Preface

This book might be described as an exercise in going too far. Its origins are in a seemingly innocent question raised by Jan Parker, the editor of the journal *Arts and Humanities in Higher Education*, namely, was the study of law in universities a proper topic for her journal – in other words, is law one of the humanities? In the course of trying to answer that question, in a form that turned into an article for the journal,[1] it occurred to me that law had far more in common with a discipline that most people would consider very distant from it, namely engineering. The initial comparison focused on two points: first, the fact that both disciplines were practical rather than theoretical, in the sense that their ultimate purpose was to change the state of the world rather than merely to understand it; and second, the similar relationship both had with other, more theoretical disciplines – that engineering drew upon mathematics and the natural sciences, but could not be reduced to those sciences, and law could draw upon history, linguistics, economics, sociology, psychology and political science (and, within limits, literature), but also could not be reduced to them.

My initial purpose was merely to make a point about these relationships between academic disciplines, and to indicate some of the consequences that might follow for legal research and education. It subsequently became clear, however, that the analogy between law and engineering could be pushed further and further, all the time yielding interesting insights. For example, it yields a surprisingly accurate answer, at least as a first cut, to the question 'what do lawyers do?' Most lawyers, most of the time, are engaged by clients to produce structures – especially contracts, but also statutes and even constitutions – that are intended to produce some desired effect. That is, of course, what engineers do. That insight in turn produces questions about how lawyers and engineers carry out their work, questions about the processes of design. Again the comparison proved useful, uncovering similarities that help in understanding both processes, but also points of difference that not only help in understanding in a different way but also suggest ways in which lawyers might learn from engineers (and perhaps

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[1] 'Is Law a Humanity (Or Is It More Like Engineering)?' (2004) 3(1) Arts and Humanities in Higher Education 9–28.

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vice versa). Furthermore, as this book attempts to show, comparing lawyers to engineers produces insights into how lawyers ought to behave, that is into legal ethics. Those insights come precisely at the point where the factual analogy between law and engineering breaks down, where lawyers do not presently behave as engineers behave, or at least where the two sets of ethical codes diverge. The comparison is apposite enough, however, that it can be used to suggest that lawyers ought to behave in ways which would make it more accurate than it presently is.

Usually, if one pushes an analogy further and further it ceases to be useful. Indeed, it starts to become unhelpful, and begins to look more like a literary device or a conceit than an analytical tool. The famous analogy between society and the human body is that kind of analogy. It might help us to understand that societies depend simultaneously on functional specialisation (just as the head has a different function from the legs, so the Civil Service is doing a job different from that of the railway industry) and on the interdependencies between those functions. Soon, however, the analogy loses its explanatory power and becomes unhelpful, or even irritating. Do we care, for example, what the societal equivalent is of the pancreas or the appendix? The law-as-engineering analogy, I would claim, goes a very long way before becoming useless or irritating. The very fact that we can still draw useful insights even where the comparison is not entirely accurate is an indication that the limits of this particular analogy might lie a long way from its origin.

Scott Boorman, whose help and encouragement with this project have been invaluable, suggests that there is a difference between 'tactical' and 'strategic' analogies – that the former help one to overcome an immediate problem in explanation, classification or communication, but take one no further, whereas the latter identify credible structural similarities between complex phenomena that help to organise what we know about them and so continue to yield insights when pressed further and further. Because a strategic analogy works at a structural level, it will work for many different kinds of example and using many different kinds of evidence. It will even work when the comparison indicates some divergence between the phenomena. Where divergence occurs inside an explanation that otherwise successfully reflects a high degree of overall structural similarity, divergence itself does its own explanatory work: in circumstances where an analogy usually holds, it is inherently interesting why in specific instances, it does not hold. Divergence outside structural similarity, in contrast, is just divergence, with nothing more to offer. My hope for law-as-engineering is that I might have stumbled across such a 'strategic' analogy.

Analogies, of course, have dangers, one of which is the temptation to refuse to recognise that they have broken down. Claiming that a lack of

correspondence is merely an instructive divergence might amount to precisely that kind of self-deception. The problem is even greater for the type of analogy developed here, where we are not looking for simple point-to-point correspondences but for the ways in which collections of facts about one thing might be usefully compared to collections of facts about another. The only practical test, however, of whether an analogy has broken down is whether continuing to press it leads to a better understanding or a worse understanding of the subject matter – in other words, is the analogy still revealing more than it is concealing? Ultimately, that question is decided not by those who devise analogies but by those who use them.

Another possible way of characterising a 'strategic' analogy is that it never reaches its ultimate boundary – that every time one pushes it further, a new insight emerges. If that is correct, one could never definitively claim to have found one, because we could never know when the process of pushing the analogy further will cease to be fruitful. All that can be said at any one time is that the limits of an analogy have not yet been reached. If we think of strategic analogies in those terms, I can only say that it will be interesting to see where the limits of law-as-engineering will occur.

There are many other people, apart from Jan Parker and Scott Boorman, to thank for their help and encouragement in this project, too many perhaps to mention by name. I would, however, particularly pick out the members of the faculty of the University of Southampton Law School, who, with great forbearance, allowed me to use one of their annual Gabriele Ganz lectures, in which they might reasonably have expected me to talk from the perspective of a practising politician about the relationship between law and politics, instead to try out some of the ideas that have taken this project from the first article to where it now stands.[2]

I would also thank the various engineers whom I have bothered for information and enlightenment about engineering, and especially Nathan Crilly, whose guidance on engineering design processes helped fill in some large holes in my knowledge. Thanks also to all the lawyers, in particular the practising lawyers, conversations with whom have helped clarify my thinking about many aspects of current legal practice. In particular I would very much thank those who took the trouble to read previous drafts of the manuscript and to provide corrections to my factual mistakes and lively counter-arguments to my conclusions. They include Nicholas Aleksander, of Gibson Dunn, Mike Smyth, formerly of Clifford Chance, and Stephen Laws, formerly First Parliamentary Counsel. As both a lawyer and an

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[2] http://www.southampton.ac.uk/law/news/2008/10/23_the_thirteenth_gabrie
le_ganz_public_law_lecture.page.

academic sociologist, Scott Boorman deserves special mention for devoting an enormous amount of his own time to reading an earlier draft and for coming up with numerous suggestions for improvement, only a small number of which are properly acknowledged in the text.

None of the aforementioned is, of course, responsible for the errors that remain, and I am sure that each will disagree with at least some of the conclusions to which I have come.