

D'AMATO THEORY OF LOGICAL REASONING: JURISPRUDENTIAL PERSPECTIVE

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INTRODUCTION

Laws are general rules that govern society. Sometimes these rules determine outcomes. Other times they grant people authority to determine outcomes on their own. Legal methods are the way that legal systems apply general rules of substantive law to specific cases. Sometimes they direct what outcomes will be. Other times, however, they structure how decision-makers acting on their own authority are to determine outcomes. Legal methods take law from the initial formulation of rules in legislatures or elsewhere through to the final application of rules to individual cases. A complete program of legal methods addresses the legal system, lawmaking, law-finding, and law-applying.² As used in this project, a legal system is a national organization of law. Lawmaking includes legislation, but also judicial or administrative lawmaking. Law finding encompasses the interpretation of statutes and precedents; it determines the specific rules that decide particular cases. Law-applying takes those rules and applies them to facts to decide concrete cases. Law applying presupposes a way of fact-finding. Taken together, legal methods should facilitate bringing rules and facts together to reach just results.

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² See Maxeiner, Legal Indeterminacy, *Supra* Note 18, At 521–27; James R. Maxeiner: Legal Certainty: A European Alternative To American Legal Indeterminacy?, 16 *Tulane. J. Of Int'L & Comp. L.* 541 (2007) [Hereinafter *Legal Certainty*]; Cf. Stefan Vogenauer, Sources Of Law And Legal Method In Comparative Law, *The Oxford Handbook Of Comparative Law* 869 (Mathias Reimann & Reinhard Zimmermann Eds., 2006) (—[A] Legal Method Typically Answers The Following Questions: (1) What Is The Style Of Lawmaking? (2) Who Applies And Interprets The Law? (3) Which Factors Are Taken Into Account In The Application And Interpretation Of The Law? (4) How Are These Factors Ranked?).

The proposition that every lawyer and judge engages in legal reasoning from time to time seems uncontroversial enough; surely some of them do it often. It is therefore rather surprising that no one has yet satisfactorily explicated the nature of this process. The attractiveness of many received conceptions of the process has diminished considerably as a modicum of careful analysis has finally been brought to bear on the problem in the last ten years. However, no unified theory has emerged to replace the older views, and it appears that legal philosophers are far from agreed on the general form such a theory might take.

This is an attempt to describe generally the process of legal reasoning in the field of case law and in the interpretation of statutes and of the Constitution. It is important that the mechanism of legal reasoning should not be concealed by its pretense. The pretense is that the law is a system of known rules applied by a judge; the pretense has long been under attack.³ In an important sense legal rules are never clear, and, if a rule had to be clear before it could be imposed, society would be impossible. The mechanism accepts the differences of view and ambiguities of words. The problem for the law is: When will it be just to treat different cases as though they were the same? A working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification. The existence of some facts in common brings into play the general rule. If this is really reasoning, then by common standards, thought of in terms of closed systems, it is imperfect unless some overall rule has announced that this common and ascertainable similarity is to be decisive. But no such fixed prior rule exists. It could be suggested that reasoning is not involved at all; that is, that no new insight is arrived at through a comparison of cases. But reasoning appears to be involved; the conclusion is arrived at through a process and was not immediately apparent. It seems better to say there is reasoning, but it is imperfect.

TRADITIONAL MODELS OF LEGAL REASONING

It is customary to think of case-law reasoning as inductive and the application of statutes as deductive.⁴ The thought seems erroneous but the emphasis has some meaning. With case law the concepts can be created out of particular instances. This is not truly inductive, but the direction

³ The Controlling Book Is Frank, *Law And The Modern Mind* (1936).

⁴ Allen, *Law In The Making* 249 (1930).

appears to be from particular to general. It has been pointed out that the general finds its meaning in the relationship between the particulars. Yet it has the capacity to suggest by the implication of hypothetical cases which it carries and even by its ability to suggest other categories which sound the same.

The traditional conceptions of legal reasoning were modeled on the basic types of traditional logic. Thus, there has been much discussion of whether legal reasoning is primarily an inductive, analogical or deductive process. Many difficulties are encountered in affirming either of the first two descriptions.

