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## Legal Thinking: Its Limits and Tensions

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LEGAL THINKING: ITS LIMITS AND TENSIONS. By *William E. Read*. Philadelphia: University of Pennsylvania Press. 1986. Pp. ix, 189. \$23.95.

William E. Read's<sup>1</sup> *Legal Thinking* is a comprehensive work outlining the interaction between different types of thought processes within the context of the legal system.<sup>2</sup> Read's analysis focuses on the actors within the legal system; he examines the perspectives of those responsible for the development, management, and operation of the legal system, from the law-breakers to the law-makers.<sup>3</sup> His thoughtful analysis will help the reader to understand her impact as a participant in the legal system, and will help her anticipate her impact on its growth. *Legal Thinking* is well written and well worth reading.

Read divides his discussion into two sections: the systemic limits imposed on the legal thought process, and the tensions created by the interaction of these limits when the actor brings other factors into the legal process. In part 1 of this two-part book, Read outlines the limitations of the tools of legal analysis, starting with the most important: the perspective of the thinker. Read establishes five perspectives: subjects, officials, advisors, legislators, and scholars.<sup>4</sup> As he describes these perspectives, he demonstrates how the position of the thinker

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1. William E. Read, A.B. 1938, Hamilton College; LL.B. 1941, Harvard University, is Professor Emeritus at the University of Louisville School of Law. He has taught Jurisprudence, Legal Method, and Conflict of Laws. A former corporate lawyer, he has also published *CORPORATE OFFICER'S AND DIRECTOR'S DESK BOOK* (1980).

2. Read's definition of the legal system includes the process that generates and applies legal norms. A legal norm is a statement, legal because it is backed by a government, and normative because it is about what ought to be. We do legal thinking when we think about at least one arguably legal norm and how it connects with a fact relevant to the norm's identity, meaning, applicability, or application. I use legal norms rather than legal rules in order to encompass "ought" statements not ordinarily called rules — such as legal principles and methods, and legally binding promises.

P. 2.

3. It is interesting to note that while Read gives thoughtful treatment to legal scholars in his perspectives analysis, he considers legal scholars to be merely commentators and not participants in the legal system. One could argue with the validity of that distinction, since the comments of both professors and students of law, through publication, are often the impetus for the promulgation of new legal norms, and the basis for decisions interpreting already existing norms.

4. Read means these to be broad categories: "(1) the subjects to whom the law applies, (2) the officials who apply the law to others, (3) those who advise others about legal problems, (4) the legislators who make new legal norms, and (5) the legal scholars who teach and write about the law." Pp. 2-3. The actor's job will allow for different perspectives within a given category. For example, Read's category of officials includes judges, those responsible for law enforcement, administrators, and ministers. The different duties of each job creates unique perspectives for each type of official. Pp. 12-13. Read also recognizes overlap in roles: for instance, a judge caught speeding on her way to a class she teaches part-time at a law school might simultaneously be an official, a scholar, and a subject. However, in a perspectives analysis we should only look to her dominant role at the moment, as the subject of a speeding ordinance.

within the legal system determines the approach she will take to a legal problem. For instance, the more personal the issue, the greater the thinker's tendency to conduct an individualized assessment of the legal norms that she may or may not decide to abide by in any given situation. Acting as a subject, she brings into her analysis the particular facts of her individual position, including moral and benefit-over-loss determinations. Read's discussion of perspectives allows the reader to compare how other actors will now approach the consequences of a subject's decision. For example, judges and other officials are burdened with the responsibility of maintaining the integrity of the system. Because that burden is a societal one, the officials look to more generalized interpretations and applications of norms and facts. Thus, many of the factors that the subject thinks are important are not part of the officials' calculation at all.

