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Practical Reasoning and Judicial Justification: Toward an Adequate Theory

Vincent A. Wellman
Wayne State University, aa2882@wayne.edu

PRACTICAL REASONING AND JUDICIAL JUSTIFICATION: TOWARD AN ADEQUATE THEORY

VINCENT A. WELLMAN*

I. INTRODUCTION

This article advances a theory of judicial justification: the argumentation used by judges to justify their decisions.[1] The nature of judicial justification and the appropriate criteria for evaluating judicial

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1. I distinguish judicial justification from the more general category of legal reasoning. *See infra* text accompanying notes 20-23. In particular, I argue that our concern over a court's justification for a decision focuses on the validity of the arguments adduced in support of the decision. Judicial justification is therefore distinct from the cognitive or psychological stages that an individual judge may go through before reaching a conclusion in a particular case. *See infra* text accompanying notes 42-43.

arguments are topics of intense interest in jurisprudence. Interest in these topics has spawned a variety of positions. Some commentators have despaired of ever developing criteria of validity that could reflect the full diversity of judicial arguments and decisions. This position is commonly associated with the Legal Realists,[2] and especially with Jerome Frank, who expressed this attitude most forcefully.[3] Other writers have resisted despair and have argued for one or another particular view of judicial justification. Two views have dominated the literature of jurisprudence. Some contend that judicial argumentation is fundamentally deductive, involving the deduction of a decision from some set of general legal standards.[4] Alternatively, others have argued that judges reach and support their conclusions by a process of analogy to other decided cases.[5]

I contend that valid arguments in support of a judicial decision are arguments of practical reasoning: the reasoning of ends to means. Since Aristotle, practical reasoning has been suggested as an alternative to deduction as a form of reasoning.[6] Contemporary philosophical investigations have illuminated the nature of practical inferences and the criteria of validity for practical arguments.[7] Drawing on these investigations, I argue that practical reasoning provides a better theory of judicial justification than either deduction or analogy.

Although scholars in law and philosophy have recognized the importance of judicial justification, they have seldom examined judicial reasoning as an independent question in jurisprudence.[8] Their differing views of judicial reasoning and their criteria of validity have been largely adjuncts to their efforts to develop and defend some general jurisprudential theory. Legal theorists have taken their respective positions on judicial argumentation in order to support or challenge the broader theory of law in which their conception of judicial reasoning

2. For a useful account of the history of Legal Realism, *see* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973). For a contemporary assessment of the Realistic American Legal Culture, see B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 6-22 (1983). It is a matter of some debate — even among scholars involved in the movement — just who should be deemed a Realist. *Compare* Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931) *with* Llewellyn, *Some Realism about Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

3. *See* J. FRANK, LAW AND THE MODERN MIND (1930).

4. *See infra* text accompanying notes 89-124.

5. *See infra* text accompanying notes 164-79.

6. *See infra* text accompanying notes 192-95.

7. I rely on the contributions of R.M. Hare and Anthony Kenny. *See* R.M. HARE, PRACTICAL INFERENCES (1971); A. KENNY, WILL, FREEDOM AND POWER (1975). *See infra* text accompanying notes 194-211.

8. There are a few notable exceptions. *See* Comment, *Legal Reasoning: In Search of an Adequate Theory of Argument*, 59 CALIF. L. REV. 821 (1971); N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978); M. GOLDING, LEGAL REASONING (1984).

figures.[9] They have not sought to uncover, for its own sake, the nature and criteria of successful justification.

This failure to treat judicial reasoning as an independent issue has had two unfortunate consequences. First, we suspect that theorists' contentions about judicial justification are laden with the baggage of their general jurisprudential theory. We are uncertain whether the particular conception of judicial reasoning can stand on its own if we choose to reject the accompanying theory of law. Second, those writers have failed to develop criteria by which we can evaluate different accounts of judicial argumentation. We have, therefore, no clear sense of how to choose the best theory of judicial justification from the available alternatives.

A central thesis of this article is that we cannot with any confidence establish the nature of judicial reasoning and the appropriate criteria of validity unless we first reflect on the nature of an adequate theory of such reasoning. That is the topic of Section II of this article.[10] What should a theory of judicial justification explain? What kind of theory will adequately explain the relevant phenomena? What are the criteria for preferring one theory over another? Jurisprudential scholarship has not heretofore focused on these questions. To develop my answer requires that I refer to parallel investigations in philosophy of science that bear on the nature of an adequate theory.[11]

Drawing on my conclusions about theory formation and preferability, I examine in Section III the two dominant views of judicial reasoning: the thesis that judicial reasoning is fundamentally deductive , in Section IIIA,[12] and the contention that justification depends essentially on analogical reasoning, in Section IIIB.[13] I argue that neither provides an adequate theory. In Section IV, I present my own view, arguing that judicial justification is best understood as a form of practical reasoning.[14] I build on the account of practical inferences developed by Anthony Kenny and R.M. Hare[15] and demonstrate that their account can explain the important features of judicial argumentation.

The nature of judicial justification is an important topic in the philosophy of law. The controversy surrounding that topic may be compared to the debates in ethics about the nature of moral argument

9. *See, e.g.*, Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136, 1140-47 (1982) (attacking deductive accounts of legal reasoning).

10. *See infra* text accompanying notes 20-87.

11. *See infra* text accompanying notes 79-86.

12. *See infra* text accompanying notes 89-163.

13. *See infra* text accompanying notes 164-89.

14. *See infra* text accompanying notes 192-259.

15. *See infra* text accompanying notes 194-211.

and the disputes in philosophy of science about scientific justification. Questions about judicial reasoning and the validity of judicial arguments, moreover, figure in a number of more general debates in jurisprudence. It is beyond the scope of this article to consider the general relationship, if there is one, between a theory of judicial reasoning and a full-fledged theory of law.[16] Some philosophers, at least, have been inclined to advance their theory of law by urging a particular conception of judicial reasoning. Professor Dworkin's writings on the nature of judicial decisions provide an example of just this inclination.[17] In challenging the view that judges in deciding cases have discretion to rely on their political and moral beliefs, Dworkin has argued that legitimate decision-making precludes any such discretion. We should expect, he contends, a right answer to every legal controversy, and the existence of a right answer means that there is no room in a valid decision for the judge's personal beliefs.[18] In the fifth and final section of the article,[19] I consider Dworkin's contentions in light of my theory of judicial justification, and I challenge his view that there must be a right answer.

II. A THEORY OF JUDICIAL JUSTIFICATION

A theory is ordinarily advanced to explain and predict the relevant phenomena, and an adequate theory will disclose the laws or structures which underlie the phenomena and produce their observable regularities.[20] Judicial justification poses some particular problems for theory development, and evaluating the adequacy of a theory of judicial justification requires some reflection on the nature and function of an adequate theory.

One problem for a theory of justification is identifying the phenomena which the theory should explain. As the legal community uses the term, "legal reasoning" may refer to wildly diverse instances of cognitive activity: not only judicial argumentation, but also judicial

16. For an example of one theorist who has considered this relationship, see N. MACCORMICK, *supra* note 8.

17. *See especially* R. DWORKIN, TAKING RIGHTS SERIOUSLY 1-130 (rev. ed. 1978).

18. *Id.*

19. *See infra* text accompanying notes 260-78.

20. "What is it to supply a theory? It is to offer an intelligible, systematic, conceptual pattern for the observed data. The value of this pattern lies in its capacity to unite phenomena which, without the theory, are either surprising, anomalous, or wholly unnoticed." N. HANSON, PATTERNS OF DISCOVERY 121 (1958). Legal theory has been generally unappreciative of the nature of an adequate theory and how this issue might affect current debates. There are a few notable exceptions. *See* Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954); Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 814-28 (1982); Nance, *Legal Theory and the Pivotal Role of the Concept of Coercion*, 57 U. COLO. L. REV. 1 (1985).

intuitions, lawyers' litigation strategies, and even scholarly research paradigms. The myriad phenomena which one might plausibly include in the category of legal reasoning are so various that the category's full range may exceed the explanatory capacity of any single coherent set of theoretical principles.

It is simpler, and likely more fruitful, to theorize about a subtype of these diverse phenomena. The arguments adduced by judges to justify their decisions are a useful focus for theoretical attention. We regard judicial decisions as particularly significant in our legal system. Their justifying arguments are thought to manifest important facets of that system's nature and operation.[21] Further, it is plausible that aspects of other types of legal reasoning can be traced to the nature and form of the judicial decision.[22] Reflecting the importance of judicial reasoning, this article advances a theory to account for the important features of judicial justification. My approach differs, then, from that of writers who have sought to explicate the nature of legal reasoning more generally.[23]

In part A of this Section I consider the object of a theory of judicial justification: what it is that the theory should explain. In developing a theory, some phenomena must be taken as the starting points for theoretical attention. Else, the theorist could not begin to formulate the laws and structures which could comprise the theory. I articulate, in part B, those features which could provide the starting points for a theory of judicial argumentation: what the legal community expects of judges in their efforts to justify their decisions. Finally, in part C I provide the bases for choosing among rival theories. To theorize about judicial justification requires us to understand the appropriate function of a theory of judicial justification. Is a theory of justification descriptive, conceptual, or normative? I argue that an adequate theory of judicial justification must play all three roles, and that this requirement motivates the criteria for choosing one theory over another.

A. The Aims of a Theory of Judicial Justification

An adequate theory of judicial argumentation should ascribe a logical structure to the arguments adduced by a judge. We should be able to identify, in terms of the theory, premises and conclusions and to describe the kind of inferences which are supposed to relate the former to the latter.

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21. *See, e.g.*, H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW iii-vi, 110-89 *passim* (tentative ed. 1958).

22. N. MACCORMICK, *supra* note 8, at 10-13.

23. *See, e.g.*, J. STONE, LEGAL SYSTEM AND LAWYER'S REASONING (1964).

Even a well-developed theory of judicial reasoning would be useless, however, if it accounted indiscriminately for each judicial argument without regard to its logical form or its success in justifying its conclusion. The legal community's critical responses to judges' arguments presuppose that we may distinguish among attempts at justification. Academics and practitioners acknowledge some arguments to be well-reasoned, but treat others as flawed. Moreover, we argue with one another about our different assessments of particular arguments. These judgments and our attempts to dispute them with one another presuppose that there are standards by which we can meaningfully evaluate judges' reasonings and discriminate among their arguments.[24]

A theory of judicial reasoning which accounted for every argument without discriminating the valid from the invalid would subsume each inference employed by a judge, no matter how specious. A theory so promiscuous would not aid us in understanding the legal system. Some arguments, it is clear, are invalid, so the theory should provide criteria which explain the legal community's judgments about which justifications succeed and which fail.

An adequate theory of judicial justification is similar, in a number of respects, to the theories advanced in linguistics to explain speech patterns within a language.[25] Speakers of a language are capable not only of generating sentences in that language, but also of distinguishing correct from incorrect sentences. To explain and illuminate a speaker's underlying capacities, a linguist develops a grammar — a general structure for producing acceptable sentences within the language and for manipulating those sentences in acceptable ways.[26] An adequate grammar can explain both the actual and the expectable responses of speakers to the grammaticality of possible sentences.[27] Focusing on the speakers' judgments of grammaticality, linguists seek to understand the language's full variety.

Similarly, a theory of legal reasoning should indicate the structures which underlie our evaluations of judicial argumentation. Its data are not the surface features of judicial arguments, but rather the critical reactions of judges and lawyers to particular arguments. It should propound criteria for evaluating judicial argumentation: for distinguishing good or acceptable judicial reasoning from bad or inadequate.

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24. *See infra* text accompanying notes 31-34.

25. The argument in this Section relies substantially on the notion of *reflective equilibrium* advanced by John Rawls for moral philosophy. *See* J. RAWLS, A THEORY OF JUSTICE 3-22, 46-53 (1971). Rawls similarly invokes linguistic research as a useful comparison. *Id.* at 47.

26. *See, e.g.*, J. GRINDER & S. ELGIN, GUIDE TO TRANSFORMATIONAL GRAMMAR 7-66 (1973).

27. *Id.* at 40-66.

This does not mean that judges necessarily craft their opinions in terms of inference forms which a theory would recognize as forms of valid reasoning, nor that the legal community's evaluations of judicial justification will refer to the standards propounded by the theory. In many cases, the conceptual apparatus proposed by the theory and its normative criteria will be constructs only.[28] An adequate theory of judicial argumentation should explain our discriminations among the argument forms employed. It need not explain those discriminations in the same way, however, nor in the same terms as might figure in our pre-theoretical discussions of judicial arguments.

It would be possible, of course, to construct a view of law and the legal system in which our various evaluations of legal reasoning were treated as otiose and inefficacious. For example, an extreme version of Legal Realism might hold that the reasons provided by a judge in justification of a holding are insignificant, except as they figure in certain mythic or political roles of the judiciary.[29] Any attention to criteria for judicial justification would be useful only insofar as it revealed the contours of that role. Similarly, a radical version of law and economics might contend that the only criterion for evaluating a judge's decisions is the extent to which his decision advances the overall efficiency of the legal and economic system. The judge's stated reasons would be superfluous, on this view, except to the extent that his opinion leads economic agents to efficient behavior.[30] The legal community's commitment to the notion that there are shared standards of justification is thus not by any stretch of the imagination necessary, and theories which discount the importance of these standards may well illuminate features of the legal system which we might otherwise not notice. But the fact remains that we rely on shared evaluations of judicial inferences in our responses to legal decisions. We need an account of our evaluations, if such can be managed.

It is arguable, however, that our evaluations of judicial arguments are so divergent and inconsistent as to indicate that there are no

28. *Cf. id.* at 11-14 (linguists' aim to explain speaker's competence leads to posit of "deep" structure and of rules relating deep to surface structure).

29. I do not claim that any Realist actually held this extreme position. Some of Jerome Frank's remarks could be read as advocating this view about judges' reasons, *see* J. FRANK, *supra* note 3, but my argument depends on the possibility of this kind of extreme position and not on the correct interpretation of Frank's views. For a thoughtful analysis of Frank's position, and the change in his thoughts across his career, see J. GLENNON, THE ICONOCLAST AS REFORMER (1985).

30. Similarly, there may be no actual scholar of the law and economics analysis who has taken this radical position. Ronald Dworkin has, on occasion, criticized Richard Posner for something like this view, *see, e.g.*, R. DWORKIN, *supra* note 17, at 97, but my point depends only on the possibility of such a radical position, not on the correct interpretation of Posner's work.

shared criteria for justification.[31] We have all seen, it might be argued, collections of cases where judges reach contrary holdings on seemingly indistinguishable facts.[32] Moreover, when evaluating the decision in a particular case, different lawyers will often reach inconsistent judgments; what seems artfully distinguished to one lawyer might be fatuous error in the eyes of another. This morass of divergent, even contradictory evaluations, it might be contended, indicates that at bottom no meaningful criteria of validity could ever be discerned for judicial argumentation.

Lawyers and judges sometimes differ in their evaluations of some judicial arguments. What is more significant, however, is that they dispute their conflicting evaluations. They will argue with one another about the validity of a given decision, or about the existence and force of a particular rule, notwithstanding their conflicting evaluations. This reflects the legal community's assumption that criteria obtain for recognizing good legal reasoning. Without common criteria for assessing the validity of arguments, there would be no grounds from which one could rationally establish the argument's invalidity.[33]

We are committed to the notion that there are standards of justification which either are or are not satisfied by judges in their arguments. An adequate theory of legal reasoning must take seriously the various ascriptions that we are all trained to make about such reasoning — its instances, successes and failures[34] — and it must elucidate

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31. It seems doubtful that anyone has asserted a nihilist position of such a radical form, although the allegation of incorrigible inconsistency could be read into some of Jerome Frank's aspersions on legal reasoning. *See* J. FRANK *supra* note 3. Two trends in The Critical Legal Studies tradition also raise questions about the consistency of our evaluations of judicial arguments, although I do not mean to attribute the position outlined in the text to any author. First, writers in the CLS tradition rely on the presence of alleged "contradictions" in legal doctrines as the basis for criticizing those doctrines and the purported structure of liberal idealogy which generates the doctrines. *See, e.g.*, Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 849 (1983). (I have doubts about the force of these claims. *See infra* note 131.) Second, some writers in the CLS tradition have suggested that focusing on legal reasoning as a distinct form of argument amounts to the vice of "formalism." *See, e.g.*, Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 565 (1983). The argument on this score seems to be that, to the extent that our evaluations of judicial justification are held to depend on controversial political or moral beliefs, our judgments of the validity of judicial arguments may be incorrigibly at odds with one another. For an insightful discussion of formalism by a writer outside the CLS tradition, see S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 169-215 (1985).

32. *Compare, e.g.*, Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co., 344 S.W.2d 639 (Mo. App. 1961) *with* McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970).

33. *Cf.* A.J. AYER, THE PROBLEM OF KNOWLEDGE 35-90 (1956) (discussing epistemological scepticism and refutations thereof); G. RYLE, DILEMMAS 94 (1962) ("There can be false coins only where there are coins made of the proper materials by the proper authorities.").

34. My claim that an adequate theory of judicial justification must "take seriously" the legal community's various critical remarks about judicial arguments parallels the arguments made by Ronald Dworkin that legal philosophy must take rights seriously as a part of the legal landscape. *See* R. DWORKIN, *supra* note 17, at 14-15, 184-86, 204-05.

the common criteria of validity which explain our critical evalutions of judges' arguments.

B. The Starting Points of a Theory of Judicial Justification

Our evaluations of judicial justification presuppose certain features of the legal process which bear on the role of judges and the judicial decision. These presuppositions are revealed in certain common expectations we bring to bear on judges' attempts to justify their decisions. Many of these expectations are unexceptional, even obvious, and articulating the obvious may seem pointless. Our shared expectations, however, can help provide the basis of our theory of judicial justification.

1. Justification and Reasons

We expect judges to try to justify their decisions.[35] We require that they state — generally in a written opinion — the warrant for their conclusions. By way of comparison, it is clear that judges are not regarded as oracles; we would not tolerate their pronouncing decisions on the basis of visions or visitations. Nor are judges logical black boxes whose outputs are expected to follow mechanically from some set of inputs.[36] Judges issue decisions, to be sure, but our legal system places certain constraints on their decision-making, most notably that their results be supportable according to certain standards of justification. In reaching their conclusions they are expected to reflect on the various dimensions of the case at hand and respond in sometimes subtle ways.

Our expectation that judges justify their decisions is only part of our more elaborate theory of the judicial process. We expect judges to justify their decisions but recognize also that the judicial decision is significant for more than just the arguments adduced. We distinguish between the holding of the case and the explanation for the holding, and the holding itself is significant apart from the explanation.[37] Whether the deciding judge's rationale is silly or cogent, the decision may serve as precedent for later judges.[38]

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35. *See generally* H. HART & A. SACKS, *supra* note 21. By itself, this requirement does not mean that the judge's justification must take the form of substantive reasons. It is conceivable, of course, that an adequate justification would consist in the judge's citing his institutional authority to decide the case before him, and then giving his decision, without references to substantive grounds for his decision.

36. *Cf.* Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 221-23 (1980) (arguing that judicial decisions are not properly explained by an algorithm).

37. For a classic review of the distinction between holding and dicta and of competing views of how to tell the one from the other, see R. CROSS, PRECEDENT IN ENGLISH LAW 35-40 (2d ed. 1968).

38. *See* N. MACCORMICK, *supra* note 8, at 84-85; R. DWORKIN, *supra* note 17, at 110-23.

Judicial justification may take different forms, but it is central to our expectations of judges that they give *reasons* for their decisions — grounds for concluding as they have and not in some alternative manner.[39] Just what counts as a reason is a frustratingly flexible and context-dependent notion. On the one hand, we do not expect every opinion to set forth a complete justification of the conclusion, reaching back in every case to legal first principles. Our doctrine of *stare decisis* means that a judge may, at least on occasion, take some legal questions as effectively decided.[40] Moreover, in weighing the applicability and strength of authority, the judge need not have considered every possible distinction in otherwise unproblematic doctrines. Some counterarguments may be dismissed cursorily, and some proffered distinctions may be rejected without ado. On the other hand, the reason-giving requirement is not trivial. We may distinguish between true reasons and statements which are reasons in only a Pickwickian sense, and we expect the decision to rest on the former sort of grounds for warrant.[41] The judge may not legitimately ignore worthy legal arguments, nor may he rely on obvious howlers as the "grounds" of his decisions.

Given the flexibility of our notion of a reason in our expectation of judges, it is not surprising that accounts will differ as to whether a particular argument has fulfilled this requirement. These divergences notwithstanding, we may note, in broad generality, certain distinct features of our standards on this score. For example, we do not normally demand a psychological account of how judges actually reach their conclusions. We distinguish between the reasons which might warrant a given result and a history of the cognitive stages undergone in deciding that the result in question was warranted.[42] However the judge may have come to the opinion, our concern with judicial reasoning focuses instead on the arguments he adduces to justify the decisions he makes.[43]

2. Like Treatment

Foremost among our standards for this reason-giving task is that

39. *See, e.g.*, Sartorius, *The Justification of the Judicial Decision*, 78 ETHICS 171, 172-75 (1968).

40. *See* R. CROSS, *supra* note 37.

41. *See* N. MACCORMICK, *supra* note 8, at 14-16.