A. Induction

It is commonly claimed that inductive logic is the mainstay of legal reasoning on the grounds that since the law is still largely uncodified we must review prior cases to determine the appropriate rules. Considerable imprecision surrounds the formulation of this claims, and has confused discussions of its implications. Induction is the inference from the observed to the unobserved, occasionally, and rather loosely, termed inferring the general from the specific.⁵ Its logical form is: All X's observed in the past have been Y, therefore the next observed X will be Y as well. The loose interpretation would conclude: Therefore all X's are Y.

The inductive model is usually offered as a substitute for the deductive theory, which inductive theorists have found unacceptable."

Thus, Paton wrote:

*Instead of starting with a general rule the judge must turn to the relevant cases, discover the general rule implicit in them The outstanding difference between the two methods is the source of the major premise-the deductive method assumes it whereas the inductive method sets down to discover it from particular instances."*⁶

⁵ See B. Skyrms, *Choice & Chance: An Introduction To Inductive Logic* 1-21 (1966).

⁶ For Some Interesting Attempts To Justify Or "Vindicate" Induction, See M. Black, *Models And Metaphors* 209-18 (1962); M. Black, *Problems Of Analysis* 191-208 (1954); H. Reichenbach, *Theory Of Probability* ? 91 (1949); P. Strawson, *Introduction To Logical Theory* Passim (1964); D. Williams, *The Ground Of Induction* Passim (1947); Stove, *Hume, Probability And Induction*, In *Hume* 187-212 (V. Chappell Ed. 1966)

B. Reasoning by Analogy

The analogical model of reasoning is probably the most widely accepted description of argument in Anglo-American legal thought.⁷ Aristotle described analogical reasoning⁸ as "neither like reasoning from part to whole, nor like reasoning from whole to part, but rather reasoning from part to part, when both particulars are subordinate to the same term, and one of them is known." This theory begins with the hypothesis that law consists basically of rules of varying precision derived from prior cases and existing statutes. When faced with a new case, the task of the court is to formulate a rule which comports with the precedent not yet overruled, relevant statutes, and the facts of the case before it. If the court cannot articulate a rule which accommodates all these factors, some or all of the precedent must be overruled or distinguished until it is possible to formulate a single rule which decides the new case and validates the remaining precedent. The new case is then decided according to the revised rule, the "moved" classification.

C. The Deductive Model

Deduction is what most people think of when they speak of reasoning.. The following set of successive arguments shows the usefulness of deduction in clarifying and directing inquiry.

All rules of X sort should be adopted.

Y is a rule of X sort.

Y should be the rule adopted

LEGAL REASONING AS A MODEL FOR MORAL REASONING⁹

Moral reasoning, despite a difference in the data base, shares the structure of legal reasoning. One's attempt to reach a moral decision and reasons by a process of analogy and difference to the new judgment most coherent with that data base. Coherence requires judging similar cases similarly within any set of shared settled judgments. Cases are similar when the same moral concepts apply, when the same values or aims underlying the application of moral concepts are at stake. A concept such as "murder" may have sufficiently negative connotation so that murder

⁷ R. Cross, *Precedent In English Law* 180 (1968): "Although The Analogy Between Judicial Reasoning With Regard To Case-Law And These Inductive Processes Is Clear Enough, The Differences Are Sufficiently Striking To Cause The Gravest Doubts Upon The Propriety Of Describing Judicial Reasoning As Inductive." See Dickinson, *Legal Rules: Their Function In The Process Of Decision*, 79 U. Pa. L. Rev. 833 (1931); Guest, *Supra* Note 6, At 189. See Also O. Jensen, *Supra* Note 11, At 28-31.

⁸ He Used The Term "Reasoning By Example." Aristotle, *Prior Analytics* 24, 69a, 13.

