism is its ideological role in the 18th and 19th centuries, an ideology of particular importance in post-revolutionary France given the immense distrust of judges. It was an ideology associated with codification and the suppression of judicial decision-making as a source of law. The ideological atmosphere in 19th-century England was not the same, even if, thanks to the writings of Bentham and John Austin (1790-1859), it could be said that there was a "positivisation" of English law. There was not the same distrust of judges, and, anyway, the common law itself was seen as being the product of the judiciary and not the legislature.

Another important point made by Rabault is the meaning of "logic" itself. It is not confined to syllogistic reasoning but embraces the systematization of law, the principle of non-contradiction, the inductive method, and the treatment of like cases alike. Just because it is often said the life of the common law has not been logic but experience, it does not follow that the common law reasoning is illogical. As two common lawyers point out, the "place of formal logic in legal reasoning is one of the most problematic topics in jurisprudence" and even to ask the question about the role of logic in legal reasoning is to ask a question that is "ambiguous and misleadingly simple" (Twining & Miers 2010: 346). What can be said with confidence is that logic has a role in common law reasoning even if it manifests itself in several different ways and not always in ways that are immediately evident (Guest 1961).

[L] WHAT HAS ANALOGY EVER DONE FOR US?

One such non-manifest (or lesser) form of logic is, perhaps, reasoning by analogy. Professor Rabault sees this as a form of casuistic reasoning which is quasi-logical and is employed in situations where the resolution of a case cannot be achieved through strict logic (2024: 109). He returns to his example of theft which, as has been seen, is defined as the fraudulent taking of a thing. Does the fraudulent extracting of electricity amount to the taking of a "thing"? Rabault thinks that when the *Cour de cassation* decided that it was theft, the court was extending the notion of a "thing" by way of analogy, something that the Imperial German Court refused to do a few years before (2024: 114).

Eisenberg is sceptical about this kind of reason when it comes to the common law. He certainly quotes many writers who claim that analogical reasoning, rather than rule-based reasoning, is a feature of the common law, but he argues that these writers "are incorrect" and that "common law courts seldom reason by analogy" (2022: 7). He asserts that when one actually studies the data—the cases—they rarely reveal analogical reasoning and this is because "a court will never reason by analogy if the case before it is governed by a binding legal rule and the common law is rich with binding legal rules" (2022: 8). Larry Alexander and Emily Sherwin, in their introductory book to philosophy and law, think, anyway, "that there is no such thing as analogical decision making" because judges "who resolve disputes by analogy either are acting on a perception of similarity that is purely intuitive and therefore unreasoned and unconstrained, or they are formulating and applying rules of similarity through ordinary modes of reasoning" (2008: 234). Or, put another way, there is a lack of logic because the "outcome of one case, without more, carries no logical implications for the outcome of another case" (2008: 118).

Two particular problems therefore seem to arise regarding analogy. Is it just a question of perception and intuition rather than reasoning? And can all apparent cases of analogical reasoning be explained as being in reality rule-based reasoning? With respect to the first problem, reference has already been made to Professor Scarciglia's view of the importance of perception in understanding how judges function; and so the issue here is the legitimacy of what might be seen as a psychological theory of legal reasoning—that is to say a theory or theories based on the "mental processes" behind decision-making in law (Jones 1940: 187). Alexander and Sherwin, if not Eisenberg, clearly think that intuitive reasoning is not legitimate. And, of course, they are more than entitled

to their opinions. But it is perhaps to be regretted that these jurists who dismiss analogy as a form of reasoning seem reluctant to do much serious research into this process. As one specialist on reasoning wrote, "analogy is a certain relation which can play a role in reasoning, and this by virtue not of its actual meaning but of its formal properties alone: reflexivity, symmetry and non-transitivity" (Blanché 1973: 184). In other words, analogy invites one to investigate, amongst other things, a structural reading of a problem; it is a form of isomorphic thinking. One is saying that there is a symmetric relationship between one factual situation and another. One can call this intuition if one wishes, which, for judicial reasoning, has a distinctly pejorative meaning since judges are not supposed to arrive at intuitive decisions. But structures are structures and, in the natural sciences, for example, they "have become the base of modern mathematics, [and] the elaboration of theoretical structures the essential object of physics" (Blanché 1973: 180). Indeed, as Robert Blanché noted, reasoning by analogy has played an immensely important and creative role in the history of science, and, when one comes to think about it, classification into genus and species is actually an analogical exercise since it is founded upon certain similarities between things (1973: 180-181).