42. This distinction is commonly expressed in terms of a difference between the context of discovery and the context of justification. *See* R. WASSERSTROM, THE JUDICIAL DECISION 25-30 (1961). The importance of this distinction should not tempt us to discount the context of discovery as an interesting focus of investigation, for judicial hunches and intentions may well be interesting and even revealing. But our demand for justification does not entail a demand that the judge have employed the correct hunch or intention.

43. *Id.* at 27.

judges should treat like cases alike.[44] This requirement has been related to a hope in the legal system for substantive justice,[45] although it is more likely that treating like cases alike is necessary but not sufficient for substantive justice.[46] The requirement of like treatment has also been related to our demand that judges approach cases without prejudice toward particular parties and without interest in the personality or identity of the parties.[47] Whatever its virtues, our expectation that judges treat like cases alike constrains the kind of reasons which could be adduced in favor of a legal conclusion. It requires that a decision for one party cannot be warranted unless a decision for another party whose legal position is entirely identical with the first's would also be warranted.[48]

Formally, this means that the judge's warrant must be general. He must be able to refer to a statement, universal in scope, which identifies a class of situations or parties and urges, if it does not compel, a decision in favor of the victorious side. The nature or source of this universal statement may vary. It might describe a large or small class of cases or litigants; it might be about principles or rights, or about technical doctrines instead; it might itself be justified by legislation or from past legal decisions. But the proposition's universal form guarantees that cases which are alike in the respect described will all be treated alike.

However important it may be that like cases be treated alike, we have only a flexible and context-dependent criterion by which to assess likeness. The use by judges of spurious distinctions among similar cases would render this requirement impotent without other, additional constraints on the reason-giving task. In general, it is easier to note what is inappropriate than it is to define when an argument is relevant or appropriate. It is not enough for a decision to be justified in terms of any universal proposition without regard to the content of the proposition. It would not be enough, for instance, that the winning party have red hair, or blue eyes, even if the judge seems to accept the implication that all similarly situated redheads would also have triumphed. It is also clear that the justification must reflect, to some degree, the particularities of the case at hand. To cite an example of Ronald Dworkin, we would be troubled if the judge decides cases merely by following a logical algorithm based on nothing more than the order in which the cases were heard, even if that algorithm pro-

44. *See, e.g.*, Winston, *Treating Like Cases Alike*, 62 CALIF. L. REV. 1 (1974).

45. *Id.*; N. MACCORMICK, *supra* note 8, at 73-99.

46. Winston, *supra* note 44.

47. N. MACCORMICK, *supra* note 8, at 72-99.

48. *Id.*

vided a logically effective account of the correct legal decision.[49]

3. Rules of Law

We expect that in giving reasons judges will appeal to certain special propositions styled "rules of law."[50] The notion of a rule of law has been a hotly contested issue in twentieth century jurisprudence. Debates flourish about various features of rules — about, for example, their force in judicial justification and their logical structure.[51] Nonetheless, our practice acknowledges that general propositions of law will figure significantly in judicial justification.

Many of the contentions about rules do not bear on the nature of an adequate theory of legal reasoning. For example, some of the controversy surrounding rules relates to past theories about legal process and political disputes about the role of the judges.[52] These disputes remind us, if we needed reminding, that judges are important for more than just their opinion-writing skills, and that judicial decisions are significant beyond the arguments adduced to justify the result. There is an obvious political dimension to the judicial role,[53] and we may wish to evaluate a judge's decisions in terms of the political cast of his holdings. Unless we suppose that the only standard of judicial justification is political, however, we need an account of judicial argumentation and its validity. This requires an account of judges' use of legal rules.

Legal scholarship of this century has been drawn to consider the nature and significance of rules by the challenges of the Legal Realists. They disputed what they thought to be the received view of legal reasoning, which, as the Realists understood it, ascribed to rules a distinct status and function within the legal system. They hoped to undermine the received view, and they challenged its picture of rules and reasoning.

Many of Realism's objections to the received view are better seen as disputes over which features may properly be ascribed to legal rules than as a complete denial of their existence in the legal system. Some of the Realists, for example, complained that judges feel free to indulge hunches and intuitions in coming to a decision about the proper

49. Dworkin, *supra* note 36.

50. *See* Sartorius, *supra* note 39, at 176-77.

51. *Compare, e.g.*, Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972) *with* R. DWORKIN, *supra* note 17, at 14-80.

52. *See* T. BENDITT, LAW AS RULE AND PRINCIPLE 22-25 (1978).

53. *See* R. DWORKIN, *supra* note 17, at 81-130; M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-860 *passim* (1977).

disposition of a controversy.[54] From that they would infer that legal rules are impotent, for rules don't seem to constrain judges from indulging their hunches. That inference could follow, however, only if a rule's essential function is to limit the judge's *cognitive* processes. But we have already noted that a judicial decision may be justified even if the judge's cognitive paths to the decision are circuitous.[55] If legal rules are significant for their role in judicial justification, then it is hardly dispositive to document their lack of influence on a judge's hunches or intuitions.

Similarly, some Realists asserted that one cannot predict a given decision with any certainty, no matter how well one may know the relevant rules.[56] It may be that we want judicial decisions to engender stability in the social order,[57] and that predictability of results is useful in promoting stability. But, from our lack of certainty about the application of some rules it hardly follows that rules play no role in judicial justification. A better conclusion may be that rules do not necessarily apply in a predictable fashion. In short, we may debate whether legal rules have certain particular features, and, as a result, we may conclude that rules do not have all the features we might wish. From such disappointment, however, we need not conclude that rules are fictitious.[58]

The Realists are an interesting chapter in American legal scholarship, and it is worth speculating on the sources and motives for their challenges to legal rules.[59] But in pursuing a theory of legal reasoning we must reject their contentions about the fictitiousness of rules as being, for the most part, rhetorical overkill. Legal practice is striking in converging on the notion that there are rules of law and that they figure significantly in the justificatory task. As Wasserstrom has observed, whichever analysis of rules we might choose to embrace and however much we might doubt that legal rules determine legal results, it remains a striking feature of our legal system that when a lawyer refers to the "rule of *Hadley v. Baxendale*" her colleagues will understand her reference.[60] Her colleagues also understand the significance of the rule regarding consequential damages for breach of contract and, except in the rare case, will agree on its application.

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54. *See* J. FRANK, *supra* note 3, at 3-13, 46-52.

55. *See supra* text accompanying notes 42-43.

56. *See, e.g.*, J. FRANK, *supra* note 3, at 3-13.

57. *See* H. HART & A. SACKS, *supra* note 21.

58. *See* T. BENDITT, *supra* note 52, at 22-42; Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833-38 (1936).

59. *See* Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961); G. GILMORE, THE AGES OF AMERICAN LAW 77-91 (1977).

60. R. WASSERSTROM, *supra* note 42, at 35-36.

4. Other Concerns

An adequate theory of judicial justification must reflect the fact that in addition to reasoning from rules judges must, on occasion, reason *about* rules. A theory should be rich enough to explain why some decisions about rules are justified and others are not. In some cases, the court must reason to a new rule or a new application or formulation of an existing rule.[61] Some controversies are such that more than one rule may apply, and the judge must decide, among the various applicable rules, which rule's application would be warranted.[62] These forms of reasoning about rules indicate that an adequate theory of justification cannot be limited to just the application of rules to particular cases.

Along with rules, judges characteristically appeal to principles and policies of law. On at least one view, it is arguments of principle and policy which provide the justification for the extension, reformulation or revision of legal rules.[63] It is a matter of substantial controversy in the literature just how properly to distinguish principles and policies from rules, and, for that matter, how to distinguish principles from policies.[64] Like rules, principles and policies are usually held to be general, and together they are sometimes referred to as "standards" of the law.[65] An adequate theory of justification should account for legal standards, of whatever kind.

Another salient form of reason offered by judges to justify their conclusions is the analogy.[66] Generally speaking, an analogy is an argument from demonstrated or assumed resemblances between cases to an inferred resemblance that is relevant to the dispute.[67] It is clear that judges will, in their justifying arguments, rely on the claim that the controversy at hand is similar in certain vital respects to another dispute. The demonstrated similarity therefore provides *some* reason for treating the case at hand in a fashion comparable to the previous decision. The logical structure of analogical arguments is a matter of some controversy — for example, it has been disputed whether analogical arguments rely in any important way on rule-like statements[68] —

61. *See* H. HART & A. SACKS, *supra* note 21.

62. *See* Winston, *supra* note 44, at 17-18, 22-23.

63. *See* H. HART & A. SACKS, *supra* note 21.

64. *Compare, e.g.*, Raz, *supra* note 51, *with* R. DWORKIN, *supra* note 17, at 22-28, 71-80, 82-89. *See also id.* at 254-301 (discussing criticisms of Dworkin's distinction).

65. *See* R. DWORKIN, *supra* note 17, at 22.

66. *See, e.g.*, S. BURTON, *supra* note 31, at 25-40; M. GOLDING, *supra* note 8, at 44-48.

67. *See, e.g.*, M. GOLDING, *supra* note 8, at 44-48.

68. *See infra* text accompanying notes 169-75.

but it seems unproblematic that judges do at times resort to analogical inferences to justify their decisions.

There are other features of judicial justification which have been bruited about in the literature: whether, for example, judicial justification is inherently and correctly political or ethical in character,[69] or whether to be legitimate, judicial decisions must rely on "neutral" principles.[70] Many of the divergent claims about judicial argumentation depend on problematic contentions about the proper role of the judiciary in our system of government. These problematic contentions cannot be included in the list of features which an adequate theory must accommodate, since their inclusion would unwarrantedly determine the shape of the theory.[71] We can hope that an adequate theory of judicial justification will aid us in the evaluation of these related debates, but we cannot require of a theory that it agree with one side or the other. What remains is to articulate just how we should choose one theory of justification over another, for then we might properly commit ourselves to one or another of these problematic visions of the law.

C. Choosing Among Rival Theories

In discussing theories of legal reasoning, it is common to distinguish three putatively different kinds of theories: descriptive, conceptual and normative.[72] This beguiling division should be carefully limited. To be sure, we may distinguish descriptive from normative remarks and note that they have different logical features. The logical differences mean that we may describe a justifying argument as analogical in nature and, without pain of contradiction, also argue that the analogy is ill-drawn or inappropriate. But the distinction may not apply in any useful fashion to theories. Any unidimensional theory of judicial justification — one that was merely descriptive, solely conceptual, or purely normative — would be inadequate.[73] A useful theory

69. *See* R. DWORKIN, *supra* note 17, at 115-18, 123-30.

70. *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

71. Rejecting these contentions about judicial argumentation is part of the process of arriving at a reflective equilibrium concerning judicial justification. *See* J. RAWLS, *supra* note 25.

72. In rough terms this classification would amount to the following differences. A descriptive theory of legal reasoning would describe the various instances of legal reasoning; a conceptual theory would identify certain concepts and notions at work among the various instances of legal reasoning; and a normative theory would posit a standard for the evaluation and perhaps improvement of the practice of such reasoning, or perhaps an ideal against which various instances could be measured. *See, e.g.*, Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977). Professor Dworkin has responded to Soper's criticisms along the same lines as I develop here. *See* R. DWORKIN, *supra* note 17, at 350-52.

73. Suppose, for example, that we could formulate a theory of judicial justification which was

of legal reasoning will, instead, integrate all three dimensions.

To illustrate this point, reconsider the question raised by the Legal Realists of *rule nihilism*.[74] The true rule nihilist (as opposed to someone who merely doubts the particular attributes of legal rules) would contend that the very notion of a legal rule is without foundation, and that any theory of justification predicated on such entities is therefore untenable.[75] It can be seen that if rule nihilism is supposed to be supported by observable legal practice, then it is conceptually incoherent.

To assert meaningfully that there are no such things as legal rules at work in our legal system requires some meaningful criteria in terms of which we could review legal practice to see whether rules play a role in the legal system. Else, the nihilist would have no intelligible basis for denying that rules obtain and that they figure in legal reasoning. But this means that the nihilist's argument presupposes a coherent conception of rules that a judge could use in justificatory arguments.[76] So, the nihilist cannot sensibly maintain on the basis of observable legal practice that rules are nonsense and that judicial reasoning cannot involve them.[77]

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descriptive only — that is, without any conceptual or normative commitments. Such a theory would provide us with nothing more useful than a laundry list of the observable instances of judges' reasoning. Without some conceptual apparatus there would be no basis on which to categorize instances of such reasoning into useful types or subtypes; there would be no warrant for comparing these various inferences; and there would be no foundation for ascribing an argumentative structure to any of the various instances. Even a theory which was descriptively and conceptually powerful enough to explain the observable examples of judicial argumentation would likely be inadequate without some normative component. For, unless we could distinguish valid from invalid inferences, the theory would subsume all instances of such argumentation, no matter how specious.

By the same token, no adequate account of legal reasoning could be normative or conceptual only, without a substantial descriptive commitment. If the proposed theory is to count as a theory of judicial justification, then its evaluative standards and conceptual structures must be such that instances of those norms or structures would be recognized by the legal community as judicial arguments. Else, the theory would vitiate the common criteria of judicial argumentation that, we have seen, our practice presupposes. The conceptual structures suggested by a theory must be discernable in acknowledged instances of judicial justification if the theory is to count as a theory of legal reasoning. Similarly, we would reject a theory whose norms were satisfied by no recognizable instance of judicial argument. If the theory's commitments could not be predicated over observable instances of legal reasoning it would simply fail to be a theory of legal reasoning as we understand the notion.

74. *Cf.* T. BENDITT, *supra* note 52, at 10-11 (distinguishing rule nihilism); T. MORAWETZ, THE PHILOSOPHY OF LAW 75-81 (1980) (discussing rule nihilism).

75. Similarly, one could distinguish *rule scepticism* — the claim that there are good reasons to doubt whether anything like a rule enters into judicial justification. *See* H.L.A. HART, THE CONCEPT OF LAW 132-37 (1961) (discussing rule scepticism).

76. *Accord* A. J. AYER, *supra* note 33, at 36-41 (experience cannot justify epistemological scepticism).

77. To demonstrate rigorously that rules are incoherent would require something like an *impossibility* proof: a formal demonstration that various proposed conditions for the existence of a legal rule cannot be satisfied simultaneously. For example, Arrow's startling Impossibility Theorem for social

The point here is that nihilism of this genre goes awry at least in part because it fails to integrate its conceptual and normative commitments with its descriptive basis: the claim that the idea of a legal rule is nonsense cannot be squared with the appeal to evidence about the role a rule does or does not actually play. The nihilist, in sum, would be more charitably understood as asserting a far less aggressive thesis: generalizing from judges' observable use, rules do not have certain attributes they are thought to have.[78]

That an adequate theory of judicial justification must integrate descriptive, conceptual and normative commitments means that we need sophisticated and sensitive criteria for evaluating a theory's acceptability. At a minimum, of course, a theory of justification must be descriptively adequate. The structures of inference and the standards of validity advanced by the theory must be such that instances of those structures and norms would be recognized by the legal community as actual justifications.

Descriptive adequacy alone is not enough, however, for a theory to be acceptable. Philosophers of science have noted that theories of any sort are *underdetermined* with respect to their data.[79] That is, for any set of data — no matter how rich and consistent with some particular theory — there are indeterminately many theories which are consistent with the same phenomena.[80] Since any theory could be revised to accommodate discordant data, the fact that a theory is consistent

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decision making begins with a set of plausible requirements for any method of making collective choices — requirements that seem intuitively to lie at the heart of our appreciation of democratic theory — and then demonstrates that no rule for collective choice can satisfy all those requirements. *See* K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951). For a useful explanation and discussion of Arrow's Theorem, *see* A. FELDMAN, WELFARE ECONOMICS AND SOCIAL CHOICE THEORY 178-95 (1980). To my knowledge, none of the critics of legal rules has attempted anything like an impossibility proof.

78. A grudging recognition of this point can be observed in recent writings of the Critical Legal Studies movement. Some writers in this tradition have questioned the intelligibility of coherence of legal reasoning based on rules. *See, e.g.*, Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383, 1384-86. More recent CLS scholarship has focused on the project of what members of the movement call an "internal" critique of the vision of law and legal reasoning that they attribute to liberal political theory. That is, they attempt to identify certain central tenets of liberal theory as regards law and then show that all these tenets cannot be achieved together. *See, e.g.*, Singer, *The Player and The Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 10-14 (1984). The internal critique is limited, therefore, in that it does not attempt to dispute the notion of rules *vel non*, but only aims at showing that liberal theory cannot meet its own criteria for success. *See id.*; Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1006 (1985): "The critique seeks to demonstrate how the various guidelines proposed by liberal legalism lack the clarity on which the liberal order presents itself as depending."

79. The point about the underdetermination of theories is most commonly attributed to Pierre Duhem. *See* P. DUHEM, THE AIM AND STRUCTURE OF PHYSICAL THEORY (1975). For a discussion of underdetermination and Duhem's contributions, see C. GLYMOUR, THEORY AND EVIDENCE 30-31 (1980).

80. C. GLYMOUR, *supra* note 79, at 31.

with our observations does not compel that theory's adoption.[81] Rather, the preferable theory is one that can explain and predict the relevant phenomena more simply, more powerfully, and more elegantly. Just how these attributes of theories lead to our accepting one candidate and rejecting its rivals is beyond the scope of this article, but some general guidelines for theory adoption can be noted.[82]

First, between two theories of judicial justification as to which we otherwise find no important distinction, we should prefer the simpler. A theory's simplicity consists in its capacity to explain the relevant data with as few theoretical primitives as possible.[83] The theory which can explain our judgments about the validity of arguments with fewer logical structures, fewer distinct kinds of inferences, and fewer criteria for validity is to be preferred over a rival which proliferates its theoretical commitments.

Next, other things being equal, a theory of judicial justification should be powerful. This involves two things. First, where we confront judicial arguments about whose validity we are uncertain, a powerful theory will provide us with a basis on which to judge them valid or invalid. This means that the theory must advance criteria of validity which support evaluations of controversial as well as unproblematic instances of judicial reasoning. Second, a powerful theory of judicial justification should help us illuminate other issues of legal philosophy. We understand that justifying a legal decision involves several important facets of the judicial process and, hence, of the law. A better theory of justification will lead us to further insights about the legal system.[84]

In addition to simplicity and power, we should favor theories which are elegant. As applied to theories of judicial justification, elegance bears on how well the theory of justification fits our other jurisprudential commitments. Where we have well settled views about other facets of the judicial process, the better theory's conceptual and normative commitments are generally compatible with those well settled views. We would avoid, for example, a theory that conflicted radically with our unproblematic assumptions about *stare decisis* and

81. *See generally* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). For a detailed account of how the possibility of theory modification bears on the choice of physical theories, see L. SKLAR, SPACE, TIME, AND SPACETIME 242-72 (1974).

82. These guidelines are drawn mostly from C. HEMPEL, PHILOSOPHY OF NATURAL SCIENCE 33-46 (1966). *Cf.* C. GLYMOUR, *supra* note 79, at 110-75 (criteria for comparing theories); see W. QUINE & J. ULLIAN, THE WEB OF BELIEF 42-53 (1970) (virtues of hypotheses).

83. This expresses the core idea behind the notion of theoretical parsimony, commonly associated with the work of William of Ockham and his famous razor. *See* Moody, *William of Ockham*, in 8 THE ENCYCLOPEDIA OF PHILOSOPHY 306, 307 (P. Edwards ed. 1967).

84. *Accord* C. GLYMOUR, *supra* note 79, at 110-75.

prefer, instead, the theory whose picture of justification accords with those assumptions.[85]

Further, elegance requires that, where our views about the law and legal decisions are not well settled, we should avoid the aggressive theory. If there are rival conceptions about the nature of law and of legal systems, then, other things being equal, we should prefer the theory that is compatible with both conceptions. Adopting a theory of judicial justification should not, by itself, foreclose our pursuit of a viable claim about a related topic in legal theory. A theory should illuminate other jurisprudential issues, not dispose of them surreptitiously.[86]

The proposals which will be examined in Sections III and IV exemplify these qualities to some extent. I will argue that a theory of judicial justification in terms of practical reasoning is preferable in the respects just reviewed to a theory in terms of deduction or analogy. It is important to note that in one sense each of these theories is plainly normative. They are theories of justification: of successful arguments which validate their conclusions. It follows that they offer criteria of argumentation under which some inferences will be found unacceptable. While the respective theories all invoke norms for the evaluation of justificatory arguments, they are not prescriptive in the sense that is normally attached to that term. That is, they do not contend that judicial justification should differ significantly from existing legal practice. They propose no new ideal for justification — no new warrant for deciding cases. They do not aim to reform existing practice, except to the extent that they provide a basis on which unacceptable arguments can be distinguished and criticized. They are theories of *judicial* justification: they attempt to explain our commonly shared evaluations of how judges do actually justify their decisions.[87] In the next two sections, it will be demonstrated that they are not equally successful in meeting this aim.

III. Two Dominant Views of Judicial Justification

In the literature of jurisprudence two approaches to the problem of legal reasoning have been dominant: one view which regards legal

85. *Accord* W. Quine & J. Ullian, *supra* note 82.

86. *Accord* C. Glymour, *supra* note 79, at 110-75.