⁹ <http://Www.Jstor.Org/Stable/Pdfplus/764734.Pdf> On Thu, 5 Sep 2013 00:55:19 Am

is always wrong. But then there are no sufficient non moral conditions for the application of the concept (murders are simply morally or legally unjustified homicides). On the other hand, a concept such as "lying" may have sufficient non moral criteria of application (uttering a falsehood with intent to deceive), but then we cannot anticipate or state in non moral terms all the kinds of cases in which lying is not wrong.¹⁰

D' AMATO'S ON THE CONNECTION BETWEEN LAW AND JUSTICE: CONCEPT OF LEGAL REASONING.¹¹

In his essay, On the Connection between Law and Justice, natural law theorist Anthony D'Amato posits that 'judges should decide cases according to justice'. Through the use of a hypothetical case wherein the written law and obvious justice contradict each other, D'Amato attempts to explain how legislated law only serves to uphold justice when it is interpreted by judges, whose job it is to seek and uphold justice in their rulings.

D'Amato sets up his hypothetical case to illustrate his main point, telling of a situation wherein a motor vehicle is driving down a road with parallel (double) white lines running down the center of the road, which, by law, are illegal to cross. In order to save the life of a child who darts out into traffic, the driver must swerve and cross the parallel white lines. In other words, in order to save the child's life, the driver must break the law. When the driver does break the law and crosses the white lines to avoid hitting the child, she is pulled over by a police officer (who witnessed the entire event) and ticketed for crossing the white lines.

D Amato gave the following proposition

- **PROPOSITION (1): JUDGES SHOULD DECIDE CASES ACCORDING TO JUSTICE AND NOT ACCORDING TO LAW.**

D Amato's version: Human liberty as advanced by the progress of civilization is dependent upon the rule of law. In order for freedom to flourish, people need to know what the law is and need to have confidence that officials will faithfully apply the law as it is written. If a police officer can

¹⁰ F. C. French, *The Concept of Law in Ethics*, *The Philosophical Review* Vol. 2, No. 1 (Jan., 1893), pp. 35-53

¹¹ Anthony D'amato, *On Connection Between Law And Justice*, Northwestern University School Of Law, 2011

arrest one because you have somehow violated his sense of justice and if a judge can convict one because she thinks that what you did was unjust, then one might be incarcerated for innocent behavior. There would be no predictability in such a system. We would not know in advance how to control our conduct to avoid landing in jail. Imagine a "hippie" judge on the bench saying to the parties, "Don't confuse me with legal mumbo-jumbo; just tell me your stories, and I'll stop you at the point when I've discovered where justice is in this case." Human liberty would be forfeit at the mercy of officials whose subjective sense of "justice" might be unpredictable as well as collectively incoherent. Moreover, officials are very likely to regard as "just" those measures and actions that are politically expedient. In short, justice is dangerous as a basis for judicial decision-making because it robs us of predictability and security. Justice undoes all the good that law has done; it transforms legality into nihilism. And the end result is that there can be no justice for anyone. All we have is the Hobbesian state of nature, where there is "continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."¹²

- **PROPOSITION (2): THE CASE FOR JUSTICE**

Not only is law part of the story the parties tell the judge, but it shapes the story they tell. Let me illustrate. Suppose you're driving in the southern countryside and come across a grove of orange trees off the side of the road. You say, "Wouldn't it be nice to load up my car with a trunk load of these beautiful oranges!" You stop and pick them and start loading the car. A police car comes by, and the police officer gets out and arrests you. Unjust? Whether you ought to be arrested or not depends on something that you can't see. There is nothing in the oranges that decides this question. The justness or unjustness of your act depends to a large extent on the laws that are in place. If the orange grove is a farmer's private property, and the oranges are the result of his expenditures and labor, and if the "private property" laws of the area remit to the owner the sole right to dispose of the oranges, then you have unfairly picked the oranges. What you did is unfair because of the laws in place. On the other hand, suppose that the orange grove is part of a state-sponsored communal area where any person can take away all the fruit that he or she can pick.

¹² Thomas Hobbes, *Leviathan* Pt. I, Ch. 13 (Oakeshott Ed., 1955). However, Hobbes Himself Did Not Contend That Justice Was Incoherent In A State Of Nature. Rather, He Contended That There Was Such A Thing As Natural Justice In A State Of Nature: Injustice Is Not Performing One's Covenants. *Id.* At Ch. 15. The Problem Of The State Of Nature Was Not That We Cannot Determine What Justice Requires, But Rather That We Cannot Enforce The Demands Of Justice Even After We Determine What Justice Requires. That Was The Main Reason Hobbes Concluded That We Need An All-Powerful Government.

