

Reason in Law

9TH EDITION

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and

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CHAPTER 1

What Legal Reasoning Is and Why It Matters

I have grown to see that the [legal] process in its highest reaches is not discovery, but creation.

— BENJAMIN N. CARDOZO

They ain't nuthin' until I calls 'em.

— UMPIRE BILL KLEM (ATTRIBUTED)

An Overview of Law and Politics

In late June 2013, millions of Americans eagerly awaited the Supreme Court's decision about whether the U.S. Constitution recognized the marriage of Edith Windsor to Thea Spyer, a same-sex couple who had been partners for forty-two years. Edith and Thea had been married in Canada in 2007, and their marriage was considered legal in the state of New York, where they lived. But under a U.S. federal law, the Defense of Marriage Act, the federal government refused to treat Edith and Thea as legally married. This had powerful consequences: when Thea died in 2009, she left behind a large estate, and because Edith was not recognized as Thea's spouse, she had to pay more than \$300,000 in inheritance taxes. This was just one of the hundreds of ways in which the Defense of Marriage Act disadvantaged same-sex couples, even those like Thea and Edith who were recognized as legally married by the state in which they resided. Edith's lawyer, however, argued that she shouldn't have to pay the tax because the Defense of Marriage Act was unconstitutional. The lawyer argued that the law violated the Fifth Amendment of the U.S. Constitution, which guarantees fundamental liberties, including, the lawyer argued, the right to marry whomever one chooses. If the justices of the Supreme Court agreed with Edith, it would affect not just her massive tax bill but also the rights of men and women

across the nation. Of course, for religious conservatives fighting for the “traditional marriage,” the decision was equally consequential. Whatever the Court ruled, it would deeply disappoint many Americans.

A little more than a decade earlier, in 2001, a British court considered a more obscure but also very divisive matter: what to do about conjoined twin girls, Jodie and Mary. The two were joined at the pelvis, though each had her own organs and limbs. Doctors believed that both girls would eventually die if they were not separated. Separating them, however, would kill Mary, the weaker twin. The twins’ parents, devout Roman Catholics, believed that it “was not God’s will” that one child die to enable the other to live because “[e]veryone has the right to life.”¹ The hospital in which the twins were treated, however, believed that failing to separate the twins would violate Jodie’s right to life. Despite the parents’ wishes, the hospital sought legal authorization to perform the separation, arguing that the operation would count under British law as saving Jodie’s life, not as murdering Mary. The judges in the case faced an awful dilemma. If they sided with the hospital, they would be overriding the rights of the parents and the arguments of religious leaders, who argued that the hospital was trying to seek authorization for the murder of Mary. If they sided with the parents, though, they might be putting Jodie’s life in jeopardy.

More than twenty years before the case of the conjoined twins, and back in the United States, a case of murder raised another complex legal issue. On August 9, 1977, a patron of a bar, Happy Jack’s Saloon, saw a confrontation in which Darrell Soldano was being threatened. The patron, hoping the police could quell the fight, ran to the nearby Circle Inn, told the bartender about the threat, and asked that the bartender call 911. The bartender refused, even refusing to let the patron make the call himself. Back at Happy Jack’s, the confrontation escalated and Darrell Soldano was shot dead. A lawsuit sought damages on behalf of Soldano’s young son, not from the shooter but from the Circle Inn, blaming the bartender who had refused to call 911. The lawsuit contended that if the call had been made, the police could have stopped the fight and Soldano would not have been shot. The restaurant, however, argued that its bartender had no duty under the law to call 911. As in the other cases, the judges in this lawsuit had to declare one side a winner and the other a loser: the son left without a father, or the Circle Inn restaurant, which considered itself blameless for Soldano’s death.

Every year courts decide millions of such disputes. Most, like the Happy

1. *In Re A (Children) (Conjoined Twins: Surgical Separation)*, [2001] 2 WLR 480.

Jack's case, don't receive much media attention; a few, like the same sex-marriage case, become worldwide news. But however famous or obscure, for the participants—the son of a murdered father, a restaurant owner worried about a huge liability bill, parents of children in a medical crisis, gay men and lesbian women hoping to be married—such lawsuits are of enormous consequence. These people's futures, sometimes even their lives, lie in the hands of judges. How should the judges decide their fates?

Laypeople unfamiliar with the legal process tend to assume that some simple legal rule—a statute or a constitutional clause or a judicial precedent—can settle the matter. But digging beneath the surface of these three cases, the rules turn out to be ambiguous. The Fifth Amendment to the Constitution, one of the rules in the same-sex marriage case, merely states: “No person shall . . . be deprived of life, liberty, or property, without due process of law.” What does this have to do with same-sex marriage? There were a couple of previously decided cases interpreting this phrase to prohibit the government from discriminating against minority groups, but how far did that principle extend? In the case of the conjoined twins the rules were equally murky. Some of the judges cited *Airedale v. Bland*,² a case in which a hospital was authorized to stop life-sustaining support measures for a young man, Tony Bland, who was in a persistent vegetative state. But was Mary, the weaker twin, really in the same position as Bland? And wasn't a surgical separation a more violent mode of causing death than simply withholding treatment? In the case of Happy Jack's the previously decided cases were also no sure guide. There were cases in which courts had held individuals culpable for refusing to help others, like the Circle Inn's bartender who refused to make a 911 phone call. In all the previous cases, however, there was some kind of “special relationship” between the victim and the defendant. Was there really a special relationship between the Circle Inn's bartender and a stranger asking for help? Or was the existence of a special relationship in the previous cases really so important? In each case the rules were ambiguous, and judges could easily interpret them to the benefit of either side. Indeed, this is one of the reasons all three of these cases were so sharply contested—the law was unclear, so the parties needed the judges to resolve their dispute.

If rules by themselves couldn't resolve these lawsuits, perhaps the judges could consider instead the moral values at stake in each dispute. From this perspective courts should serve as a kind of moral forum in which judges articulate society's most deeply held values and interpret the rules so as

2. *Airedale NHS Trust v. Bland*, [1993] 2 WLR 316.

to advance those values. But in each of the cases there were several such values, and the competing values pushed the judges in different directions. Gay men and lesbian women claimed the values of freedom and equality, but cultural conservatives pointed to the value of the traditional family and hundreds of years of moral and legal prohibitions on homosexual conduct. Jodie and Mary's parents invoked their rights to make decisions for their children without interference from others, and they argued for the sanctity of the life of Mary; the hospital cited the right to life of Jodie. The lawsuit against the unhelpful bartender rested on a duty to help one's fellow human being; the restaurant owner could equally cite the value of freedom to do as one chooses, including the freedom not to help. How should judges choose among these competing, deeply held principles?

Making things even more difficult for the judges were the factual disputes in the cases. How could the doctors know for sure that Jodie and Mary couldn't survive together, or that Jodie would live if separated? How could anyone know if calling 911 would have prevented the escalation of the fight that killed Darrell Soldano? And there were also broader factual questions that went beyond the particularities of each case. When parents and doctors disagree about complicated medical treatments for children, are parents sophisticated enough about the science involved to make informed choices? Would expanding the duty to help others really make society more safe—or would it simply lead to more lawsuits against blameless bystanders wherever trouble erupted? Would the recognition of same-sex marriage really affect the well-being and robustness of the traditional family, as cultural conservatives claimed? What evidence should judges rely on in assessing this question?