87. *Cf.* Ryan, *Introduction*, The Philosophy of Social Explanation 1 (A. Ryan ed. 1973): "[I]t would be difficult to understand as a philosophy of *science* one which did not recognize as scientific achievements at least most of what scientists and laymen accept as such . . . . [Similarly], [t]he moral philosopher wishes neither to legitimate every moral position whatever nor to give an account of morality which makes what we ordinarily take to be moral positions simply unrecognizable as such." (Emphasis in original.)

reasoning as a species of reasoning by analogy (the "analogical thesis"), and another which regards it as a species of deduction (the "deductive thesis"). While other approaches have been proposed,[88] these two approaches have seen the greatest development. In this section, I examine these conceptions of legal reasoning in light of the conclusions reached in the previous section about the nature and function of a theory of justification. I present these views, beginning with the deductive thesis, and evaluate them in light of the criteria articulated in the previous section.

A. The Deductive Thesis

1. Deduction and Judicial Justification

The deductive thesis contends that deduction provides the appropriate model for legal reasoning in general and judicial justification in particular. As it has been developed for judicial justification, the deductive thesis centers around two claims. First, the thesis claims that judicial argumentation involves rule-like general propositions that subsume a class of litigants or factual situations and specify legal consequences for the members of the class.[89] Second, and most distinctively, the deductive thesis contends that on at least some occasions it is a valid legal inference to deduce a legal conclusion from premises consisting of a rule and the claim that a specific case is of the sort covered by the rule.[90]

In varying guises, this approach has enjoyed recurring but controversial favor in the jurisprudential literature.[91] An unsophisticated version of this thesis is frequently caricatured as the dreaded "mechanical jurisprudence." Whether or not anyone has actually advanced mechanical jurisprudence as a viable theory of legal reasoning,[92] it has been a frequent whipping boy. Holmes initiated the modern abuse, pronouncing that the life of the law has been not logic, but experi-

88. *See, e.g.*, T. PERRY, MORAL REASONING AND TRUTH, 75-92, 196-215 (1976); J. HOROVITZ, LAW AND LOGIC: A CRITICAL ACCOUNT OF LEGAL ARGUMENT (1972). *See also infra* note 149 (discussing deontic logic).

89. N. MACCORMICK, *supra* note 8, at 18-32, 73-86.

90. *Id.* at 53-62.

91. In favor of the deductive theory: N. MACCORMICK, *supra* note 8; Guest, *The Logic in Law*, in OXFORD ESSAYS IN JURISPRUDENCE (1st ser. 1961); Hart, *Philosophy of Law*, in 6 THE ENCYCLOPEDIA OF PHILOSOPHY (P. Edwards ed. 1967); Comment, *supra* note 8.

Against deduction: Lloyd, *Reason and Logic in The Common Law*, 64 LAW Q. REV. 468 (1948); G. GOTTLIEB, THE LOGIC OF CHOICE (1968); Burton, *supra* note 9; Wilson, *The Nature of Legal Reasoning: a commentary with special reference to Professor MacCormick's Theory*, 2 LEGAL STUD. 269 (1982).

92. "So far [nominalists] have had little luck in caging and exhibiting mechanical jurisprudents (all specimens captured — even Blackstone and Joseph Beale — have had to be released after careful reading of their texts)." R. DWORKIN, *supra* note 17, at 15-16.

ence,[93] and Pound added the derogatory label "mechanical."[94]

Since these worthies set the tone, mechanical jurisprudence has been pilloried for a variety of indiscretions.[95] Some of the criticisms of deduction charge, in effect, that it does not reflect the actual cognitive processes of the deciding court.[96] Whatever the truth of this charge, it is largely irrelevant for developing a theory of judicial justification; justification, as I have noted, is different from the psychological processes of the judge.[97] Deduction has also been scorned as inadequate to explain the myriad ways in which judges use legal rules to rationalize their decisions.[98] And, it has been criticized as incapable of accounting for the reasoning advanced by judges to justify their conclusions in novel situations, when they must justify their choices among rules or formulate the rules they use.[99]

Despite the contumely heaped upon mechanical jurisprudence, the deductive thesis has generated adherents. Two theorists, in particular, have carried its banner. Richard Wasserstrom, in his pioneering and insightful work, *The Judicial Decision*, argued forcefully that the critics of mechanical jurisprudence had failed to disprove the deductive thesis, understood more broadly.[100] Neil MacCormick, in his recent monograph, *Legal Reasoning and Legal Theory*, has expanded Wasserstrom's picture to accommodate our sense of "hard cases."[101] Together, they have advanced two lines of argument in favor of the deductive thesis.

First, by invoking more subtle conceptions of rules, they have blunted the caricature of mechanical jurisprudence — the blind and inflexible application of simple rules to complex situations.[102] Rules can be of different sorts and play different roles in judicial justification.[103] It is not, for example, essential to the nature of rules that it be easy to ascertain whether some particular rule is significant in the legal system. Nor is it crucial that it be a straightforward matter to state the rule's correct formulation. Scientific laws, for example, are frequently hard to decipher, and ascertaining the correct physical law

93. O. W. HOLMES, THE COMMON LAW 1 (1881).

94. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

95. For a thoughtful recent discussion of the significance and failings of any mechanical conception of judging, *see* Gordley, *Legal Reasoning: An Introduction*, 72 CALIF. L. REV. 138, 140-46 (1984).

96. *See, e.g.*, J. FRANK, *supra* note 3, at 31-34.

97. *See supra* text accompanying notes 42-43.

98. *See* Burton, *supra* note 9; G. GOTTLIEB, *supra* note 91.

99. *See supra* note 98.

100. R. WASSERSTROM, *supra* note 42.

101. N. MACCORMICK, *supra* note 8, at 195-221.

102. *See* R. WASSERSTROM, *supra* note 42, at 138-72; N. MACCORMICK, *supra* note 8, at 66-72.

103. *See* T. BENDITT, *supra* note 52, at 30-41.

may well require creativity and imagination.[104] But these difficulties do not, by themselves, convince us that scientific laws do not obtain or that they mask the underlying processes. It may well be that the scope of a given rule is uncertain.[105] Least of all need it be simple to predict the result of the rule's application.[106] What is crucial for the deductive thesis is the claim that a rule, when applicable, counts as some reason for a decision. This claim is consistent with a variety of different conceptions of rules. Given a different conception of the possible roles of rules in judicial justification than was assumed (and then attacked) by the Realists, many of the horrors of "mechanical jurisprudence" simply do not bear on the adequacy of the deductive thesis.[107]

Second, the deductive thesis need not deny that other, non-deductive forms of reasoning sometimes figure in the judicial decision. Wasserstrom coined the notion of a "two-level procedure of justification."[108] At one level the inference of a legal conclusion from a legal rule may be deductive in nature. But at another level non-deductive reasoning may be used to warrant the rule or to define its scope. MacCormick has elaborated on this notion, propounding two non-deductive criteria of inference — consistency and coherence — to account for inferences at the non-deductive level.[109] What *is* essential to the deductive thesis, its adherents have argued, is the claim that it is at least a justified form of argument to deduce a legal decision from a rule and the factual specification of a particular case.[110] Legal conclusions inferred from such premises by a valid deductive inference are warranted if the rule was appropriate and the factual characterization correct.

The case for the deductive thesis goes beyond merely refuting the objections raised against it. Its proponents have laid the foundation for the claim that it provides an adequate theory of judicial justification. In particular, proponents have taken great pains to establish the view's descriptive adequacy. Acknowledging that other forms of reasoning may also be employed by lawyers and jurists, advocates of the deductive thesis contend that at least some opinions are, in fact, deductive in form. To prove their point they have rewritten actual opin-

104. *See generally* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

105. Rules may be formulated in terms of vague or open-textured words. *See* H.L.A. HART, *supra* note 75, at 121-32.

106. *See* T. BENDITT, *supra* note 52, at 31-34.

107. *Id.* at 30-41.

108. R. WASSERSTROM, *supra* note 42, at 138-72.

109. N. MACCORMICK, *supra* note 8, at 100-28.

110. *Id.* at 52.

ions as sequences of deductively valid arguments.[111] This, they argue, demonstrates the "possibility" of a purely deductive justification.[112]

Beyond its descriptive accuracy, deduction's normative ramifications are attractive. To the extent that legal arguments either take the form of deductive arguments or can cogently be rewritten to take that form, and to the extent that such arguments are unproblematically regarded as having supported their conclusions, deductive inference seems to constitute one form of justification for decisions. The hallmark of deduction is its formal criterion for the validity of a given argument form.[113] An argument is deductively valid if and only if there is no possibility, in an argument of that same form, of inferring a false conclusion from true premises.[114] Deductively valid arguments are *truth-preserving* arguments, and truth-preservingness is a ready and reliable test for the acceptability of inferences.[115] If truth-preservingness were also a standard by which lawyers and jurists could evaluate the justification of a given decision, then the deductive thesis would be normatively useful as well as descriptively adequate.

Furthermore, the proposal that legal reasoning involves deductive inferences is appealing on conceptual grounds. A common feature of a wide range of theories of law has been the focus on legal rules.[116] The deductive thesis conforms to this common expectation of judging. The "major" premise of the form of deductive inference with which we are most familiar[117] resembles those abstract propositions that we associate with legal justification: "All men are mortal"; "A contract not to be performed within a year's time of its making is unenforceable unless it is evidenced by a writing, signed by the party to be charged."[118] Seen along these lines, a legal rule is construed as a general proposition that identifies a class of actual situations and prescribes certain legal consequences for cases of that class. If the case at hand is subsumed under a particular rule, and if the rule prescribes particular conse-

111. *See, e.g.*, N. MACCORMICK, *supra* note 8, at 19-34. *But see* Wilson, *supra* note 91 (challenging MacCormick's rewriting).

112. N. MACCORMICK, *supra* note 8, at 19.

113. *Id.* at 21. For a general discussion of the nature of deductive validity, *see* W. SALMON, LOGIC (2d ed. 1973); I. COPI, INTRODUCTION TO LOGIC (4th ed. 1972).

114. N. MACCORMICK, *supra* note 8, at 21.

115. There are a variety of procedures for testing the truth-preservingness of an argument: truth tables, *see, e.g.*, I. COPI, *supra* note 113; semantic trees, *see, e.g.*, R. JEFFREY, FORMAL LOGIC, ITS SCOPE AND LIMITS (1967); and axiomatic methods, *see, e.g.*, B. MATES, ELEMENTARY LOGIC (1965).

116. *See supra* text accompanying notes 50-62.

117. As an example of this form of inference, consider the classic syllogism: "All men are mortal. Socrates is a man. Therefore, Socrates is mortal." The first sentence, asserting the universal mortality of humankind, is commonly referred to as the *major* premise, and the second sentence, stating Socrates' humanity, the *minor* premise.

118. *See* N. MACCORMICK, *supra* note 8, at 72-86.

quences for subsumed cases, then it follows in a deductively valid inference that the prescribed consequences are true of the given case.

Along these same lines, developments in logic appear useful in relating the issues of legal reasoning to other jurisprudencial concerns. It has already been noted that judges are expected to treat like cases alike, and that to meet this expectation they are bound to frame their justifications in terms of universal statements of law.[119] The ability of deductive logic to capture valid inferences involving propositions of universal scope suggests the appropriateness of deductive logic as the fundamental form of legal inferences.[120]

Deduction looks like a particularly fruitful model for judicial reasoning because it offers a rich and already well-developed theory of argument.[121] It is a reliable and powerful form of reasoning. In many contexts valid deductive inferences are regarded as the paradigm form of justification.[122] Given our general respect for deduction as a justifying form of argument, legal conclusions would seem to deserve a similar respect when they are warranted by deductive logic. Moreover, logicians have constructed an elaborate formal apparatus in which formal conclusions about deduction itself can be proven in the most rigorous fashion.[123] Powerful metatheorems — theorems about the capability of various formal systems of deductive logic — have been established using this formal theory of deduction.[124] Deductive logic, in short, is an attractive foundation for a theory of legal reasoning because it appears intellectually elegant and well-established.

2. Evaluating a Deductive Theory of Judicial Justification

Despite the apparent virtues of deduction it is my contention that any deductive theory of judicial justification suffers from a number of conceptual and normative maladies. These infirmities result from the deductive theory's commitment to the truth-preserving criterion of validity and its supposition that the statements of a judicial argument

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119. *See supra* text accompanying notes 44-48.

120. *See* I. TAMMELO, MODERN LOGIC IN THE SERVICE OF LAW 79-93 (1978). Logicians standardly distinguish between propositional and quantified logic. Use, in the latter logic, of a quantifier provides a simple mechanism for representing in symbolic form the difference between singular and universal propositions. *See, e.g.*, W. SALMON, *supra* note 113, at 74-79. At least one commentator has criticized MacCormick for failing to appreciate the significance of quantified logic and its relation to our expectation that like cases be treated alike. *See* White, *Philosophy and Law: Some Observations on MacCormick's* LEGAL REASONING AND LEGAL THEORY, 78 MICH. L. REV. 737, 742 (1979).

121. *See, e.g.*, I. TAMMELO, *supra* note 120, at 7-70.

122. *See, e.g.*, C. HEMPEL, *supra* note 82, at 3-18; W. SALMON, *supra* note 113, at 13-17.

123. For an elaboration of the formal theory of deductive propositional and quantified logic, see G. HUNTER, METALOGIC (1971).

124. Among them: consistency, completeness, and decidability. *See id.* at 78-79 (consistency), 92-96 (completeness), 118-20 (decidability).

have a certain logical form. Construing judicial decisions so that the decisions could properly be said to be deductively valid attributes to the judicial role various features which conflict with important and well-settled expectations of judging and judicial argument,[125] or else requires untenably aggressive assumptions about the nature of law and the legal system.[126]

Deductive Validity

If an inference is deductively valid then the conclusion follows from the premises in a truth-preserving inference form. Suppose that a case is correctly subsumed under a particular legal rule which for a given jurisdiction accurately states the legal consequences for cases of that class. It follows that the prescribed legal consequences are true of the subsumed case. Whether or not we wish to apply that particular rule to that case, if the rule subsumes the case then the prescribed consequences follow.[127]

In deduction, the truth-preserving nature of the inference form is the only warrant for drawing the conclusion. Moreover, it is logically sufficient. Any applicable deductively valid inference is *ipso facto* warranted.[128] And, since there is no other warrant for the conclusion there is no other basis on which to challenge the argument's validity.[129]

The situation is different in the law. We may distinguish between the applicability of a legal rule, on the one hand, and the warranted application of the rule on the other.[130] For example, suppose there is a

125. Therefore, a deductive theory's commitment to the deductive criterion of validity conflicts with the third of my criteria for choosing among rival theories articulated in Section II. *See supra* text accompanying notes 83-86.

126. The commitment to truth-preservingness, therefore, runs afoul of the elegance criterion. *See supra* text accompanying notes 85-86.

127. Philosophers and logicians commonly express this feature by saying that the premises of a valid deductive argument *necessitate* the conclusion. *See, e.g.*, W. SALMON, *supra* note 113, at 15. Of course, the validity of an argument does not necessitate the truth of its premises or conclusion. Philosophers therefore distinguish the validity of an argument from the argument's *soundness*: a sound argument is a valid argument with true premises (and, therefore, a true conclusion). *See, e.g.*, I. COPI, *supra* note 113, at 33.

128. W. SALMON, *supra* note 113, at 15.

129. *Cf. id.* at 82:

> Given a valid deductive argument, we may add as many premises as we wish without destroying its validity. This fact is obvious. The original argument is such that, if its premises are true, its conclusion must be true; this characteristic remains no matter how many premises are added as long as the original premises are not taken away. By contrast, the degree of support of the conclusion by the premises of an inductive argument can be decreased by additional evidence in the form of additional premises.

130. The phrasing of this distinction is Kenneth Winston's, from his discussion of arguments by H.L.A. Hart and Chaim Perelman that the generality of legal rules leads to a "minimum" fairness of the legal system. *See* Winston, *supra* note 44, at 17-18, 22-23. Winston points out that a rule's descrip-

legal controversy that appears to be subsumed under conflicting rules of law. That is, suppose that the case at hand is simultaneously a member of two classes governed by different rules, but that the rules prescribe mutually incompatible legal consequences for cases they subsume.[131] By hypothesis, each rule applies to the case at hand, and to warrant his decision the judge must justify the application of one rule and the rejection of the other. On a deductive theory of judicial justifi-

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tion of the class of cases which are subsumed by the rule is "necessarily incomplete" — i.e. that the description does not preclude a case's being simultaneously described as a case of another sort. *Id.* at 16. He then argues that the generality of a rule does not entail that the rule's consistent application will be fair:

> If the descriptions of cases embodied in rules of law are necessarily incomplete, then there is no guarantee that the application of a particular rule to a case will take account of all the features of the case relevant to determining fairness of the application. In different words, the description in the rule is sufficient for determining the *applicability*, but not the *warranted application*, of the rule to the case. Cases always overflow the boundaries within which rules attempt to confine them. As a consequence, the identification of a case as a member of a class (*i.e.* as subsumable under a rule) does not commit one, on moral grounds, to the same identification for any other case satisfying an identical description.

Id. at 17-18. *Cf. also* Note, *Understanding the Model of Rules: Toward a Reconciliation of Dworkin and Positivism*, 81 YALE L.J. 912, 917-21 (1972) (distinguishing a decision that a rule is applicable from a decision that the rule should be applied).

131. Some terminological precision is required on this point. As I will use the term, a *conflict* obtains between rules if the rules subsume the same case and prescribe for that case incompatible results. For example, the Statute of Frauds requires a writing if certain kinds of contracts are to be enforced. Among the kinds of contracts "within" the Statute are those not to be performed within a year's time from their making, and those involving an interest in land. Courts early on developed a part performance exception in the latter category. Part performance by one party could make the contract enforceable notwithstanding the fact that there was no writing to evidence the contract. Yet, courts steadfastly resisted a part performance exception as regards contracts not to be performed within a year. *See, e.g.*, Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co., 344 S.W.2d 639 (Mo. App. 1961). Suppose a particular contract falls under both parts of the Statute, and one of the parties has rendered part performance. Should the court enforce the contract? Judicial doctrines would be said to conflict on the question of enforcing that contract. For an exposition of the part performance doctrine and the conflicting judicial approaches to the exception, see 3A CORBIN ON CONTRACTS § 459 (1960).

Grant Gilmore has described a similar situation posed by the RESTATEMENT OF CONTRACT's twin bases for the enforcement of promises — the Holmsian "bargained-for" consideration, articulated in § 75, and the emerging promissory estoppel which was embodied in § 90. *See* G. GILMORE, THE DEATH OF CONTRACT 60-72 (1974). "The extent to which the new § 90 was to be allowed to undercut the underlying principle of § 75 was left entirely unresolved." *Id.* at 64. Promissory estoppel and Holmsian consideration conflict, on this usage, as regards a particular contract where promissory estoppel would enforce the promise and bargained-for consideration would deny enforcement.

However, there will be myriad instances where no conflict results from these two rules: where, for example, there is neither consideration nor detrimental reliance. Since in such a situation it is possible to satisfy both rules simultaneously, it is misleading and inappropriate to say that the rules are inconsistent. Rather, rules are inconsistent if they conflict on every case. *See* Marcus, *Moral Dilemmas and Consistency*, 73 J. PHIL. 121, 128-31 (1980). *A fortiori*, it is a mistake to assert that the rules contradict one another. Since it is common for lawyers and legal academics to refer to situations of conflicting legal rules as situations of legal "inconsistency," I will say that applying conflicting rules may lead to inconsistent results, and that the legal system is, in a derivative sense, inconsistent if it is possible to generate incompatible results by applying valid but conflicting rules. For further analysis of the nature of legal conflicts and their possible significance for legal theory, see Munzer, *Validity and Legal Conflicts*, 82 YALE L.J. 1140 (1973).

cation two conflicting legal conclusions would each be warranted. However, the judge must decide the case. Although both rules apply, he must decide which conclusion to impose and, implicitly, which rule is appropriate.

Proponents of the deductive thesis could respond to this challenge by trying to refine their picture of judicial justification so as to account for the distinction between an applicable rule and a rule whose applicability is warranted.[132] More specifically, proponents of the "two-level" version of the thesis could argue that at the non-deductive level of justification the judge can evaluate the various rules that seem to be applicable and conclude which rule's application would be warranted. MacCormick, in particular, has argued that justification at times involves a different form of argument — what he labels "second-order justification" — which establishes the preferability in the legal system of one possible rule over another.[133] Proponents of the two-level version could try to extend MacCormick's idea of second-order justification. The court could, on this argument, rely on second-order justifications to determine which rule's application would be warranted.

This is, no doubt, an appealing argument and, if it could be sustained, would seem to accommodate the distinction between a rule's applicability and its warranted application while preserving the essence of the deductive theory. The argument's thrust is that however the judge derives the appropriate rule, applying it to the given case involves a deductive inference. Some reflection shows that this response is ultimately unsatisfying. In deduction, the conclusion of a truth-preserving inference follows, whether or not we approve of it.[134] So, regardless of the judge's second-order ruminations about which rule is appropriate to the case at hand, if both rules are applicable and

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132. It is a consequence of the underdetermination of theories of judicial justification that a deductive theorist could revise his theory in a way to accommodate this apparent difficulty for the theory, *see supra* notes 79-82 and accompanying text, either by adding "auxiliary hypotheses" to his theory or by redescribing the distinction between a rule's applicability and the rule's warranted application. MacCormick, at least, takes the latter tack, arguing that cases where more than one rule seems to apply are actually cases where further refinement of the competing rules is required. *See* N. MACCORMICK, *supra* note 8, at 101-19.