Then it would be fair for you to pick the oranges. In any subsequent judicial proceeding, it would be absurd of the judge not to want to know what laws are in place in area of the orange grove. Only by knowing what those laws are can the judge make at least a prima facie judgment¹³ as to whether it is fair for you to pay a fine.¹⁴

THE COURT'S PERSPECTIVE ON HYPOTHETICAL CASE: JUSTICE IS PART OF THE LAW

The argumentative use of hypothetical cases not only characterizes good classroom teaching in law schools,¹⁵ but is found in questions judges ask from the bench during oral argument and in many other areas of law study and practice.

Hypothetical case has been selected i.e. motor vehicle regulation that is fairly standard throughout the world: the parallel (double) white lines down the center of a road. I will focus on the parallel lines and not the statutory regulation behind it, because once we look at a particular statute, we have an interpretive problem that could vary from country to country or from language to language. The parallel lines therefore offer a purely semantic and generalizable legal rule, meaning, in effect, "don't cross me." The driver of a car understands the parallel lines as a legal prohibition, barring vehicles from driving over and hence crossing the parallel lines. It is this meaning that will be focus upon, rather than any particular set of statutory words that purports to express the meaning.

D'Amato splits this hypothetical case into two different possible judicial outcomes (which will be refer to as cases A & B) to highlight his position.

In case A, after the driver is ticketed, she attempts to seek justice with the Supreme Court by explaining how she had to break the law in order to serve a higher justice (saving the innocent child's life), and therefore the ticket is bogus and the law ought to be amended for extenuating circumstances such as this one. The Court's response is that it is the legislature's duty to make

¹³ But The Law May Not Necessarily Tell The Judge What The Ultimate Judgment Should Be. My Reasons For This Qualification Will Appear In The Course Of This Essay.

¹⁴ <http://www.jstor.org/discover/10.2307/1226151?uid=3738256&uid=2&uid=4&sid=21102608596117> last accessed on September 5, 2013

¹⁵ See Anthony D'amato, The Decline And Fall Of Law Teaching In The Age Of Student Consumerism, 37 J. Legal Educ. 461 (1987).

law, and it is merely the judges' duty to enact judgment according to these laws. The court says that because there is no gray area in this statute that plainly says it is illegal to cross the lines, they must uphold the law, and so the driver's ticket stands.

In case B, when the driver is ticketed and her case comes to the Supreme Court, the driver makes the same argument as in case A, that the law prohibiting crossing the white lines must be amended to account for exceptional cases such as this, where the higher justice is actually served by crossing the white lines. In hypothetical case B, the Court responds quite differently than they did in hypothetical case A. The Court says that 'Judges should decide cases according to justice and not according to law (when the law is clearly unjust)'. In this circumstance, the judge's decide to interpret the law and find the driver not guilty of any offense, since she did the right and just thing. However, the legislature does not decide to change the written law to include provisions for situations wherein the higher justice is served by crossing the white lines (breaking the law). Their reasoning for this is twofold. First, they say that since justice is a relatively subjective term, if they amended the law to say something like, 'do not cross the double white lines except in circumstances when doing so would cause a deeper injustice', every person who see this sign would inevitably have a different idea of what justice is and what circumstances call for crossing the white lines. This might lead to chaos.

As the Supreme Court of the United States said in *United States v. Locke*,¹⁶ even if the legislative rule is arbitrary, it must be accorded its plain meaning.¹⁷ If that was true in *Locke*, it is certainly true in the present case. The parallel-line rule is not arbitrary. It is the rule selected by the legislature. If on occasion its application appears to work an injustice, a court may not invoke the concept of injustice to overrule the law itself. We have no constitutional mandate to invalidate laws, or write exceptions into laws when their plain language admits of no exceptions, all in the name of justice.

Assume for a moment that the parallel divider lines had no legal significance. Suppose they were simply painted on the roadway as a guide for motorists. Indeed, in the early days of automobile

¹⁶ *United States v. Locke*, 471 U.S. 84 (1985). For A Critical Analysis Of The Court's Reasoning, See Anthony D'amato, Counterintuitive Consequences Of "Plain Meaning," 33 *Ariz. L. Rev.* 529, 535-39 (1991).