As for the second problem, it is always possible to assert that it is not the symmetry or isomorphic structure—or indeed the quality of a thing—that is at the basis of analogical reasoning, but a rule. Analogy is, then, just induction where the rule inducted is implicit. Given that *ex post facto* it is probably always possible to describe any analogical reasoning in terms of some apparently implicit rule-like statement, it is difficult, if not impossible, to argue that analogical reasoning is essentially different from induction. As Neil MacCormick (1941-2009) said, "no clear line can be drawn between arguments from principle and from analogy" (1978: 161). If one returns to the example given by Lord Simon concerning the rule in *Rylands v Fletcher* and the requirement that in any subsequent case the dangerous "thing" that escapes and does damage must be something analogous to water, what is going on in terms of reasoning? When the court concluded, in a case concerning the escape of electricity, that this fell within the precedent because electricity was analogous to water, was this just an example of implicit inductive rule-reasoning? The same question might be posed with regard to Professor Rabault's example of the theft of electricity. Professor Scarciglia might say that this is an issue of perception and thus found analogy on a psychological model of reasoning; the rule-theorists might reply that underpinning water and electricity is an implicit rule about fluidity.

In fact this dichotomy itself is incomplete because there are also questions of schemes of engagement. A reasoner might employ analogy simply as a device to apply a functional scheme of engagement: extending the rule in *Rylands*, or the notion of theft in France, to cover electricity is to be justified on the ground of public interest or utility. Another judge might take a hermeneutical approach, arguing (perhaps implicitly) that the author of the *Rylands* or the theft rule intended that it should cover new forms of "thing". The structuralist, of course, would simply use analogy to assert that there is an identical structural relationship between person and water and between person and electricity. One might say accordingly, following MacCormick, that in many cases "analogy provided legal support for, and not legal compulsion of, the decision given" (1978: 182). Does it follow, therefore, again referring to MacCormick, that analogies "only make sense if there are reasons of principle underlying them" (1978: 186)? The rule-theorists would undoubtedly agree, but this is perhaps to underestimate the role of analogy both as a structural scheme of engagement—one is extending a structure rather than a rule—and as a spatial-reasoning process. Rule-theorists operate in a flat two-dimensional world, whereas reasoning through factual images permits one to think in three-dimensions. As a French jurist, reflecting on how law is represented, notes: the loss of a dimension—that is the reduction of a three-dimensional world to a two-dimensional one (or flat world)—just adds a further constraint to problem-solving (Mathieu 2014: 140).

Perhaps this spatial or perception point has been recognized by an Australian judge who seems to have insisted on a distinction between a rule and an analogy:

> When a legal rule or result is attached to certain relationships or phenomena, the perception of similar characteristics in another relationship or phenomenon leads to the attachment of a similar legal rule or result. Unless the analogy is close, the applicability of the legal rule or result to the supposedly analogous relationship or phenomenon is doubtful. It is fallacious to apply the same legal rule or to attribute the same legal result to relationships or phenomena merely because they have some common factors; the differences may be significant and may call for a different legal rule or result. Judicial technique must determine whether there is a true analogy (Brennan J in *Dietrich v R* [1992] HCA 57, para 10).

Analogy according to this judge is not a means as such for arriving at a conclusion. Rather, it provides a contextual picture which permits the reasoner to appreciate whether or not a rule applying to one situation should actually be applied in another, seemingly similar, situation.

[M] WHAT, THEN, HAVE INTRODUCTORY BOOKS TO LEGAL REASONING DONE FOR US?

Returning, by way of conclusion, to the principal question concerning introductory books on legal reasoning, perhaps the first consideration to note is the insistence of many of them, especially the more recent, that the ontological foundation of legal knowledge is the rule model. The student arriving at the law faculty will, so the books indicate, have to gain knowledge of a mass of rules emanating from official legal sources (primarily legislation and cases) and to learn how to apply these rules to practical legal problems. Such an application process will, it would seem, involve a methodology that is largely "analytical" and "interpretative". The rules themselves, as the Barnard, O'Sullivan and Virgo book (2021) indicates, will be divided up into various categories, each category representing an individual course or module. In the common law world, some of these categories—crime, contract, tort, property and public law, for example—will be regarded as fundamental and will usually be obligatory. Other courses will be optional and may range from the strictly doctrinal (company law, family law, immigration law and so on) to the more reflective (international law, comparative law, legal history, for instance), and indeed to some that are even philosophical in their substance (jurisprudence or legal theory).

