Book Review

Larry Alexander and Emily Sherwin, *Advanced Introduction to Legal Reasoning*, Cheltenham, U.K.: Edward Elgar Publishing, 2021, pp. 184, $120 (hardback), $25.95 (paperback)

Reviewed by Brian H. Bix

I. Introduction

Larry Alexander and Emily Sherwin have, for many years, both individually and as co-authors, offered and defended unconventional views about constitutional interpretation, statutory interpretation, precedent, and common-law reasoning.[1] With the publication of *Advanced Introduction to Legal Reasoning*, the Alexander/Sherwin view and its justifications are now available in a relatively short (the main text is less than 170 pages), accessible, and (in its paperback version) quite affordable form. It should be emphasized, however, that the book is not just an advocacy piece; the authors are consistently fair and comprehensive in their discussion of contrary views, so the text also succeeds as an overview of contemporary debates regarding legal reasoning.

Here is a summary of the views that Alexander and Sherwin articulate and defend in *Advanced Introduction to Legal Reasoning*:

(1) Regarding the nature of rules, there is inevitably a gap between the reasons and values motivating rules and the results of their application (9–11);[2] this gap is justified (to the extent that it is) by the benefits derived from social settlement and predictability. However, because of this gap between reasons and rules, it may often *seem*, and may often *actually be*, rational for judges and the citizens subject to rules to act contrary to what the rules prescribe.

(2) Legal reasoning is essentially ordinary reasoning—moral, empirical, and deductive reasoning—and *not* some form of reasoning peculiar to law. In common-law reasoning (precedent), judges have only two alternatives: deductive reasoning from determinate rules and unconstrained moral/empirical reasoning. Posited alternatives, like reasoning by analogy or reasoning from principles, are ungrounded, unwise, or both.

Brian H. Bix is the Frederick W. Thomas Professor of Law and Philosophy, University of Minnesota.

1. *See, e.g.*, Larry Alexander & Emily Sherwin, Demystifying Legal Reasoning (2008); Emily Sherwin, *Rules and Judicial Review*, 6 Legal Theory 299 (2000); Larry Alexander, *The Banality of Legal Reasoning*, 73 Notre Dame L. Rev. 517 (1998).

2. *See also* Larry Alexander, *The Gap*, 14 Harv. J. L. & Pub. Pol'y 695 (1991).

(3) Interpretation of legal texts, like all interpretation, is essentially intentionalist.[3] For interpreting the products of collective bodies (including not only legislatures, but also appellate court panels), this entails determining what was intended by a majority; if there is no majority for a position on a particular issue, then there is presumptively no law on that issue

In what follows, the review will look at each set of claims in turn: Section II will discuss the text's discussion of the nature of rules and the problem of "the gap"; Section III will consider what Alexander and Sherwin have to say about legal reasoning in general and common-law reasoning in particular; and Section IV will review their positions on various issues relating to interpretation and intentionalism before concluding.

II. The Nature of Rules

Alexander and Sherwin write:

> If a rule is to settle doubt and controversy, it cannot simply track the values it is designed to promote. Instead, it must simplify moral and practical problems and translate their complex and controversial considerations into relatively simple and uncontroversial terms. As a consequence, cases will arise in which the rule dictates a result that differs from what its motivating reasons require (9, citation omitted).

The fit between the rules and their underlying values (reasons, purposes) is inevitably imperfect; rules will always be "overinclusive" and "underinclusive." In principle, then, it would seem better for agents to face each decision individually, making whatever choice best reflects the applicable reasons. But there are also factors pushing in the direction of general rules, including and especially the value of settlement, in having disputes resolved and outcomes of future disputes predictable (5-6).

Nonetheless, from the perspective of both individuals subject to the rules and the officials tasked with applying and enforcing the rules, there will be instances in which it will appear rational to act contrary to what the rule prescribes. As the official or subject perceives the matter (correctly or otherwise), the reasons justifying the rule will be better served by an action in variance with the rule's prescriptions (acting "in the spirit" of the rule, as they say, rather than "according to its letter"). However, because the state thinks that agents are apt to make errors in determining when a rule should be ignored, and, in any event, the state does not want individuals second-guessing collective decisions, the state imposes sanctions for violations of the rules, however justified those violations may seem, at the time or afterwards.

With the existence of sanctions (consistently enforced), subjects will no longer find it rational to break the rule (10-11).[4] While such sanctions thus "close the gap,

3. *See also* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation is an Impossibility*, 41 San Diego L. Rev. 967 (2004).