The moral of Section II, *supra*, is that theoretical emendations, such as MacCormick's, are possible. However, they do not necessarily keep the revised theory above reproach. MacCormick's argument, in particular, avoids conflict only by supposing that his criteria for choice among competing rules — consistency and coherence — will yield a unique answer in every case of competing rules. Else, the situation would still obtain where deducing the consequences of each rule would be warranted. Therefore, his revision succeeds only at the cost of overly aggressive theoretical commitments. *Cf.* Winston, *supra* note 44 (arguing that it is implausible that only warranted rules are applicable).

133. N. MACCORMICK, *supra* note 8, at 100-28.

134. *See supra* text accompanying notes 127-29.

the consequences of each follow in a deductively valid inference, then both consequences are warranted. In short, even for the two-level versions of the deductive theory, the deductive theorist must either tolerate the existence of inconsistencies in the legal system, or else posit that no such inconsistencies obtain.[135] It can be seen that neither horn of the dilemma is acceptable to the deductive theorist.

Consider, first, the problem that inconsistency poses for a deductive theory. In formal logic, a system of logic is inconsistent when a proposition p and its negation $\sim p$ can both be proven in the system.[136] Inconsistency would be a deeply troubling result for a deductive system; from an inconsistent premise set any conclusion whatsoever can be justified.[137] If inconsistency were tolerated, a deductive system would be an utterly unreliable means of justifying claims.[138] For that reason, it is crucial in developing a formal system of deductive logic to establish that using valid inferences in that system does not lead to inconsistent conclusions.[139]

While the deductive proponent cannot accept inconsistency, he cannot preclude its existence in the legal system.[140] Indeed, our expectations about the role of judges in the legal system suggest that complete consistency throughout the system is implausible. The consistency of a deductive system of logic implies that we may rely on indirect or *reductio ad absurdum* arguments.[141] Yet, *reductio* arguments are unreliable in the law. When a judge decides a particular case he might be taken to have denied the validity of one party's arguments, but he is not necessarily understood to have decided that any other legal propositions are false. Consider, for example, the situation where there are two applicable but conflicting legal rules,[142] but where

135. *See supra* note 131 for an explanation of this notion of inconsistency in the legal system.

136. *See* G. HUNTER, *supra* note 123, at 78-79.

137. Suppose both p and $\sim p$. From p, one may validly deduce p *or* q, for any q whatsoever, by the rule of inference known as addition. But, from p *or* q, and $\sim p$, one may validly deduce q. So, q can be justified in deduction, regardless of its content. *Id.*

138. *Cf. also* J. POLLOCK, KNOWLEDGE AND JUSTIFICATION 39-46 (1974) (consistency as a requirement for epistimological justification).

139. *See, e.g.*, G. HUNTER, *supra* note 123, at 79-83.

140. While consistency can be proven formally as a metatheorem about a system of logic, there is no reason to suppose that it could be proven of a legal system.

141. *See, e.g.*, P. SUPPES, INTRODUCTION TO LOGIC, 36-41 (1957). *Reductio* arguments take the following form. Given premises which we know are true, if a contradiction is validly deducible from those premises in conjunction with some additional premise or premises, then it follows that the additional premise (or one of the additional premises) is false. Put differently, affirming the truth of the given premises entails the denial of the added (false) proposition. There is no reason to suppose that consistency, or any comparable metatheorem, could be proven formally of the set of legally valid inferences. Nor is there any good reason independent of the metatheory, to suppose that such a set is consistent.

142. *See supra* note 131.

the second is neither argued by any of the parties nor considered by the bench. The judge's use of the first does not entail the falsity of the second. Indeed, his decision does not even mean that the second rule was inapplicable.

We distinguish in our legal system between the holding of a case and its dicta, and the two are valued quite differently in our system of precedent. This distinction means that even when a given holding appears entirely inconsistent with some legal rule not at issue in the decision, the holding, no matter how valid, does not *entail* the falsity of the apparently inconsistent rule. Of course, the deciding judge might attempt a more aggressive characterization of his decision — suggesting, perhaps, that his holding meant that the inconsistent rule was false. But his suggestions could be understood as dicta only. In any subsequent case in which the inconsistency of the first decision with the other rule itself became an issue, the judge deciding the second case would have to evaluate the problematic rule and reach his own decision about which authority to apply and which to reject.

It is, finally, an embarrassment to the deductive theorist that he cannot provide an affirmative argument in support of the legal system's consistency. The system's inconsistency undercuts the reliability of deductive justification, and given consistency's significance it would be heroic, if not quixotic, simply to assume that no inconsistencies in fact obtain. The aggressiveness of such an assumption must surely count against the deductive theory's plausibility. Moreover, many jurisdictions are rife with instances of apparent inconsistency; the deductive theorist would have to suppose that each of these apparent inconsistencies could be explained away as apparent only.

At most, a deductive proponent could argue that judges and lawyers work to rid the legal system of its inconsistencies. MacCormick, for one, posits consistency of the legal system as one of the norms of second-order justification.[143] But, it is hard to see how the proponent could demonstrate that consistency is an unequivocal norm of the legal system, and hence, that inconsistency would inevitably be

143. N. MACCORMICK, *supra* note 8, at 106. It seems entirely plausible that judges do indeed work to rid the legal system of inconsistencies. So, for example, while the final chapters have yet to be written for the interplay of bargained-for consideration and promissory estoppel, *see supra* note 131, it now appears the latter is ascendant. Indeed, the detrimental reliance idea seems so powerful that in many jurisdictions it has prevailed over the Statute of Frauds itself. *See, e.g.*, McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970); RESTATEMENT (SECOND) OF CONTRACTS § 139 (1982).

It also is beyond dispute that, when confronted with inconsistencies, courts frequently reinterpret or reformulate one or both of the conflicting rules so as to eliminate the grounds for inconsistency. What is at issue, however, is whether *every* instance of incompatible rules can cogently be supposed to be just an instance of incomplete analysis or infelicitous phrasing on the part of past jurists.

weeded out of the legal system.[144] Even if he could advance a norm of consistency, that norm does not preclude the existence of *current* inconsistencies in the system, and those existing inconsistencies indicate deduction's current unreliability.

Logical Form

The deductive thesis' reliance on the truth-preserving criterion of validity commits the theory's proponents to another unsatisfactory position regarding what philosophers call the "logical form" of legal statements: the kind of sentence a legal statement should be construed to be, and the proper logical parts of a legal statement.[145] Specifying a statement's logical form will indicate how that statement can validly figure in arguments of various sorts, and asserting that a particular statement figures validly in some particular argument implicitly commits one to claims about that statement's logical form.[146] The deductive criterion of validity — truth-preservingness — can apply only to

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144. MacCormick, for example, simply asserts consistency is a norm, and, apparently, an unequivocal one:

> The idea of a 'consistent' body of norms I use in a strict sense: however desirable on consequentialist grounds a given ruling might be, it may not be adopted if it is contradictory of some valid and binding rule of the system. Of course, an ostensibly contradictory precedent may be 'explained' and 'distinguished' to avoid such a contradiction. . . . But if such devices for reconciliation fail, the requirement of consistency would require rejection of an otherwise attractive ruling on the ground of its irresoluble conflict with (contradiction of) established valid rules.

N. MACCORMICK, *supra* note 8, at 106. Thus, he assumes not only that the norm of consistency must be fulfilled, whatever else, but further that there are at present no inconsistencies among the set of valid and binding rules of the system. Else, there would be no resolution of the situation which is considered in the text, where two incompatible rules apply to the same case: for applying either would result in a ruling that conflicted with some valid rule.

It is beyond this essay to establish that inconsistencies will always be with us, but support for that idea may be found in a number of reflections on the process of common law adjudication. *Cf.* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 82-90, 96-109, 112-14 (1980) (arguing that common law judges can accommodate and have, in the past, accommodated into the legal topography statutory excursions, many of which are plausibly inconsistent with settled law); Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity and the Linear Order of Decisions*, 72 CALIF. L. REV. 369, 380-83, 395-402 (1984) (arguing that in any legal theory in which the truth of a disputed proposition is determined by its coherence with other settled claims, the set of true propositions is subject to change as new judicial decisions are made).

145. [G]rammar is supposed to tell us that "Socrates" and "The tallest man in the world" are phrases of the same sort, while "Socrates" and "George thinks Mabel" are of different sorts. The classification is logical in character, in the sense that prhases are classified together (in our example) if systematic substitution of one for the other does not affect the validity of arguments. It is convenient therefore to say that characterizations of phrases which are relevant to matters of validity are characterizations of the *logical form* of those phrases.

Introduction, THE LOGIC OF GRAMMAR (D. Davidson & G. Harman ed. 1975) (emphasis in original).

146. *Id.* at 2-3, 8-14.

inferences between statements which can be true or false.[147] Legal statements, then, must be *propositions*, if the deductive thesis is to have any cogency. This commitment, in turn, precludes any legal theory which holds that legal statements are not assertions of fact but have, instead, the form of commands or norms.

In the literature of jurisprudence, there is a long and venerable tradition of legal theories which treat at least some of the operative statements of a legal system as commands, directives, or norms[148] — the kind of statements which do not bear truth values.[149] Of course, it may be true (or false) that someone has commanded an inferior to do something or other, and it may be true that some norm is obligatory in the legal system. But we would not standardly regard the command "Do such-and-such" as either true or false. If neither true nor false, then commands and norms can be neither premises nor conclusions in arguments which look to establish the truth of some statement.[150]

More importantly, accepting truth-preservingness as the sole criterion of validity means that commands and norms cannot figure at all in judicial argumentation. Even if one were to suppose that commands could somehow figure in deductive arguments, it can be seen that inference forms which are deductively valid may be invalid among commands and that acceptable inferences among commands are deductively invalid. In deduction, from the proposition *p* one may validly infer *p or q* for any *q* whatsoever.[151] On the definition of the

147. *See, e.g.*, I. COPI, *supra* note 113, at 5.

148. *See, e.g.*, J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832) (law as commands); H. KELSEN, THE PURE THEORY OF LAW (1967) (law as norms); J. RAZ, PRACTICAL REASON AND NORMS (1975) (law as norms).

149. *See* I. COPI, *supra* note 113, at 5. There is some debate within the philosophical community about whether norms can bear truth values. It is arguable that moral norms, at least, bear truth values, inasmuch as we might wish to talk about some moral claims being true and others false.

The development of deontic logic — a logic for obligations and permissions — suggests that at least some norms may be construed as involving truth values. Space does not permit a full discussion of the thesis that we can understand judicial justification as a version of deontic logic. *See* C. ALCHUORRON & E. BULYGIN, NORMATIVE SYSTEMS 65-94, 144-65; Kanger, *Law and Logic*, 3 THEORIA 105 (1972). Research in deontic logic is *exceedingly* technical and defies even a short description. *See generally* B. CHELAS, MODAL LOGIC: AN INTRODUCTION 190-203 (1980). Its technical nature means that it may be possible for a deontic thesis to explain the important features of judicial justification which are noted in Section II, *supra*. However, it is important to note that most of the standard accounts of deontic logic treat it as an extension of deductive logic. In particular, in the most common elaboration of deontic logic — what is commonly termed a semantics of possible worlds — norms are treated as valid if they are true in every possible world. Thus, in the absence of further elaboration by proponents of the deontic thesis, we would expect that many of the objections to the deductive thesis — the problems of the deductive criterion of validity and the difficulties with logical form — would also afflict the deontic thesis.

150. This will be true for both deductive and inductive arguments. *See, e.g.*, W. SALMON, *supra* note 113, at 13-15.

151. *See supra* note 137.

connective "or" in deduction, there is no possibility of *p or q* being false when *p* is true. Inferring the disjunction is always valid. Thus, "The letter is posted or the letter is burned" is a valid inference in deduction from "The letter is posted." But, from the command "Post the letter," it would be patently unacceptable to infer "Post the letter or burn it," no matter how valid the inference might have been among truth-bearing propositions with the same descriptive content. No commander who wants the letter posted would accept fulfillment of the inferred disjunction as fulfillment of the original order.[152] On the other hand, while inferring "Bring me a cloak" from "Bring me something to keep me warm" may be an acceptable inference among commands, the corresponding inference among the related propositions would be invalid in deductive logic.

Some interesting and historically important theories of law hold that legal statements are commands or else are essentially like commands in certain respects. Legal theorists from Austin to Kelsen, and since, have propounded the view that legal orders and rules are commands, directives, or norms, and not propositions capable of bearing truth values.[153] Since valid inferences among commands or directives are not valid in deduction, construing judicial justification as essentially deductive would preclude any such command-based theory of law. We reach the same impasse when we consider more recent theories of law that conceive of legal statements as norms, rather than as propositions.[154]

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152. *See* A. KENNY, *supra* note 7, at 73. This example of Kenny's reveals, in miniature, many of the issues pertinent to debates over logical form. The descriptive sentences "The letter is posted," and "The letter is burned" can be represented by *p* and *q* respectively. The fiat "Post the letter" would be symbolized by the addition of a marker of imperative mood: *F(p)*. *See infra* text accompanying notes 196-99. An issue of logical form is posed by the question of how properly to symbolize and, ultimately, how to understand the statement "Post the letter or burn it." One understanding would be represented by the expression *F(p) or F(q)* — a disjunction of two imperatives. On that understanding, if commands could bear truth values the inference from *F(p)* to *F(p) or F(q)* would be truth preserving and valid in deduction. A more natural understanding of the sentence, however, would lead to the symbolization *F(p or q)* — which might be expressed as "Let it be the case that the letter is posted or burned." Inferring *F(p or q)* from *F(p)*, however, can be seen as invalid in the logic of commands. Another example of the same sort would be the inference from "Vote for Mayor Daly" to "Vote for Mayor Daly or somebody." No party boss would accept the chain of reasoning.

For a variety of reasons Kenny and Hare have argued that reasoning from imperatives and norms requires that the markers of mood should remain outside the descriptive contents, thereby preserving as invalid what is intuitively troubling about these examples. *See* A. KENNY, *supra* note 7, at 73-75.

153. *See* J. AUSTIN *supra* note 148; H. KELSEN, *supra* note 148.

154. *See* J. RAZ *supra* note 148. *But see* Hart, *Problems of Philosophy of Law*, in 6 THE ENCYCLOPEDIA OF PHILOSOPHY 268-69 (P. Edwards ed. 1967):

> It has been contended that the application of legal rules to particular cases cannot be regarded as a syllogism or any other kind of deductive inference, on the grounds that neither general rules nor particular statements of law (such as those ascribing rights or duties to individuals) can be characterized as either true or false and thus cannot be logically related

It is beyond the scope of this essay to consider the many intricate arguments that bear on this question of the logical form of legal statements. Many remarks by judges and lawyers have the surface form of a proposition, purporting to describe some state of affairs, for example: "[A] moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit."[155] But the apparent propositional form of a statement is not conclusive. Research in both linguistics and philosophy of language has led to the acknowledgment that the true form of a statement may be other than its apparent form.[156] Even if the statement quoted above is a valid rule of law, we are not thereby committed to the truth of the apparent assertion about moral obligation, nor even to the existence of a thing called "consideration," which could be either sufficient or not. We may, instead, construe legal rules as having the form of norms, or as having the form of a directive to the deciding judge.

Whether or not one accepts a theory that construes legal statements as having a non-propositional form, such theories have been important in jurisprudence. But they are incompatible with the deductive thesis and its commitment to the truth-preserving criterion of validity. Other things being equal, we should prefer a theory of legal reasoning that does not force us to accept an aggressive position on logical form. We might, for independent reasons, determine that the best view on this subject is as the deductive thesis supposes, but we should be reluctant to view legal statements as propositional in form just because we accept a deductive theory of legal reasoning.

There is a further discrepancy posed by the deductive thesis' requirement that legal statements be either true or false. To suppose that legal statements are propositions capable of bearing a truth value

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> either among themselves or to statements of fact; hence, they cannot figure as premises or conclusions of a deductive argument. This view depends on a restrictive definition, in terms of truth and falsehood, of the notion of a valid deductive inference and of logical relations such as consistency and contradiction. This would exclude from the scope of deductive inference not only legal rules or statements of law but also commands and many other sentential forms which are commonly regarded as susceptible of logical relations and as constituents of valid deductive arguments.

In Section IV it will be argued that the better account of both commands and directives and also of legal inferences requires just what Hart hopes to avoid: a non-deductive understanding of the statements involved.

155. Webb v. McGowin, 27 Ala. App. 82, 85, 168 So. 196, 198 (1936). The stylistic habit of writing about rules and principles in the declarative is not limited to judges. Reformers, as well, frame their pronouncements as if they were matters of fact even though they may be urging changes in existing law. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (1981): "A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice." It is arguable that this stylistic device has served political or jurisprudential aims. *See* G. GILMORE, *supra* note 59, at 12-18, 108-10; M. HORWITZ, *supra* note 53, at 253-66.

156. *See supra* note 146.

suggests that the judge's conclusion is a description of the world, similar to the hoary "All men are mortal" and "Socrates is mortal." But this seems unnatural, to say the least. It seems more plausible, instead, to regard the judge's holding as a *decision*, and not as a description.[157]

Indeed, construing legal statements as descriptions of the world is rife with conceptual difficulties. A rule, on this argument, should be construed as a general proposition. Suppose a judge decides a case by subsuming it under a rule. If the rule is true, then all subsumed cases have the prescribed legal consequences. Indeed, those consequences are true whether or not the judge actually decides the case in accordance with that rule; that the judge actually cited that rule is unimportant. But now suppose that the judge had decided differently than he in fact decided. How should we regard this other judicial conclusion? As the falsification of the rule? A counter-instance? It would seem that the "truth" of the rule depends on the actual decision, but, the rule can be no more true than the extent to which judges actually follow the rule.[158]

Defenders of the deductive thesis have sought to support it by avoiding the many criticisms raised against it. In particular, proponents of the "two-level" version of the thesis have sought to recharacterize the deductive inference as the last step of a chain of judicial argument, the initial steps of which may not be deductive.[159] It might be thought that such a recharacterization avoids the undesirably aggressive quality of the deductive thesis. It can be seen, how-

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157. *See, e.g.*, N. MACCORMICK, *supra* note 8, at 103-04:

> Legal rulings are normative — they do not report, they *set* patterns of behaviour; they do not discover the consequences of given conditions, they ordain what consequences *are to* follow upon given conditions. They do not present a model *of* the world, they present a model *for* it. (Emphasis in original.)

That MacCormick recognizes the problems consequent to a deductive theory of judicial justification does not stay him from advocating the theory nonetheless. His response to this particular problem is an argument that propositions of law are "relatively" true or false — they are true or false relative to a given legal system at a given time. *Id.* at 271. But conjuring relativized systems of truth and falsity — required, on MacCormick's account, to accommodate both the apparent normativity of law and his commitment to a truth-preserving criterion of validity — surely runs counter to the criteria of theory preferability outlined above. *See supra* text accompanying notes 83-86. With this move, MacCormick's theory loses simplicity, and it makes a series of undesirably aggressive assumptions.

158. Else, the deductive theorist must provide an account of what it means for a legal rule to be true, if truth does not mean that the rule is operative in the legal system as a premise for deductive reasoning. Thus, the deductive theory loses simplicity, and risks overly aggressive commitments. For example, a natural law theorist might accommodate this problem about the truth of a disregarded legal rule by positing that laws are "true" in the same way that moral laws are "true." But, I take for granted that recourse to a natural law theory in order to save a deductive account is a paradigm case of an overly aggressive commitment required by a theory of judicial justification.

159. *See* N. MACCORMICK, *supra* note 8, at 100-19.

ever, that the deductive theorist's commitment to the truth-bearing nature of legal statements is thoroughgoing and incorrigible, and that this objectionable consequence of the deductive thesis is unavoidable.

For example, in dealing with the difficulty about the logical form of legal statements, it might be supposed that commands and directives could somehow figure in the non-deductive "level" of judicial reasoning without creating logical difficulties for the deductive tier: the concluding syllogism. This approach would be misconceived. In the two-level version of the deductive thesis the non-deductive inferences lead to the adoption of the appropriate legal rule which, in the concluding syllogism, deductively implies the judicial result. Even if the reasoning process used to generate that rule is non-deductive in nature, the rule itself must be a proposition with a truth value. Otherwise, it could not figure in the concluding deductive syllogism. But, commands and directives, not bearing truth values, can be neither premises nor conclusions in arguments that establish the truth of some proposition. Therefore, commands and norms cannot figure in the inferences of the non-deductive level, inasmuch as the conclusion of that stage must be a rule, bearing a truth value. So, a two-level version of a deductive theory cannot integrate commands and directives into the justification procedure if that justification is fundamentally deductive.

But statements of obligation are commonly the last step of a legal argument. Some commands are issued directly to the parties, as in the case of injunctions. Others are less direct but nonetheless authoritative — as in the standard conclusion of an opinion, "It is so ordered." The deductive theorist must provide some account of how a command could be said to follow from the conclusion of a deductive syllogism, in order to provide a deductive account of judicial argumentation. A long and contentious history adorns the philosophical issue of whether any descriptive statement could validly imply a statement of obligation.[160] Unless the deductive theorists can resolve this controversy, deduction cannot account for this common feature of judicial opinions.

