The Concept of the Judicial Decision

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The judicial decision serves a primary role in the Anglo-American legal system. The judicial decision performs numerous functions including that of precedent for future cases. This Article examines three related aspects of the judicial decision. First, the author discusses the use of reasons in judicial decisions and concludes that interpretation of a judicial decision requires one to develop an understanding of one's judicial view. Second, this Article analyzes the role of legal forms. Finally, reasoning by analogy is examined. The author maintains that the latter is not different from reasoning by induction and that true nondeductive reasoning should be called argument by metaphor.

INTRODUCTION

THE CENTRAL CONCEPT in the common law is the judicial decision. Analyzing past decisions and framing arguments for future decisions together serve as the focus for legal argument. Given the importance of judicial decisions, it is hardly surprising that there is controversy over the proper technique for understanding adjudication. However, the nature of the controversy is masked. The assumption that a universally accepted proper or canonical way to analyze decisions exists has led to confusion over where the real controversy lies. Some precision in the use of legal terms is essential, as is an understanding that not just bad technique but a difference in one's legal theory causes disagreement. This does not simply mean that people disagree on the outcome of decisions, but that differences in belief about what are the important aspects of adjudication lead to different approaches to deciding any case.

The structure of the common law finds its two-sided focus in the judicial decision. Looking back, the decision is authority for a set of conclusions reached by or attributed to a previous court.

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The rule in *Shelley's Case*, the holding of *MacPherson v. Buick Motor Co.*, and the *Erie* doctrine are familiar examples of the authority of a past decision. This authority is complex as it is not only often difficult to locate the conclusions in the text, but controversy surrounds the selection of criteria for location. Should a case have one or a number of conclusions? What happens when the reasons given do not support the stated conclusion? How critical are the facts of the case in limiting the authority or precedential value of the case? In *Erie Railroad Co. v. Tompkins*, the Supreme Court overruled *Swift v. Tyson* and stated that the *Swift* Court had wrongly declared that a general federal common law existed for diversity purposes. As *Swift* only discussed negotiable instruments law, did the fact that subsequent decisions read it more broadly change the holding of *Swift*? Are its commercial paper facts incidental or central?

Of course, decisions do not possess the same authority as statutes or custom. Decisions can be wrong—the reasons given might not support the conclusions reached, they might misstate or misuse the facts, the reasons themselves might be inappropriate or unsound, or there might be one of a hundred other possible flaws in reasoning. Therefore, the authority is based both on the fact of the decision and on its being well-reasoned.

The forward centrality of the judicial decision comes from its form. Common law lawyers structure all further questions into the hypothetical judicial case form but it could be otherwise. One might ask, for any particular aspect of the common law, how the case form affects the behavior of those governed by it or the officials who apply the legal rules. Practitioners, however, dissect other forms of legal authority (statutes, constitutions, custom), take reasons, and reassemble a new argument for use as a reason in a judicial decision. This technique or process has well-defined strictures. For instance, only certain forms of authority count. Weighing the reasons is more controversial because measuring the reasons and policies of past decisions against statutes or one another is not just a matter of technical expertise. It is also a matter

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2. 217 N.Y. 382, 111 N.E. 1050 (1916).
4. *Id.*
5. 41 U.S. (16 Pet.) 1 (1842).
of stating what is important in the general way one reaches or should reach decisions.

This Article serves as an introduction to these concerns. By analyzing the structure of reasoning within judicial decisions, it provides a picture, albeit a somewhat sketchy one, of one central concept of the common law. This Article examines only the logic of judicial decisions as precedent. Decisions serve a number of other functions, including providing a record for inspection and appeal and allowing a judge an opportunity to state reasons to justify his conclusions. More fundamentally, the decision allows for the resolution of disputes. As a result, decisions must be in a form suitable to resolve disputes. In this sense, a decision is more than a mere assertion of ordinary speech, it is also performance, a speech act. If a judge states: “You are now divorced,” “Adoption granted,” “Guilty,” or “There is no valid contract,” he cannot, in this one sense, be right or wrong. His statement, like a clergyman’s pronouncement of wedlock, makes it so. It is this answer-providing function, which awards or denies a suitor relief, that this Article will set aside.

Judicial theory also needs to be set aside, but only in part. Theoretical problems of identifying what counts as a decision or precedent and why decisions should count at all, involve difficult areas of individuation, identity, and balancing. Some legal systems, including the civil law, early English equity and the original Court of Common Pleas, have given past judicial decisions little weight. In the common law, identifying the criteria for selecting a case to carry a certain authority is complex and controversial. Some kind of judicial theory is necessary to sift the myriad of putative authority and to create an ordering among selected contenders. If theory construction is beyond the scope of this Article, the demonstration of the place of such theory is not. Judicial theory is the body of principles that determines whether a decision is rightly decided. As this Article will discuss later, this theory, at least in embryonic form, is essential to any analysis of the concept of the judicial decision. The minimum content of this

7. See generally J.L. Austin, How to Do Things with Words (1962) for an analysis of the nature of different functions of speech. For a fuller, more recent treatment, see also J.R. Searle, Speech Acts (1969).
9. Legal scholars do not agree that early equity greatly differed from the common law in its use of precedent. See, e.g., F. Maitland, Equity 8, 93-94 (2d ed. 1936).
theory must include a judicial view, a set of beliefs and attitudes about the proper criteria for deciding cases.

This Article discusses three related aspects of the concept of the judicial decision. The first section analyzes the use of reasons. A part of the disagreement about what a judgment within a decision "means," "holds," or "stands for" sometimes is not really a disagreement but a confusion. For example, a judge's given reasons need not imply his stated conclusions. If one person claims the decision stands for what the stated reasons imply and another maintains that it stands for what the conclusion states, a confusion is the basis of their disagreement. To suppose that a factual disagreement exists within the case, as practitioners may often suppose, would conflate distinct matters unknowingly. The difference lies with conflicting beliefs about how adjudication should work. Eliminating confusion over terms allows for clarity about the dimensions of the real (normative) disagreement.

The second section looks at the sources of authority in adjudication, legal forms. These forms operate ambiguously in the decision. Once the ambiguity is clarified, there is a further problem: discovering the meaning of the forms. Some resort to intentional-ity is necessary.

The third section looks briefly at reasoning by analogy. Like "the reason of the case" and the legal form, practitioners consider it a straightforward tool of adjudication. After the clarification of certain features of reasons and forms, legal reasoning by analogy collapses.

I. REASONS AND CONCLUSIONS IN JUDICIAL DECISIONS

There is vast literature which purports to explain how to read, understand, and use judicial decisions. Much of it centers on what a holding of a decision entails and how one distinguishes the holding, sometimes in common law called the ratio decidendi, from other conclusions, obiter dicta. As decisions are authority

11. See infra notes 14-45 and accompanying text.
12. See infra notes 46-70 and accompanying text.
13. See infra notes 71-101 and accompanying text.
15. This distinction between the ratio and the obiter was once at the heart of jurispru-
and arguments from past decisions are arguments from authority (the doctrine of precedent), it is important to understand where the authority is strong (in the form of the ratio decidendi) and where it is weak (in the form of obiter dicta). An often ignored prior question involves asking in what way a decision serves as an authority. In order to examine this question, several distinctions must be made.

A. Conclusions Stated and Conclusions Implied

The first distinction is between the actual conclusions stated in the decision and the conclusion one can imply from the reasons stated in the opinion. The reasons in the opinion may imply one of five possible things: the conclusion the opinion actually states; a different conclusion, either contrary or contradictory; the conclusion or another conclusion with both being satisfactory (the disjunct here being inclusive); either the conclusion or another conclusion with only one conclusion being satisfactory (the disjunct here being exclusive); or no conclusion. One cannot expect the strict logical implication of the kind found in mathematical statements. The reasons for a certain and widespread imprecision are well-known; judicial reasons often employ vague and ambiguous language, judicial intention is often uncertain, and opinions leave unstated many premises in the reasoning chain. However, the reasons a judge offers in his opinions are not meant to be implied strictly. They are premises in judicial argument and such an argument is employed within a socially shared tradition. Given that tradition and its concomitant common discourse, one can speak of implication of reasons within actual decisions.