This book describes how judges, despite the ambiguities and dilemmas that lurk in every corner of life and law, can use good legal reasoning to resolve difficult disputes. Laypeople, the people for whom we have written this book, may think that legal reasoning is so complex and technical that only those with professional training can possibly understand it. We believe, however, that laypeople with no such background are fully able to become sophisticated evaluators of legal opinions—judges of judging—and in the process, smarter and more engaged citizens. Indeed, we believe good citizenship requires some understanding of how legal reasoning works, because law, far from a dusty, dry, technical topic, is fundamental to politics. Legal reasoning serves simultaneously as the velvet glove covering the fist of governmental power and as the sincerest expression of a community's ideals of justice. To understand legal reasoning is to understand the rule of law itself.

Chapter 6 and appendix B explore more fully the relationship between law and politics, but we begin with three observations about the many ways in which they are intertwined.

The Law Is All around Us

When President Obama in a May 2013 speech defended his policy of using drones to kill people his administration had determined to be enemies of the United States, critics argued strenuously that the policy violated international law.³ Because no world court had the power to resolve the matter and enforce its judgment, that legal issue remained just another political shouting match. Law becomes “the rule of law” only when courts have the power to resolve legal claims or when people, knowing that powerful courts can step in to settle matters for them, “bargain in the shadow of the law.”⁴

The political system of the United States, unlike the international system, incorporates a powerful and independent judiciary. Our nation thereby claims to honor the rule of law. Alexis de Tocqueville wrote long ago that “there is hardly a political question in the United States that does not sooner or later turn into a judicial one.”⁵ The daily flow of news reports regularly reaffirms Tocqueville’s observation:

- Civil rights groups and the Obama administration in 2014 challenged a Texas law that required voters to have a government-issued photo identification in order to cast a ballot. The group argued that because many minority voters lack such identification, the law would disproportionately block them from voting. A federal district court judge agreed with the challenge, concluding that Republican governor Rick Perry and the Republican legislature enacted the law to suppress the “overwhelmingly Democratic votes of African-Americans

3. Max Fisher, “Obama’s Case for Drones,” *Washington Post*, May 23, 2013. The group Amnesty International in 2013 issued a report condemning the U.S. drone program as unlawful and possibly involving international war crimes. Amnesty International, *Will I Be Next? U.S. Drone Strikes in Pakistan* (London: Amnesty International, 2013). A “white paper” produced by the Department of Justice and leaked in 2012 provides the Obama administration’s argument for the legality of drone strikes even against U.S. citizens. U.S. Department of Justice, “Lawfulness of a Lethal Operation Directed against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force.”

4. See Robert H. Mnookin and Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce,” *Yale Law Journal* 88 (1979): 950–997.

5. Alexis de Tocqueville, *Democracy in America*, ed. J. M. Mayer, trans. George Lawrence (New York: Harper and Row, 1969), 270.

and Latinos,” thus bolstering their party’s political prospects.⁶ The judge ruled that the law violated both the Voting Rights Act and the Twenty-Fourth Amendment to the Constitution, which bars a “poll tax,” a fee assessed for the privilege of voting; the judge concluded that the fees associated with the photo identification cards required by the law amounted to a poll tax. A federal appeals court, however, allowed Texas to proceed with the photo identification requirement for the 2014 election, and the U.S. Supreme Court refused to hear an appeal of that decision.⁷

- In 2012 the struggle over President Obama’s major health-care reform law, the Patient Protection and Affordable Care Act (Obamacare), reached the Supreme Court, where Obamacare opponents argued that the law’s requirement that individuals buy health insurance went beyond the powers granted to Congress by the Constitution. On June 28, 2012, the Court by a 5–4 vote upheld the constitutionality of Obamacare, ruling that the penalty assessed against those who would fail to buy health insurance could be considered a tax, and thus within Congress’s taxing powers.⁸
- The South Carolina Supreme Court on November 12, 2014, declared that the state was not providing a “minimally adequate” education to all students as required by the state’s constitution. The Court noted that in most of the school districts covered by the lawsuit, test scores revealed that more than half of students were failing to perform at even a minimum level for their grade. The Court by a 3–2 vote directed the state to address the problem. Dissenting from the decision, Judge Kittredge argued that the Court was stepping beyond its bounds and becoming a “super-legislature.” He pointed out that words of the state constitution merely required the state legislature to create a “system of free public schools” and did not stipulate that the education received achieve any particular standard of quality.⁹
- An inmate awaiting execution on Texas’s death row, Charles Hood, learned years after his initial conviction that the prosecuting attorney in his case and the judge who sentenced him to death were having a sexual affair at the time of his trial. Each was married to another at

6. *Veasey v. Perry*, Civil Action No. 2:13-CV-193 (S.D. Tex. 2014).

7. Adam Liptak, “Supreme Court Allows Texas to Use Strict Voter ID Law in Coming Election,” *New York Times*, October 18, 2014.

8. *National Federation of Independent Business v. Sebelius*, 567 U.S. ____ (2012).

9. *Abbeville County School District v. South Carolina*, 767 S.E. 2d 157 (S.C. Sup. Ct. 2014).

the time and had vigorously denied the affair. Hood argued that the romance raised legitimate doubts about the impartiality of the judge, and so violated his right to a fair trial under the Constitution. A Texas appeals court, however, denied his claim.¹⁰

The Rule of Law Keeps the Peace

Many people, no doubt, react to such politically charged cases by comparing the legal result against their own political beliefs. Liberals and civil rights advocates critical of the Texas voter identification law excoriated the U.S. Supreme Court for allowing the law to stand; Republicans in Texas praised the result. Liberals cheered the Supreme Court's decision upholding Obamacare; conservatives decried it. But if you stop and think about it, judging a legal result simply in terms of one's own sense of right and wrong won't do. The whole point of the rule of law is to set standards of governance that transcend individual beliefs. If all we bring to law and politics is a determination that our values should prevail, we are no better than religious and political fundamentalists who insist that *their* moral scheme justifies destroying other incompatible moral systems. The claim of moral righteousness and superiority has driven many of our species' worst atrocities, such as the Holocaust, the genocide of American Indians, and the killing of millions of "enemies of the state" by various communist regimes.

So the rule of law substitutes legal reasoning for moral righteousness. In the sample of cases in the previous section, the legal reasoning question is not whether we like the result but whether the judge has given reasons we find trustworthy. If this distinction seems too abstract, think of an organized sport or game, one with umpires or referees. You may root passionately for one side, but when a referee's call goes against your team, you don't automatically condemn it. You consider whether you trust it, whether the facts on the field fit the call. It is indeed extraordinary that sports and games, contests among emotionally charged people whose self-

10. The Texas Court of Criminal Appeals ruled that Hood had failed to raise his argument by the deadline required under Texas law. Although a group of former prosecutors and thirty legal ethicists urged reversal of this decision and a new trial for Hood, the U.S. Supreme Court declined to hear his appeal. Prior cases in which a judge had accepted large campaign contributions from a litigant in a case before the judge had come to light, but never sex between judge and prosecutor. Dahlia Lithwick, "Courtly Love," *Newsweek*, May 3, 2010. Hood later won a new trial on other grounds, but he pled guilty to murder charges in exchange for a life sentence. Diane Jennings, "After Years of Insisting He Was Innocent of Murder, Death Row Inmate Charles Hood Pleads Guilty, Takes Life Sentence," *Dallas Morning News*, February 8, 2013.

respect and wealth may be on the line, remain for the most part civil and peaceful.¹¹

The Critical Importance of Judicial Impartiality

Reflect a bit further on your experience of sports referees and you will soon realize that a critical call against the home team does not normally turn a peaceful home crowd into a rebellious mass of frothing maniacs (who would throw beverage bottles at the refs if glass containers were still allowed in the stands). Only blatantly erroneous calls and, worse, a *pattern* of wrong calls that suggests a bias against the home team cause fan rage. The impartiality of legal judges is as necessary for political peace as the impartiality of referees and umpires is to keeping peace in the stands.