Finally, we may observe that many of the deductive theory's adherents argue for the theory on the ground that we lack an attractive alternative. "If the value of [legal] logic is totally denied, a reaction to this denial is to ask what its reasonable alternative could possibly be. So far there appears to be no sensible reply to this question."[161] Phi-

160. For a collection of a number of insightful essays see THE IS-OUGHT QUESTION (W. Hudson ed. 1969). This issue was also raised in a legal context by Professor Northrop. *See* Northrop, *Law, Language and Morals*, 71 YALE L.J. 1017, 1031-32 (1962).

161. I. TAMMELLO, *supra* note 120, at vii. Hart's claim, *see supra* note 154, seems to involve the

losophers and logicians have been slow to develop alternatives to deduction as a logical account of commands and directives, and lawyers and jurisprudents have trailed behind the others. This argument might carry some weight if there really were no viable alternative, for we need some account of judicial justification in order to pursue related controversies in philosophy of law. But the force of this claim is undercut when we consider, in Section IV, recent work providing a logical account of practical reasoning.

In sum, however attractive the deductive thesis might appear at first glance, closer examination reveals various consequences of the thesis that conflict with our understanding of the role of judges and the legal process. These conflicts pose a challenge to the adequacy of the thesis: we would prefer a theory which did not raise these conflicts, or which provided a more insightful account of the legal process.[162] Further, the deductive thesis may also be seen to require a series of aggressive theoretical claims about the nature of law. The aggressiveness of these claims should make us reluctant to embrace the deductive thesis even if it did not commit us to positions inconsistent with our understanding of the judicial role.[163]

B. The Analogical Thesis

1. Analogy and Judicial Justification

The second dominant view of judicial justification describes judges' arguments as depending on analogical inferences, or "reasoning by example." "Analogical reasoning involves the passage from assumed or given resemblances to an inferred resemblance."[164] The analogical thesis received an extended treatment in E. Levi's *An Introduction to Legal Reasoning*,[165] which remains the locus classicus of the view. The argumentation of judges and lawyers, Levi contended:

> . . . is reasoning from case to case. It is a three step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to the next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.[166]

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same kind of argument: inferences among commands must be deductive, else they would not be susceptible of logical relations.

162. *See supra* text accompanying notes 83-86.

163. *Id.*

164. M. GOLDING, *supra* note 8, at 102.

165. E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948).

166. *Id.* at 1-2.

A quick canvas of the literature of jurisprudence indicates that this view of judicial justification has enjoyed great popularity and is widely regarded as an accurate description of a fundamental process by which judges reach their conclusions.[167] Those who advocate analogy as a model for judicial reasoning, however, have failed to develop an adequate theory which can account for the significant features of judicial justification which were noted in Section II.[168]

In the first place, the advocates of analogy as the foundation of judicial argument have failed to illuminate the logical structure of an analogical argument. What are its premises and its conclusions? What is the inference that relates the former to the latter? Advocates of analogy have yet to extend their claim about judicial reasoning in a way that illuminates these important conceptual issues.

We may nevertheless distinguish two different versions of analogical inferences appropriate to judicial justification. The first of these involves an inference to a rule, and then an inference from a rule to a specific case. The second version posits an inference directly from one case to the next, without the intermediating rule.

Levi's characterization of analogy is an example of the first ver-

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167. "Reasoning by analogy is the most prevalent form of legal reasoning." Murray, *The Role of Analogy in Legal Reasoning*, 29 UCLA L. REV. 833, 847 (1982). *See also* Burton, *supra* note 9, at 1145 (common law reasoning "works primarily by analogical reasoning"); Soper, *supra* note 72, at 487 ("Legal reasoning, deductive only in a trivial sense, is primarily a matter of determining relevant similarities and differences among fact situations that distinguish cases covered by a standard from cases that are not.").

The role of reasoning by analogy in the law is discussed at some length in M. GOLDING, *supra* note 8, at 44-49, 102-12. While Golding argues that judges will commonly employ analogical arguments, his discussion indicates that, at bottom, he views judicial argumentation as distinct from analogical reasoning as ordinarily understood. Indeed, he appears to view judicial reasoning as fundamentally practical reasoning. He argues, most notably, that questions of judicial classification have the form: "Should X be treated as a Y for certain legal purposes?" This way of putting the question, he argues, "has the advantage of revealing that the judge's affirmative answer [on the question of a steamboat owner's liability in Adams v. New Jersey Steamboat Co., 151 N.Y. 163, 45 N.E. 369 (1896)] is based on the claim that the same *practical* legal argument for imposing a stringent responsibility on innkeepers is also applicable to steamboat proprietors, because of the similarity between the two cases." M. GOLDING, *supra* note 8, at 106 (emphasis in original).

However, the proper reading of Golding's view is uncertain. For, he understands "practical reasoning" as a description of the kind of *reason* advanced for an action, and contrasts it with deduction, induction, and analogy, which he describes as kinds of *arguments*. In other words, he does not appear to consider the possibility that practical reasoning could be understood as a distinct form of argument — different from but comparable to deduction or analogy. In this respect, he seems unaware of the work by Kenny and Hare on which Section IV of this paper relies in arguing that practical reasoning represents a distinct form of reasoning. *See infra* text accompanying notes 192-211. Nonetheless, Golding's characterization of legal reasoning draws several distinctions between judicial argumentation and analogical reasoning as the analogical theorists would describe it. M. GOLDING, *supra* note 8, at 102-12.

168. *See supra* text accompanying notes 35-71.

sion. He describes analogy as a three step process.[169] First, similarity is perceived between two cases, and, second, the rule of law "inherent" in the first case is announced. Then, third, the announced rule is applied to the second case.

Nothing in Levi's discussion indicates the nature of the first or second steps of the process.[170] The third and last step is described in a fashion that suggests a deductive inference: a rule of law is applied to a particular case. So far as he has described this last step, Levi has failed to indicate the nature of the inference that relates the applicable rule to the case.

It is at least arguable that, so far as Levi has characterized them, judicial arguments by analogy are just one form of reasoning by deduction.[171] We noted in Section IIIA that deductive theorists have propounded a two-level procedure in which only the last step of the justification is a deductive argument.[172] If, in an analogical justification, the "application" of a rule to a case is a deductive inference, then Levi's description of analogy would be consistent with MacCormick's two-level deductive theory of judicial justification. The first and second steps of the analogical process might be understood as one kind of argument at the non-deductive level of justification. The third step would be an ordinary instance of deduction, deriving the resolution of the case at hand from a general standard. In short, Levi's description of the analogical argument is so underdeveloped that we cannot be sure that it differs in any important way from the two-tier version of the deductive thesis we observed in Section IIIA.

Recent investigations of legal arguments by analogy have suggested a second conception of analogical arguments which minimizes the significance of the legal rule.[173] The premises of an analogical ar-

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169. E. LEVI, *supra* note 165, at 1-2. Precisely how Professor Levi understood analogical reasoning is a complicated matter, *see, e.g.*, *id.* at 4 n.8, and this article will not undertake the exegisis necessary to attribute to him any particular view.

170. Indeed, it is possible that the first two steps are meant by Levi as involving questions of the context of discovery rather than the context of justification. *See supra* note 42. In these remarks I assume Levi meant the latter.

171. *Cf.*, Soper, *supra* note 72, at 487 (legal reasoning is deductive in a "trivial sense"). While this is an attractive reading of Levi, since it would clarify other difficulties with his view, his book provides too little detail on which to base an interpretive claim. *See also* M. GOLDING, *supra* note 8, at 103 n.11.

172. *See supra* text accompanying notes 108-10.

173. *See* M. GOLDING, *supra* note 8, at 102-11. In Golding's view, arguments by analogy are best understood not as inferences to a rule which then may be applied to the next case, but rather as questions of classification. *Id.* at 103. Golding argues, in analogizing the case at hand to some line of precedent, that the judge is attempting to answer the question: Should this case be placed in the same category with those cases? More precisely, he views legal analogies as having the following structure:

(i) Case *x* has characteristics F, G, . . . [.]
(ii) Case *y* has characteristics F, G, . . . [.]
(iii) *x* also has characteristics H.

gument, on this conception, are various statements of similarities or differences between the two cases. The argument's conclusion is the resolution of the second case in a fashion similar to the decision in the first case.[174] Whatever the premises and conclusion, on this conception, it is difficult to specify the nature of the inference connecting the former to the latter.[175]

Proponents of the analogical thesis have also failed to illuminate the normative features of judicial justification. What makes an analogical argument valid? What are the criteria by which we could evaluate any given use of analogy by a judge? Consider the situation in which a problematic legal dispute is similar to two (or more) different precedents. There is some analogy to be drawn between the case at hand and each of the precedents. Which analogy is preferable?

Under Levi's conception of analogical arguments, discussed first above, each competing precedent might give rise to a rule of law. If the competing precedents are sufficiently dissimilar, then the rules "inherent" in the different cases could be different. These different rules could yield different and possibly inconsistent legal consequences for the case at bar.[176] In this situation, it would be possible to analogize the dispute in two or more conflicting ways. So far as Levi's view has been developed, no comparison is *a priori* illegitimate if some similarity obtains. Hence, the choice of analogy — and, through the choice of analogy, the choice of legal rule — can only be evaluated in terms of the comparative similarity of the disputed situation to one or another of the available precedents. There is no difference between acceptable

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(iv) F, G, . . . are H-relevant characteristics.

(v) Therefore, unless there are countervailing characteristics, *y* has characteristic H.

Id. at 107. Characteristic H, on this view, is some legally relevant attribute. Although on Golding's model no rule of law is derived from the past cases, there is a rule of decision: unless there are countervailing characteristics the similarities between *x* and *y* warrant classifying both in category H. Joseph Raz has offered an account for analogical arguments which parallels Golding's at least for cases where there is no binding precedent. *See* J. RAZ, THE AUTHORITY OF LAW 201-06 (1979).

Murray's account, *supra* note 167, also seems to deny the relevance of rules to analogical arguments. He relies on an Aristotelian account of reasoning by example as reasoning "from part to part" and contrasts that reasoning with reasoning from part to whole or from whole to part. *Id.* at 847 (citing Aristotle, *Prior Analytics*, in THE BASIC WORKS OF ARISTOTLE 62, 103 (R. McKeon ed. 1941). However, at other places Murray suggests that analogical arguments may be used to establish new rules or reform old ones. *See* Murray, *supra* note 167, at 851.

174. M. GOLDING, *supra* note 8, at 107; Murray, *supra* note 167, at 841 n.30.

175. Golding's discussion indicates that he is uncertain about some parts of the inference pattern he has outlined. *See* M. GOLDING *supra* note 8, at 107-12. In particular, it is not clear whether the analogical inference is a matter of determining the truth of a classification or the usefulness of classifying a case in one category rather than another. *See id.* at 106-07. *See also supra* note 167. Murray discusses the structure of an analogical inference at only one point. *See* Murray, *supra*, note 167, at 841 n.30.

176. *See supra* note 131 and accompanying text.

and unacceptable analogies in terms of the form of the inference involved, and each rule is warranted by its precedents. The competing authorities can be differentiated only in terms of the resemblances of the case at hand to the various precedents.

The same point can be made with respect to the second version of analogical reasoning. The premises of the analogical inference, on this conception, are the similarities between the two cases. By hypothesis, however, there will be similarities between the case in dispute and each of the competing precedents. If the prior cases were decided in inconsistent ways, then the correct disposition of the case in dispute remains unsettled; nothing about the form of the analogical inferences gives us reason to prefer one analogy over another.

A theory of judicial justification, if it is to be useful, must provide us with a criterion or set of criteria by which we can discriminate valid from invalid arguments. In the situation where competing analogies suggest different dispositions of a disputed case, neither version of the analogical thesis has provided a basis on which we might discriminate good analogies from bad.[177]

The choice of legal authority is sometimes said by advocates of the analogical thesis to depend on the relative importance or significance of competing analogies,[178] or, more often, on the *relevance* of the various similarities.[179] Whichever description they might prefer, proponents have failed to provide useful criteria by which we might evaluate judicial argumentation and assess the respective analogies. Neither "significance" nor "relevance" have been given any independent content. What makes one similarity relevant, but another not? We are left, it seems, with nothing more than our intuitive sense of the attractiveness of different possible analogies. Whether we regard a given opinion as having justified its conclusion depends on whether or not we concur with the deciding judge's aesthetics regarding similarities. The analogical thesis, in short, has not provided us with any useful normative insights.

2. Evaluating an Analogical Theory of Judicial Justification

The analogical thesis has been so little developed that we can barely deem it a true theory of judicial justification. Undeveloped as it is, however, it can also be seen to lead to an unnecessarily problematic view about the logical nature of legal statements.

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177. Many of the theorists who have considered argument by analogy have made this very point. *See, e.g.*, Murray *supra* note 167, at 851-52; M. GOLDING, *supra* note 8, at 45, 111.

178. *See, e.g.*, Murray, *supra* note 167, at 851.

179. *See, e.g.*, M. GOLDING, *supra* note 8, at 45; J. RAZ, *supra* note 173, at 202-04.

Philosophers and logicians standardly describe reasoning by analogy as a species of inductive reasoning.[180] On this characterization, the conclusion of a judicial analogy is a remark about the likelihood that the case at bar is a member of the same legal category as the selected body of precedent.[181] Proponents of the analogical thesis have generally failed to rebut this characterization.[182]

However descriptively suggestive the analogical thesis may appear at first blush, it seems clear that we would not regard the judicial holding as merely an observation that some case is *likely* to be of such-and-such a kind. Nor would we suggest that a lawyer's brief, employing a legal analogy to urge a particular decision — is arguing that one probabilistic conclusion is more accurate than another. Instead, a judge's conclusion is a decision — a pronouncement that the law requires what he holds — and the lawyer's argument urges just such a decision for his client.

Moreover, since induction is a form of argument to conclusions regarding the likely truth or falsity of various propositions, legal analogies seem to yield conclusions about the likely truth or falsity of various legal holdings. Adopting the analogical thesis seems to commit us to the view that statements of law are true or false. As we saw in Section IIIA, this commitment precludes us from pursuing any other view of the logical nature of legal statements. This thesis, then, begs an important question about legal theory and is, for that reason, unattractive.[183] Again, we might decide to adopt a position in jurisprudence which holds that legal statements bear truth values. But we should accept that position because we think that it is the better view of law and legal reasoning, and not just because we believe that judicial argumentation is frequently analogical in nature.

We may also observe that different inductive arguments, all valid, may lead to inconsistent conclusions. This means that conceiving of analogical arguments as inductive in nature has one possible advan-

180. *See, e.g.*, W. SALMON, *supra* note 113, at 97-100.

181. *Id.*

182. Indeed, proponents of analogy as an essential form of judicial justification have generally failed even to try to rebut this characterization. One exception is Murray, *supra* note 167. He distinguishes analogy from induction on the ground that induction arrives at a conclusion or rule, but does not apply that conclusion to a new case; analogy, however, applies the conclusion to a new case. *Id.* at 847. Most discussions of induction in logic and philosophy, however, would contradict Murray's assertion that induction does not apply its conclusions to new particulars. *See, e.g.*, W. SALMON, *supra* note 113, at 97-100. Following the standard description of inductive reasoning, we may note two different forms of inductive inference: one form, induction by enumeration, leads to a conclusion in the form of a statistical generalization. *Id.* at 83-84. A second form, statistical syllogism, applies the statistical generalization to a particular situation. *Id.* at 87-91.

183. *See supra* text accompanying notes 83-86.

tage for the development of a theory of judicial justification. We noted, in Section IIIA, the distinction between a rule's applicability and its warranted application.[184] This distinction, we saw, entailed a difficulty for the deductive thesis in a situation where two or more conflicting rules applied to the same dispute. Inductive arguments, however, are somewhat more amenable to this feature of judicial justification.

Unlike deductive arguments, inductive arguments do not necessitate their conclusions.[185] To the contrary, adding additional relevant data can alter the truth of an inductive conclusion.[186] For example, compare these two inductive inferences:

A. (1) The vast majority of 35-year old American men will survive for three more years.
(2) Henry Smith is a 35-year old American man.
(3) Therefore, Henry Smith will survive for three more years.

B. (1') The vast majority of men with advanced lung cancer will not survive for three more years.
(2') Henry Smith has advanced lung cancer.
(3') Therefore, Henry Smith will not survive for three more years.[187]

Each inference appears acceptable and each relies on true premises. But, these arguments nonetheless lead to incompatible conclusions.

If we conceive of competing rules as different pieces of relevant evidence, then we can explain the conflict between competing rules: they are different factual characterizations of the controversial situation, each leading to a different inductive conclusion. Conceiving of analogical arguments as inductive does not advance us far enough, however, for it still does not help us distinguish which of the applicable characterizations would be warranted.[188]

The analogical thesis seems to offer one significant insight — its perspicacity in acknowledging that judges sometimes justify a decision by comparing the case before them with other decisions. Beyond this insight, the chief virtue of the thesis for many of its defenders seems to be that it is not a deductive account.[189] These are weak reeds for the selection of a theory, and it is at least arguable that analogy does not even provide a full-fledged theory of judicial justification to compare

184. *See supra* text accompanying note 130.
185. W. SALMON, *supra* note 113, at 13-15.
186. *Id.* at 89.
187. *Id.*
188. *Id.* at 90-91.
189. *See, e.g.*, Burton, *supra* note 9, at 1142-44.

with deduction, already considered, or practical reasoning, to be considered next.

IV. PRACTICAL REASONING AND JUDICIAL JUSTIFICATION

While the deductive and analogical theses have dominated the literature concerning legal reasoning, there are other accounts of legal argumentation.[190] In this Section, I advance an alternative theory of judicial justification which conceives of judicial arguments as examples of practical reasoning.[191] In practical reasoning we reason from ends to means — from our aims and needs to conclusions about what to do.

Practical reasoning, on the view I present here, is a distinct form

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190. *See, e.g.*, T. PERRY, *supra* note 88; J. HOROVITZ, *supra* note 88. *See also supra* note 149 (commenting on deontic logic).

191. The view that judicial justification involves practical reasoning in *some* sense or other has been suggested by a number of writers. *See, e.g.*, M. GOLDING, *supra* note 8, at 106; Ladd, *The Place of Practical Reason in Judicial Decision*, in VII NOMOS: RATIONAL DECISION 126 (1964); Visser't Hooft, *On Legal Reasoning and the Concept of Practical Reasoning*, 13 RECHTSTHEORIE 269 (1982). Even proponents of other views have made remarks suggesting that they think that legal reasoning is somehow "practical" in nature. *See, e.g.*, Murray, *supra* note 167, at 848 n.45; N. MACCORMICK, *supra* note 8, at 108, 266-74.

Few of these writers, however, have articulated an effective criterion of validity by which valid practical judicial arguments could be distinguished from invalid. As a result, the reader is frequently unable to ascertain just what it is that supposedly makes practical reasoning distinct from any other kind of reasoning. My contention, following Kenny and Hare, is that we may distinguish practical reasoning in terms of the logics of satisfactoriness and satisfaction, and valid practical inferences in terms of the respective criteria of validity of these logics.

The significance of distinguishing practical reasoning from deduction in terms of the different criteria of validity is highlighted by the schizoid position taken on legal reasoning by Neil MacCormick. In a variety of places, MacCormick has suggested that legal reasoning is a form of practical reasoning. *See* N. MACCORMICK, *supra* note 8, at 1-8, 166-74; N. MACCORMICK, H.L.A. HART: PROFILES IN JURISPRUDENCE (1981); MacCormick, *Legal Reasoning and Practical Reason*, in VII MIDWEST STUDIES IN PHILOSOPHY 271-86 (P. French, et al. ed. 1982). But, MacCormick has been a persistent and forceful exponent of the deductive theory, and shows no sign of recanting on this point. *See* MacCormick, *The Nature of Legal Reasoning: A Brief Reply to Dr. Wilson*, 2 LEGAL STUD. 286 (1982). It appears, then, that MacCormick feels that deduction and practical reasoning are fundamentally compatible. However, the examples in Section IIIA of this paper show how inferences among commands are not valid in deduction, while, as this section will indicate, they may nonetheless be valid in the logic of satisfactoriness. Thus, if practical reasoning is captured by the logics of satisfactoriness and satisfaction, practical reasoning and deduction are not compatible.

Of the welter who have in some sense advocated practical reasoning as a model for judicial argumentation, only two have arguably anticipated my position, relying on the logics of satisfactoriness and satisfaction. Joseph Raz has argued at some length that legal statements are norms and that reasoning among norms is practical reasoning. *See* J. RAZ, *supra* note 148. In a footnote, Raz asserts that the reasoning involved in practical inferences "conform[s] to the logic of satisfactoriness." *Id.* at 181 n.7. He does not, however, develop this aspect of his thesis, nor does he draw out the differences between the logics of satisfactoriness and satisfaction on the one hand, and deduction or analogy on the other.

Martin Golding has also suggested that judicial reasoning is practical reasoning. *See* M. GOLDING, *supra* note 8, at 55-60, 102-12. He does not develop, however, what he means by practical reasoning other than to cite J. RAZ, PRACTICAL REASON AND NORMS (1975) and PRACTICAL REASONING (J. Raz ed. 1978).

of reasoning, with its own logical structure and criteria of validity. In part A of this Section, I outline the nature of practical inferences and the criteria of valid practical arguments. In part B, I suggest how practical reasoning can explain the important features of judicial justification. Finally, I argue in part C that practical reasoning provides a better theory of judicial justification than either the deductive or analogical theses.