16. The authority of judicial decisions is a dominant common law notion. It is weaker in civil law and many commentators argue that cases do not serve as authority in civil law jurisdictions. Typical is the comment of John Henry Merryman: "[T]he accepted theory of sources of law in the civil law tradition recognizes only statute, regulations, and custom as sources of law. This listing is exclusive." J. H. MERRYMAN, supra note 8, at 25. However, as Merryman points out later, "[t]he civil law is a law of the professors." Id. at 60. These professors often draft the statutes and write the texts which control interpretation. An examination of past decisions is a large part of professorial scholarship. Thus, even here, the judicial case has some importance as authority, although somewhat removed. Of course, the fact that constitutions allow for judicial review of certain cases in some civil law jurisdictions further erodes the idea of the legislature as the sole source of authority.
Judges presumably include reasons in opinions because they believe that, taken as a set, they imply the stated conclusions. Although this is certainly sometimes the case, often it is not. If the judge makes a mistake—such as where he states: "if $p, q, r,$ and $s,$ then $t$" and $p, q, r,$ and $s$ implies either not $t$ or more specifically, $u$—the two will vary and a wrong determination results. More commonly, an underdetermination or overdetermination can occur. Underdetermination occurs when reasons run out; for example, when "if $p, q, r,$ and $s,$ then $t$" is true, but the judge assumed "if $p, q,$ and $s,$ then $t.$" Overdetermination occurs when both "if $p, q, r,$ and $s,$ then $t$" and "if $m, n, o,$ and $p,$ then $t$" are true and the judge uses both of these statements to reach his conclusion—$\ldots$

One should not assume that a disparity between reasons and conclusions is necessarily due to fuzzy thinking. It can be personally advantageous for the judge to mask his indecision or uncertainty. In a more basic sense, it can be institutionally advantageous for courts generally to settle disputes in individual cases while not heightening or highlighting the kind of disparity of views that often gives rise to entire dockets of disputes. In that a certain obfuscation is encouraged, ambiguity is sure to follow.

Some commentators dispute the existence of this distinction because they see an integrated decision with reasons leading to the stated conclusion. For example, Professor Rupert Cross stated, "The ratio decidendi of a case is any rule of law expressly or implicitly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury."\(^{17}\)

Rather than assuming that reasons and conclusions coincide, i.e., each implies the same proposition or set of propositions to produce the ratio, it is more accurate to say (if one wants to retain

\(^{17}\) R. Cross, supra note 14, at 76. Cross does qualify this by noting: "The adoption of one line of reasoning by the judge is not incompatible with his adopting a further line of reasoning. Allowance must be made for the fact that a case may have more than one ratio decidendi." Id. at 76 n.3. What Cross means by more than one ratio still involves lines of reasoning tied to judgment; he merely allows that there may be either more than one judgment or two parallel lines that are compatible and lead to the judgment. Id. at 54-59, 86-89. He does not recognize a separation between the stated reasons and the stated judgment.

In Cross’ defense, he claims to describe the general usage of “ratio” by lawyers rather than the correct usage. Id. at 76-78. Later he wavers in that restriction and seems uncertain about whether his work is a description of certain social data or a recommendation for the use of the data as a basis for improvement. For example, he tells the reader when and to what extent a ratio is binding, presumably using the lawyer’s description of that term, but treats the subject as if the ambiguities and difficulties did not exist. Id. at 90-101.
the idea of a ratio) there are two sets of rationes in every case. The reasons stated in the opinion produce the first ratio and the opinion's conclusion yields the second.\footnote{This division is apart from any other propagation method for a ratio, i.e., several issues or several judgments. It is a necessary rather than a contingent division.} Sometimes the two rationes coincide (they each imply the other), but even then, one can individuate the two and each can serve as a check on the other.

B. Decisional Reasons as Reasons and Authority

A second and more important distinction exists between decisional reasons as reasons and decisional reasons as authority. Each decision contains one or more arguments for the conclusion or conclusions it reaches. Reasons figure as premises in those arguments. In order to put forth a judicial argument, the judge must consider his audience. He assumes a large body of shared knowledge in any case and the scope of that assumption varies depending on ordinary things such as whether the case is one of first instance or an appeal, whether he is sitting alone or en banc, whether the type of case is commonplace or esoteric, and whether the situation is straightforward or complicated. In order to advance an argument, it may be just as necessary to employ traditional legal propositions as it is to employ propositions of fact, logic, ethics, or politics.

However, practitioners reasons in judicial decisions are taken as authority for future cases.\footnote{Although this applies to the common law tradition, evidence exists that it also applies to some extent in civil law. See supra note 16.} Especially susceptible to this practice are reasons which one can restate as normative propositions. The difficulty arises when one decides to criticize judgment. It is a necessary but often neglected aspect of analysis to decide whether reasons are suspect as logical premises or as authority. For example, in \textit{Riggs v. Palmer}\footnote{115 N.Y. 506, 22 N.E. 188 (1889).} a legatee murdered his testator but nevertheless sought to enjoy the benefits of the testator's will. One of the court's reasons for its decision denying the legatee recovery was that no man ought to benefit from his own wrong.\footnote{\textit{Id.} at 511-15, 22 N.E. at 190-91.} One could criticize that reason as being faulty authority. It is vague, it says more than is necessary to reach a conclusion to the case (it is overbroad), and it has a suspicious pedigree (nowhere does the decision clearly state where one could find the reason in previous case law or statutes). In fact, the results of other cases contradict
this reason. For example, when an intentional contract breacher violates a contract where there is no benefit to the bargain, the breacher is in a position to benefit from his or her wrong. The "no benefit from wrongdoing" reason could be attacked logically as well. It might not be thought to lead to the conclusion, but merely duplicate it in a more general form. That is, given the counter-reason that disposal of the estate should be in accordance with the testator's written instructions, a statement concerning a reluctance to reward wrongs in the courtroom is of uncertain relevance. Does the reason go toward a reevaluation of the testator's actual or probable intention if he knew about his imminent poisoning? Does it establish a rule that overrides other rules and if so, when?

Both criticisms are valid. However, if one rejected the proposition that "no man shall benefit from his own wrong" as authority because the argument contains faulty logic, one would commit an error. One commits a complementary error by rejecting the reason as logically invalid merely because it has a suspicious origin. A statement may carry authority regardless of errors of reasoning, just as one may employ a groundless argument in support of a correct and valid conclusion.

C. Issues Raised Versus Issues Addressed

A third distinction and one that generates controversy where controversy does not seem possible, is the distinction between the actual questions raised by the case and the questions stated and addressed in the opinion. Fact situations can produce a complex and initially bewildering number of issues. Judges often address them in the manner suggested by the advocate presenting the case. Appellate courts usually discuss only those issues raised on appeal. At times, courts neglect, overlook, or misunderstand issues. The more common occurrence is that perceptions of what is important within a controversy change. Even a slight movement in separating the questions actually addressed from the questions theoretically possible can have dramatic consequences. The shift in products liability cases from the "inherently dangerous rule" to products merely "dangerous" well illustrates this

22. See, e.g., A. CORBIN, 3A CORBIN ON CONTRACTS § 707 (1960).
23. Cases examining whether a sum of money serves as good consideration for a promise to pay a greatly larger sum exemplify all of these possibilities. These cases virtually never discuss the issue of usury. See, e.g., In re Green, 45 F.2d 428 (S.D.N.Y. 1930); American Univ. v. Todd, 1 A.2d 595 (Del. Super. Ct. 1938); Schnell v. Neil, 17 Ind. 29 (1861); Shepard v. Rhodes, 7 R.I. 470 (1863).
principle. Thomas v. Winchester involved a case of mislabeled poison sold to a remote vendee. The issue for the court was whether the remote vendor's action put life in "imminent danger," the test under relevant precedent. A subsequent decision, MacPherson v. Buick Motor Co., allowed recovery in a similar case which involved a defective automobile. In MacPherson, the court looked back at Thomas v. Winchester and found in the latter case the foundations of general liability for all defective articles. The court simply looked at Thomas as raising a general issue never considered by the original court.