4. While sanctions can close the gap for subjects, it will not do so for the judges who are asked

(11)" they do not entirely eliminate it. The authors note that rule compliance is nonetheless widespread, and they appear to find such compliance mysterious. They speculate that "the explanation for this lies in habit, socialization, and an element of self-deception (10)."

Note that most of the book's observations are about rules generally, not about *legal* rules in particular. The claims apply equally well to the rules of a social club, the rules a couple applies to their children, or the rules of a game. And this is, in turn, the text's central point: Most of what we say about the interpretation, application, and following (or not following) of rules is not distinctive *to* law, and not different *in* law.

III. Legal and Judicial Reasoning (Including Common-Law Reasoning)

One overlap between the authors' discussion of the nature of rules and their discussion of the nature of legal reasoning is the insistence that there is nothing special about law. This goes against many conventional tropes, from the "teaching you to think like a lawyer" of countless first-year law classes (and numerous movies and television shows about law school) to the oft-cited argument of Sir Edward Coke that law was a matter of "artificial reason"[5] to the conventional views of precedential reasoning. Alexander and Sherwin repeatedly assert that how judges and lawyers reason is no different from how all of us reason in our daily lives: some combination of deductive application of existing rules and more open-ended moral and empirical reasoning.

To an outside observer—or a first-year law student—precedent seems strange.[6] At one level, it is a straightforward exercise in hierarchy and consistency: Lower courts must abide by the decisions of higher courts, and (often) later courts at the same level are bound to come out the same way as had earlier decisions. However, it is in describing *what courts are bound by* that matters start to get mysterious. Courts are generally bound *not—precisely—*by a rule promulgated by the earlier court, but, we are told, only by some combination of the key

to enforce the rule (especially in circumstances in which the judges believe that it was rational for the citizens to disobey) (11). Judges who ignore or selectively apply the rules may face sanctions, though likely in a more indirect or amorphous form. Their decisions may be reversed on appeal, they may suffer a lower reputation, and their chances of promotion may diminish. *Cf.* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 Sup. Ct. Econ. Rev. 1 (1993) (discussing the incentives and disincentives judges face). In the parallel context of judicial decisions to follow or not to follow other judges' precedent, Erin O'Hara offered a game theoretical explanation for judicial compliance and noncompliance. Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 Seton Hall L. Rev. 736 (1993).

5. Coke was quoted as saying to King James I of England that legal disputes "are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience before that a man can attain to the cognisance of it…." Sir Edward Coke, Reports, xii. 65 (1727) (quoted by Roland G. Usher, *James I and Sir Edward Coke*, 18 Eng. Hist. Rev. 664, 664 (1903)).

6. What follows is, roughly speaking, the classical story given in sources like Edward H. Levi, An Introduction to Legal Reasoning (1949).

facts, the core of the reasoning (the so-called *ratio decidendi*), and the holding of which side won. Later courts are said to have some level of discretion in (re-) characterizing the decision of the earlier court. Courts are able to distinguish precedent, saying that the earlier decision does not control the current dispute because there are morally significant differences in the facts of the two cases. And with earlier cases at the same level, courts sometimes have the power to overrule the prior decision.

How should we describe what is going on in precedential reasoning, and to what extent do (can) earlier decisions actually constrain later decision-makers? The proper understanding of precedent remains controversial, as shown by the contributions—including one by a co-author of *Advanced Introduction to Legal Reasoning*[7]—to the forthcoming *Philosophical Foundations of Precedent*.[8] Some commentators (particularly among the American legal realists) argued that precedent is infinitely manipulable and thus effectively does not constrain at all.[9] Many influential texts argue that what goes on when a later court interprets and applies precedent is bound up with analogies, the discovery of principles, or the search for underlying reasons (111-65).[10]

Alexander and Sherwin reject all of these approaches. The problem with constraint by analogy (similarity) is that there are infinite similarities and differences between any two fact patterns (114). The search for imminent principles or reasons has similar concerns about indeterminacy. In earlier work, Alexander has (as author and co-author) expressed his general skepticism of legal principles—not only as part of precedential reasoning, but also when such principles take up central roles in the jurisprudential works of Ronald Dworkin and Robert Alexy.[11] Ultimately, the book argues, the judge's choice in the context of precedent is for some general rule, and the merits of that rule (as against alternative potential general rules) should be the decision-maker's focus. Alexander and Sherwin also reject the idea that the later court recharacterizes the earlier decision as part of the normal precedential process. They see the process more sharply: Either the later court is applying, deductively, a rule set down by the earlier court, or the later court is legislating.