¹⁷ 471 U.S. At 93-96.

travel, road signs were placed simply to help traffic flow more easily. The early traffic signal light was invented simply to reduce the confusion at intersections when drivers at right angles to each other misinterpreted each other's signals as to who should proceed first. It was only after traffic signals were installed and working that some state legislatures began making the signals legally compulsory.

Under our temporary assumption that the parallel lines in the present case are without legal significance, no one would seriously maintain that the appellant should run over a child when she had the clear alternative of running over the white lines. In fact, if the appellant did kill the child instead of observing the (legally insignificant) parallel lines, she could be prosecuted for manslaughter or even murder. There is hardly a clearer case of injustice than one in which a temporary and safe deviation from a given route is not taken when the cost of not taking it is the life of an innocent child. The only difference between our assumed case and the actual instant case is that the parallel lines are backed by a statute.

If the "plain meaning" rule as enunciated by the appellate court below is given unbridled priority, then such a contradiction would indeed be expected to occur. The "plain meaning" rule, as the court below interpreted it, would mean that in the name of safety, innocent children should be run over. But we can extend the analysis farther than that. Suppose the legislature did propose the clause we have just imagined. Surely there would have been a public outcry—indeed, the same kind of public outcry that we take judicial notice has occurred in recent weeks in connection with such "darting child" cases. The public surely would have found it outrageous for a legislature to contemplate the death of innocent children in a legislative provision that was deliberately intended to bring about such a horrible result. Indeed, any legislator who is at all attuned to public concerns would reasonably expect such a public outcry to attend any attempt to pass a bill containing the clause we have just imagined. And therefore, such a clause simply would not have been proposed, much less enacted.

D'Amato juxtaposes these two outcomes of his hypothetical case in order to support his thesis that the connection between law and justice lies in the hands of judge's that preside over cases. Clearly, the hypothetical outcome in case A is preposterous. Most people would agree that the

woman who crossed the double white lines/and broke the law, did so for a just reason (saving the life of an innocent child), and therefore shouldn't be found guilty of committing a crime. Most people would also agree by strictly following this law, and finding the woman guilty, the Court under serves justice. The hypothetical outcome in case B sounds much more logical and rationale in comparison to case A. It seems rational that the driver, in crossing the lines/breaking the law and saving the child's life, did the right thing. Since law ought to support doing 'the right thing', it seems obvious that the Court and the judges' ought to interpret the law in light of seeking the clearly just outcome, and therefore side for the driver.

JUDICIAL PRONOUNCEMENT ON LEGAL REASONING: INDIAN PERSPECTIVES

The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the "words themselves best declare the intention of the law-giver."

The golden rule of statutory interpretation may be applied where an application of the literal rule would lead to an absurdity. The courts may then apply a secondary meaning.¹⁸ In *Sutters v. Briggs*¹⁹, the Privy Council held:

"There is indeed no reason for limiting the natural and ordinary meaning of the words used. The term "holders or indorsees" means any holder and any indorsee, whether the holder be the original payee or a mere agent for him, and the rights of the drawer must be construed accordingly. The circumstance that the law apart from the section in question was repealed in 1845, without any repeal of the section itself may lead to anomalies, but cannot have weight in construing the section."

For instance, in *Olga Tellis v. Bombay Municipal Corporation*,²⁰ a journalist had filed a petition on behalf of hundreds of pavement-dwellers who were being displaced due to construction activity by the respondent corporation. The Court recognised the 'right to livelihood and housing' of the pavement-dwellers as an extension of the protection of life and personal liberty,

¹⁸ River Wear Commissioners V Adamson (1876-77) L.R. 2 App Cas 743.