When one states that a case stands for a certain proposition, one must carefully separate the proposition intended by those deciding the case from what other readers, beginning with the facts and ending with the conclusion, may reason that it stands for. This difference between the opinion of the decision's author and practitioners' possible, later impressions, is also relevant to the fourth distinction—that between judicial intention toward the case and other later parties' intentions.

D. The Deciding Judge's View of the Case Versus the Opinion of Later Observers

Karl Llewellyn put forth the above difference as the "distinction between the ratio decidendi, the court's own version of the rule of the case and the true rule of the case, to wit what it will be made to stand for by another later court." One can restate Llewellyn's distinction in general terms and distinguish between the deciding judge's view of the case and later observers' assessment.

25. 6 N.Y. 397 (1852).
27. 217 N.Y. 382, 111 N.E. 1050 (1916).
28. K. LLEWELLYN, supra note 15, at 52. Llewellyn continues by saying that [o]ne of the vital elements of our doctrine of precedent is this: that any later court can always reexamine a prior case, and under the principle that the court could decide only what was before it, and that the older case must now be read with that in view, can arrive at the conclusion that the dispute before the earlier court was much narrower than that court thought it was, called therefore for the application of a much narrower rule. Indeed, the argument goes further. It goes on to state that no broader rule could have been laid down excathedra, because to do that would have transcended the powers of the earlier court.
Id. Llewellyn does not fully accept the third distinction. He fails to see that a subsequent reading of a case can broaden as well as narrow the conclusions. This process occurs routinely in constitutional law cases and generally takes place when there is an attempt to eliminate an overcrowded classification.
of the judgment. A difference can arise when just interpreting a previous decision involves deviations from the original intention of its authors. This occurs when a decision is of ancient or alien origin (borrowed from another or predecessor legal system) or when one tries to fit a troublesome decision into an otherwise tidy line of past cases. Interpretation can also range wider afield and wide discrepancies may occur when a later court or observer fastens onto an earlier decision's ambiguity or vagueness and proceeds to gloss or rereason the previous case.29

A. W. B. Simpson contests this distinction. He speaks in terms of the ratio decidendi,30 but one can generalize his position. Simpson states:

The *reductio ad absurdum* of this confusion is to be found expressed in the theory that the *ratio decidendi* of a case is a rule which is constructed by a later court when called upon to consider the case. To *define* the *ratio* in this way is surely perverse—if it were correct to do so a number of oddities would follow. For example it would be a contradiction to say that a court had misunderstood an earlier case's *ratio*, for by definition this could not be so; it could neither be understood nor misunderstood; confronted with two variant judicial decisions as to the *ratio* of an earlier case one would have to say that the case had two different *rationes decidendi*; analyses of cases which had not yet been considered by a court would have to be portrayed as prophecies as to what in the future would be the *ratio decidendi* of a case already decided.31

Given the divergent use of "ratio," Simpson might want to offer his own definition of the term. He could also argue, as Cross does in places,32 that the accepted usage of the phrase "ratio decidendi" lies in the original court's expression of its intended interpretation. Instead Simpson uses a logical argument that suggests that the point discussed above is untenable because the idea of a later construction of the ratio is not logically viable. He uses three arguments to support this idea, none of which is satisfactory.33

First, he suggests that allowing a later interpretation of a case's

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29. Perhaps Glanville Williams had this phenomenon in mind when he said that the phrase "ratio decidendi" is slightly ambiguous. See G. Williams, *Learning the Law* 80 (8th ed. 1969).


31. *Id.* at 169.


ratio prevents practitioners from asserting that a court misunderstood an earlier court's ratio. If this were true, one could only echo Simpson and state that it is odd. It is not incoherent and, in fact, one can see advantages to such an approach. Where neither the decision's stated reasons nor the court's actions imply the earlier decision's stated conclusions, one can simply disregard the inconsistent and usually irrational conclusion. However, Simpson's objection fails for another reason. One can recognize parallel types of approaches to case analysis as useful and use them without a commitment to any single approach. Even if one is committed to the approach of later construction, one can speak of wrongly interpreting an earlier ratio. Strictly speaking, this would not constitute an assertion of an incorrect ratio but a statement that the court reached an incorrect conclusion, but this is a small matter of terminology. In any case, the type of analysis and criticism under Simpson's preferred approach would still be available.

Simpson's second argument maintains that if later cases interpret an earlier case differently, one is placed in the unhappy position of having to say that the earlier case has two or more rationes decidendi. This, however, confuses conditions for asserting a proposition with conditions for that proposition's being true. Suppose two later courts seek to discover whether a previous decision's conclusions are justified. That they may disagree on the answer does not suggest that either is without grounds for its assertions. If both later courts have authority to declare judgment, then presumably there is some method for deciding which of the cases' judgments is superior. As for whether the original conclusion was justifiable, anyone who analyzes it is equally able (if not equally competent) to comment upon this question. Disagreement does not indicate that subsequent analysis is impossible. One can make the same argument for the ratio. That courts may disagree about where to locate it does not suggest that any contradiction need arise. If the original decision is a social fact to be observed, then one can settle the subsequent disagreement about its ratio decidendi in the same way as one settles any dispute.

Simpson's third argument is that, until a decision is reexamined, if a ratio is subsequently constructed, then one can only pre-

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34. Id.
35. Id.
36. Id.
dict its holding. This is exactly what occurs as a normal aspect of the concept of precedent anyway. When one looks to judicial decisions (or statutes for that matter), their application in subsequent cases is a matter of concern. Some normative standard may exist which will tell what the answer ought to be and such a standard may serve as the controlling element in a prediction. If judges use standards, one cannot only predict the holding but one can predict it with some confidence. Stating that a method employs prediction is not a criticism if the expectations of persons interested in court opinions focus upon prediction and the construction of a method which allows success in predicting future court judgments is possible at least in theory.

E. Style and Ordering in Judicial Decisions

The final distinction drawn is between a canonical or formula-bound way of presenting reasons and the judge's peculiar and individual method of presentation. Legal scholars have always recognized style as an important component in a case and the American Realists often pointed to schools of style and their effects on a decision's presentation. If given a set of facts and a set of competing arguments, one might devise an analogue for ordering facts and arguments in such a way to reach a determination. If one were then to criticize an individual's or judge's ordering, one could have a standard by which to measure it. Suppose that use of this analogue depended upon information that was occasionally missing. In addition, suppose that one could find the method for attaining this information, whether missing or incomplete, in the ordering that the analogue meant to criticize. Then any criticism leveled at a judge's treatment would be suspect, for

37. Id.

38. For example, Karl Llewellyn saw the development of Anglo-American common law as a battle between two types of judicial style. The "Grand Style" allowed for growth through the incorporation of new concepts into lines of precedent. The "Formal Style" allowed for a system of increasing internal consistency at the expense of adequately shaping decisions for solving societal problems. Llewellyn recognized both styles as equally legitimate vis-a-vis the law, but criticized the Formal Style as socially and politically inadequate, intellectually moribund, and aesthetically cumbersome and inelegant. In this sense, he embraces the judicial pluralism position. K. LLEWELLYN, supra note 14, at 62-120. Llewellyn uses the term "style" not merely to refer to "literary quality or tone, but to the manner of doing the job, to the way of craftsmanship in office, to a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need." Id. at 37. While this description is a bit overblown for our purposes, style does denote a personal approach to cases as well as a literary tone.
the criteria that produced the analogue are themselves a function of criticism of the case. An illustration will clarify this point.