7. Emily L. Sherwin, *Do Precedents Constrain Legal Decision-Making? in* Philosophical Foundations of Precedent (Timothy Endicott et al. eds., forthcoming 2023).

8. *See id*.

9. *See, e.g.*, Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 583 (1987) (summarizing one version of the argument); *cf.* Duncan Kennedy, A Critique of Adjudication 157-79 (1997) (offering a critical legal studies version of the argument).

10. *See, e.g.*, Levi, *supra* note 6; Lloyd L. Weinreb, Legal Reason: The Use of Analogy in Legal Argument (2016); Grant Lamond, *Do Precedents Create Rules?,* 11 Legal Theory 16 (2005).

11. Larry Alexander, *Legal Objectivity and the Illusion of Legal Principles*, *in* Institutionalized Reason: The Jurisprudence of Robert Alexy 115 (Matthias Klatt ed., 2012) (on Alexy); Larry Alexander & Ken Kress, *Against Legal Principles*, *in* Law and Interpretation 279 (Andrei Marmor ed., 1995) (on Dworkin).

IV. Interpretation of Legal Texts

On the topic of the interpretation of legal texts, Alexander and Sherwin again insist that there is nothing distinctive about *legal* interpretation that it is like other mundane acts of interpretation, including the mundane act of understanding friends in conversation. "As in life, interpretation in law is a search for speaker's meaning (23)." Lawmakers are those delegated to make decisions for the country (or the city or the state), and we need to determine what decisions they have made in our name. "Because posited rules are communications from lawmakers of what they have determined others should do, the texts in which their rules are encoded should be read accordingly (20)."

Of course, *some* things are distinctive about law: The texts to be interpreted are generally meant to guide official or citizen behavior, and the texts are often the product of multi-person institutions (including legislative bodies and appellate judicial panels). One question in legal interpretation involves at what level of intention interpreters should be focused. Lawmakers may intend that citizens follow particular detailed behaviors, but they may *also* intend (through those prescribed behaviors) to achieve certain policy objectives, by which, in turn, the lawmakers hope to promote some combination of justice, fairness, efficiency, etc. What happens when the narrow intentions are at odds with the more general intentions?

In part, this is "the gap" all rules have, discussed above. As a related matter, as Alexander and Sherwin point out, there is often a temptation for legal officials involved in the interpretation and application of legal rules to correct the mistakes of the lawmakers—"mistakes of fact, mistakes of means-end reasoning, and mistakes in reasoning about values (62)." If only the lawmakers had been wiser, they would have enacted the legal rule the "enlightened" interpreters would have preferred. Alexander and Sherwin strongly advise interpreters to fight this temptation: "[I]f the rule-makers' mistakes are always to be corrected by interpreters, then there will be no rule-makers (62)." And while there are tensions between more specific intentions and more general purposes, Alexander and Sherwin argue that there is a right answer regarding the proper level of intention on which interpreters should focus (and defer): "[W]hat the rule-maker determined ought to be done (63)" —the particular action being prescribed or prohibited.

A different concern arises from the fact that many lawmaking bodies are composed of more than one person (legislatures, of course, but also multiple-member panels among appellate courts and administrative agencies, etc.). For such lawmaking bodies, Alexander and Sherwin insist that we find an intention that was shared by a majority of the lawmakers. Thus, if in a 100-member legislative body, a law passed seventy to thirty, and thirty-five lawmakers in the majority thought that a term in the legislation means for a particular purpose **A**, but thirty-five others thought it means for that same purpose something else—not **A**, but rather **B**—then for that purpose the law has *no meaning*, for there is no legislative majority for the law's meaning (50-51). "[O]nly the intended

meaning of a legislative majority regarding what law subjects are obligated to follow is authoritative for those subjects (51)."

That under this analysis there might not be law for a significant number of cases—and also that it might be difficult to determine when this conclusion is warranted—are conclusions that would be uncomfortable and inconvenient for a working legal system. Alexander and Sherwin understand that such problems may justify the workaround that legislators should be held to have intended whatever the objective meaning of the words they chose, regardless of their actual subjective intentions.[12] However, they argue that this is legitimate only if it is an existing higher norm—a norm higher than the legislation whose interpretation it is affecting—rather than one produced by a court with no express authority to enact such norms.

What of the long-established rule for interpreting statutes in such a way as to avoid absurdities?[13] One standard view is that interpreting a legal text to avoid an absurd or unjust outcome is a way of respecting the intentions of the lawmakers (or other drafters), because, almost by definition, an absurd or unjust outcome is one that a reasonable lawmaker could not have intended (52). At the same time, lawmakers *can* make mistakes—either mistakes in their predictions of mistakes or moral mistakes as to what is right.[14] And in that context, "a norm that directs interpreters to disregard intended absurd or unjust results operate as a constraint on the rule-maker's power to determine authoritatively what ought to be done (52)." Again, for the authors, this is only permissible where authorized by a norm higher than (or at least chronologically prior to) the legal rule being interpreted.