Indeed, we find that in most human societies, trusted third parties routinely resolve disputes. Alec Stone Sweet and Martin Shapiro call this phenomenon “triadic dispute resolution”:

If a conflict arises between two persons and they cannot resolve it themselves, then in all cultures and societies it is logical for those two persons to call upon a third to assist in its resolution. That assistance falls along a spectrum that stretches from the mediator to the arbitrator to the judge. . . . The triad contains a basic tension. To the extent that the triadic figure appears to intervene in favor of one of the two disputants and against the other, the perception of the situation *will shift from the fairest to the most unfair of configurations: two against one*. Therefore the principal characteristics of all triadic conflict resolvers will be determined by the need to avoid the perception of two against one, for only then can they rely on their basic social logic.¹²

How can judges, the triadic conflict resolvers we are concerned with, overcome the “two against one” perception? In most nontrivial appeals cases, judges write opinions explaining and thereby justifying the results they reach.¹³ This makes appellate judges different from baseball umpires, who make most of their calls automatically. It is the job of appellate judges

11. Lief Carter explains in detail the peacekeeping tendencies of “good games” in “Law and Politics as Play,” *Chicago-Kent Law Review* 83 (2008): 1333–1386; and see appendix B.

12. Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (New York: Oxford University Press, 2002), 211 (emphasis added).

13. For an introduction to the legal procedures and terms by which cases reach the appellate level, see appendix A.

to write opinions that justify their decisions on impartial grounds, grounds that don't seem to take partisan sides. (The concept of impartiality is explored more fully in chapter 6.)

Because law gains its authority through impartiality, people often assume that law isn't "political." We, however, view law and legal reasoning as a special kind of politics. *Politics*, in our definition, refers to all the things people do in communities in order to minimize threats to their well-being. People sometimes cooperate with each other to resist perceived threats, but sometimes they fight. Political behavior sometimes tries to conserve what is and sometimes tries to change what is. Hence, like other forms of politics, law can either preserve communities or change them. By the end of this book, you will have encountered many examples of legal actions that resulted in both change and preservation.

If referees and umpires do triadic dispute resolution badly, public belief in the integrity of a game can suffer. If *judges* do triadic dispute resolution badly, the whole community can be affected. When people believe that judges cynically manipulate legal language to reach partisan and self-interested political ends, faith in fairness and equity ebbs, motives for social cooperation falter, and communal life becomes nastier and more brutish. The sense of injustice can cause explosive social damage. When in 2014, for example, a grand jury refused to indict Ferguson, Missouri, police officer Darren Wilson for shooting Michael Brown, an unarmed black man, communities throughout the United States were outraged by what they considered a racially biased verdict, and some protests against the decision became violent. The violence escalated a few weeks later when a grand jury in New York chose not to indict a police officer for choking to death Eric Garner, another unarmed black man. The reactions to the Ferguson and Garner cases were an echo of the major riots that erupted more than two decades before when a suburban Los Angeles jury acquitted police officers in the beating of Rodney King. Distrust in the impartiality of judging creates disrespect for legal institutions and ultimately the rule of law.

The problem of judicial impartiality seems particularly acute in the United States today because of growing controversy over the selection of judges. Other books examine judicial selection in more detail.¹⁴ We must,

14. See, for example, Herbert J. Kritzer, *Justices on the Ballot: Continuity and Change in State Supreme Court Elections* (New York: Cambridge University Press, 2015); Herbert Melinda Gann Hall, *Attacking Judges: How Campaign Advertising Influences State Supreme Court Elections* (Palo Alto, CA: Stanford University Press, 2015); James L. Gibson, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy* (Chicago: University of Chicago Press, 2012); Keith J. Bybee, *All Judges Are Political—Except When*

however, report that the systems of judicial selection in the United States are not designed to recruit judges on the basis of their ability to reason well and rule impartially. Nor does the United States systematically teach future judges about the basic social logic that avoids “two against one.” Indeed, compared with the systems of judicial selection in many nations (or most organized sports leagues!), American selection processes almost seem designed to make this problem worse. Many state judges are elected, and campaigns for judicial office can be polarizing and partisan.¹⁵ Other judges are appointed by politicians, for life in some cases, for partisan reasons.

No one would trust a home-plate umpire who calls pitches before they leave the pitcher’s hand. Should the public trust those who become judges only because they have already taken sides on legal issues? Remember that this book has ruled out the simplest method of judging judges: cheering the ones who decide “for our side” and scorning those who don’t. Instead, we must decide whether judges have used their power legitimately. We may believe that a referee missed an obvious foul under the basket, or a player straying offside, and still believe that the ref is trying his or her best to judge the game fairly, even when a particular bad call hurts our team. Similarly, even when judges make rulings with which we disagree, we must be able to trust that those judges decide impartially. At bottom, then, this book explores a classic political question: how can we be confident that someone we disagree with nevertheless acts with integrity? Our answer is that judges can convince others of their integrity when they reason persuasively. The rest of this book illustrates how judges, by reasoning well or badly, either succeed or fail at this task.

A Definition of Law

Law is a language, not simply a collection of rules. What distinguishes law from other ways of making sense of life? Lawyers and judges attempt to prevent and solve other people’s problems, but so do physicians, priests, professors, and plumbers. The term *problem solving* therefore includes

They Are Not (Palo Alto, CA: Stanford University Press, 2010); Nancy Scherer, *Scoring Points* (Palo Alto, CA: Stanford University Press, 2005); Sheldon Goldman, *Picking Federal Judges* (New Haven, CT: Yale University Press, 1999).

15. Both Kritzer and Hall find evidence that systems for selecting state court judges are no more politicized than in the past, and that political conflict over the selection of judges does not seem to hurt the standing of courts with the public. See Kritzer, *Justices on the Ballot*, and Hall, *Attacking Judges*, as well as Gibson, *Electing Judges*. For an explanation of why this may be so, see Bybee, *All Judges Are Political*.

too much. Lawyers and judges work with certain kinds of problems that can lead to conflicts, even physical fights, among people. Contrary to the television's emphasis on courtroom battles, however, most lawyers try to stop conflicts before they start. They help people discover ways to reduce their taxes or write valid wills and contracts. They study complex insurance policies and bank loan agreements. They help people and organizations to govern their own affairs so as to minimize conflicts.

Yet some conflicts start anyway, perhaps because a lawyer did the planning and preventing poorly or because the client did not follow a lawyer's good advice. Many conflicts, such as an auto collision, a dispute with a neighbor over a property line, or the angry firing of an employee, begin without lawyers. Then people may call them in after the fact, not for an ounce of prevention but for the pounding of a cure.

Once such a battle starts, lawyers may find a solution in the rules of law, although when people get angry at each other, they may refuse the solution lawyers offer. If the lawyers don't find a solution or negotiate a compromise, then either one side gives up or the opponents go to court; they call in the judges to resolve their dispute.

You may now think that you have a solid definition of law: law is the process of preventing or resolving conflicts between people. Lawyers and judges do this; professors, plumbers, and physicians, though they do solve problems, do not routinely resolve conflicts. But parents prevent or resolve conflicts among their children daily. And parents, perhaps exasperated by family fights, may turn to a family counselor to deal with their own conflicts. Many ministers no doubt define one of their goals as reducing conflict. Lawyers, then, aren't the only people who try to resolve conflicts.