Suppose that $D$ and $P$ are adjoining landowners. $D$ is a plant biologist who performs regular and extensive experiments on his property. He has devised a spray that, when applied regularly, causes regular grass to mutate into a giant, woody, fast-growing, pungent, and high-in-protein cereal. Because of the prevailing wind and the fact that $P$ took down a high fence that once separated their properties, $P$'s yard has become a cereal jungle. $P$ is unhappy and therefore sues $D$. The judge, sitting in an American jurisdiction, holds for $D$. He reasons that $D$'s work is socially useful, that $P$ could have taken steps to prevent the growth by simply not removing the fence, and that $P$ came to the property knowing of $D$'s operations.

An observer of this hypothetical case would note that the judge treated the matter as a private nuisance. While examining the case's main proposition, this observer would note at least two facts. First, the reasoning of the judge is ambiguous. The reader does not know whether each of the stated reasons alone mandates a holding against $P$ or whether all are necessary to the decision. The reasons themselves are closely tied to certain facts and how general the reasons are (that is, how many fact situations they cover) is not known. Under the court's opinion, given a replica of $P$ v. $D$, $D$ wins. But given cases like $P$ v. $D$, we cannot say how $P$ or $D$ might do. Second, an alternate basis of liability might exist—that of trespass. We do not know from the actual case of $P$ v. $D$ whether or not the court barred trespass as a basis of liability because the jungle growth did not constitute interference with pos-

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39. Assuming that the court treats the case as one of private nuisance, one well-recognized defense arises when the alleged creator of the nuisance is conducting an activity of great social worth or value. See, e.g., Richard's Appeal, 57 Pa. 105, 111–14 (1868).


41. Courts sometimes hold that “coming to the nuisance” bars liability when the public has a major interest in the nuisance. See, e.g., East St. Johns Shingle Co. v. City of Portland, 195 Or. 505, 524–25, 246 P.2d 554, 562 (1952); Powell v. Superior Portland Cement, 15 Wash. 2d 14, 19, 129 P.2d 536, 538 (1942).

42. The difference between trespass and nuisance is historically obscure, but the Restatement of Torts provides the current view which states that trespass is an invasion of plaintiff's interest in the exclusive possession of the land, while nuisance is an interference with his use and enjoyment of the land. Obviously, the two are not mutually exclusive. Restatement of Torts § 822 scope and introductory note (1939). See also Ryan v. City of Emmetsburg, 232 Iowa 600, 603–04, 4 N.W.2d 435, 438 (1942) (describing the historical difference between trespass and nuisance).
session, because the statute of limitations ran out, because of another good reason, or because no one thought of trespass as a basis for liability.

The style of the judge's opinion prevents us from knowing which lines of reasoning he considered necessary and which lines were sufficient for the holding. It also prevents a full understanding of which other possible causes of action might lie in similar cases. One might wish to criticize P v. D by claiming either that the court should have considered trespass or that one or another line of reasoning was irrelevant. Criticism might require an analogue based in part on the holdings of past decisions. In theory, these past decisions are as vulnerable as P v. D to the objection that style shaped their meaning. The analogue is uncertain to the degree that style allows for ambiguities. There is thus a considerable measure of indeterminacy of intention in evaluating decisions, an indeterminacy that undermines any attempt to use past decisions precisely to assess the validity of future decisions.

After making these five distinctions we can now say something about the role of a case in judicial reasoning. All five distinctions suggest that reliance on previous decisions as authority is far from an uncomplicated matter. One's judicial view provides a method for approaching a past decision as well as for answering questions in a present case. However, there is a logical space between giving judgment and understanding an already-answered case.

A judge lists reasons in his judgment, but these reasons are not necessarily the ones that brought him to the conclusion. He may not know or remember these and others may not have the ability to offer a satisfactory account of his reasons. The judge does not look at his own psychological reasons as relevant for inclusion in his decision. Rather, he looks to reasons that are appropriate and justify a decision. In this important sense, judicial decisions are reconstructions. Once the judge arrives at a decision, he employs an analogue yielded by his judicial view and reconstructs his decision on a rational basis. The actual reasons for his decision are

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43. Traditionally, an action for trespass becomes complete upon entry onto the land, while nuisance begins when substantial harm occurs. If D had stopped spraying but the growth continued, a difference in actions could be significant. See W. Prosser, Handbook of the Law of Torts § 89, at 595–96 (4th ed. 1971).

44. In this context, analogue connotes an ordered procedure for solving a problem, e.g., a statistical method or a computer program. Analogue in the sense of "paradigm" or "model" is not intended.

45. One should not impute duplicity to judges in this context. In their reconstruction, judges may employ the reasons that motivated their decision or at least those that they
outside the purview of any propositional set, as are the reasons that consciously or unconsciously motivated his decision. The reasons stated are evidence of his judicial view.

To understand what a judge meant by his stated reasoning, one must have some notion of his judicial view. This will tell why he put forth the stated reasons. But it is one's own view that determines how one assesses the meaning of judicial decisions. One can look at the distinctions made earlier and see them as competing alternatives for inclusion within a judicial view. In this sense, when one speaks of a case standing for some proposition or holding some position, the case is a reconstructed reconstruction, what one might call a "rereconstruction." One's own judicial view tells one how to read the case (whether one looks to reasons or conclusions, whether one takes questions as actually raised, whether one looks at the judge's intention as central, and how one treats the individual style of reasoning in past cases), puts in an orderly basis the disparate elements of individual cases, and allows classification of the variety of cases.

The distinctions discussed might also suggest methods of adjudication. Commitments at the level of theory govern one's approach to a case. For instance, a commitment will dictate whether one looks to all of the reasons stated in a previous decision or just to the stated conclusion. The same logic holds for other legal forms—strict versus revisionary interpretations of written constitutions or statutes interpreted on their face, versus statutes interpreted according to legislative intent as evidenced by legislative committee records and floor debates. These are competing positions based on competing views and debate on one's choice of position is constitutive of view disparities. Of course, the various positions only occasionally produce different results. This is generally a characteristic of judicial views. Identity of conclusions between competing views on so many questions lull one into believing that only a single view predominates. However, if intersubjective agreement does not imply an objective standard, neither should agreement between different views suggest that only one view is operating.

II. Legal Forms

Judicial decisions are central to a discussion of judicial reason-
Within the context of legal systems, they are one among several elements labeled legal forms. Individually, these forms have their own nuances, but they share several formal features that this Article examines. Several difficulties inherent in interpreting the meaning of cases are common to all legal forms and have received quicker recognition as difficulties in other forms. Both statutory and constitutional interpretations are usually considered difficult matters and controversy surrounds the selection of criteria for settlement. As with cases, other legal forms often exhibit a certain logic intended to persuade. They thus collapse an otherwise clear distinction between sources that argue from authority and sources that argue through reason. There is the difficulty in all legal forms of deciding which concept of intention to employ. This determination must take into account numerous factors including who originally generates the legal form—customs originate with no individual; cases with a certain, ascertainable individual; statutes with a discrete corporate body of individuals with a range of competing views; and constitutions with several corporate bodies, often without a certain ascertainable membership. If intention is a well-accepted, necessary component in any theory of meaning, then the construction of a concept of intention broad enough to interpret legal forms is a general difficulty in this area.

There is a popular picture of legal forms. Practitioners employ forms, usually called sources of law, as authoritative reasons for determining a certain judicial proposition. If a question arises

46. This Article employs intention here in the ordinary language sense—one’s purpose or meaning concerning a future act. This Article does not use the special denotation of the term in law which at times differentiates “intention” from “motive” or “presuming the natural consequences of one’s acts.” The ordinary sense is closer to the meaning discussed in philosophical literature. See, e.g., E. Anscombe, Intention (2d ed. 1963); Davidson, Belief and the Basis of Meaning, 27 Synthese 309 (1974); Davidson, Truth and Meaning, 17 Synthese 304 (1967).