A. Practical Reasoning

As an introduction to practical reasoning, consider the following example, adapted from Aristotle.[192]

I need a covering to keep me warm.
A cloak is a covering.
Therefore, I need a cloak.
I must make what I need.
I must make a cloak.

Two things are significant about the inferences involved in this chain of reasoning. First, there is a sense in which we would understand the reasoning to be valid. From a practical problem the speaker has reasoned to a plan of action which, so far as we can tell, will satisfy his needs. Second, while the reasoning is valid, its validity is not deductive in nature. From the premises "I need a covering to keep me warm" and "A cloak is a covering" the conclusion "Therefore, I need a cloak" hardly follows in a truth-preserving form of argument. To the contrary, the argument is an instance of a classic fallacy.[193]

Deduction is not the only form of reasoning on which we can rely. Practical reasoning, as distinguished from deduction, is both ubiquitous and unproblematic. We reason from ends to means in all manner of ordinary situations without undue concern: whether to take the bus rather than drive; whether to eat at home or go out; whether to invest in money funds or the stock market. And, we accept the conclusions of our practical deliberations without inquiring into their deductive validity. R.M. Hare[194] and Anthony Kenny[195] have illuminated the nature of practical inferences and have provided an account of their validity. Kenny's contributions, in particular, show that practical inferences have a distinct logical structure in terms of

192. *See* A. KENNY, *supra* note 7, at 72 (citing ARISTOTLE, DE MOTU ANIMALIUM (701a18)).

193. Logicians commonly refer to this as the fallacy of affirming the consequent. *See, e.g.*, I. COPI, *supra* note 113, at 233, 271.

194. R.M. HARE, *supra* note 7; R. M. HARE, THE LANGUAGE OF MORALS (1952).

195. A. KENNY, *supra* note 7. Parts of his book have been reprinted in Kenny, *Practical Reasoning and Rational Appetite*, in PRACTICAL REASONING, *supra* note 191, at 63-80.

which deciding to make a cloak can be a valid practical conclusion even if the inference is not deductively valid.

At the heart of these analyses of practical reasoning lies a distinction between the descriptive content of a sentence like "I need a cloak,"[196] and its *mood*.[197] The command "Close all the windows in the school" has the same descriptive content as the assertion "All the windows of the school are closed," but a different mood. Expressions of desire and intention, such as "I need a covering to keep me warm" and "I must make what I need," share, on this analysis, the same mood as commands. Together, sentences with this mood are designated as *fiats*.[198] "Fiats contain descriptions of possible states of affairs whose actualization satisfies the desires expressed by them."[199] Where p is some proposition which describes a state of affairs, then $F(p)$ stands for the fiat which we could express by the statement "Let it be the case that p."

Practical reasoning is reasoning that involves fiats, and valid practical inferences are valid inferences among fiats. Deductive logic may be distinguished by its criterion of inferential validity: the truth-preservingness of the form of the argument at issue.[200] But, the validity of inferences among fiats cannot be captured by this criterion. Valid inferences among commands, for example, are not valid in de-

196. Termed by Hare a "phrastic." *See* THE LANGUAGE OF MORALS, *supra* note 194, at 18.

197. Hare originally termed the marker of mood — imperative, asertoric, or the like — as a "neustic." *Id.* He apparently now terms it a "tropic" instead. *See* A. KENNY, *supra* note 7, at 39 n.1.

198. Kenny acknowledges Hofstadter & McKinsey, *The Logic of Imperatives*, in PHILOSOPHY OF SCIENCE, 446 (1939) as the origin of the term "fiat." *See* A. KENNY, *supra* note 7 at 39. The class of fiats includes commands, requests, intentions and desires. Commands and requests together are termed directives, which are distinguished by their being uttered to an agent. For a fiat to be satisfied, the state of affairs described in it must obtain. For a directive, the state of affairs must be brought about through the agency of the person to whom the directive is given, and because of the utterance of the directive.

199. A. KENNY, *supra* note 7, at 79.

200. As Kenny has argued, it is useful to distinguish among different logics in terms of the rules of inference which they deem valid:

> [I]t is possible to think of logic as primarily the study of patterns of inference rather than the formalization of logical truths. Historically, both approaches have been made dominant in the work of different authors. . . . Most contemporary logical systems employ both logical truths and rules of inference: in axiomatic systems such as Frege's the logical truths which are the axioms and theorems are dominant, and rules of inference within the system are applied only to logical truths; in natural deduction systems such as Gentzen's it is the rules of inference which are basic; they are applied to non-logical propositions and the logical truths are yielded only as the results of particular applications of the rules.
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> In assertoric logic, to every valid inference schema there corresponds a logically true conditional statement, and to every logically true conditional statement there corresponds a valid inference schema; so that it may seem to be a matter merely of combinatorial elegance, not of philosophical importance which approach is taken. But of course when we turn to study the logic of imperatives or fiats, the matter is quite different. For here, it seems, we can take only the rules-of-inference approach. For commands, requests, and wishes, not having truth-values at all, *a fortiori* cannot be logical truths.

Id. at 85-86.

duction, and inferences which are valid when truth-bearing propositions are involved are unacceptable when commands are at issue.[201] To express adequately the inferential relations among fiats we need two other logics — the logic of *satisfactoriness* and the logic of *satisfaction* — and criteria of validity appropriate to each of these logics.

For an account of judicial justification, the logic of satisfactoriness is the more significant of these logics. The Aristotelian arguments leading to the need for a cloak — from the need for a covering to a need for a cloak, and from a need for a cloak to the necessity of making a cloak — involve inferences in the logic of satisfactoriness.[202] The logic of satisfaction, on the other hand, concerns the relationship between a fiat and the actual state of affairs, namely, whether the fiat is fulfilled.[203] Let me explain these two logics, and their respective criteria of validity, in turn.

(a) *Satisfactoriness.* In practical reasoning we consider the merits of decisions and plans of action. We are not concerned whether some state of affairs is true or false, but whether instead the plan or decision will serve our purposes and gratify our desires. In Kenny's terminology, we wish to know whether the plan is *satisfactory*.

A plan is satisfactory or not with respect to a certain set of wants and desires. Satisfactoriness, unlike truth, is a relative notion. More precisely, a fiat is satisfactory relative to a set of wants and desires if and only if whenever the fiat is satisfied every want and desire in the set is satisfied.[204]

In deduction, validity is defined in terms of an argument's truth-preservingness: if the argument form is deductively valid then there is no possibility of inferring a false conclusion from true premises. Validity in the logic of satisfactoriness prevents our inferring an unsatisfactory plan of action from a satisfactory goal. Valid forms of argument in this logic are satisfactoriness-preserving. If the goal is satisfactory and the inferences valid then the plan chosen to implement the goal will be satisfactory as well. More precisely, a fiat *F(b)* may be validly inferred from another fiat *F(a)* in the logic of satisfactoriness if and only if "necessarily whenever [*F(a)*] is satisfactory [relative] to a certain set of wants then [*F(b)*] is satisfactory to that set."[205]

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201. *Id.* at 73.

202. The inferences involved in the example of the cloak are interesting in that the premises include both fiats and propositions. Handling such mixed inferences requires a few special rules. *See id.* at 83-84 n.10.

203. *Id.* at 81.

204. *Id.* at 80-81.

205. *Id.* at 81. In describing deductive inferences, one normally says that one proposition implies another, but the sense of implication at work in deduction is a technical one, defined truth-functionally

Relative to that set of wants we will have reasoned from our ends to good means for achieving those ends.

Two features, in particular, are notable about the logic of satisfactoriness. First, it is the mirror image of deductive logic. Suppose that p and q are respectively the descriptive contents of the fiats $F(p)$ and $F(q)$. If it is valid in deduction to infer q from p, then $F(p)$ may be validly inferred from $F(q)$ in the logic of satisfactoriness.[206] Second, the relativity of satisfactoriness means that the same plan may be satisfactory relative to one set of desires but not satisfactory to another set with different constituents. Even if the desires and wants which populate the two sets are largely the same, the plan's satisfactoriness relative to one set does not guarantee its satisfactoriness relative to the other.

(b) *Satisfaction*. An adequate account of practical reasoning also requires the logic of satisfaction. With the logic of satisfaction we may conclude whether a fiat has been satisfied — whether a command has been obeyed or a project has been carried out. The logic of satisfaction expresses the inferences from fiats to their fulfillments. This inference is straightforward: a fiat $F(p)$ is *satisfied* only when the assertion p — the fiat's descriptive content — is true.[207] Valid inferences in the logic of satisfaction are satisfaction-preserving. "[T]hey are designed to prevent one from passing from a satisfied fiat to an unsatisfied fiat."[208]

The logic of satisfaction is, as Kenny has put it, "an exact and uninteresting parallel" of deductive logic.[209] "[W]henever we can infer [the truth of q] from [the truth of p] we can infer the satisfaction of [$F(q)$] from the satisfaction of [$F(p)$]."[210] The logic of satisfaction is also the mirror image of the logic of satisfactoriness. If it is the case

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in terms of the truth of the propositions involved. *See, e.g.*, W. SALMON, *supra* note 113, at 37-38. To avoid confusion with this technical sense, I described the relations among fiats in terms of the passive "infers."

206. A. KENNY, *supra* note 7, at 81-82. In deduction, an argument is valid if and only if the hypothetical sentence whose antecedent consists of the argument's premise or premises and whose consequent is the conclusion is a tautology. Thus, in the immortal example of logicians everywhere, the argument:

> All men are mortal.
> Socrates is a man.
> Therefore, Socrates is mortal.

is valid because the complex hypothetical sentence "If all men are mortal and Socrates is a man, then Socrates is mortal" is a tautology. Tautology may be tested in a number of ways. *See supra* note 115. Since the logic of satisfactoriness is the mirror image of deduction, the fiat $F(q)$ may be validly inferred from the fiat $F(p)$ in the logic of satisfactoriness if and only if the sentence "If p then q" is a tautology.

207. A. KENNY, *supra* note 7, at 82.

208. *Id.* at 81.

209. *Id.*

210. *Id.*

that when *F(p)* is satisfied *F(q)* is also satisfied, then if *F(q)* is satisfactory *F(p)* is also satisfactory.

Following Kenny and Hare, we may explain practical inferences as non-deductive inferences among fiats, including commands and intentions.[211] We may assess the validity of particular practical inferences in terms of the logic of satisfactoriness — whether the decision is a good one relative to a set of wants and desires — and in terms of the logic of satisfaction — whether the decision has been carried out. By using valid practical arguments we provide good reasons for our actions; the conclusions are good means to given ends.

B. Practical Reasoning and Judicial Justification

It is at least initially plausible that judicial argumentation should involve practical reasoning. Judges' arguments are commonly practical in force, and their conclusions are decisions about what to do. Thus, we would expect that judicial reasoning could be understood as reasoning to the fulfillment of purposes and values in the legal system.

What remains is to demonstrate that practical reasoning, understood in terms of the logics of satisfactoriness and satisfaction, can adequately account for the special features of judicial justification that I noted in Section II, *supra*.[212] Practical reasoning is a distinct form of reasoning, different from deduction and from analogy (if analogical arguments are understood as probabilistic in nature). We can identify the premises and conclusions which constitute a practical inference, and we can evaluate the inference as valid or invalid in the logics of satisfactoriness and satisfaction. In short, valid practical arguments provide reasons for action, and, if the practical arguments are valid, justify the decisions about what to do. The logics of satisfaction and satisfactoriness provide effective criteria for distinguishing valid judicial arguments from invalid.[213] In these respects, at least, practical reasoning is an alternative to deduction or analogy as a form of reasoning which might explain judicial argumentation.[214] This account

211. According to Joseph Raz, inferences among norms also conform to the logic of satisfactoriness. *See* J. RAZ, *supra* note 148, at 181 n.7.

212. *Supra* text accompanying notes 35-71.

213. The logic of satisfaction parallels deductive logic, and the logic of satisfactoriness is a mirror-image of deductive logic. *See supra* text accompanying notes 204-10.

214. In other respects, it might be argued that practical reasoning is not as conceptually attractive as is, say, deduction. In contrast to the rich and complex metatheory which logicians and mathematicians have developed for deductive and modal logics, there has been a paucity of formal work done with the logics of satisfactoriness and satisfaction. For two formulations of these logics, *see* Levinson & Atlas, A Version of A.J. Kenny's Logic of Practical Inference, Xerox TS, Mathematical and Social Sciences Board Workshop of the Formal Pragmatics of Natural Language (1973); Atlas, More on A.J. Kenny's Logic of Practical Inference (unpublished, 1975). These papers are developed only for the

of practical reasoning also explains other salient features of judicial justification.

1. Rules

Judicial justification involves rules.[215] By subsuming a particular case under a statement of universal form a judge may justify his decision by applying a legal rule. And, in problematic cases — where no rule clearly subsumes the case, or where two or more conflicting rules may apply — the judge may reason to the extension of a rule to an unprecedented case, or, perhaps, to the formulation of a new rule. Some non-legal examples will provide a context for demonstrating how practical reasoning can illuminate these features of the justificatory task.

Consider, for example, the simple fiat expressed by a general intention, "Let it be the case that I close all the windows in the house."[216] In the logic of satisfactoriness, it would be valid to infer the particular intention "Let me close this window" from the general intention together with the additional premise "This is the only window in the house." If it was satisfactory that I close all the windows, then it would be satisfactory that I close this, the only window.[217] The final step of the argument involves the logic of satisfaction: the fiat "Let it

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propositional, not the quantified, logics of satisfaction and satisfactoriness, and they regard the logics of practical inference as extensions of standard formal sentential logic. I am unaware of any further formal results; in particular, I have not uncovered any metatheoretical results comparable to completeness, or decidability, which are routine for first order deductive logic. *See, e.g.*, G. HUNTER, *supra* note 123.

215. *See supra* text accompanying notes 50-60.

216. It would be more natural to express the command in another fashion — perhaps, "I need to close all the windows in the house," or "I must close all the windows in the house." The phrasing in the text is more perspicuous with respect to the reasoning involved.

217. The reasoning involved would be more complicated if there were multiple windows. Then, from the fiat "Let me close all the windows," the appropriate inference in the logic of satisfactoriness would be "Let me close the first window, and the second, and the third, . . ." for as many windows as there are in the house. To conclude, in a case where there are multiple windows, just "Let me close this window" would not, in fact, be satisfactoriness-preserving, for the general fiat would not be satisfied if only one of the windows were closed. *See* A. KENNY, *supra* note 7, at 83. For ease of exposition, I have assumed in this discussion that there is only one window.

This feature of the logic of satisfactoriness is potentially troublesome, for it would appear that we could never infer a singular fiat from a general fiat in the logic of satisfactoriness. Instead, the only valid conclusion from a general fiat in the logic of satisfactoriness would seem to be the conjunction of a string of singular fiats, from which no one of the conjuncts could be validly inferred in the logic of satisfactoriness. But this is obviously not a barrier in ordinary practical reasoning, for we are perfectly capable of concluding that we should close this window first and then go on to all the rest of the windows. So, as part of practical reasoning, we must have some inference procedure that allows us to focus on one of the conjuncts first, complete that part of our obligation under the fiat, and then proceed to the rest. I develop later the notion of second-order rules of practical reasoning. *See infra* notes 227-29 and accompanying text.

be the case that I close this window" is satisfied just in case the window is closed by me.

Legal standards should be general, and I noted, in Section IIIA, how the deductive thesis could account for this expectation of judicial argumentation: applying a general rule to a particular case can be understood as a valid deductive inference from a universal proposition. Fiats, too, can be universal: "Let it be the case that I close *all* the windows in the house." A rule's generality can also be understood in terms of a fiat's universality. Applying the rule to a particular situation in the logic of satisfactoriness would lead to the conclusion of a particular fiat: "Let me close this window." The particular command or norm is a valid conclusion from the general rule if the inference is satisfactoriness-preserving. In short, applying a rule to a situation is valid in the logic of satisfactoriness if it is satisfactory that the situation be resolved in accordance with the rule.[218]

On this account of practical reasoning, a judge's inference from a legal rule to a decision in a case is an inference from a general to a particular fiat. Judicial justification is, as the deductive theorists have claimed, sometimes syllogistic in nature, but the syllogisms need not be construed as deductive in form. They are better understood as practical in nature, involving the logics of satisfactoriness and satisfaction.

To understand judicial argumentation as fundamentally practical reasoning requires that we posit a variety of goals and purposes to the legal system, similar to the desires and purposes of an individual. Legal statements — both rules and specific conclusions — are fiats which are satisfactory or not relative to various goals and purposes of the legal system. A rule or decision which serves some set of goals and purposes is satisfactory relative to that set. Valid applications of a legal rule are valid inferences in the logic of satisfactoriness. If the legal rule is satisfactory relative to some set of goals and purposes and applies to the case at hand, then a valid inference will yield a satisfactory conclusion relative to those goals and purposes.

Let us suppose, for example, that the fiat expressed by the Statute of Frauds is satisfactory relative to the goals and purposes of contract law.[219] The Statute is a universal fiat and may be applied to a particu-

218. For the same reasons as were indicated in note 217, *supra*, the situation is more complicated when the fiat is general. Since the appropriate inference from the general fiat would be a fiat urging the action be done for each of the particulars in sequence, closing one of the windows and then stopping would not satisfy the general fiat. Rather, the general fiat would be satisfied only when every one of the windows was closed.

219. It is perhaps arguable that I have begged a number of important issues regarding judicial justification by building my account around the arguably special circumstances in which justification

lar situation — say, an oral contract of employment which cannot be performed fully within a year of its making. If a fiat calling for non-enforcement of that unwritten contract is a valid inference from the Statute in the logic of satisfactoriness, then it would be satisfactory relative to the purposes of contract law to apply the rule and deny enforcement of that contract.[220]

Practical reasoning also involves reasoning *to* rules which are satisfactory relative to certain goals, and it can explain judicial reasoning to the acceptance of legal rules. Consider first an example from Joseph Raz which exhibits practical reasoning to a rule in an everyday non-legal situation.[221]

Raz discovers something wrong with his car, and decides to take it to be repaired the next day. He needs to go to a meeting today, so he decides to go ahead and drive the car to the meeting, knowing that it is defective and possibly dangerous. It occurs to him that friends at the meeting might ask for a ride home, but he doesn't want to take the risk of driving them in the car until it has been fixed. He knows that if his friends ask for a ride and he hasn't resolved before they ask to turn them down, he'll find it difficult to refuse their requests. He decides, in advance of the meeting, not to give any rides. Raz continues:

> I may go further. I may, reflecting on the matter, decide on this occasion to make it a rule never to take anyone in my car when I suspect it has some mechanical fault. If so I am simply making a general decision. Of course even if I adopt the rule now I may have to decide again in the future what to do in a particular case, but my problem then will be different from what it would have been had I not adopted the rule. Having adopted the rule what I have to decide is whether to act on it in this particular case. What I am not doing is assessing the merits of the case taking all relevant facts into consideration.[222]

As Raz' example indicates, we reason practically to the adoption of rules in everyday situations. Our premises are desires and beliefs: a desire to use the car before taking it to the garage and a disinclination to assume the risk of transporting a friend in the flawed auto, together with the belief that it will be difficult to refuse a request for a ride

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involves a statute as a dispositive norm. But, the Statute of Frauds is extraordinary in that, while statutory in nature and origin, its place in the legal landscape is more plausibly comparable to a common law rule. As Grant Gilmore has put it, the Statute of Frauds has become "judicialized" — "the courts borrow a principle, initially statutory, erect a common law structure around it and forget the statute." Gilmore, *Putting Sen. Davies in Context*, 4 VT. L. REV. 233, 234 (1979).

220. *See supra* note 217.

221. Raz, *Reasons for Actions, Decisions and Norms*, in PRACTICAL REASONING, *supra* note 191, at 128-39.

222. *Id.* at 139-40.

when it is made. Practical reasoning establishes a plan of action relative to these premises. That is, following the rule to refuse requests will be satisfactory relative to those intentions and desires. Further, we may compare rules in terms of their satisfactoriness. The troubled owner might have adopted a different rule. He might have decided to explain the risks to his colleagues who sought a ride and to let each make an informed choice about whether to ride with him. Or, he might have required his colleagues to sign a waiver before letting them ride. Depending on the full range of the owner's desires, these alternative plans might be satisfactory. In general, we may note that more than one rule may be satisfactory relative to a given set of desires and purposes.

Judicial reasoning that leads to the adoption of a legal rule exhibits the same structure and can be evaluated by the same criteria as in the example above. Courts are led to accept a rule if following it will be satisfactory to the relevant goals and purposes of the legal system. Consider, for example, the rule in contract law regarding the revocability of bids submitted to a general contractor. Ordinarily, the offeror is master of his offer and may withdraw it without liability at any time prior to its acceptance.[223] When, however, the offer is a bid which the general contractor may use in preparing his own bid, the general contractor's reliance binds the bidding subcontractor to an "implied subsidiary promise" not to withdraw his offer for a reasonable time.[224] This rule at least arguably advances several of contract law's goals. It protects the general contractor's justifiable and foreseeable reliance on the subcontrator's offer; this enhances the ease and reliability of the construction industry's practices regarding bidding. In addition, it protects the offeror by requiring the general contractor to accept the bid within a reasonable time and by barring the general contractor from shopping for a better offer.[225] The rule is valuable, if it is, because it serves various goals of contract law that underlie the doctrines of offer and acceptance.

