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# ALL THE RIGHT MOVES

*Charles A. Reich\**

TACTICS OF LEGAL REASONING. By *Pierre Schlag* and *David Skover*. Durham: Carolina Academic Press. 1986. Pp. x, 105. Cloth, \$12.95; Paper, \$6.75.

This very brief and lucid book offers an outline of the most common flaws in legal arguments and how such flawed arguments may be effectively attacked. Usually the student will encounter these forms of bad reasoning during ordinary law school work. The special contribution of Professors Schlag and Skover is to assemble and organize all of these reasoning errors so they can be studied, and the skill of answering them practiced, independently of substantive courses.

The authors hope to encourage students to think of attacking weaknesses in reasoning as being similar to learning "moves" in sports. The lawyer's craft of argumentation is broken down into its component units so that these can be mastered by drill, just as the basketball player's flowing play of a game has previously been practiced in units such as dribbling or blocking. Can this approach accomplish any educational purpose that is not already served by the many debates and discussions that take place in classrooms, in the hallways, over meals, or wherever two or more law students are found?

Law school teachers frequently say that nothing can be done to change the fact that some students are bright, some are not bright, and most occupy a middle ground in between. It is assumed that there is a sort of legal intelligence, or lack of the same, that does not change much despite the best efforts of teachers. This is an assumption that must be challenged if we want a broadly based legal profession. *Tactics of Legal Reasoning* may be a good way to bring about improvements in legal intelligence that might not occur as the result of classroom experience alone.

Too many things happen in the classroom: the study of legal rules, exceptions, and distinctions, the analysis of cases, the use and misuse of precedent. Often students who make mistakes are given little chance to practice a correct response, certainly not at their own pace. One could hardly learn to type if after a mistake the task was quickly transferred to someone else. Schlag and Skover offer a way of leisurely practicing one "move" at a time. It seems a promising way to learn.

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It is also helpful to see common errors in reasoning organized by general headings, such as faulty premises or improper levels of abstraction. The headings are accompanied by illustrations or examples. Thus, under the subheading "Improper Combination of Levels of Abstraction," the example is given of a court undertaking to balance "the value of a particular speaker's speech, and see if it is offset by the general societal interest in regulating this type of speech" (p. 42). This is an error we hear quite commonly today, as when would-be drug testers say that an employee's right to privacy must yield to the public's concern with safety. But while we hear the error often, we seldom hear it identified as an error, and almost never do we hear the error described by its generic name as a wrong combination of levels of abstraction. A student who learns to recognize and classify a form of mistaken thinking in this way should be able to increase his or her "legal intelligence."

The ability to identify logical errors by name and example may require not only comprehension, but also practice and drill. Here too, this book is valuable, because it encourages the notion that drill may be appropriate and advantageous. Athletes practice the same moves hundreds or thousands of times. No athlete would imagine that it would be enough to hear the coach describe a move, watch a demonstration by another player, and wait to try the move in the midst of play. But law students are led to believe they must either successfully jump into the middle of legal argument or think themselves unintelligent. The middle way of drill, on this level of learning to think, is seldom presented as an available method of helping intelligence to grow.

Some law students have in fact been practicing arguments all their lives. If one, or both, of their parents are lawyers, they may have grown up in a home where verbal and logical skills are in use every day. Other students come from backgrounds which are much less verbal. This can be a severe disadvantage, and law schools are hard put to help students to compensate. The more that the discrepancy can be seen as one of practice, and not of innate ability, the more disadvantage is likely to be overcome.

In his essay on "Power" in *The Conduct of Life* Emerson says that although personal power derives from qualities that are inborn, power may nevertheless be improved by two "economies": concentration and drill. This advice, so frequent in the case of nonintellectual abilities, is too seldom offered to those who are not, or do not consider themselves, gifted thinkers.

"Practice is nine-tenths. A course of mobs is good for orators. All the great speakers were bad speakers at first. . . . A humorous friend of mine [Thoreau?] thinks that the reason why Nature is so perfect in her art, and gets up such inconceivably fine sunsets, is that she has learned how,

at last, by dint of doing the same thing so very often.”<sup>1</sup>

Some of the fallacious arguments that the authors dispose of in a page have held sway over courts for years, and continue to mislead editorial writers, officials, and the public. For example, the category “False Dichotomy” is illustrated by the “right-privilege” distinction. The false statement is that a legal entitlement is either a right, which is protected, or a privilege, which the state can take away at will. The authors observe that “a legal entitlement may fall somewhere in between an absolute right and a privilege” (p. 34). If, in the future, the law of entitlements continues to develop more and more complexity, lawyers will need all the training they can get in escaping from the danger of inadequate reasoning due to false dichotomies.

The outline of arguments and responses takes up about half of this book. In the second half, the reasoning in four judicial opinions, all casebook classics, is analyzed. The cases are from four areas: property, constitutional law, criminal law, and torts. Students are likely to remember these cases for almost anything except the type of reasoning at issue. Once the error of reasoning is pointed out, the familiarity of the case makes it easier to remember its particular type of flawed thinking. In the property example, *Pierson v. Post*,<sup>2</sup> a saucy intruder was allowed to make off with the quarry of some fox hunters, because their pursuit, while close, had not yet become “occupancy.” The authors call this an example of “ideological overstatement” because “there are standards other than occupancy that could well serve to define the point at which one acquires a property right in a wild animal” (pp. 56-57). We do not usually associate “ideological overstatement” with *Pierson v. Post*, being more likely to remember the learned and humorous dissent by Livingston, J., as a gem of legal wit. It seems a good move by the authors to make sure that if we ever have to think about ideological overstatements, we can remember the reason for the decision against the frustrated gentlemen hunters who pursued “the windings of this wily quadruped.”<sup>3</sup>

*Tactics of Legal Reasoning* is an unpretentious book with a simple aim. In these days when the catalogues of our leading law schools offer such courses as “Anarchy, Liberty, and Community,” or “The Tyranny of Kant,” this book may seem unsophisticated. On the other hand, the basics still matter. For those who want to learn and practice the fundamental “moves” of legal argument, this unique book should offer welcome help.

Clear thinking will always be in short supply, in the law and elsewhere. Professors Schlag and Skover offer a valuable tool toward a commendable end.

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1. R. EMERSON, *Power*, in *THE CONDUCT OF LIFE* 78 (1860).

2. *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

3. 3 Cai. R. at 180.