47. See Peacocke, Truth Definitions and Actual Language, in Truth and Meaning 162 (1976). Many commentators have tried to characterize the role of intention, but all have had at best limited success. H.P. Grice made the most ambitious attempt and defines the meaning of an expression in terms of the intentions of the majority of individuals who commonly use it. He defines the meaning a particular speaker gives that expression in terms of the effect he intends to bring about in the mind of the listener. See Grice, Utterer’s Meaning and Intentions, 78 Phil. Rev. 147 (1969); Grice, Meaning, 66 Phil. Rev. 378 (1957).

48. For a good illustration of how a deviant model of intention illuminates a particular type of utterance or statement, see MacCallum, Legislative Intent, 75 Yale L.J. 754 (1966), reprinted in Essays in Legal Philosophy 237 (R. Summers ed. 1968). MacCallum argues that legislatures are not capable of ordinary intention. Therefore, in order to understand the meaning of statutes, one needs to construct an institutional model that interprets the workings of a corporate body when it enacts legislation.
before a court, attorneys turn to legal forms which are (1) complete or nearly complete, (2) easily selected as relevant from the universe of possible sources, and (3) authoritative according to some not too difficult preference ordering (e.g., if a case and a statute conflict, choose the statute; if an earlier statute conflicts with a final court's gloss on it, choose the case). A great deal of debate among legal theorists centers on just how well forms fulfill the task described above. Do they answer all questions or most? Are things such as customs, international agreements, or administrative rulings properly considered legal forms in themselves, or do they merely figure derivatively, so that, for example, administrative rulings are authoritative only because statutes prescribe them? Are judicial interpretations of constitutions subject to alteration by legislatures or future courts? Does the repeal of a statute give life to prior case law inconsistent with that statute, even though that case law has neither evolved nor been tempered by other cases subsequent to the statute's enactment? All of these kinds of questions assume that the popular picture is true. That picture, however, is incomplete and depending on how one completes it, becomes nearly accurate or quite misleading.

Practitioners introduce legal forms at two distinct steps in the judicial reasoning process which can be called the definitional occurrence and the resolution occurrence. The definitional occurrence indicates the role of legal forms in defining the judicial role. The resolution occurrence indicates the part played by legal forms in reaching an actual decision in a case. Legal forms are social facts, evidence of individual or group practices, or intentions. They contain propositions but are themselves largely documentary. Occasionally, forms include unwritten but easily recognized social, business, or religious customs. The ties between legal

49. This controversy concerns completeness and centers on when, if ever, one can look beyond legal forms for assistance in decisionmaking. Further, if one must go beyond legal forms, does the decision have as much authority as it would if it only employed legal forms?

50. This question exemplifies the inclusion controversy, which focuses upon what should be included within the set of legal forms.

51. This is an example within the ordering controversy, which centers on how one should settle interformal disputes. See, e.g., Douglas, Stare Decisis, 49 COLUM. L. REV. 735 (1949) (a practical ordering controversy that focuses on judicial interpretations of written constitutions).

52. This second order example of an ordering controversy illustrates how the difficulty in ordering can escalate.

53. One should not assume that individuals retain these distinctions when constructing a judicial view, but only that they are logically distinguishable.
forms and the judicial decision are so tight that it is easy to forget that they are not a necessary but a contingent element in judicial decisionmaking. One could imagine a system, perhaps not unlike early English equity, where legal forms would exist as facts but judges largely ignore them. Under such a system, the Chancellor might claim not to be governed by central court cases, past equity cases, custom, and certainly local regulations and pronouncements. The intimacy of legal forms to the judicial decision also obscures the fact that forms enter twice into the judicial equation.

The initial intrusion of legal forms comes with the definitional occurrence. Because judges are to act as judges, their formulation of questions takes on an altered, contextual flavor. Many of the kinds of questions found in courtrooms are also found, perhaps in slightly altered terminology, in other settings. Conflicts make for judicial cases and their characterization and resolution depends upon the type of forum resolving the conflicts. The judicial form depends on the role of the judge. The question of what he should do arises in every conflict that comes into court.

Formulating a concept of role involves constructing a procedure for deciding cases. That is, a part of role involves making decisions on what types of things a judge ought to use to resolve cases. A not uncommon set of possible factors would include a notion of justice, a notion of fairness or equity, a certain political and social “philosophy”, and loyalty or adherence to certain legal forms. A conflict at this point between, for instance, a statute (a legal form) and some fairness principle is not an argument about how to resolve specific cases. It is, rather, an argument about what things are proper considerations for judges. One might believe that judges should consider the pronouncements of legislatures without being committed to any position concerning competition between statutes and equity principles. This position only states that a judge is not behaving as a judge if he does not consider statutes.

Legal forms are among the competitors for inclusion in the

54. This is the common picture of early English equity. See generally Holdsworth, The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor, 26 Yale L.J. 1 (1916) (defending this view). However, given England's common law backdrop and the small size of its bench and bar (which allows all to know of past cases) it seems that from an early time equity may have looked to past decisions as authority de facto if not de jure. This suggests that the case is important here, as in civil law, despite an orthodoxy that follows the contrary view. See generally C. Dickens, Bleak House (1853) (a classic, if not notorious caricature of the narrowness and relative smallness of the equity bench and bar).
concept of judicial role, in that role entails a method of proceeding for the judge. Here, the popular picture is misleading, as it suggests that one turns to legal forms and more or less finds answers to the issues raised in cases. In the case of the definitional occurrence, however, one uses legal forms to determine role. The determination involves whether to look to legal forms and deciding to what extent they are the concern (or a concern) in defining role. One has to determine the exact direct scope of forms in the definition and then analyze the derivative part which arises upon practical application. An example will clarify this point.

In *Williams v. Walker-Thomas Furniture Co.*, plaintiff-respondent furniture company sold household items to defendant-appellant on credit. The sales and credit involved a complicated contract whereby Walker-Thomas added each purchase price to the general amount owed and credited pro rata each payment toward paying off all past purchases. Purchases were deemed to be leases until the customer paid all outstanding debts to the company. The court stated: "As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings." Five years after initiating the contract relationship, defendant made and defaulted on a final purchase. Plaintiff sued in replevin for possession of all of the items defendant ever purchased. Defendant claimed the contract was unconscionable by reason of past cases and a recently enacted statute of limited relevancy. The court reversed and remanded the case on the grounds of the possible uncon-

55. 350 F.2d 445 (D.C. Cir. 1965).
56. Actually, the case on appeal joined two lower court cases with a common plaintiff but with unrelated defendants. This Article disregards the other joined case.
57. 350 F.2d at 447.
58. *Id.*
59. *Id.* at 448. The cases cited were from other jurisdictions. Even *Scott v. United States*, 79 U.S. (12 Wall.) 443 (1870), although a United States Supreme Court case, was not binding on the federal circuits. The reliance on these cases was largely due to relevant case authority within the jurisdiction rejecting unconscionability as a defense in a liquidated damages contract case. *See, e.g.*, District of Columbia v. Harlan & Hollingsworth Co., 30 App. D.C. 270 (1908).
60. D.C. CODE ANN. § 2-302 (Supp. IV 1965), amended by D.C. CODE ANN. § 28:2-302 (1981). The District of Columbia enacted this version of § 2-302 of the Uniform Commercial Code after the parties had entered into the instant contract. The section provides that a court may refuse to enforce a contract which was unconscionable at the time it was made. *Id.*
scionability of the contract, in large part because of the defendant’s weak bargaining position due to economic duress which gave him no real choice but to sign an unfair contract. Further, unconscionability was a concern relevant to the court and a factor which the lower court could use to overturn otherwise valid contracts, but one which it failed to exercise.