Moreover, we may assess this rule against its rivals in terms of how well each alternative serves the various goals of contract law. For example, it might be doctrinally simpler to dispense with the implication of a subsidiary promise and hold that the general contractor's reliance on the bid makes the subcontractor's offer enforceable. In effect, this alternative rule would hold that a general's reliance gives

223. *See, e.g.*, James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344 (2d Cir. 1933).

224. *See, e.g.*, Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958).

225. *Id. But see* Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237, 283-85 (1952) (arguing that construction industry does not actually need bid irrevocability).

him an enforceable option to contract on the terms submitted in the bid. In contrast with the implied subsidiary promise rule, making the subcontractor's offer enforceable as an option, would allow the general contractor to shop for a cheaper bid: the subcontractor would be barred from withdrawing his offer and the general contractor would have an unwarranted advantage in his negotiations with other possible subcontractors.

While fundamentally similar to an individual's practical reasoning to the acceptance of a rule, judicial reasoning is complicated by special considerations that bear on the selection of one possible legal rule over its rivals. In reasoning about legal rules, courts must consider that legal rules figure in a system of rules and in a system of adjudication. Some rules, if adopted, might call into question other settled areas of the law or, conversely, could trigger the resolution of parts of the law which are in turmoil. Some rules will be more easily understood by the affected parties and their counsel, and some will be easier for courts to follow. These considerations can influence judicial deliberation about rules to an extent not found in non-legal reasoning to rules.[226] But judicial deliberation is nonetheless practical in form, and these considerations are best understood as among the desiderata to be weighed by the court in deciding whether to adopt a particular rule.

Even in Raz's simple example of the troubled car owner, the speaker's evaluations of the satisfactoriness of possible rules plausibly involved some assessment of what could be called administrative convenience. Raz knew that it would be difficult to refuse his friends' requests at the time the requests would be made, so he was led to adopt a rule against giving rides. The rule was accepted with an eye to the likely difficulty of turning down those requests. It is plausible that he might contemplate a different approach if he thought it would be hard to stick with the blanket rule against rides. For example, he might decide on a rule to give rides if asked, but not to volunteer. Or, if he were steeped in the common law he might search for a fiction by which he could decline his friends' requests without seeming churlish: he might exaggerate the danger of riding in his car, or he might claim that a clause in his insurance policy prevented him from giving rides.

In some situations we will adhere to a previously formulated rule even though we suspect that had we reassessed *de novo* the rule's satisfactoriness in the situation at hand we might have drawn a different conclusion. We understand that a rule's satisfactoriness may depend on how, as a general matter, it helps us to dispose of cases. We reason

226. *See* H. HART & A. SACKS, *supra* note 21, at 131-86 *passim*.

practically to the rule's adoption and to its proper application, but we need not review the rule's satisfactoriness relative to the purposes and goals of the legal system to justify the proper resolution of each case. So long as considerations of the ease and prudence of applying and justifying a rule are among the accepted purposes of the legal system relative to which a rule must be satisfactory, our evaluations of various rules in the light of those concerns will be a proper part of practical reasoning.

More generally, we can distinguish certain kinds of reasons which elaborate satisfactoriness conditions for our practical reasoning. Following Raz, I call them *second order* reasons.[227] Second order reasons tell us how to decide cases as part of a system of law. Judicial argumentation is rich with standards about how judges should reason in a particular situation. It is clear that among the standards for satisfactoriness in judicial justification are those associated with the idea of *stare decisis*. On occasions, applying a rule to a new case will be distasteful, if not disgraceful. But the legal system recognizes a value in fidelity to precedent. It is related to the law's ambition to treat like cases alike. It may also promote stability in and respect for the legal system.[228] Therefore, we expect that judges will generally follow precedent rather than reassess the satisfactoriness of every problematic rule on each occasion of its application. And, where there was no rule, we would expect it to be satisfactoriness-preserving to develop a rule, for that might ease future case disposition, and provide a system of rules on which people could rely in ordering their affairs. Judicial reasoning may invoke a number of criteria for judging the appropriateness of inferences.[229]

2. Like Treatment

The thesis that judicial justification is fundamentally practical reasoning explains the judicial justification of legal rules and their applications to particular cases. The practical reasoning thesis is also consistent with our expectation that courts treat like cases alike. If a general fiat is satisfactory, then reasoning from that fiat in satisfactoriness-preserving inferences will ensure that every case to which the fiat is applied will be treated in accordance with the fiat's prescriptions. In

227. Raz has developed this aspect of practical reasoning in PRACTICAL REASON AND NORMS, *supra* note 148, at 35-48. Full elaboration of the variety of norms involved in legal reasoning is beyond the scope of this essay, but it seems unproblematic to suppose that such criteria as the need for "bright" lines, the hope to curtail further litigation, or the desire to reduce transaction costs may all be understood as second order reasons for deciding a case in a particular way.

228. *See* H. HART & A. SACKS, *supra* note 21, at 587-95.

229. J. RAZ, *supra* note 148, at 35-48.

short, if the rules are validly applied then like cases will be treated alike.

The practical reasoning thesis is also consistent with the legal community's observations about the vicissitudes of judicial justification. General legal fiats would be heir to the same misfortunes as the general legal propositions posited by the deductive theory. On the practical reasoning thesis, any statement of a rule may be as susceptible to ambiguity, vagueness, and misunderstanding as would be its counterparts in deductive or analogical reasoning. Expressions of a legal rule may also, on the practical reasoning thesis, need interpretation and construction in order to be applied to a specific case, and may be vulnerable to manipulation by willful judges. Thus, nothing about the observable vagaries of legal language commits us to a deductive as opposed to a practical reasoning theory of judicial justification.

3. Analogies

It is clear that judges sometimes employ analogies as part of the process by which they reason to satisfactory legal decisions. Since analogical inferences lead to a decision by the judge about how to resolve a particular controversy, it is at least initially plausible that judicial analogies are fundamentally practical in nature.

In Section IIIB, I distinguished two different descriptions of the logical structure of judicial analogies.[230] On one version, an analogy to past cases leads to the extraction of a rule from those cases, and that rule is applied to the case at hand. On the other version, the analogy to past cases justifies the decision without the extraction of a rule. Each can be explained in terms of practical reasoning.

On Levi's view, the court perceives a rule "inherent" in the decided cases.[231] Just how a judge comes to conceive of the "inherent" rule is properly understood as a question of the context of judicial discovery and not of judicial justification.[232] As a theory of judicial justification, the practical reasoning thesis has therefore as little to say about the judicial perception of analogies as it does about the hunches which may encourage judges to decide a case one way rather than another. The issue for a theory of judicial justification is what warrants one analogy over the host of other comparisons which could have been drawn.

On my view, the satisfactoriness of a comparison of cases relative to the goals and purposes of the law warrants the court's reliance on

230. *See supra* text accompanying notes 169-75.

231. E. LEVI, *supra* note 165, at 1-2.

232. *See supra* text accompanying notes 42-43.

an analogy to infer a legal rule. Cases may be compared and contrasted in a number of ways, but advocates of the analogical thesis hold that the court's choice of analogy should turn on the *relevance* or the *relative importance* of the various similarities.[233] In other words, what distinguishes an acceptable from an unacceptable analogy is how well a distinction in terms of one similarity or another would serve the goals and purposes of the law, including the goals and purposes of a precedential system. On this view, what justifies an analogy and the extraction of a rule of decision will be the same considerations and the same forms of inference that justify the derivation of a legal rule. The rule of the analogy, once extracted, is applied to the case at hand, in a manner that parallels the application of a rule of law to a particular case.

On the second version of judicial analogies, comparing the present controversy to past cases warrants some particular resolution of the case at bar, without focusing on the intermediate inference of a legal rule.[234] On this second version, practical legal analogies could be understood along the following lines:

> *A*, *B*, and *C* all have characteristics *x*, *y*, and *z*.
>
> *D* also has characteristics *x*, *y*, and *z*.
>
> *A*, *B*, and *C* were (satisfactorily) resolved in manner *S*.
>
> Therefore, let *D* be resolved in manner *S*.

In short, *D* should be treated in the same fashion as were *A*, *B*, and *C* because *D* resembles those other cases in ways (*x*, *y*, and *z*) that bear on the purposes of the rule resolving those cases.[235] As in the first version, the proper analogy is drawn in terms of the goals and purposes of the law or the legal system. But, if judicial analogies are drawn in order to serve the purposes of the legal system, then analogies are essentially practical in nature; if it is satisfactory that cases *A*, *B*, and *C* are resolved in manner *S*, and *D* is relevantly similar to the other cases, then it would be satisfactory that *D* be handled in the same manner.

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233. *See supra* text accompanying notes 178-79.

234. *See supra* note 173 and accompanying text.

235. The structure in the text is a revision of the structure proposed in M. GOLDING, *supra* note 8, at 107. Although Golding indicates that he regards judicial analogies as practical arguments, in some sense, his structure is cast in the form of propositions with truth-values. I have rewritten Golding's structure to cast it in the form that a modified account of analogies might take in practical reasoning. In the situation of competing analogies, Golding suggests that the choice between a premise "(iv) y, z, . . . are q-relevant characteristics" and an alternative premise "(iv') s, t, . . . are non-q characteristics" depends on considerations that sound eminently practical. *See id.* at 111: "If, as usually will be the case, premise (iv) rests on a different goal or right than premise (iv'), the judge should estimate which goal or right is the more important goal or right: the more important one is the weightier one."

4. Counter-Instances and Defeasibility

Construing the application of a rule to a case as an inference in the logic of satisfactoriness can also account for aspects of judicial argumentation that were problematic for the deductive theorist. The deductive thesis, we saw, is committed to the position that legal rules and legal decisions are true, and this creates certain problems for the deductive theory.[236] The rule "Contracts not to be performed within one year are unenforceable unless in writing and signed by the party to be charged" is not easily understood as a *true* assertion about the law. Unless the Statute of Frauds is in fact followed in every case, the rule would not be universally true. The practical reasoning thesis provides a more natural understanding of the significance of legal rules than does the deductive theory. If judicial justification is essentially practical, then a legal rule indicates what is satisfactory relative to certain goals and purposes of the legal system. The judge's failure to instantiate the Statute is not a real counter-instance, on this thesis. Rather than falsifying the Statute, as is entailed by the deductive theory, the judge's failure simply means that the Statute has not been applied. On that occasion, the judge would fail to satisfy the goals and purposes of contract law. But those goals and purposes would still obtain, and the Statute would still be a satisfactory norm for the legal system.

Practical reasoning has yet another advantage over the deductive theory. We noted, in Section IIIA, that a deductive theory could not explain the distinction between the applicability of a rule and its warranted application.[237] An important feature of the logic of satisfactoriness — its *defeasibility* — provides a useful explanation for this and other aspects of judicial justification.

To illuminate this feature of the logic of satisfactoriness, recall the example from Raz about the troubled car owner. We observed that he could have chosen any one of several different possible rules as his plan of action. So far as he had articulated his desires and goals in that situation, various different rules might have been satisfactory. Relative to other unstated desires, however, some of the possibilities might well be unattractive to a driver in Raz's position. For example, asking his friends to sign a release before letting them ride in the car might have disserved another of Raz's aims: it might have offended his friends. Because the rule about signing releases might have conflicted with other purposes, that rule might not have been satisfactory relative to an expanded set of goals which included some of the driver's other goals and desires.

236. *See supra* text accompanying notes 157-58.

237. *See supra* text accompanying notes 131-44.

Whether a rule is satisfactory depends on the set of desires and goals which one hopes to satisfy by following the rule. A rule, we have noted, is not satisfactory *simpliciter*; rather, it is satisfactory relative to a set of aims. Satisfactoriness' inherent relativity means that practical reasoning is defeasible: if we add a further satisfactory premise to our argument in the logic of satisfactoriness, we can no longer be sure that the conclusion of the inference will remain satisfactory.[238] Including the further premise may defeat the satisfactoriness-preserving quality of the inference,[239] even though it would not defeat the validity of a deductive argument.

Ordinary and quite obvious instances of practical reasoning exhibit defeasibility. Let us return to Raz's example again. The troubled car owner anticipated that his colleagues might ask for a ride. His rule against giving rides was formulated to enable him to deal adequately with such requests relative to a given but plausibly incomplete set of aims. If a colleague were to encounter an emergency and, in dire straits, request a ride, Raz might well reconsider his rule in light of the new situation. His colleague's emergency raises not just new facts, but also calls into play desires not previously considered when formulating the rule. The rule he originally formulated might no longer be satisfactory, relative to the new set of desires. The rule might be defeated because a new satisfactory premise had been added to his practical argument.

In the ordinary non-legal case, our grasp of the desires and purposes we seek to satisfy will be incomplete. As the situation is elaborated, we may become cognizant of additional desires which we wish to satisfy as well. In that case, we may discriminate among the various rules, not by reference to the initial set, but by adding other satisfactory premises. With respect to this revised set of aims some of the candidate rules may be satisfactory, but perhaps not all.

To decide a case a judge must, in certain situations, choose among competing and conflicting rules, each of which appears supported by the relevant authority, or among rival formulations of a rule, each of which seems consistent with the decided cases.[240] If one rule were acceptable and the other not, then the judge could reject one and apply the other. But if, in the judge's assessment of the immediately applicable precedent and the goals of that area of the law, the rival rules each appear tenable, then to justify his decision the judge must articulate a basis for accepting one and rejecting the other. Prac-

238. *See* A. KENNY, *supra* note 7, at 92.

239. *Id.*

240. *See, e.g.*, McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970).

tical reasoning's defeasibility provides a useful explanation for the arguments used by judges to differentiate among the competing rules or rival formulations.

Where two rules are well supported by the relevant authority, the apparent force of each rule indicates, on my view, that each alternative is satisfactory relative to the goals and purposes of that area of the law. Therefore, to differentiate among the rival alternatives, the judge may point to other goals of the law or the legal system, or to other precedent in a related but distant area of the law. When other satisfactory fiats are added to the premises of the practical argument it may be that one of the alternatives is no longer satisfactory relative to the new, expanded set. By appealing to further goals and values of the legal system the judge can justify the choice of one rule over the other.

We should expect that reasoning to rules which are satisfactory to the legal system's goals and purposes will be a complicated matter, for it is doubtful that we have a firm grasp of all of the system's various purposes. Consider a simple rule like the Statute of Frauds. The Statute is a valid rule in the law, on my view, if it is satisfactory relative to the various purposes of the law of contracts and the legal system in general. Relative to those purposes, the Statute's satisfactoriness is not *a priori* absurd. The Statute arguably serves several aims: our desire to channel enforceable promises into certain forms; our interest in securing appropriate evidence of the promise's existence and nature; and our hope of impressing on the parties to the contract the importance of the enforceable obligations they are assuming so that we can be sure that they entered into the contract willingly.[241] The Statute may also make it easier for courts to enforce the regime of contract law by providing a simple precondition for enforceability of certain kinds of contracts. Given the rule's possible usefulness within the law of obligations, it may be satisfactory, relative to the goals and purposes of contract law, to deny enforcement of a contract which is within the Statute but unwritten.

But the Statute is not an unequivocal contribution to the law of contracts. It contemplates that some freely made agreements will not be enforced just because they lack a particular formality. The Statute, therefore, sometimes seems like the vehicle for fraud rather than its prophylactic.[242] The Statute of Frauds might not be a satisfactory rule if we add to our set of satisfactory premises the notion that we want to prevent the avoidance of honest bargains by the mere manipulation of a formal requirement. In that case, since the Statute contemplates

241. *See, e.g.*, Llewellyn, *What Price Contract?*, 40 YALE L.J. 704, 747-48 (1931).

242. McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970).

that sincerely made agreements will be unenforceable in the absence of a writing, following the Statute may no longer be satisfactory. In short, the Statute's satisfactoriness is problematic. It is plausible that there are divergent and countervailing considerations which, if added to our enumeration, might defeat the rule's validity.

We recognize, in fact, a long and complicated series of values at work in the law of contracts,[243] and in the legal system more generally.[244] It is beyond the scope of this article to provide an account of how each of these various expressions of the goals of the common law might be explained by the practical reasoning thesis.[245] But we would expect that a fully developed theory of legal reasoning will explain the variety of standards that might be said to justify a rule and the differing ways in which they figure in judicial argumentation.[246] With respect to the problems of judicial justification, what is signal about these various standards is the role they might play in establishing a legal decision's satisfactoriness. By referring to some principle of the law or to some rough assessment of public welfare we may expand the set of goals and purposes which we hope to satisfy in the case deci-

243. *See, e.g.*, Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 813-16 (1961).

244. *See, e.g.*, R. DWORKIN, *supra* note 17, at 22-39, 82-130, 297-311.

245. Within current scholarship, one finds a plethora of accounts of the differences between principles and policies. *Compare* H. HART & A. SACKS, *supra* note 21, at 151-65, *with* R. DWORKIN, *supra* note 17, at 22-39. *Compare also id. with id.*, at 82-130. Debates also flourish over the differences between rules and principles. *Compare, e.g.*, R. DWORKIN, *supra* note 17, at 22-39, *with* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). Since jurisprudence lacks agreement on the nature of these different norms and on the differences among them, to show how the practical reasoning thesis could account for the principles and policies would require, in effect, an account for each different version of these differences.

246. While jurisprudence lacks an agreed-upon explanation of these norms, it is clear that the views of Ronald Dworkin on the nature of principles and policies, *see supra* note 244, are as central as any. As I indicated in note 245, *supra*, Dworkin's views, while central, are not necessarily consistent on many details. However, it is possible to describe, in very broad strokes, how the practical reasoning thesis would account for certain salient features of Dworkin's view. In his first statement of the distinction between principles and policies, R. DWORKIN, *supra* note 17, at 22-39, Dworkin asserts that a policy sets out "a goal to be reached, generally an improvement in some economic, political, or social feature of the community . . . ." *Id.* at 22. A principle, he states, is "a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality." *Id.*

Inasmuch as a policy states a goal to be achieved, it seems unproblematic to regard a policy as a statement of a value in the law that is satisfactory to further that goal. A principle also states a value in the law, and it seems similarly unproblematic to regard a principle as the expression of a value that can serve as a premise in judicial justification through the logic of satisfactoriness. The difference between principles and policies inheres in the way that they constrain judicial justification. Any decision that furthers that policy would seem to be satisfactoriness-preserving, although that inference could be defeated by including some principle, or perhaps another policy of greater importance, in the premises for judicial justification. A decision that fails to observe a principle cannot be satisfactoriness-preserving, except in circumstances where some other principle of greater weight is also at issue, or circumstances of great social danger. *See id.* at 95-96.

sion.[247] Including these legal standards can allow us to differentiate among competing legal resolutions in the logic of satisfactoriness.

We recognize that not every applicable rule will be applied to each case; the application of some rules might be unwarranted, their applicability notwithstanding. This feature of judicial reasoning poses difficulties for the deductive thesis,[248] but it is understandable within practical reasoning, for practical reasoning, unlike deduction, is defeasible.[249]

The defeasibility of practical inferences explains the distinction between the applicability and warranted application of a rule. We may say that a rule is *applicable in the strict sense* to a situation if the situation exhibits those features that, in the formulation of the rule, are the appropriate predicates for its application. In this strict sense, then, any rule is applicable that correctly subsumes the situation; more than one rule may be applicable. But, whether a rule's application is warranted depends on the rule's satisfactoriness relative to some set of goals and purposes of the law. Any situation will exhibit some features in addition to those which make a particular rule applicable to it. If these additional features call into question other goals and purposes of the law, then applying that particular rule to the situation at hand may frustrate those other purposes and goals. In that circumstance the particular rule would be applicable, in the strict sense, but its application would not be warranted.

When different rules, each applicable to the same situation, lead to incompatible legal decisions, the court must apply one and reject the other.[250] Rejection of a rule does not, on my view, mean that the rule is without vitality in the law. So far as it had been developed, the rejected rule was satisfactory relative to some particular set of goals and purposes of the law; it might still be satisfactory to apply that rule to cases different from the one at hand. It may well be that the rejected rule, suitably qualified, continues to bind courts in other situations.[251]

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247. This function of principles and policies is common to the accounts of Dworkin, *supra* note 17, and H. HART & A. SACKS, *supra* note 21.

248. *See supra* text accompanying notes 131-44.

249. *See* A. KENNY, *supra* note 7, at 92: "Theoretical deductive reasoning is not defeasible in the sense that the addition of a premise cannot invalidate a previously valid inference: if a conclusion follows from a given set of premises it can be drawn from any larger set containing those premises no matter how many are added to the set." *See also supra* note 129.

250. It might be said, on such an occasion, that the rejected rule was not applicable. It would be wrong, however, to conclude that the rejected rule was necessarily inapplicable in the strict sense. For, the rule was applicable, but the court concluded that its application to this case was unwarranted relative to the goals and purposes of the legal system.