Law, like the priesthood and professional counseling, encounters an immense variety of problems. Law requires the ability to see specifics and to avoid premature generalizing and jumping to conclusions. But so do good counseling, good ministry, and good parenting. What distinguishes the conflict solving of lawyers and judges from the conflict solving of parents, counselors, or ministers?

Consider again the cases at the outset of this chapter, in which judges had to wrestle over the federal government's refusal to recognize same-sex marriages, whether to authorize the surgical separation of conjoined twins, and whether a restaurant should be held responsible for its bartender's refusal to call 911 to stop a fight at a neighboring bar. These are legal problems, not counseling or parental problems, because we define their nature and limits—though not necessarily their solution—in terms of rules that the

state, the government, has made. The judges in the same-sex marriage case weren't asked to decide how best to resolve the struggle over rights for gay men and lesbian women; they based their decision on their understanding of what was required by the Fifth Amendment to the Constitution. The case of the conjoined twins was decided under British and European laws regarding murder and the right to life. The Happy Jack's case was decided according to California common law, which requires people to treat strangers with the care expected of a "reasonable and prudent person," the fictional legal character judges have invoked for centuries. The process of resolving human conflicts through law begins when people decide to take advantage of the fact that the government has, one way or another, made rules to prevent or resolve such conflicts. And by taking their disputes to court, litigants benefit from another distinctive aspect of legal problem solving: the court's resolution of the problem has the force of the government behind it. This makes a decision rendered by a judge or jury quite different from one made by a counselor or minister. Even in noncriminal cases, if those on the losing side fail to comply with a legal decision, a judge can use the government's authority to order compliance, if necessary by imprisoning the losers.

The law, then, is a language that lawyers and judges use when they try to prevent or resolve problems—human conflicts—using official rules made by the state as their starting point. To study reason in this process is to study how lawyers and judges justify the choices they inevitably make among various legal solutions. It is to study, for example, how in *McBoyle v. United States* the justices of the Supreme Court made sense of the National Motor Vehicle Theft Act, which prohibits transporting a stolen "motor vehicle" across state lines. (This case is discussed in appendix A on legal terminology, which we invite readers to consult.) In that case, McBoyle hired a man to steal an airplane in Illinois and fly it to Oklahoma. The hired thief was caught, and his confession led investigators back to Mr. McBoyle, who was tried and convicted of violating the National Motor Vehicle Theft Act. But McBoyle argued on appeal that the Act, which prohibits the theft of "any self-propelled vehicle not designed for running on rails," did not cover the airplane he stole. Does an airplane fall within that definition? In studying legal reasoning, we examine the methods by which judges and lawyers work through such a puzzle. We ask the same key questions they do: What does the law mean as applied to the problem before me? Which different and sometimes contradictory solutions to the problem does the law permit in this case?

Now stop and compare our definition of law and legal reasoning with

your own intuitive conception of law, with the definition of the legal process you may have developed from television, movies, and other daily experiences. Do the two overlap? Probably not very much. The average person usually thinks of law as trials, and criminal trials at that. But trials are one of the less legal, or “law-filled,” parts of the legal process. For example, the jurors in the trial of George Zimmerman, the man accused of murdering Trayvon Martin, the seventeen-year-old wearing a hoodie on a rainy Florida night, were asked to assess whether or not Zimmerman reasonably feared for his own safety when he shot Mr. Martin. The jurors were not asked to determine what the proper standard for self-defense should be; that was set by the judge’s instructions, which were in turn an interpretation of Florida’s “stand your ground” law. Instead, the jury was told to put all the facts in the case together to decide whether a “cautious and prudent person under the same circumstances” as Zimmerman would have believed it necessary to shoot Martin.¹⁶ That involved some fine-grained historical research: Was Zimmerman returning to his car when Martin lunged at him? Did Martin or Zimmerman throw the first punch? Was Martin on top of Zimmerman when he was shot? We are confident enough that such historical problems do not require legal reasoning that we often turn the job of solving them over to groups of amateur historians, better known as jurors.

Of course, juries don’t simply determine the facts of case; they also must apply law to the facts, and that requires them to think carefully about the legal standards given to them by the judge. In deciding whether Zimmerman acted reasonably, they had to decide whether the facts of the situation would justify a “cautious and prudent person” to fear Martin. This meant that the jury had to assess what it meant to be a “cautious and prudent person.”

Facts and law, then, are intertwined. Yet the heart of the reasoning part of law, and the subject of this book, involves not deciphering the facts of a case but figuring out what to make of the facts once we “know” them. In the airplane theft case, for example, the historical problem was whether the defendant hired someone to steal a plane and fly it across state lines. The legal reasoning problem was whether the statute’s definition of a “vehicle” included airplanes.

The illustrative case at the end of this chapter sets out the distinction between trial and appellate decisions. In that case, a trial court had decided

16. Mark Memmott, “READ: Instructions for the Jury in Trial of George Zimmerman,” *The Two Way: Breaking News from NPR* (blog), July 12, 2013.

that a certain Mr. Prochnow was the father of his wife's baby. The facts—which included a suspicious liaison between the wife and another man, the physical separation of the husband and wife except for one encounter eight months before the birth of a full-term baby, and the incompatibility of the husband's blood type with that of the child—seemed to point conclusively in the other direction. Nevertheless, certain official rules of law, as interpreted by the appellate court, seemed to prevent the trial judge from holding that the husband was not the child's natural father. This case also provides our first full-length example of a court trying—and demonstrably failing—to do legal reasoning well.

A Definition of Legal Reasoning

It is a fundamental political expectation in the United States that those in power justify the way in which they use that power. We expect, both in private and in public life, that people whose decisions directly affect our lives will show how their decisions serve common, rather than purely self-ish, ends. We expect teachers to articulate grading standards. We expect elected politicians to respond to the needs of voters. In all such cases, we reject the authoritarian notion that power justifies itself, that those with money or political office can do whatever they please. If we merely want a decision—any decision—to settle a case, we could simply appoint a dictator to pronounce one. In his foreword to this book, Sanford Levinson writes:

As suggested by the American author Ring Lardner, “‘Shut up,’ he explained” is an ever-present possibility when responding to someone dissatisfied with the way he or she is being treated. Every parent has taken refuge in such a posture, and every child no doubt has felt frustrated by the perceived failure to be taken seriously.

Holding public officials responsible for justifying their power may seem obvious to us, but this practice is actually a fairly recent development in Western political philosophy. The alternatives—governing through greater physical strength and brute force, or through tradition and authoritarian right (as did kings when they proclaimed “divine right” to rule)—may have seemed acceptable when people believed that God willed everything. However, religious theories of government, still prevalent in many parts of the world, tend to produce so much warfare and bloodshed that liberal

philosophers from John Locke forward have tried to substitute reason and justification for the force of armies and for the unchallengeable authority of kings, tyrants, and other “supreme leaders.”¹⁷

The rule of law transforms the way power is exercised. Yet we must never forget that law itself is a form of power. Indeed, though law may seem civilized, even erudite, it is also violent, as the essays of Robert Cover remind us. “Legal interpretation,” he wrote, “takes place in a field of pain and death.” Law often justifies violence that has occurred or that is about to occur.¹⁸ Judicial outcomes in lawsuits can literally kill and bankrupt people. Courts govern, and government, at its core, is the collective use of authority backed by threats of violence. Whether appellate judges meet or fail to meet our fundamental expectation about the use of judicial power depends on the quality of their legal reasoning. We hold legislators, governors, presidents, and many other politicians to account by forcing them to run for election, but we hold appellate judges accountable primarily by examining the honesty and quality of their opinions.¹⁹

Legal Reasoning Does Not Discover the “One Right Answer”

Western culture reinforces some misunderstandings of legal reasoning. Perhaps because, starting in the Renaissance, a stream of discoveries about the physical world has continuously bombarded Western civilization, we too often assume that legal reasoning is aimed at discovering the law’s “right answer,” the correct legal solution to a problem. The idea that we live under a government of laws, not people, seems based on the assumption that correct legal results exist, like undiscovered planets or subatomic particles, quite independent of man’s knowledge.