The main disagreement between the majority and the dissent concerned competing conceptions of judicial role and the exact place of legal forms in constructing that role. The dissent thought that looking to legal forms provides a more or less complete description of judicial role, at least in terms of how a judge ought to proceed. They did not argue that the contract was fair or that general considerations of public policy did not suggest that there was duress in the bargaining situation. Further and more basically, they did not argue that the majority disregarded precedent, ignored statutes, or abused any legal form. The dissent did argue, though not in these terms, that it was not part of the judge’s task to assess fairness in agreements, or more generally, that judges may not look outside legal forms for criteria to make decisions.

The majority presented a slightly more complicated argument. At first glance, it also appears to hold that a judge may not go beyond legal forms when reaching a decision. The court states that no controlling authority exists on the points raised in the case and thus, the congressional adoption of section 2-302 of the Uniform Commercial Code becomes “persuasive authority for following the rationale of the cases from which the section is explicitly derived.” This argument is untenable. Its difficulties are many. First, subsequent statutes are generally considered irrelevant to the resolution of cases arising prior to their enactment, especially in contract matters where reliance of the parties is a major concern. Second, statutes are more often taken as changing case law, which suggests that the legislature believed that the case law did not remedy unconscionable contracts. Third, relevant precedents existed which favored the plaintiff. Four hundred years of con-

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61. 350 F.2d at 449.
62. A secondary disagreement involved the lower court’s failure to find unconscionability. The dissent recognized that failure as an indication of a finding of conscionability. Id. at 450. The majority believed it made no finding on the issue, one way or the other. Id.
We shall assume for the purposes of this discussion that the majority is correct.
63. Id. at 450–51.
64. Id. at 450.
65. Id. at 449.
tract law suggest that courts should enforce bargains, unless they are illegal, formally faulty, or subject to some recognized excusing defense. Despite a plethora of case citations and discussion of the Uniform Commercial Code, the court simply argued that the contract was in fact unfair. It was apparently self-evident to the court that if a contract was unfair it could not be enforced. The cases and the Code agreed with this conclusion. Yet, according to the opinion, neither formed the basis of the decision. Legal forms were significant here because they evidenced a fairness principle. Their consideration in looking to role was derivative. The court recognized that its perception of the proper conception of judicial role might be a minority view and thus recommended that Congress codify the decision. Nevertheless, the holding demonstrated that the court's own position on judicial role obviously did not require codification to allow a conscionability test in any case involving a challenged contract.

The Williams case suggests how the popular picture of legal forms can be misleading. The dissent is not merely arguing within the context of legal forms, it is implicitly arguing for their primacy. The majority is either arguing for forms to be one consideration among many or that forms serve a token primacy, but one which should not obscure the extent to which they are only one factor among several. If the popular picture suggests that courts can always or ever reach a judicial decision solely by resorting to legal forms, it misleads by failing to state that how one considers legal forms depends upon one's view of role. Depending on the answers to the prior questions of role, solutions suggested by legal forms may be more or less relevant or important. This is why, for example, a computer could not solve cases satisfactorily even if its memory bank included a thorough knowledge of legal forms. Judges hold competing positions about the place of legal forms and no single analogue would duplicate the varieties of judicial behavior.

Williams does illustrate how, even when controversy exists

66. Id. at 450.
67. Id. at 449.
68. Id. at 448.
69. This is not to say that a computer could not do as good a job, vis-a-vis legal forms, as any particular judge. The assertion merely suggests that no single program could duplicate the workings of a judicial system, even in the matter of narrow legal questions. Nevertheless, in stating that a computer could not duplicate a judicial system, one should not imply that it necessarily would always operate more poorly or achieve less satisfactory results.
over the definitional occurrence, the resolution occurrence can be straightforward. The entire court agreed on how, given certain assumptions about role, one would reach a decision. The professional education of the bench and the bar focuses primarily on the study and employment of legal forms. Once forms are considered relevant, debate about their workings is extremely narrow. The popular picture is a simple one, and this shared universe of knowledge allows the simplicity to remain and yet be accurate. When conflicts come before courts, the modus operandi is apparent and consistent. Both the majority and the dissent in Williams looked to cases and statutes and found almost the same thing. Although their procedure was almost identical, their use of procedure differed.

A brief word might be helpful in ascertaining the meaning of the statement that legal forms contain propositions but are not themselves part of the chain of judicial reasoning. One identifies legal forms by their pedigree. They are public objects generally taken as having a special relevance to judicial decisionmaking. This relevance results partially because of their authority as standards for decision and also because of their pedigree, as these were intended uses. This does not mean that the forms' authors' actual or imputed intentions toward legal forms are reasons for attributing authority to those forms—a quite unsupportable assertion. Rather, one can believe that the forms' authors realized that practitioners would take their work as authority and produced them with that realization in mind. The reader manufactures the intention which makes no pretense of being identical to the actual intentions of the authors. Statutes, published cases, and constitutions may be intended as authority for future decisions. Customs rarely carry this intention, but practitioners and judges read or gloss an intention into each legal form. Thus, the propositions that one can extract from legal forms have an immediate relevance to making a judicial decision, but they are only important when employed propositionally. The legal realists recognized this and said that forms are not law but evidence of law. A clearer interpretation is that forms are not law but one can use their propositional contents as law, depending on one's judicial view.

70. See R. Dworkin, Taking Rights Seriously 17 (1977). According to Dworkin, pedigree refers to the manner of adoption or development of such forms (or in other contexts, rules).
III. REASONING BY ANALOGY

Judicial reasoning is often thought to be primarily reasoning by analogy. That is, at least in the case of the common law, one expects a judge to look to specific previous decisions to decide a specific instant case. A movement from the general to the specific is deductive reasoning, from the specific to the general is inductive, and from the specific to the specific is reasoning by analogy.71

The movement from specific to specific often involves making a generalization after analyzing the first case, and that generalization forms the basis for deciding the next case. It thus resembles an induction followed by a deduction. One observer characterized it as

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 then applied to a 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.72

Nevertheless, one should consider analogy as a separate kind of reasoning from induction because it characterizes those cases where there is no already established rule as provided by induction. Thus, it is necessary to look to a specific case to generate a rule. In reasoning by analogy one can impeach the second case if the first case is faulty, while in the case of induction followed by a deduction, normally one only attacks as far back as the rule. An attack on a specific application of that rule is not fully sufficient to impeach the rule but only weakens its scope or creates an exception.

It is important to understand clearly that induction is not the logic of the law. Essential to any inductive logic is a method of testing the correctness of hypotheses or putative conclusions. Thus, planetary behavior could disconfirm an astronomical hypothesis, a native speaker could inform a language learner of misuse of a concept, or weather could determine the accuracy of a theory of meteorological forecasting.73 Predicting right answers

71. Strictly speaking, this is not the way the terms would appear to a logician, but it is the way lawyers would probably define them. Some lawyers do not speak of analogous reasoning but see statutes as involving deductive reasoning and cases as involving inductive reasoning. The terminology is erratic in much of the literature and one can think of this section as applying to reasoning from case to case, rather than pertaining to reasoning under a certain tagged category.
72. E. LEVI, supra note 14, at 1–2.
73. Whether one can confirm or disconfirm any hypothesis or theory is a philosophy
or results becomes the focus of any inductive logic, both methodologically and for purposes of establishing its soundness. If the criteria for being right are unavailable, such a logic amounts to no more than random guesses.\textsuperscript{74} Given that testing is not a method of judging the appropriateness (truth, correctness, verisimilitude) of judicial assertions, such a fact at least would suggest that one cannot regard induction in any ordinary sense as logic.

In this final section, this Article argues that reasoning by analogy is not a distinct matter from reasoning by deduction.\textsuperscript{75} Instead, analogy is a method of proceeding when certain premises in a deductive argument are hidden or obscure. When one employs a truly nondeductive method, it is more aptly called argument by metaphor than argument by analogy.