251. When the judge distinguishes the case at hand from those situations to which applying the

C. Evaluating a Practical Reasoning Theory

Practical reasoning, understood in terms of the logics of satisfactoriness and satisfaction, can explain the significant features of judicial justification while satisfying the criteria for theory acceptability articulated in Section II. The thesis that judicial argumentation is fundamentally practical reasoning provides criteria for recognizing valid judicial inferences without committing us to unnecessarily aggressive or unappealing positions about the judicial process. The practical reasoning thesis is therefore preferable to either of the two dominant views. However, it must be acknowledged that the practical reasoning thesis is not an unambiguous improvement over its deductive counterpart. In particular, there are two aspects of this thesis which may be thought troublesome.

Doubts may be felt, first, about the consequences of practical reasoning's defeasibility for a theory of law. In particular, one might wonder whether any argument in the logic of satisfactoriness could ever be conclusive or final. No matter how sure one might be of a conclusion's satisfactoriness relative to a given set of goals, adding some further desideratum could negate that conclusion's satisfactoriness relative to the revised set.[252] It might therefore be argued that unless it were possible to articulate a complete set of legal goals and purposes, legal conclusions could be established only provisionally — they seem liable to being overturned upon the introduction of some further premise. Now, to defeat any particular conclusion would require both adducing some further premise and also demonstrating that upon the addition of that further premise the conclusion in question was not satisfactory relative to the revised set of goals and purposes. But the possibility of defeasance seems to cast doubt on the acceptability of every conclusion in the logic of satisfactoriness. Without a complete set of legal goals and purposes, in short, it seems that no judge's decision could be said to be justified once and for all.

It is, of course, arguable that the set of goals and purposes for judicial justification is in fact complete. Indeed, completeness of legal premises would be the consequence of an act-utilitarian theory of law: the set of goals and purposes would consist only of the utilitarian

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rejected rule would be warranted, he suggests a reformulation of the rejected rule. That is, he notes those features of the case at hand which, relative to various goals and purposes of the legal system, warrant recourse to the other rule. If the distinction which the judge draws is satisfactory relative to the goals and purposes of the legal system, then we should expect that judges and lawyers will come to employ the rejected rule, suitably reformulated so as to distinguish it from the type of situation to which its application would be unwarranted.

252. *Cf.* W. SALMON, *supra* note 113, at 11-13 (noting the inconclusiveness of inductive reasoning). *See also supra* text accompanying notes 236-40.

maxim, and the satisfactoriness of any legal decision would be assessed relative to that single concern.[253] However, this contention is unattractive. Utilitarian theories of law are problematic, to say the very least.[254] In addition, while the issue seems beyond rigorous demonstration one way or the other, I share Kenny's doubts that the premises of practical reasoning could reasonably be supposed to be complete.[255]

This objection to the practical reasoning thesis rests, to some extent, on an equivocation. Practical reasoning *is* conclusive. Valid conclusions follow from their premises in accord with the logics of satisfactoriness and satisfaction. It is significant, however, that practical reasoning, unlike deduction, does not *necessitate* its conclusions.[256] The conclusion of an argument in the logic of satisfactoriness is not necessarily satisfactory just because the given premises are satisfactory. But, the fact that deduction necessitates its conclusions gives rise to an important objection to the deductive thesis — namely, that deduction cannot accomodate the distinction between the applicability of a rule and its warranted application. That practical reasoning does not necessitate its conclusions is, if anything, a virtue when we try to explain the important features of judicial justification.

Moreover, while it is doubtful that a complete set of goals and purposes for the law could ever be articulated, the lack of a complete premise set for practical reasoning is of less significance for the deciding judge than it might initially seem. The possibility that a further desideratum might undercut the satisfactoriness of the judge's conclusion is less troubling when we recall the legal community's expectations of judges. I noted in Section II that judges are not expected to

253. This is, as Ruth Marcus has noted, an "unregenerate" version of act-utilitarianism. *See* Marcus, *supra* note 131, at 128.

254. *See, e.g.*, R. DWORKIN, *supra* note 17, at 94-100, 232-38.

255. *See* A. KENNY, *supra* note 7, at 94:

> The notion of a premise which is complete enough to prevent defeasibility while specific enough to entail a practical conclusion is surely chimerical. Only in restricted contexts can we even approach completeness in the specification of practical premises: we insist, for instance, that the listing of contra-indications on a marketed drug should be not only accurate but, within limits, complete . . . . It is a presupposition of truth-functional logic that any proposition which has the value 'true' does not also have the value 'false'; but it is not the case that a proposal for action which has the value 'good' may not also have the value 'bad'. . . . An argument which shows something to be a good thing to do in no way shows that something incompatible with the conclusion it reaches may not also be a good thing to do.

Cf. H.L.A. HART, *supra* note 75, at 136: "It does not follow from that fact that . . . rules have exceptions incapable of exhaustive statement, that in every situation we are left to our discretion and never bound to keep a promise. A rule that ends with the word 'unless . . .' is still a rule."

256. *See supra* note 127.

justify every legal decision from first principles.[257] At least within the constraints of a system of stare decisis, judges are permitted if not expected to take some issues for granted. Indeed, I also argued that if a judge did try to decide every possible legal ramification of the controversy at hand, his resolutions of those more remote questions would likely be regarded as mere dicta. In sum, the objection to practical reasoning's defeasibility seems largely beside the point: the decisions of an individual judge are not treated as justified once and for all but, rather, are open to review and reconsideration depending on future developments of the law.

Second, the practical reasoning thesis commits us to a position on logical form that some will find problematic: it denies that legal statements are true or false. The extent to which this consequence of the practical reasoning thesis counts against the thesis will depend on the reasons why a theorist might hold that legal statements bear truth values. It is possible, for instance, that the principal attraction to the notion that statements of law are true or false has been jurisprudence's interest in the deductive thesis. In that case, the superiority of practical reasoning as an account for judicial reasoning should obviate the commitment to truth values.

Beyond our interest in the deductive thesis, it may be that legal theory has an independent stake in the metaphysical status of legal statements. If so, then that fact would count against the view of judicial argumentation here presented. We must be careful, however, to make sure that our theory of law really commits us to the truth or falsity of legal statements. For, it is plausible that some positions in legal theory have characteristically been framed in terms of the truth of legal statements even though the position is compatible with other claims about the nature of statements of law.

Consider, for example, the prospect of a natural law theory. One might advance a natural law theory which simultaneously holds that a legal proposition is law properly so called if and only if it is consistent with the dictates of morality, and that moral norms are necessarily true or false. It would follow that legal propositions are true or false. On this version of a natural law theory, one could not easily adopt the view that legal reasoning is practical reasoning. But other formulations of a natural law theory are available which do not commit us to the position that legal statements are true or false. We might hold, instead, that statements of legal norms are law, properly so called, only if those statements accord with certain moral norms, but avoid any position on the status of moral norms. On this formulation the

257. *See supra* text accompanying note 40.

practical reasoning thesis would require no substantial reconsideration of our commitment to natural law. Moral norms may be binding even if one does not also view them as true or false.

The significance of the metaphysical claim about legal statements, in other words, should itself be regarded as an unsettled issue. If we decide that our best theory of law requires a commitment to legal statements bearing truth values, then we should rethink our understanding of judicial argumentation, but we should be sure that our best theory of law does indeed require that commitment.

That master of the epigram, Holmes, shaped the attitudes of many theorists about the problem of legal reasoning when he pronounced: "The life of the law has not been logic: it has been experience."[258] In considering the possible models for legal reasoning, it may commonly be felt that no formal "logic" could capture the processes by which the legal system adapts and responds to the "felt necessities of the time" that supposedly determine the rules of law which govern us.[259] My contention is that practical reasoning, understood in terms of the logics of satisfactoriness and satisfaction, is a distinct form of reasoning. We rely on it in ordinary reasoning: we make decisions about what to do in light of our needs and purposes. In one sense, at least, practical reasoning dissolves the Holmesian dichotomy: it provides a logic of the "felt necessities." Practical reasoning may thus serve to bridge the gap which Holmes posits between logic and experience. In any event, practical reasoning is a model for judicial justification. It explains the relevant features of judicial argumentation better than does either the analogical or deductive thesis, and it avoids the problematic consequences posed by the deductive thesis. It is, in sum, a better theory.

V. PRACTICAL REASONING AND LEGAL THEORY

I have argued that practical reasoning provides a better theory of the nature and validity of judicial justification than does either the analogical or deductive thesis. As part of the argument, I have contended that we should aim for an account of argumentation that is not dependent on any particular theory of law. Judicial justification is important enough a topic in jurisprudence that we should aspire to explain it as an independent concern. Developing a theory of judicial justification is, however, only one part of the larger task of investigating the nature of law and the legal system. Issues in philosophy of law are commonly thought to depend on an understanding of judicial justi-

258. O.W. HOLMES, *supra* note 93, at 1.

259. *Id.*

fication. Moreover, the worth of a theory of justification can be measured, in part at least, by the extent to which the theory illuminates other questions in jurisprudence. In this last section, I will explore how the practical reasoning thesis helps us understand other problems in legal theory.

One longstanding controversy has been the debate over the existence of "gaps" in the law. Are there legal claims which we cannot determine to be either valid or invalid as a matter of law? Legal theorists of varying stripes have taken the position that a mature legal system must be without gaps: for every possible controversy the system should generate one right answer. It is sometimes asserted that Blackstone held this view,[260] and great jurists have relied on this claim in their opinions.[261]

The question of the law's gaplessness is related to other jurisprudential concerns. If there are no gaps, unease might be felt at the prospect of judges deciding cases originally or creatively. Judicial originality seems to mean that the legal obligations of the parties have been reshaped by the court's decision, and judge-made changes in the law, it is suggested, raise substantial problems of unfairness in the law. Among other things, when the law changes, parties whose cases are resolved under the new law are treated differently than those whose disputes were adjudicated under the old law. Moreover, the parties may have relied on the older standard at the time they decided to act. Conversely, if judicial law-making is a proper part of the task of deciding cases, then it would seem that the law is incomplete. Any case that falls in one of the gaps would therefore seem to be decided by the

260. *See, e.g.*,Linkletter v. Walker, 381 U.S. 618, 623 (1965).

261. Consider, for example, the remarks of Chief Justice Shaw in his opinion for the court in Norway Plains Co. v. Boston & Maine R.R., 67 Mass. (1 Gray) 263, 267-68 (1854):

> It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it. . . .
>
> Another consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances. The consequences of this state of the law is, that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice, and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstances.

judge, not as a matter of law but as a matter of personal whim or prejudice.

In their arguments about the existence of gaps, theorists have frequently relied on claims about judicial argumentation. H.L.A. Hart, for example, has advanced the claim that on occasion the law simply "runs out." On such occasions, he contends, judges have discretion to decide the case at hand, and their decisions must be regarded as original, if not necessarily creative.[262] Hart implies that if there is no law in such a case, there cannot be, as a matter of law, a right answer. The judge must make new law if he is to decide the case at all.[263]

Ronald Dworkin, on the other hand, has been a vigorous advocate of the position that in a well-developed legal system there is, in principle, a right answer to each legal controversy.[264] In a variety of writings, he has advanced a skein of related contentions about the existence of legal gaps. First, he has been a diligent and devoted critic of what he calls the "no-right-answer" thesis — the claim that there are gaps in the law. In some of his writings, he challenges the coherence of certain arguments which might be advanced in support of the existence of gaps.[265] Other of Dworkin's contentions aim at support-

262. *See* H.L.A. HART, *supra* note 75, at 132.

263. *Id.*

264. Professor Dworkin has not taken a clear position on the logical nature of judicial justification. Various remarks indicate that he is in sympathy with the deductive thesis. He is apparently committed to the notion that statements of law are true or false. *See, e.g.*, R. DWORKIN, *supra* note 17, at 283; Dworkin, *No Right Answer?*, in LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 58, 62-65 (P. Hacker & J. Raz ed. 1977). And, on at least one occasion, he demonstrates his apparent agreement with the deductive thesis: "In easy cases legal rights can be deduced, in something close to a syllogistic fashion, from propositions reported in books that are available to the public." R. DWORKIN, *supra* note 17, at 337. However, there is too little basis on which to claim that these remarks represent a full-fledged commitment to deductive logic as the nature of justification.

265. Dworkin has attempted to defuse Hart's view of judicial discretion to decide hard cases. By including, as a part of what must be counted as "law," principles and policies which might guide the judge in deciding cases even where there are no rules, Dworkin has advanced the notion that the judge is never without law. Courts have therefore no real discretion, at least not of the sort that might imply that the judge makes new law. *See* R. DWORKIN, *supra* note 17, at 14-80.

Moreover, in two related essays he has sought to demonstrate that certain arguments in favor of the no-right-answer thesis are logically incoherent. *See id.*, at 279-90; Dworkin, *supra* note 264. He offers a variety of distinctions in an effort to make this second point. First, he distinguishes two different versions of the no-right-answer thesis. "On the first version, two lawyers debating whether the plaintiff has a right to a decision, or whether, on the other hand, the defendant has a right to win, may both be wrong, because the right answer is that neither party has a right to win. On the second version, neither lawyer is right, but neither is wrong either; what each says is, for some reason, neither true nor false." R. DWORKIN, *supra* note 17, at 331.

He further distinguishes between two different standpoints from which the conclusion that some issue has no right answer — in the sense of the second version of the claim noted above — might be advanced. There are claims that there is no right answer which are made, as Dworkin puts it, "within the enterprise," and other claims that law lacks a right answer which are made "outside the enterprise." Claims made within the enterprise are claims about the relative reliability of three different legal resolu-

ing directly the proposition that if settled law is sufficiently complex, only one legal answer will be tenable.[266] Finally, he advances a related claim about the obligations of a judge in a mature legal system. In their deliberations, he argues, judges should assume that there is a right answer and should undertake in every case to find it.[267] The practical reasoning thesis can help clarify this dispute about the purported completeness of the legal system. In particular, it can help us evaluate some of Dworkin's claims.

Dworkin's principal arguments in favor of the right answer thesis rely on his theory of judicial decision making, which he expounds in his article "Hard Cases."[268] On this theory, the right answer in a particular controversy follows from the best available constitutional theory of the legal system in which the controversy arises.[269] No actual jurist, he acknowledges, could be expected to accomplish the intellectual feat of building such a theory, so he posits Hercules, a mythical judge who is capable of this labor.[270] Assuming Herculean capabilities, Dworkin articulates a test for the truth of a legal proposition: "A proposition of law may be asserted as true if it is more consistent with the theory of law that best justifies settled law than the contrary proposition of law."[271]

Dworkin uses the Hercules story to support two important propositions about the existence of gaps. First, in a mature legal system there will be "enough" law so that only one theory will justify settled law, and only one answer to a legal controversy will be consistent with that best theory.[272] Second, all possible answers to a legal controversy

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tions of a particular controversy: (i) plaintiff has a right to win; (ii) defendant has a right to win; and (iii) there is no right answer to the dispute. A claim made within the enterprise that there is no right answer "is a judgement of the same character, and is equally fallible, as either of the other available alternatives." *Id.* at 285. Claims made outside the enterprise that there is no right answer are of an entirely different character. They are "external, critical" claims about the enterprise of judging and our standards for the validity of judicial decisions. *Id.*

266. *See infra* notes 268-72 and accompanying text.

267. *See infra* notes 276-78 and accompanying text.

268. R. DWORKIN, *supra* note 17, at 81.

269. *Id.* at 105-23.

270. *Id.* at 105.

271. *Id.* at 283.

272. *See id.* at 286: Suppose "that the legal system these judges administer is very advanced, and is thick with constitutional rules and practices, and dense with precedents and statutes. The antecedent probability of a tie is very much lower; indeed it might well be so low as to justify a further ground rule of the enterprise which instructs judges to eliminate ties from the range of answers they might give. That instruction does not deny the theoretical possibility of a tie, but it does suppose that, given the complexity of the legal materials at hand, judges will, if they think long and hard enough, come to think that one side or the other has, all things considered and marginally, the better of the case." *See also* Dworkin, *supra* note 264, at 84: "*For all practical purposes*, there will always be a right answer in the seamless web of our law." (Emphasis added.)

Professor Dworkin's conception of a gapless mature legal system bears some resemblance to the

can be ranked according to their consistency with the best theory of law for the legal system. Various features of practical reasoning cast doubt on these propositions.

Let us suppose that judges are equipped with a single theory which best justifies settled law. On the practical reasoning thesis, this theory will invoke a set of goals and purposes of the law relative to which past decisions are satisfactory. The judge should justify his decision in any controversy in terms of that statement of legal goals and purposes. In Section IV I noted that, relative to any statement of the goals of the law, more than one rule or holding could be satisfactory.[273] Of course, as between competing rulings, we can discriminate some from the rest by appealing to further goals and purposes: by adding those goals to the premise set, some of the rulings which were satisfactory relative to the original set of premises may be defeated. This means that, for any particular controversy, the court may be able to reach a decision. But, as a general claim about the legal system, there is no more reason to assume that only one possible ruling will be satisfactory relative to the legal system's purposes and goals than there is to assume that one plan of action will be satisfactory for an individual. In short, the practical reasoning thesis suggests that we cannot assume that only one answer to a controversy will be consistent with the best theory for a legal system. There may well be more than one right answer.

Further, practical reasoning's defeasibility casts doubt on any argument for the law's gaplessness that depends, as does Dworkin's claim, on the effectiveness of judicial reasoning to rank all possible legal answers in terms of their consistency with the best theory of the legal systems.[274] On Dworkin's view, the ranking is determined by the answers' relative consistency with a theory that justifies *settled* law. But the practical reasoning thesis suggests that further, valid premises might always obtain. We could never preclude the possibility that, upon considering further valid premises, settled law might become un-

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logician's notion of a complete formal system of logic. A formal system of logic is complete if and only if every logically valid statement of logic is a theorem of that system. *See, e.g.*, G. HUNTER, *supra* note 123, at 92-95. Dworkin's apparent kinship with deductive theorists of judicial justification, *see supra* note 264, together with his rejection of the no-right-answer thesis, has led some commentators to suggest that Dworkin conceives of a well-developed legal system as comparable to a complete logical system. *See, e.g.*, Farago, *Intractable Cases: The Role of Uncertainty in the Concept of Law*, 55 N.Y.U. L. REV. 195, 220-29 (1980). I see no good independent reason to suppose that completeness, or anything comparable, could be proven of the legal system. While it is possible that a proponent of the deductive thesis might be seduced into thinking that completeness of the legal system is an attainable goal, I doubt whether such a view is properly attributable to Dworkin.

273. *See supra* text accompanying notes 222-29.

274. This part of Dworkin's argument has been challenged on other grounds by the late John Mackie. *See* Mackie, *The Third Theory of Law*, 7 PHIL. & PUB. AFF. 3, 9 (1977).

settled.[275] So, it is doubtful that even Hercules could state settled law with any finality. We would therefore have to expect that in at least some legal controversies there might be no effective procedure for generating a single right answer.

Another strand of Dworkin's writing urges the right answer thesis not just as the correct claim about the existence of gaps, but also as a standard for evaluating judicial performance.[276] It is Dworkin's view that judicial decisions enforce antecedently existing rights of the parties. As a consequence of the political theory which justifies the institution of judging, courts are bound by a general requirement of articulate consistency in their decisions. At least in the case of Hercules, this requirement obligates him to ascertain the force of available legal authority. He has fulfilled this obligation only when he has considered the bearing on a particular case of any and all relevant authority.[277] Thus, the right answer thesis commends itself as a prophylactic against the prospect that judges, when confronted with a welter of conflicting authority, might fail to enforce the pre-existing rights of the justified party. In short, Dworkin argues, we may well hold judges in a mature legal system accountable for deciding cases as if there is a right answer, even though there is not.[278]

The practical reasoning thesis is, to some extent at least, consistent with Dworkin's argument. As we noted, a judge may appeal to further goals and purposes of the legal system in an effort to discriminate among competing rules and decisions. Practical reasoning's defeasibility defies the prospect of a complete premise for justification and hence undermines the general claim that there are no gaps. But, for most controversies, it may well be that only one answer is satisfactory relative to a suitably expanded set of legal goals and purposes. That is, it may well be that a judge, if he thinks long and hard enough, will be able to justify the choice of one claim but not the other by reference to some goal or purpose.

Of course, to acknowledge the possibility that one ruling can usually be justifed over its rivals does not establish that a single right answer will necessarily obtain. The practical reasoning thesis suggests that no judge should expect *a priori* that some particular controversy

275. *Cf.* A. KENNY, *supra* note 7, at 92-94.

276. *See* R. DWORKIN, *supra* note 17, at 286; Dworkin, *supra* note 264, at 84. In this connection, it is worth noting that Hercules' responsibilities in deciding the case before him are prior, in Dworkin's development of the thesis, to any claim about the necessity of a right answer. *See* R. DWORKIN, *supra* note 17, at 113-23. The right answer thesis seems to depend on the claim about judicial obligations; we can agree with the latter without committing ourselves to the former.

277. R. DWORKIN, *supra* note 17, at 115-23.

278. *Id.* at 286.

will be undecidable: as between any two competing rules or decisions, judges may well be able to establish one over the other. This does not guarantee, however, that there is only one right answer.

It is always possible that there are other arguments in favor of the right answer thesis, and the practical reasoning thesis may cast no light on those other positions. But, where a controversy depends on a claim about judicial justification, the superiority of the practical reasoning thesis means that we may begin with that understanding of judicial argumentation to help resolve our broader concerns.