Of course, if law actually worked that way, a book on legal reasoning would be absurd. To see whether a judge settled a contract dispute correctly, we would simply study the law of contract. In all cases, trained lawyers and legal scholars would, like priests in the olden days, have access

17. Lief Carter develops this theme further in his first chapter of *An Introduction to Constitutional Interpretation: Cases in Law and Religion* (White Plains, NY: Longman, 1991).

18. Robert Cover, “Violence and the Word,” in *Narrative, Violence and the Law: The Essays of Robert Cover*, ed. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: University of Michigan, 1995), 203.

19. All federal judges who are appointed under Article III of the Constitution, the judicial article, serve for life. Impeachment and removal from office are rare. Many state appellate judges, however, must win an election either to gain or retain their seat on the bench.

to correct answers that laypeople—most readers of this book—could not hope to match. A layperson would either defer to the conclusion of the expert or else rebel.

Appellate judges do justify their power through the quality of the opinions they write. The quality of their opinions, however, depends on something other than proving that they found the one correct legal answer. After all, when the law is clear enough that people on opposite sides of a case can agree on what law commands, they usually don't spend the many thousands of dollars that contesting a case in an appellate court requires. Inept or apathetic litigants do, of course, bring "easy" cases, but resolving those does not require persuasive legal reasoning.²⁰ Legal reasoning describes what judges do to justify their decision when they *cannot* demonstrate or prove that they have reached the "right" answer. As Benjamin Cardozo pointed out the better part of a century ago (see the epigraph that opens this book), appellate judges usually *create* law. The uncertainties and imperfections in law force judges to choose what the law *ought* to mean, not merely to report on what it does mean.

The Four Elements of Legal Reasoning

To persuade us that the law ought to mean what the judge has decided, the well-reasoned judicial opinion will harmonize the following four basic building blocks present in every case:

1. The *case facts* established in the trial and preserved in the record of the evidence produced at the trial.
2. The facts, events, and other conditions that we observe in the world, quite apart from the case at hand, which we call *social background facts*.
3. What the *rules of law*, that is, the official legal texts created by the state, say about the case.
4. Widely shared moral *values* and social principles.

20. Federal judge Richard Posner contends that appeals courts with mandatory jurisdiction, meaning those that cannot pick the cases they hear (unlike the U.S. Supreme Court, which chooses its cases), mostly get such "easy" cases. Hopeless appeals are made for many reasons, among them: the appellant's lawyer may be inept, the appellant may have lost perspective on whether the case is winnable, the appellant may have little to lose by appealing, or the appellant may have strategic reasons for appealing that have nothing to do with winning the case. Posner, *Reflections on Judging* (Cambridge, MA: Harvard University Press, 2013), 106–107.

These four building blocks are the foundation of good legal reasoning. Judges need to take account of each of them in explaining their decisions. When judges reason well, their opinions “harmonize” or fit together these four elements. When they don’t fit together the elements, their opinions become less persuasive.

Our criteria for good legal reasoning, no doubt, seem abstract and fuzzy at first. Our suggestion that legal reasoning is at heart a kind of artistic practice, a “harmonizing” of elements akin to the harmonies constructed by a music composer, is probably at odds with your understanding of law. We hope that by the time you finish this book you will see why accounting for each of the four elements is essential for a well-reasoned legal opinion, and why harmonizing them is so important (and often, so difficult). The following sections present illustrations of each of the four at work. You should practice identifying and distinguishing them.

Case Facts

Of the four building blocks, case facts are perhaps the easiest to understand. These are facts about the dispute between the parties in the case as developed during a trial. In a jury trial, the judge usually charges the jury that it must find certain things to be true in order to find for the plaintiff, or to find a defendant guilty; a jury verdict of guilt or liability necessarily finds those particular facts to be true. In trials in which a judge sits without a jury, the judge usually reads into the court record his or her findings of fact. In either situation, the only way an appellate court can overturn a trial court’s factual conclusions is to hold that they have no substantial basis in the evidence and are therefore “clearly erroneous,”²¹ a rare event.

At the center of the case of the conjoined babies Mary and Jodie were several case facts about their condition. Medical experts determined that the two would likely die if not separated and that Jodie (but not Mary) could live on her own. The judges in the case had to wrestle with the implications of these troubling facts. In the case of the Texas voter identification law, a trial determined that minority voters are more likely than white voters to lack government-issued photo identification. This key case fact became an essential building block of the trial judge’s finding that the law violated the Voting Rights Act.

21. See Rule 52A, Federal Rules of Civil Procedure.

Social Background Facts

Social background facts are conclusions about the world independent of the specific case facts that the parties are disputing. In the Happy Jack's case, about the unhelpful bartender, the Court cited as key social background facts the rising crime problem and the significance of the telephone for stopping crimes. The opinion noted that the state had established the 911 telephone system as a public resource for citizens to call the police quickly and without paying a charge. Seen in the light of these social background facts, the case facts—that a bartender refused to let a stranger use a phone to call 911—suggested to the Court an “attitude of extreme individualism” at odds with the needs of society.²²

More than thirty years later, in 2014, the Supreme Court rested an important criminal justice case on social background facts about another kind of phone, the smartphone. In *Riley v. United States*, after police arrested some suspects in a crime, they searched the suspects' smartphones and found evidence of further crimes. Did these searches, conducted without warrants, violate the Fourth Amendment's ban on “unreasonable searches and seizures”? The Court concluded they did, in part because of the powerful storage capacities of smartphones. Chief Justice John Roberts argued that because cell phones contain so much sensitive private data, “a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house.”²³

Social background facts can include anything about how the world works. Often they are so obvious that parties do not argue over them or even remark on them. For example, in *Prochnow v. Prochnow*, the child support case presented at the end of this chapter, both sides acknowledged that babies do not arise spontaneously in the womb but only from a sperm's insemination of an ovum. Sometimes when the social background facts in a case are not so clear, judges and juries will rely on hunches about them, something Judge Learned Hand does openly in a case you will read in chapter 2, *Repouille v. United States*.

Rules of Law

Judges must take account of all the rules of law that are relevant to a case. Rules of law come from statutes or constitutions, but they can also come from precedents—previously decided cases. For example, in the Happy Jack's case, in which a bartender refused to call 911, the judges had to con-

22. *Soldano v. O'Daniels*, 141 Cal. App. 3d 443, 450 (1983).

23. *Riley v. California*, 573 U.S. ____ (2014), slip op., 20.

sider “the established rule that one who has not created a peril ordinarily does not have a duty to take affirmative action to assist an imperiled person.” The Court’s opinion acknowledges that many precedents are based on this rule, but explained why in the particular case the rule should not determine the outcome.²⁴

Widely Shared Values

To be convincing, judges must also take account of social values. This is not an invitation for judges to recite their own values or to pick the values they deem most worthy. Instead, judges must try to persuade communities that they have considered the widely shared values that ordinary members of the community can see embedded in the dispute.

We have already witnessed the collision of two widely held values—religious liberty and human life—in the case of Jodie and Mary. Indeed, all the cases described in this chapter involve deep value conflicts over such principles as individual freedom, equality and integrity in voting, the rights and duties of parents, and the right to an education.