Contrasting this view with the one presented by Joseph Raz in \textit{The Authority of Law}\textsuperscript{76} can best illustrate these points. Raz begins by suggesting that a court can be in two positions, one where a statute or a ratio is binding, and one where it is not.\textsuperscript{77} Only in the latter case does reasoning by analogy come into play. According to Raz, "A court relies on analogy whenever it draws on similarities or dissimilarities between the present case and previous cases which are not binding precedents applying to the present case."\textsuperscript{78} Thus, in cases where a court is not bound it uses analogy, which allows it to discover new rules.\textsuperscript{79} These new rules are not binding;

\textsuperscript{74} Predicting judicial results fails on two well-known accounts. Prediction would not help judges reach decisions because even if one believed that judges predict what other judges do, one would engage either in circular thinking or in a search for some objective psychological standard of correctness. More basically, judicial reasoning has a normative component, with court results capable of fallibility. Absent this, the bench and the bar could not accomplish their routine tasks, i.e., discuss and assess whether decisions are correctly decided.

\textsuperscript{75} Deduction here denotes a standard zero and a first order logic that allows for implication and equivalence.

\textsuperscript{76} J. \textsc{Raz}, \textit{The Authority of Law} 201–09 (1979).

\textsuperscript{77} \textit{Id.} at 85, 90–97, 102, 111–15 (discussing the division of cases into two categories, those where the judge can exercise discretion and those where the judge is bound).

\textsuperscript{78} \textit{Id.} at 202.

\textsuperscript{79} \textit{Id.} at 202, 204–05. Raz explains that argument by analogy "is not a method of discovering which rules are legally binding because of the doctrine of precedent; [rather, it is] a form of justification of new rules laid down by the courts in the exercise of their lawmaking discretion." \textit{Id.} at 202.
however, they are persuasive. Raz sees this position as a compromise between that held by Ronald Dworkin, whom he characterizes as holding that analogies are binding, and that held by those who "have concluded that analogical argument is mere window-dressing, a form of argument without legal or other force resorted to for cosmetic reasons." Analogies for Raz "are always morally relevant. . . . [But] there is no point in saying judges are legally obliged to use analogical arguments." He sees analogies as a reforming aspect of adjudication, one where new ideas, brought in as new rules via old cases, are used differently.

Raz sees the actual procedure of applying analogy as this: One looks at the series of relevant features the instant case possesses, then looks at a past case sharing some but not all of these features, somehow sees that past case as relevant, and finally borrows the conclusion of the past decision and uses it in the instant case.

The major difficulty with Raz's position is that it seems to con-
fuse cases with propositions or, using his own terminology, rules. 
Raz appears committed to the view of a past case as binding au-
thority for only one thing, and that thing is intimately connected 
with the factual background of the specific case. Let us imagine a 
case, case \( F \), where, for the first time, a defendant raises the tort 
defense of self-defense in a civil suit for assault and battery. Past 
cases allowed self-defense as a defense in criminal cases, but \( F \) is a 
case of first impression. According to Raz, a judge is under no 
obligation to consider the criminal cases; if he did, he would be 
engaging in a moral activity.

This Article suggests earlier that interpreting the ratio 
decidendi of a case is a matter that can vary according to one’s 
judicial view.\(^8\)\(^5\) Certainly, one can imagine judicial views where 
reasons provided in one context are always considered relevant, if 
not determinative, in others. Under these views, there would be 
no “new rules” (as Raz calls them) but merely the discovered im-
lications of existing propositions. However, even under a judi-
cial view with a narrower notion of intercontextual relevancy, one 
needs to consider the premises of any argument as part of the ratio 
according to the rule of logical implication. One element in the 
criminal propositional set would necessarily specify the scope of 
the criminal self-defense claim and would offer a higher order rea-
son that justifies that claim. Cases can state or imply reasons such 
as discouraging violence, allowing for just deserts for assailants, 
protecting potential third-party innocent victims, providing a cost-
efficient method of imposing punishment on those who should be 
punished, and allowing for the spending of the retributive inclina-
tions of a society in a fruitful and limited manner. Raz would 
argue that higher order reasons always are nonobligatory in the 
related civil cases because of the disparity in factual context.

Let us consider a second case of first impression, case \( N \), that 
involves prosecution of a wife for criminally assaulting her hus-
band. The wife claims self-defense. \( N \) would be the first instance 
of the use of self-defense within a marriage. One must remember 
that marriage is a legal relationship that allows certain kinds of 
contracts between persons which are sometimes impermissible 
outside that relationship.

Raz at this point has a choice: he may claim either that a new 
rule is needed to decide \( F \) but not \( N \) or that new rules are needed

\(^{88}\). \textit{See supra} notes 28—45 and text accompanying note 45.
to decide both $F$ and $N$.\textsuperscript{86} If he chooses the first option, he must distinguish $F$ from $N$. He certainly cannot say that $N$ shares more features with the traditional self-defense case than $F$ does, because they each share all relevant features but one—a lack of criminal proceedings versus a lack of nonmarital proceedings. In fact, given the complications that one could imagine, it is difficult to know how to measure the similarity of factual situations. Moreover, it is not clear why greater similarity alone is a reason for allowing precedent to govern $N$ and applying analogy to $F$.

Raz could say that the difference between $N$ and the traditional cases is not significant. The circumstances of marriage should not make a difference in an assault and self-defense case. That is, the reasons for allowing self-defense in normal circumstances also apply to $N$. Raz, however, cannot distinguish $N$ from $F$ on these grounds. The reasons for allowing self-defense in $F$ might be compelling and they are certainly likely to be the same reasons found in criminal cases. Looking at reasons rather than facts logically requires a court to apply reasons from analogous cases to determine the result, even in new factual situations. Raz seems to reject this position.

One might believe that $N$ is obviously distinguishable from $F$ because the "old rule" that one can protect oneself from deadly assault applies only to $N$ and not $F$. However, assuming that past decisions enunciated this formulation of the rule, it covers both $N$ and $F$. Of course, one can formulate the rule in such a way as to exclude $F$, but this Article does not use, ex hypothesi, this formulation. One can assume a broad formulation of the rule where subsequent exceptions have been previously introduced. In other words, one can assume what often occurs—courts, not overly careful about the possibility of future difficult cases, leave the determination of those cases and the reformulation of the rule to a future court.

Raz's other option is to say that a new rule is necessary in both $F$ and $N$. The obvious difficulty with this position is that if one can freely decide case $N$ as one sees fit, then when must one decide cases in accordance with old rules? Each case presents a unique factual situation. For a rule to be useful, it must cover diverse cases with common features. Specifying in advance which

\textsuperscript{86} Raz actually makes a third type of objection. He claims that the kind of position taken here is indistinguishable from (or collapses into) Ronald Dworkin's position and is thus defective for the same reasons that he criticized Dworkin's position. \textit{See supra} note 80 and accompanying text.
cases a rule covers involves understanding the reasons why one applies a given rule. These higher order reasons compel the use of the given rule when no rational differences exist between the instant situation and the type of situation that the rule was meant to cover. This is just the type of situation, however, that Raz claims analogy covers. If one does not apply the rule, an irrationality exists in the rule system; if it is applied, the instant case is not one outside the purview of existing propositions.

One might object that the categories of criminal and civil are so basic, that whatever difficulty might surround delineating the scope of specific rules, the criminal/civil distinction is easy to trace throughout the case law. Given this fact, one could see how to distinguish $F$ from $N$. Such a distinction ignores the numerous intermediate cases between criminal and tort categories that includes cases in tort with punitive damages, criminal proceedings where the defendant must pay restitution to the victim, and declaratory judgment actions where plaintiff asks for advice on some contemplated action that may eventually sound in either tort or criminal law.