In the civil law world introductory books will equally regard the foundation of legal knowledge as being rules or norms themselves categorized into subject-areas dictated, regarding private law (strictly separated from public law), by the civil codes (well expressed in the French Code of Civil Procedure, article 12). In other words, it is not just the rules or norms which make up official legal knowledge but also the taxonomical plan. And the plan to be found in most of the civil codes is one that has been largely dictated by the *Institutes of Gaius* and so (with some variations) usually means the tripartite plan of the law of persons (status, personality and family law), law of property (ownership, possession and rights in another's property) and the law of obligations (contract, delict and unjust enrichment). Criminal law, which in theory belongs in public law, will have its own code and in the French model is, for historical reasons, regarded as part of private law. As for public law itself, this is usually sub-divided into constitutional and administrative law. In addition to introducing students to these different areas of the law, these introductory works stress that the legal system is one of coherence and

order. Introductory books thus present law as a taxonomical structure to the extent that "the law is the language of order" (Libchaber 2021: 161).

This idea of coherence and order is at the basis of the civilian idea that law is a science. As a German professor has pointed out, in Germany there is not a tradition of introductory books to law; instead, there are introductions to legal science (Schulze 2017: 119). Moreover, in Germany, law has traditionally been seen not just as an actual science but one that is independent of the social sciences and which has its own particular set of methods (Corre-Basset 2021). This leads to a "sentiment largely shared by professors of law that the critique of law cannot be developed by any science other than legal science itself" (Miaille 2021: 181). In other words, "the specificity of the law would be such that only lawyers could usefully write on this material, and without having to preoccupy themselves with the state of the literature in other disciplines" (Corre-Basset 2021: 85). Legal writers might claim that law is a social fact, but in the pages of an introduction "society disappears and it is not a matter of introducing the law as a social fact, but as a legal phenomenon" (Geslin 2021: 117). Other social sciences are seen as auxiliary and, if not ignored completely, they are discussed for their utilitarian function, the frontiers of law itself being studiously maintained. "Rare are the works", says one French Professor, "where are presented, if only in a few lines, epistemology, linguistics, literature, the cognitive sciences, psychology, legal geography and so on" (Geslin 2021: 119). Erica Thompson would say "welcome to model land" (Thompson 2022).

Common lawyers, in contrast, do not on the whole see law as a science, only as a social science if the word is to be used at all. The Roman institutional scheme has been used by writers of introductions to law, as has been seen, but this scheme has rarely been considered as a highly coherent and systematic (logical) structure whose principal method of application is through the syllogism. However, what many of these books—especially the more recent—do seem to be asserting is a legal ontology based on rules. What perhaps is more disturbing is that some of these books provide at best academic assertions that a colleague from the philosophy department might find surprising. Take this example from Eisenberg:

> American private law is made by the courts. Accordingly, American common law courts have two functions: resolving disputes by the application of legal rules and making legal rules (2022: 3).

The second assertion does not actually follow from the first. It may be that both are true (whatever "truth" means)—although the idea that knowledge

of law is knowledge of rules is highly debatable. But the passage from one to the other is not logically consistent. In fact, Eisenberg's assertion takes one on to another dubious statement:

> In our view, there are two plausible models of common-law reasoning, and only two. The first is the "natural" model, in which courts resolve disputes by deciding what outcome is best, all things considered. In the courts' balance of reasons for decision, prior judicial decisions are entitled to exactly the weight they naturally command. The second model of common-law reasoning is the "rule" model, in which the courts treat rules announced by prior courts as serious rules of decision, but then revert to natural decision making when rules provide no answers (Alexander & Sherwin 2008: 31-32).

The aware student will notice immediately that this second assertion is not actually compatible with the one by Eisenberg—not that this is necessarily a bad thing—but also that any serious debate about legal reasoning and legal knowledge is immediately closed off by the "only two" assertion. The two models may not be wrong as such: there are undoubtedly many cases in the law reports in common law countries where the judicial reasoning might well seem to fit into one or other of the two proposed models. Yet, by setting up a dichotomy between "best outcome" and "rule" reasoning models the authors are making what might be termed a category mistake. One cannot oppose the generic or universalist category of best outcome with a specific ontology category of the rule model, for it is like comparing "cauliflower" with "vegetables". Judges strictly applying a rule using syllogistic logic might well believe that this leads to the "best outcome" of a case.

What would be more useful, arguably, is for the rule model to be compared with models based on other institutional possibilities such as the rights model, interest model or remedies model (see further Samuel 2018: 87-116). Such different models are not, of course, strictly isolated one from another—the rights model may well intersect with the rule model just as the remedies model can intersect with the interest one. Yet, operating at the level of these different ontological approaches can better highlight—arguably—the types of argument and schemes of intelligibility employed by judges in their reasoning. Instead, what the student will get from these rule-model authors is a very simplistic view of legal reasoning—and one that even many strictly doctrinal lawyers might find unhelpful. One only has to look at two of the leading French doctrinal textbooks on legal method to appreciate that legal reasoning is a highly complex and doctrinally sophisticated area of study (Bergel 2018; Rouvière 2023; and see also Waddams 2003).