In a widely praised 2010 commencement address at Harvard University, retired Supreme Court justice David Souter said he had learned in his nineteen years on that bench that the Supreme Court’s highest function may be to help society resolve the “conflict between the good and the good.” Souter noted that in many cases, the legal rules don’t tell judges which “good” to choose:

A choice may have to be made, not because language is vague, but because the Constitution embodies the desire of the American people, like most people, to have things both ways. We want order and security, and we want liberty. And we want not only liberty but equality as well. These paired desires of ours can clash, and when they do a court is forced to choose between them, between one constitutional good and another. The court has to decide which of our approved desires has the better claim, right here, right now, and a court has to do more than read fairly when it makes this kind of choice.²⁵

Judges can’t maximize all goods, so they must acknowledge those they choose and explain their choices.

24. *Soldano v. O’Daniels*, 447.

25. Linda Greenhouse, “Justice Souter’s Class,” *New York Times*, June 3, 2010.

Several immensely important corollaries follow from our definition of legal reasoning. First, two judges may reach different decisions in the same case, yet each may reason equally well or badly. Like two excellent debaters, opposing opinions from two judges may still persuade us that each judge has fit together the four elements into a vision of justice that we trust.

Second, because of the wide range in people's experiences and beliefs, no single opinion will persuade everyone. Laypeople who read judicial opinions can and should react to them and decide whether the opinion actually persuades them. Reactions for and against judicial decisions about such volatile issues as gay rights, voting rights, education, and health care inevitably shape the further evolution of law.

Third, legal reasoning does *not* refer to the specific calculations that go on in a judge's head. In 1929, U.S. district judge Joseph Hutcheson confessed that the actual decision-making process revolved around the judicial "hunch."²⁶ Professor Warren Lehman in 1986 agreed: "What we call the capacity for judgment . . . is an intellectualized account of the capacity for decision making and action, whose nature is not known to us."²⁷ Legal reasoning justifies the decision but does not explain how the judge arrived at it. In theory, a devilishly partisan judge could decide cases solely to advance her political agenda, yet write masterful opinions that appear fair and impartial. A truly apathetic judge could flip a coin to make a decision, then write a brilliant opinion that convincingly justified it. We will never know with certainty why judges decide as they do, and it would be foolish to assume that a judge's opinion is some kind of record of the decision process.

Psychologically speaking, however, a judge's internal mental process and the quality of her public justification for the result may interact. The discipline of writing thoughtful opinions can, through a mental feedback loop, make a judge's reasoning itself more thoughtful and well considered. Some particularly intriguing research suggesting this possibility surfaced in 2014, when researchers in Spain posed difficult moral dilemmas—scenarios

26. Joseph C. Hutcheson Jr., "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision," *South Texas Law Review* 39 (1998): 889–903. Hutcheson defined *hunch* as "that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way."

27. Warren Lehman, *How We Make Decisions* (Madison: Institute for Legal Studies of the University of Wisconsin Law School, 1986), 12. See also the reflections of Judge Richard Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008), and Carter, "Law and Politics as Play," 1342–1348.

pitting the pull of an emotional attachment against a rational utilitarian outcome—to bilingual subjects, either in their native language or in their second language. They found that subjects were consistently better able to reach well-reasoned outcomes when their minds were not “freighted” with all the subtle associations of words in their native tongues. If law, as we argue, is a distinct language for engaging the world, reason in law may work the same way, helping judges to avoid the subtle freightings of ordinary language that would lead them to conclusions based on emotion rather than logic.²⁸ It is no stretch, then, to believe that judges who write well-reasoned opinions are also likely to make good decisions.²⁹ Still, there is always a gap between the decision and the reasoning that explains it. A judge’s opinion is a public justification of the choice she has made, not a moving brain scan of a mind at work.

Finally, the process by which judges seek to fit the four elements of legal reasoning together inevitably requires them to simplify and distort each element to some degree. Therefore, most opinions will fail to meet the requirements of formal logic. (The Supreme Court’s rulings about establishment of religion—which allow churches and church schools many tax advantages, yet prohibit the government from providing certain forms of financial aid to church schools—are notoriously incoherent by purely logical standards.) So, too, opinions will simplify the moral and empirical issues in them. Simplification and alteration are facts of life. We always must reshape raw materials if we want to fit them together smoothly.

Thus we return to the point made previously: law does not provide a technique for generating “right answers.” This book’s analysis assumes that nothing, including science and technology, can ever be demonstrated to be universally, singularly, and objectively correct. For the same reasons, pitches in baseball become balls and strikes, tripping becomes a yellow-card foul in soccer, and elbowing becomes a foul in basketball for all practical purposes because the umpire or referee calls them that way—even when we, as spectators, may see things differently. Just so with judges and lawyers, who agree to follow certain procedures and to use a common vocabulary of legal reasoning but do not automatically agree on legal outcomes, or even on which techniques of legal reasoning to use and when to use them.

28. “Gained in Translation,” *Economist*, May 17, 2014, 74.

29. We explore this possibility more fully in our discussion of the psychology of judging in “A Psychological Sidebar” in chapter 6.

Sources of Official Legal Texts

The range of legal problems and conflicts is infinite, but lawyers and judges will, one way or another, resolve disputes by referring to and reasoning about official legal texts created by the state, texts that these practitioners usually call “rules of law,” or “legal rules.” Lawyers and judges usually resort to four categories of these legal rules: statutes, common law, constitutional law, and administrative regulations.

The easiest category to understand is what we often call “laws”—the *statutes* passed by legislatures. Laypeople tend to think of statutes as the rules defining types of behavior that society wishes to condemn: crimes. However, legislatures enact statutes governing (and sometimes creating!) many problems unrelated to crime—civil rights, income tax rates, and Social Security benefit levels, for example. Statutory law, the subject of chapter 4, also includes the local ordinances passed by the elected bodies of cities and counties.

But there is a problem here. Legislatures do not enact statutes to cover everything. And when lawyers and judges face a problem not covered by a statute, they normally turn to that older set of legal texts called *common law*, the subject of chapter 3. In fact, the traditions and practices of common law shape how judges interpret statutes, so this book examines common law before moving to statutory interpretation.

Judges make law in a way completely different from legislators. Instead of meeting together to draft, argue about, and vote on proposals to change the law, judges decide individual cases—and in so doing create legal rules. Common law rules emerged through a process introduced in England before the “discovery” of the New World. The process began because the king of England chose to assert national authority by sending judges throughout the country to decide cases in the name of the Crown, but the king did not write rules to govern all judges’ decisions. It was because the judges acted in the name of the central government, a shaky government by our standards, that their decisions became law common to the king’s entire domain. Many common law rules originated in local custom or in the minds of the judges themselves.

Chapter 5 explores the third category of official legal texts, *constitutional law*. The Constitution of the United States and the fifty state constitutions set out the structure and powers of government. They also place legal limits on the way those who govern can use their power. While statutes and common law, where statutory law is silent, can govern anybody, con-

stitutions govern the government.³⁰ The U.S. Constitution even governs presidents, although most constitutional cases involve an alleged conflict between a constitutional provision and a decision made by a public administrator who claims to act under statutory authority.

Administrative regulations—of the Internal Revenue Service, or the San Francisco Planning Department, or any of the thousands of national, state, and local administrative agencies—make up the fourth category of legal texts. Problems in administrative law can fascinate and perplex as much as any. Because this book's length and your time both have limits, we examine reasoning about administrative regulations only indirectly. Do not, however, let this deliberate neglect mislead you into thinking that the subject is unimportant. Administrative regulations shape our lives more and more.³¹ The scope of this book, however, is mainly confined to historically more developed official legal texts: statutes, common law, and constitutional law.