Raz schematically tries to show when an argument from analogy holds.\(^87\) Let us assume two cases, case 1 and case 2.\(^88\) Each has facts shown by lower case letters, implications of facts shown by upper case letters. Raz uses for analogy the precedent case 1: $a, b, c, d, e, g/A, B, C \rightarrow X$ (which means $A, B, C$ yield the holding $X$), and the instant case 2: $a_2, b_2, c_2$ (i.e., not $c_2$), $d_2, e_2/A, B, D \rightarrow ?$ Raz says that we know $A, B, C \rightarrow X$, but we do not know if $A, B \rightarrow X$ or $A, B, D \neg \rightarrow \neg X$. If one introduces case 1 as an analogy, it is for the proposition that $A, B \rightarrow X$, which would solve case 2.

The problem is that long before one needs to settle case 2, it is appropriate to ask what is meant by case 1 yielding $X$. Suppose the issue in case 1 is whether a contract exists. We see consent (mutual assent), consideration, and an exchange of promises, that is, $A, B,$ and $C$. The specific facts would be at least a set: $a, b, c, d, e,$ and $g$. What does the case stand for? It certainly does stand for $A, B, C \rightarrow X$ where $X$ means the contract is valid, but it strictly applies only where there is exactly $A, B,$ and $C$. Suppose $a$ is the fact that Smith consented and $A$ denotes consent. If $A$ is a broad concept of legal consent—freely entered into with certain kinds of

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\(^87\). See J. Raz, supra note 76, at 180–89 (where he sets out his schema), 201–06 (where he applies it to analogies).

\(^88\). For purposes of clarity, this Article uses the designations case 1 and case 2, instead of Raz's symbols, $P$ and $Q$. 

knowledge of the bargain, etc.—then $a$ does not imply $A$. No $a$
can be that complex. Here $A$’s meaning will derive from propositions
outside the facts of the case. In order to work out the logic of $A$, an
investigation of the criteria that yield its parameters is eventually
necessary. When case 2 arises, perhaps a consent case where duress is
more explicitly at issue, the scope of $A$ will be determined for both
case 1 and case 2. But one’s commitment to case 1 also serves as a
commitment to a certain line on case 2. On the other hand, if $a \rightarrow A$,
then each case stands only for its facts. This seems to make each case
unique and to yield a degenerate notion of implication in case law.

The problem with Raz’s explanation of analogy largely lies
with its allowing for exactly two kinds of cases, those where past
decisions bind the court and those where they do not. One is bound,
however, by reasons rather than decisional judgments. This
process begins with the construction of a multilevel propositional
schema where one has a commitment to the implication of one’s judicial
view. This means that a number of conclusions can be
generated, each of which is binding, that are not normally asso-
ciated with the holdings of past decisions. For example, suppose
that in reaching a judgment in a property case, one needs to hold
that “if $p$ then $q$.” Regardless of the general relevancy of that
property case in a subsequent commercial paper case, if one is
committed to $p$, one is also committed to $q$. If a judge is to have
a rational judicial view, one can envision him looking to other cases
to investigate the nature of his commitments. In that sense, one
can state that analogies intrude rather than entice.

One should note that this is not Professor Ronald Dworkin’s
view. Because judicial views are partly a matter of choice, no
analogue exists for settling disputes among those with different
views. Thus analogy, as it is part of the process that begins with
higher order propositions, is not uniform. It seeks internal consis-

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89. A partial difficulty is that Raz’s use of the stroke function (“/”) is deviant and the
reader is left to ponder just what he might intend.

90. This position is at odds with John Wisdom’s well-known analysis of analogies.
that the process of reasoning by analogy does not involve a chain of reasoning. “The rea-
sons are like the legs of a chair, not the links of a chain.” Id. at 195. But if one reaches for
an analogy and that analogy fails, a critical support for one’s argument is missing. This can
result in more than a tipsy chair; it can result in a failed argument. This Article does not
contest Wisdom’s argument that analogical discussion is a priori and not a matter of
probabilities (a matter of experience).

91. See supra note 80 and accompanying text, for a discussion of Dworkin’s view.
tency, but allows for change even in the higher order propositional set as consequences are revealed. Thus, in Raz's terms, it is re-formative rather than conservative, a label he applies to Dwor-kin's theory.92

Raz might object that he could admit everything said, but still be able to say that certain cases involve neither deduction nor a search for hidden premises and deduction from discovered premises. These other cases employ a method whereby a rule from one case is applied to another case, even though it does not strictly apply. These cases sometimes use a method labeled "legal fictions."93 In other cases, the new rule is such an obvious change from the old rule that the court employs a different tag, as in cases of tacit consent or constructive eviction. The cases, though, share the feature of holding some proposition that the judges know is not strictly true. Therefore, they use metaphor, a rhetorical device, to transpose a term from its original concept. Metaphor allows the transposition even when there is no preservation of truth. "All the world's a stage" may be evocative, interesting, poetic, and perceptive, but unless one changes the meanings of certain terms it is false. The metaphor as a linguistic device is inoffensive to a concept of truth; it allows for the deviant predication of names without evoking literal truth. To say, within a system such as the common law, that metaphor compels a result is not only logically and methodically untrue but wrong, because the suggested result is the wrong result under the existing principles of the system. Metaphor suggests future reform or perhaps that it is time to reconsider one's judicial view.

The above interpretation provides the best analysis of Raz's sole example of a case that reasons by analogy. In D v. National Society for the Prevention of Cruelty to Children,94 an action for negligence against the National Society for Prevention of Cruelty to Children (NSPCC), the House of Lords' holding allowed de-
fendant to hide the identity of one of its informants, even though that identity was relevant to the case.95 Existing rules seemed flatly to compel the NSPCC to reveal its source.96 However, a rule (or proposition) allowed government agencies to keep similar information secret if revealing it would be contrary to the public interest or the efficient function of government.97 The Lords held that in cases where the NSPCC serves a public function, it is entitled to the protections of privilege afforded to government agencies.98

It seems unlikely that a desire for propositional consistency motivated the Lords' holding, as no instances of a separation between an agency's governmental aspect and its public function aspect previously had arisen.99 If one supposes, however, that courts granted the privilege to government agencies because they serve a public function,100 this does not help Raz. This supposition would make the case one of deduction, where a judge should be bound to view the NSPCC as having the privilege.

Normally, private agencies do not enjoy the privilege.101 For Raz to claim that one can freely choose whether or not to grant the privilege to the NSPCC, he must consider prior cases withholding the privilege from private agencies as a matter of course (usually, no doubt, without discussion) as not endorsing the rule they seemed to use. Ruling for the NSPCC not only expanded the rule of privilege for those meeting the revised test, it reduced the scope of the rule that allows for the discovery of information in normal circumstances. If later courts can cut back rules, when are they ever binding? If one can articulate reasons for reading in exceptions later, then, in fact, the distinction upon which Raz bases his argument, between binding and nonbinding situations, falls apart.

A more reasonable explanation of D v. National Society for the Prevention of Cruelty to Children involves seeing the case as an instance of metaphor. Metaphor allows one to alter propositional sets (in Raz's terms, existing or old rules) not merely by adding new propositions, but by changing unsatisfactory old ones. In the

95. 1 All E.R. at 589–90.
96. Id.
97. Id. at 590.
98. Id.
99. Id. at 600 (opinion of Lord Hailsham).
100. Id. at 590.
101. Id.
instant case, the House of Lords separated the factor of “public function” from its governmental usage home. The two were no longer synonymous. Thus, certain cases that were previously outside the purview of governmental rules can be brought in without destroying the concept of “governmental” or the content of a large quantity of previous case law. The great utility of both metaphor and deduction masked as analogy is that they allow judicial growth and refinement without offending notions of consistency, justice, disinterestedness, or fairness.

IV. Conclusion

If the authority of the common law is to remain vigorous, one must not misunderstand the characteristics of its logic. The process of adjudication is complex and vague, but necessarily so, for it reflects the complex and vague beliefs and attitudes of those officials, litigants, and members of the public who shape it and are ruled by it. Perhaps greater care in framing arguments and analyzing precedent will not only aid the achievement of clarity in adjudication, but the alleviation of injustice.