¹⁹Sutters v. Briggs [1922 (1) Appeal Cases 1]

²⁰ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1985 SC 180

and issued an injunction to halt their eviction. In *S.P. Gupta v. Union of India*²¹ the judgment recognized the locus standi of bar associations to file writs by way of public interest litigation. In this particular case, it was accepted that they had a legitimate interest in questioning the executive's policy of arbitrarily transferring High Court judges, which threatened the independence of the judiciary. In *Parmanand Katara v. Union of India*, the Supreme Court accepted an application by an advocate that highlighted a news item titled "Law Helps the Injured to Die" published in a national daily, The Hindustan Times. The petitioner brought to light the difficulties faced by persons injured in road and other accidents in availing urgent and life-saving medical treatment, since many hospitals and doctors refused to treat them unless certain procedural formalities were completed in these medico-legal cases. The Supreme Court directed medical establishments to provide instant medical aid to such injured people, notwithstanding the formalities to be followed under the procedural criminal law²²

In the latest judgment, the legal reasoning has been aptly applied by the judges by held that *Even if the said woman was assumed to be mentally incapable of making an informed decision, what are the appropriate standards for a Court to exercise 'Parens Patriae' jurisdiction? If the intent was to ascertain the 'best interests' of the woman in question, it is our considered opinion that the direction for termination of pregnancy did not serve that objective. Of special importance is the fact that at the time of hearing, the woman had already been pregnant for more than 19 weeks and there is a medico-legal consensus that a late-term abortion can endanger the health of the woman who undergoes the same. In the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.*²³

From the perusal of the above cases, one can safely conclude that golden interpretation and public interest litigation are two aspect of laws that is in sync with legal reasoning of D'amato.

²¹ *S.P. Gupta v. Union of India (1981) Supp. SCC 87*

²² *Parmanand Katara v. Union of India (1989) 4 SCC 286*

²³ *Suchita. Srivastava V. Chandigarh. Administration, (2009). 9. SCC 1.*

D'Amato's concept of legal reasoning which focuses on the law, to be read liberally, so as to benefit a vast section of society is reflected in the above judgment.

CRITICISM ON METHOD OF LEGAL REASONING

However, Schauer, however, is half-hearted in his defense of legal reasoning; he seems to be infected by rule skepticism himself. He acknowledges widespread and perhaps his own uncertainty when he devotes his first chapter to the question —Is there legal reasoning?²⁴

Schauer says that legal reasoning produces less than the best results because of law's generality. Although disputes, in court and out, involve particular people with particular problems engaged in particular controversies, the law tends to treat the particulars it confronts as members of larger categories. Rather than attempting to reach the best result for each controversy in a wholly particularist and contextual way, law's goal is often to make sure that the outcome for all or at least most of the particulars in a given category is the right one.²⁵

It may be objected that this analysis of legal reasoning places too much emphasis on the comparison of cases and too little on the legal concepts which are created. It is true that similarity is seen in terms of a word, and inability to find a ready word to express similarity or difference may prevent change in the law. The words which have been found in the past are much spoken of, have acquired a dignity of their own, and to a considerable measure control results. As Judge Cardozo suggested in speaking of metaphors, the word starts out to free thought and ends by enslaving it.

CONCLUSION

No decision can be based on justice if relevant facts are unknown to the decision-maker. Since law is part of the facts of any case, the law must be made known to the decision-maker and must be taken into account by the decision-maker in order to render full justice to the parties. Thus,

²⁴ Schauer, *Supra* Note 1, At 1. Nor Is He Alone; Other American Authors Feel The Same. See, E.G., Steven J. Burton, *An Introduction To Law And Legal Reasoning*, At Xiii–Xvi (1st Ed. 1985). The 2007 Edition Does Not Include This Preface

²⁵ . See Also Frederick Schauer, *The Generality Of Law*, 107 W. Va.L. Rev. 217, 227–31 (2004) (Discussing The Inherent Generality Of Rules); Frederick Schauer, *Profiles, Probabilities, And Stereotypes* 300 (2003) (—Yet Not Only Is Generality Not, In General, Unjust, But Justice Itself May Involve Considerable Components Of Generality

two propositions are to be followed i.e. "Proposition (1)" should now be reformulated as follows and judges should decide cases according to justice. The law is a fact that is as relevant as any other material fact in the determination of what is just under the circumstances. Accounts of legal reasoning are descriptive theories. The degree, to which this response can be incorporated into accounts of legal reasoning and the fit criticism, and the nature and plausibility of the political theories or accounts of ethics they invoke, is another way in which to assess success or failure. Finally, facts and description offered here that accounts of legal reasoning are not best regarded as theories in the primary sense.