The Choices That Legal Reasoning Confronts

While official legal texts are the starting point for legal reasoning, they are rarely the endpoint. If judges could resolve disputes simply by reciting the words of a legal text, disputes would not come to court in the first place. Anybody can read. People can usually find ways to dispute what words mean. The George W. Bush administration engaged in a long-running dispute over the meaning of the word *torture* as used in international treaties and federal law, at one point defining it so narrowly as to include only techniques that inflict pain that one would feel from “organ failure, impairment of bodily function or even death.”³² For better or worse, it takes judicial reasoning and judgment to say what legal texts actually mean in the context

30. If I, as a private citizen, don't like a speech of yours and forcibly remove you from your podium, I will probably violate a principle of common or statutory law. I will also violate the value favoring free exchange of ideas. But I will not violate the First Amendment of the U.S. Constitution. If, however, I did this while employed by a government agency, such as the FBI, my action could be a constitutional violation.

31. See Christine B. Harrington and Lief H. Carter, *Administrative Law and Politics*, 5th ed. (Washington, DC: CQ Press, 2015).

32. Deputy Assistant Attorney General John Yoo, Memorandum to White House Counsel Alberto Gonzales regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, August 1, 2002. This memo, as well as other documents from the Bush administration regarding torture, is reprinted in Karen J. Greenberg, ed., *The Torture Debate in America* (New York: Cambridge University Press, 2006), 317. And see U.S. Senate Select Committee on Intelligence, “Committee Study of the Central Intelligence Agency's Detention and Interrogation Program,” December 9, 2014.

of specific cases. In most cases, judges must reconcile the potential inconsistencies and contradictions among widespread values, the actual words of legal rules and prior judicial opinions, and their own views of the case facts and the social background facts in the cases before them. Judges must make difficult choices, such as the following:

- Does the case before me call for continued adherence to the historical meaning of legal words? Must I do what the framers of statutory or constitutional language intended their language to accomplish? Isn't it impossible to know what other people in the past intended? When do social, political, and technological changes permit or require a different or revised interpretation of legal concepts?
- Should I always follow the literal meaning of words? In which circumstances can I ignore the literal meaning of words altogether?
- Does this case obligate me to follow a judicial precedent the wisdom of which I doubt? When am I free to ignore a relevant precedent? Just what makes a precedent relevant in the first place?

Throughout the following chapters, we shall see that choices such as these—the choice of change or stability and of literal or flexible interpretation of words and precedents, for example—have no “right answer.” Judges inevitably have discretion to decide.

Judges also must make choices when a case pits widely shared moral values against each other. Thus, the Constitution contains language protecting the freedom of the press. It also contains language ensuring the fairness of criminal trials. But an unrestrained press can do much to prejudice the members of the jury who follow the news, and hence impair the fairness of a trial.

In this instance, perhaps judges can do justice by reaching a fair compromise between values. A more difficult problem arises not when two values collide but when two ideas of justice itself collide. One such collision pits *general* justice against *particular* justice. Is it just for bus drivers and train engineers always to pull away from the station exactly on time, even if it means that a soldier on leave and racing down the platform to get home for Christmas will miss his ride? Isn't it true in the long run, to paraphrase Professor Zechariah Chafee, that fewer people will miss buses and trains if they all know that buses and trains always leave on the dot, and that more people will miss if they assume that they can dally and still find the vehicle at the station? While it is often possible to engineer compromises among competing values, it is often impossible to compromise between different

visions of justice itself. Unless they are corrupt or lazy, judges will *strive* to do justice, but whether they succeed often remains debatable.

Because legal decisions require choices from among competing values, judges and others who analyze legal problems cannot be “objective” in any simple sense. The problem of general versus particular justice is a good illustration. Neither one will mechanically dictate “the correct” result. A value, a preference, or a moral feeling is not a concept we can prove to be right or wrong. Those who adopt values that conflict with yours will call you biased, and you may feel the same way about those people’s values. In the final chapter, we examine more fully the nature of bias and impartiality in law. If biases and values are psychological feelings or beliefs about right and wrong, then legal reasoning cannot eliminate them, but we will see that judges can act impartially nevertheless.

The value of giving sincere reasons to justify our choices that have serious consequences for the lives of others has been woven into our political culture and lore from the beginning. In the Declaration of Independence, Thomas Jefferson, claiming inherent equality between Americans and the British, concluded that “a decent respect to the opinions of mankind requires that they [the Americans, who were abruptly proclaiming their divorce from the British Crown] should declare the causes which impel them to the separation.” In effectively explaining “the causes” that lead a judge to rule for one person and against another, the impartial judge will persuasively harmonize, or coherently fit together, the four elements described in this chapter. The examples of both impartial (good) and partial (bad) legal reasoning presented in chapters 2–5 prepare the way for the more complete development of this idea in chapter 6.

Impartiality is a critical component of good judging anywhere, in sports or politics or life itself, but it does not eliminate the tragic element in law. In Martha Nussbaum’s *The Fragility of Goodness*, we learn that tragic situations exist whenever circumstances pull people in two inconsistent but equally good directions at once. Imagine yourself having to decide the case of the conjoined twins, and you will feel its inherently tragic nature. Immanuel Kant believed, as Nussbaum puts it, “that objective practical rules be in every situation consistent, forming a harmonious system like a system of true beliefs.” Nussbaum (and most contemporary moral philosophers), however, rejects Kant’s claim that an internally consistent structure of rules can eliminate the need to make tragic choices in life. Think of all the tragic consequences that even the routine award of child custody in a contested divorce case can have on the parent denied custody, and perhaps on the child. Impartiality requires judges to persuade us that they have reached, if not

the better result, at least a good one. But if judges deny the tragic choices in a case by pretending there is an easy answer, they will not persuade us to trust their exercise of power over us. We will know better, because we know from Greek mythology and from our own experience that we often cannot do right without doing wrong. Legal reasoning matters because, done well, it helps communities acknowledge that something is necessarily and unavoidably lost whenever a judge has to choose between competing values, commitments, and principles that we all share. As Nussbaum writes, “If we were such that we could in a crisis dissociate ourselves from one commitment because it clashed with another, we would be less good.”³³

ILLUSTRATIVE CASE

Each chapter ends with an illustrative case that gives you a chance to apply what you have learned to an example of legal reasoning. After presenting each case, we pose questions that will help you identify the four legal reasoning elements in its majority and dissenting opinions. (Routine embedded citations and footnotes have been omitted without ellipses in all illustrative cases.)

Prochnow v. Prochnow
Supreme Court of Wisconsin
80 N.W.2d 278 (Wis. 1957)

A husband appeals from that part of a decree of divorce which adjudged him to be the father of his wife’s child and ordered him to pay support money. The actual paternity is the only fact which is in dispute.

Joyce, plaintiff, and Robert, defendant, were married September 2, 1950, and have no children other than the one whose paternity is now in question. In February 1953, Robert began his military service. When he came home on furloughs, which he took frequently in 1953, he found his wife notably lacking in appreciation of his presence. Although he was home on furlough for eight days in October and ten in December, after August 1953, the parties had no sexual intercourse except for one time, to be mentioned later. In Robert’s absence, Joyce had dates with a man known as Andy, with whom she danced in a tavern and went to a movie, behaving in a manner which the one witness

33. Martha Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (New York: Cambridge University Press, 1986), 31 and 50.

who testified on the subject thought unduly affectionate. This witness also testified that Joyce told her that Robert was dull but that she and Andy had fun. She also said that a few days before Friday, March 12, 1954, Joyce told her she had to see her husband, who was then stationed in Texas, but must be back to her work in Milwaukee by Monday.