A paradox is therefore created: a subject, the whole focus of a legal norm, will examine the choice of norms with a less restricted perspective than that of the official faced with the consequences of that subject's actions. One of Read's examples clearly highlights the importance of perspective. It centers on a familiar type of ordinance: a speed limit (pp. 62-67). A driver may decide whether to observe the speed limit using a personalized analysis, such as whether she is in a hurry; or perhaps her decision will be keyed into an emotion, such as tension or anger.<sup>5</sup> The police officer stopping the driver mechanically applies a norm which has already evaluated the importance of strict enforcement as a deterrent to reckless driving.<sup>6</sup> To the officer Mary Jones is known only as Speeding Driver, and all of Mary Jones's problems should be irrelevant.<sup>7</sup> In this way, characterizations of position and perspective are the pivotal points of legal analysis and consequently of *Legal Thinking*.

Part 1's discussion of the limitations on legal thought created by the legal system also canvasses the limitations of the norms to be applied to the facts at issue. Norms include the rules currently being enforced by the government, legal principles such as due process, and legal methods such as strict scrutiny (pp. 25-26). "Normal" limits in-

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5. We can obviously imagine other factors. Can she afford another speeding ticket? How will another citation affect her insurance rates? How important is it for her to reach her destination quickly?

6. Of course, this is the perfect case. Read only briefly considers how the officer's analysis might be influenced by politics, such as local pressure to cut down on speeding, departmental quotas, or the officer's personal prejudices regarding the race, age, affluence or attractiveness of the driver. Read casually labels these factors "complications." P. 66. It is possible that these are intended to be part of the tensions analysis Read undertakes in part 2, but none seem to fit in the categories of tensions outlined in that part.

7. Read fails to carry his example through in one regard: sometimes the system itself takes into account the subject's own evaluation. Thus, Speeding Driver is further classified into Speeding Doctor going to a patient, or Speeding Husband with wife in labor. These subjects may be excused by a norm, or by another decisionmaker in the system.

clude the necessary existence of a norm, its enforceability, and the leeway allowed in the norm's interpretation and application as determined by the perspective of the party conducting the analysis. For example, a judge cannot declare a subject's action illegal unless a rule exists that declares it illegal. Even then, the enforceability of the rule may be suspect on constitutional grounds. To bring the example to its conclusion: in making a determination of constitutionality, the court has some discretion in deciding on a method of analysis (the choice between strict and low-level scrutiny, for example) and in determining how the standard applies in a given case.

Perhaps the easiest limitation to understand is the factual limitation. The scope of a personal injury lawsuit is shaped by determinations of who ran into whom, whether one of the drivers was drinking, and other factual issues (p. 32). Facts such as these will largely determine the outcome when the norm — negligence — is applied. Read classifies all of the limits described in part 1 as "objective" or "structural" — how the system applies pressure on those acting within it to respect the legal norms. How well does the system work? No matter how well any system is designed, problems are inevitable. Read devotes the last chapter in part 1 to examples of problems in legal thinking. These problems do not arise in the abstract; if the system is not responding correctly, or not addressing the proper issues, greater pressure is put on the actor making the decision to adjust the process.

In Read's hypothesis, the status of a legal norm may cause problems in the decisionmaking process. A good example is the absolute nature of a speed limit, a definitional problem. Does driving one mile-per-hour over the limit warrant a citation? This is a question both subjects and officials will consider in deciding whether to abide by the norm.<sup>8</sup> The pressure in these types of circumstances is to look to extra-norm sources for guidance. Read gives the actor three questions to ask: Why was the norm made? How was the norm made? What has happened since the norm was made?<sup>9</sup>

The discretion given actors to resolve these types of issues creates an underlying tension in the system. How the actor can and should resolve these issues is the subject of part 2 of *Legal Thinking*.<sup>10</sup> Read uses the term "subjective tensions": these tensions result from the in-

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8. P. 48. Presumably the legislature has answered this question affirmatively by using an absolute standard. Some pressure is taken off the subject and official by the system of different types of tickets for different levels of violation.

9. Pp. 53-56. The reader should add to this list two important underlying questions: Who should make these types of evaluations? Under what circumstances?