As the authors recognize, the relationship between lawmakers' intentions and interpretive rules is complicated. To the extent that an interpretive norm is settled, there is a sense in which lawmakers should reasonably be understood to intend how their enactments will be understood *under those interpretive norms*, just as in normal conversation one can reasonably assume (until receiving evidence to the contrary) that individuals who are speaking to you intend their words to be understood under the current conventional rules of meaning (*cf.* 42, 63, 84). Still, the authors insist that a higher-order rule that holds a rule with no intended meaning (because there is no majority agreement among the lawmakers) should be understood according to the objective meaning of the words used is not an "interpretation": "Interpretation is the recovery of the rule-maker's intended meaning. Higher-order procedural norms do not aid in that endeavor and are not meant to do so (64)." They are instead, effectively, delegations to the legal officials applying the legal text "to construct rules out of the materials that the rule-makers have provided (64)."

12. Though reference to "objective" meaning may not entirely solve the problems in such cases, where the terms are "objectively" ambiguous or vague.

13. *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387 (2003).

14. Perhaps it is more precise to say that the lawmakers can make decisions that the interpreter(s) consider to be mistaken.

Given the above, it is not surprising that Alexander and Sherwin are largely opposed to textualism. Textualism seeks the objective meaning of the words chosen by the lawmakers (at the time of enactment) while expressly ignoring evidence of the lawmakers' intentions (as found, e.g., in the legislative history). Some textualists ground their views on rule-of-law considerations: that legislative history is not part of what the lawmakers officially enacted and that such materials are relatively inaccessible to citizens (66-67).

Without dismissing or discounting those concerns, Alexander and Sherwin challenge textualism at a conceptual level, in the way that textualism seems to seek (and to assume the existence of) "objectified intention" or "intention-free" meaning (68). And that sort of intention and that sort of meaning, the authors argue, does not exist. One can imagine examples where the surf brings in seaweed in a pattern that seems to spell "C-A-T," or perhaps the same can be seen in the momentary pattern of clouds in the sky. However, the authors would argue, unless you think that God or some force in Nature is trying to communicate with you, this is a word without a meaning. "One cannot attribute meaning to marks on a page . . . without reference to an author, actual or idealized, who is intending to communicate a meaning through the marks (68)."

Some view intentionalism in a slightly different way, as how a text would be read by an average reader or an idealized reader. However, the problem for either alternative is how to give content to that fictional reader: What knowledge, attitudes, and values must the hypothetical reader have? Significant indeterminacy comes in, both in predictable disagreements about the nature of the average or idealized reader and in speculation about how this imagined figure would read a particular text (78-80).

Among theories of constitutional interpretation, Alexander and Sherwin's views seem closest to what is now called "original intentions originalism,"[15] a focus on the application intentions of the framers. This form of originalism is now far less popular—far less influential—than a view that focuses on "original meaning," how the terms chosen by the framers were understood at the time of ratification.[16] But the original meaning approach has, for the authors, all the problems of textualism generally: that it is indeterminate, at best, and incoherent, at worst (85). As they see it, a true "reasonable" or "average" reader will do what all interpreters do, in all contexts—seek the intentions of the speaker. "We can see no good reason for the proponent of original public meaning to base interpretation on anything other than what the most informed, intelligent member of the public would have concluded was the authors' intended meaning (85)."

15. On the origins and development of "original intentions originalism," see, *e.g.*, Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *in* The Challenge of Originalism: Theories of Constitutional Interpretation 12, 16-19 (Grant Huscroft & Bradley W. Miller eds., 2011).

16. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611 (1999) (discussing the move from original intentions to original meaning).

Conclusion

Alexander and Sherwin's *Advanced Introduction to Legal Reasoning* functions both as an overview to the issues of legal reasoning, useful to students and scholars being introduced to the field, and as a rough guide to Alexander and Sherwin's distinctive and often controversial views on those issues.

The authors somewhat mysteriously claim that "[t]he arguments we have made in this book should not be understood as a call for significant changes in legal education or legal practice (167)." Perhaps a great deal turns on how one understands "significant," for most readers will take from the work a prescription for significant changes in the way judges reason and interpret texts, and how judges characterize what they doing, and, one would suspect, how law students are taught (about) legal reasoning.