What, then, are introductory books on legal reasoning doing for the law student? In fairness, before answering this question, one perhaps ought to recognize that much depends upon the expectation of the reader. One might also recall how introductions to law in the past have played a major role in transporting legal knowledge—or aspects of legal knowledge—from one society to another (Watson 1994). However, from the viewpoint of some kind of sophisticated insight into legal knowledge and the reasoning based on it, if the books examined in this contribution are to be seen as typical, the answer ranges from "modest" to "not much". Most of them are too fixated on the rule model. Indeed, in the case of Eisenberg's book, whatever its value for US students, it is positively misleading, in several respects, for English readers. And so, on the whole, the books examined in this survey are unlikely to act as any kind of vehicle for transporting any serious knowledge of legal reasoning from one society to another—or even from law faculties to the intending students of law. They are far too limited in their intellectual scope.

Yet, the problem is not so much the introductory books themselves. Some of them, like the Barnard and colleagues, are basically just informing students what they will face—particularly at Cambridge—over the three years of their degree, and they do this well enough given the nature of most law programmes. Indeed, the chapters on the various legal subjects are informative and sometimes imaginative. As one of the chapters says, the students have to know what the law is (if such a thing is possible). Yet, there is a 2000-year history of legal knowledge: should this not figure, somewhere, in the university programme? Should there not be some serious comparison between different legal traditions? Introductory books to English literature (Eagleton 2008) or to art history (Cothren & D'Alleva 2021) inform students about how to "read" a novel, poem or picture; that is to say they inform students about structural, functional, hermeneutic and other schematic engagements. Should not law students be told how structuralism, functionalism, hermeneutics, psychoanalysis and so on are fundamental to legal reasoning? If Dan Priel is right (2019), it would seem not.

AFTERWORD

This said, it has to be pointed out that this critical survey—as will be evident—is restricted in its scope. It has focused only on some of the recent books published in the common law world, and primarily on those that emphasize or at least discuss legal reasoning. Moreover, it is not always easy to distinguish between an introductory book and a more sophisticated work. And so, to give just one example, there has been no

discussion of the monograph from the late Ronald Dworkin (Dworkin 1986) on the ground that this book, like Herbert Hart's *Concept of Law* (1961, supposedly published in an introductory series), is less an introduction and more a serious work on legal philosophy. The reason for this limited scope is that much more scholarly research needs to be undertaken regarding introductions to law and so this present survey should be seen more as an "opening gambit" rather than as any kind of definitive project. One future project, for example, will be a comparative survey comparing introductions to law with introductions to other disciplinary subjects in the hope of gaining further epistemological insights (a project that has already begun: see Samuel 2024). Another project is to undertake comparative research into introductions to legal theory. One final acknowledgment needs to be made. There is no doubt that this investigation into introductions to law has been stimulated by the two French-edited books on this topic (discussed in the article). However, the original idea of investigating these introductions actually came out of a discussion with Professor Fiona Cownie, many years ago. Professor Cownie has more recently denied any knowledge of suggesting this research topic, but anyone who knows her first-class and original work on legal education will have no difficulty in recognizing her as the source of this kind of scholarly research.

About the author

Geoffrey Samuel *was born in 1947 and is Professor Emeritus at the Kent Law School UK and formerly a Professor* affilié *at the École de droit, Sciences Po, Paris. He received his legal education at the University of Cambridge and holds doctoral degrees from the Universities of Cambridge, Maastricht and Nancy 2 (*honoris causa*). He has also held many visiting posts in France, Belgium, Switzerland, Spain and Italy. He is the author of a considerable number of books, chapters and articles on contract, tort, remedies, legal reasoning, comparative law theory and method and legal epistemology. Professor Samuel's more recent books include* An Introduction to Comparative Law Theory and Method *(Hart, 2014),* A Short Introduction to Judging and to Legal Reasoning *(Edward Elgar, 2016),* Rethinking Legal Reasoning *(Edward Elgar, 2018) and (with Simone Glanert and Alexandra Mercescu)* Rethinking Comparative Law *(Edward Elgar, 2021). A new book,* Rethinking Historical Jurisprudence *(Edward Elgar), was published in 2022. A substantial article on comparative law and the social and human sciences was published this year in the* Journal of Comparative Law.

Email: g.h.samuel@kent.ac.uk.

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