10. In summary, the obligations of officials to offer good reasons for their decisions encourage them to respect legal norms. At the same time, these obligations may also encourage officials to see themselves as free to interpret and to apply (or not apply) norms in light of what seems sensible or fair. This paradox leads to the tensions in the legal thought processes that are the concern of the second part of the book.

terplay of the objective limitations and the legal freedom afforded to the actor by the system to choose, evaluate, and make other subjective judgments when coming to a legal determination.

Read examines three relationships: structure-freedom tension, law-morals tension, and norm-fact tension. Structural tensions arise most commonly when the structure requires, allows, or encourages the application of the actor's own judgment. There is also tension when a legal norm to be applied is morally unacceptable to the actor either generally or in particular fact situations. Finally, norm-fact tensions arise when an actor, primarily a subject, considers the impact of a norm on a particular interest or value. The important link between the sections is the perspectives analysis, which acts as the key to understanding the moral perspective, actionable discretion, and decision-making capacity of the actor.

The discussion of tensions, though it represents the bulk of Read's analysis, has less impact on the reader than Read's outline of the legal system. The purpose of part 2 is to put the human factor back into the analysis of the legal system: the identities of Mary Jones and Officer Smith, and how those identities affect legal decisionmaking according to their current role in the decision process, their individual moral evaluations, and the facts at their disposal. It is unfortunate that at the same time that Read emphasizes the human element, he retreats into the realm of the abstract. There are fewer examples in part 2, and those that are included are abrupt and wordy.<sup>11</sup> A thoughtful examination of the Warren Court's struggle with segregation, for example, would highlight all three types of tensions, and would be interesting and current, as well as highly pertinent. While Read uses this example (p. 120), it is only one of many treated rather summarily in the law and morals chapter.

However, Read is to be commended for his restraint. In his discussion of tensions, he is descriptive only; he makes no judgments as to how the tensions should be resolved, but only points out their existence. He also refrains from making a sweeping assessment of how often these tensions arise and where the user typically looks for resolution. The reader is free to hypothesize about whether a legal decision will be influenced by the personal experience of the actor, by social policy, or by some other source.<sup>12</sup>

The strength of *Legal Thinking* is the simple structure of Read's theory and his conscious avoidance of pontification. Of course, a book devoted to tensions of legal thought must generate its own brand of

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11. This problem only exacerbates Read's reliance on his own specialized vocabulary; more and clearer examples would help the reader to keep in mind the particularized meanings Read has given some common terms. Pp. 3-5.

12. If the reader is a Legal Realist, then every source contributes to the actor's response to legal problems, all of the time, to the detriment of the legal system. See, e.g., J. FRANK, *LAW AND THE MODERN MIND* (1930).

paradox and tension: despite its brevity, the strength of *Legal Thinking* is the warm, detailed examples found in Read's description of the legal system, which bring to his theory a vibrancy not often found in legal writing.

In his introduction, Read states that his goal was originally to assist beginning law students in understanding how legal thinking differs from other thought processes (pp. 1-2). At some point, though, Read escalated his endeavor to a comprehensive reevaluation of legal thinking. From the beginning student's point of view, this focus shift is unfortunate; many of the concepts Read describes will take on meaning only after some experience with them. Still, even the beginning student should appreciate how Read outlines, quite nicely, old puzzles ("the evils of judicial legislation"), gives insight from all perspectives to complexities new to us all ("the complexities of highway speeding"), and highlights his effort with meaningful examples. While the more sophisticated reader<sup>13</sup> will find part 2 heavy going, if she is willing to supplement Read's discussions with her own experiences, the analysis will nonetheless help her better understand the legal process in which we all participate. *Legal Thinking* is worthwhile reading for a wide range of readers.

—*Marcella David*

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13. Included in this category are practitioners, professors, those immersed in bureaucracy, and, of course, upper-level law students.