On March 12, 1954, Joyce flew to San Antonio and met Robert there. They spent the night of the 13th in a hotel where they had sex relations. The next day, before returning to Milwaukee, she told him that she did not love him and was going to divorce him. Her complaint, alleging cruel and inhuman treatment as her cause of action, was served on him April 8, 1954. On September 16, 1954, she amended the complaint to include an allegation that she was pregnant by Robert and demanded support money.

The child was born November 21, 1954. Robert's letters to Joyce are in evidence in which he refers to the child as his own. He returned to civilian life February 13, 1955, and on February 18, 1955, answered the amended complaint, among other things denying that he is the father of the child born to Joyce; and he counterclaimed for divorce alleging cruel and inhuman conduct on the part of the wife.

Before trial, two blood grouping tests were made of Mr. and Mrs. Prochnow and of the child. The first was not made by court order but was ratified by the courts and accepted in evidence as though so made. This test was conducted in Milwaukee on March 21, 1955. The second was had in Waukesha [on] September 29, 1955, under court order. The experts by whom or under whose supervision the tests were conducted testified that each test eliminated Robert as a possible parent of the child. An obstetrician, called by Robert, testified that it was possible for the parties' conduct on March 13, 1954, to produce the full-term child which Mrs. Prochnow bore the next November 21st. Mrs. Prochnow testified that between December 1953 and May 1954, both inclusive, she had no sexual intercourse with any man but her husband. . . .

BROWN, JUSTICE.

The trial judge found the fact to be that Robert is the father of Joyce's child. The question is not whether, on this evidence, we would have so found: we must determine whether that finding constituted reversible error.

Section 328.39 (1) (a), Stats., commands:

Whenever it is established in an action or proceeding that a child was born to a woman while she was the lawful wife of a specified man, any

party asserting the illegitimacy of the child in such action or proceeding shall have the burden of proving beyond all reasonable doubt that the husband was not the father of the child. . . .

Ignoring for the moment the evidence of the blood tests and the effect claimed for them, the record shows intercourse between married people at a time appropriate to the conception of this baby. The husband's letters after the child's birth acknowledge it is his own. The wife denies intercourse with any other man during the entire period when she could have conceived this child. Unless we accept the illegitimacy of the baby as a fact while still to be proved, there is no evidence that then, or ever, did she have intercourse with anyone else. The wife's conduct with Andy on the few occasions when the witness saw them together can justly be called indiscreet for a married woman whose husband is absent, but falls far short of indicating adultery. Indeed, appellant did not assert that Andy is the real father but left that to the imagination of the court whose imagination, as it turned out, was not sufficiently lively to draw the inference. Cynics, *among whom on this occasion we must reluctantly number ourselves* [emphasis added], might reasonably conclude that Joyce, finding herself pregnant in February or early March, made a hasty excursion to her husband's bed and an equally abrupt withdrawal when her mission was accomplished. The subsequent birth of a full-term child a month sooner than it would usually be expected if caused by this copulation does nothing to dispel uncharitable doubts. But we must acknowledge that a trial judge, less inclined to suspect the worst, might with reason recall that at least as early as the preceding August, Joyce had lost her taste for her husband's embraces. Divorce offered her freedom from them, but magnanimously she might determine to try once more to save the marriage: hence her trip to Texas. But when the night spent in Robert's arms proved no more agreeable than such nights used to be[,] she made up her mind that they could live together no more, frankly told him so and took her departure. The medical testimony concerning the early arrival of the infant does no more than to recognize eight months of gestation as unusual. It admits the possibility that Robert begat the child that night in that San Antonio hotel. Thus, the mother swears the child is Robert's and she knew, in the Biblical sense, no other man. Robert, perforce, acknowledges that it may be his. Everything else depends on such reasonable inferences as one chooses to draw from the other admitted facts and circumstances. And such inferences are for the trier of the fact. Particularly, in view of Sec. 328.39 (1) (a), Stats., *supra*, we cannot agree with appellant that even with the blood tests left out of consideration,

the record here proves beyond a reasonable doubt that Joyce's husband was not the father of her child.

Accordingly we turn to the tests. The expert witnesses agree that the tests excluded Mr. Prochnow from all possibility of this fatherhood. Appellant argues that this testimony is conclusive; that with the tests in evidence Joyce's testimony that she had no union except with her husband is insufficient to support a finding that her husband is the father. . . . But the Wisconsin statute authorizing blood tests in paternity cases pointedly refrains from directing courts to accept them as final even when they exclude the man sought to be held as father. In its material parts it reads:

Sec. 325.23 *Blood tests in civil actions.* Whenever it shall be relevant in a civil action to determine the parentage or identity of any child, . . . the court . . . may direct any party to the action and the person involved in the controversy to submit to one or more blood tests, to be made by duly qualified physicians. Whenever such test is ordered and made the results thereof shall be receivable in evidence, but only in cases where definite exclusion is established. . . .

This statute does no more than to admit the test and its results in evidence—there to be given weight and credibility in competition with other evidence as the trier of the fact considers it deserves. No doubt in this enactment the legislature recognized that whatever infallibility is accorded to science, scientists and laboratory technicians by whom the tests must be conducted, interpreted, and reported retain the human fallibilities of other witnesses. It had been contended before this that a report on the analysis of blood is a physical fact which controls a finding of fact in opposition to lay testimony on the subject, and the contention was rejected. . . . When the trial judge admitted the Prochnow tests in evidence and weighed them against the testimony of Mrs. Prochnow he went as far in giving effect to them as our statute required him to do. Our opinions say too often that trial courts and juries are the judges of the credibility of witnesses and the weight to be given testimony which conflicts with the testimony of others for us to say that in this case the trial court does not have that function. . . .

The conclusion seems inescapable that the trial court's finding must stand when the blood-test statute does not make the result of the test conclusive but only directs its receipt in evidence there to be weighed, as other evidence is, by the court or jury. We hold, then, that the credibility of witnesses and the weight of all the evidence in this action was for the trial court, and error

cannot be predicated upon the court's acceptance of Joyce's testimony as more convincing than that of the expert witnesses.

Judgment affirmed.

WINGERT, JUSTICE (DISSENTING). With all respect for the views of the majority, Mr. Chief Justice Fairchild, Mr. Justice Currie, and the writer must dissent.

In our opinion the appellant, Robert Prochnow, sustained the burden placed upon him by Sec. 328.39 (1) (a), Stats., of proving beyond all reasonable doubt that he was not the father of the child born to the plaintiff.

To meet the burden, appellant produced two classes of evidence, (1) testimony of facts and circumstances, other than blood tests, which create grave doubt that appellant is the father, and (2) the evidence of blood tests and their significance, hereinafter discussed. In our opinion the blood[-test] evidence should have been treated as conclusive in the circumstances of this case.

Among the numerous scientific achievements of recent decades is the development of a method by which it can be definitely established in many cases, with complete accuracy, that one of two persons cannot possibly be the parent of the other. The nature and significance of this discovery are summarized by the National Conference of Commissioners on Uniform State Laws, a highly responsible body, in the prefatory note to the Uniform Act on Blood Tests to Determine Paternity, as follows:

In paternity proceedings, divorce actions and other types of cases in which the legitimacy of a child is in issue, the modern developments of science have made it possible to determine with certainty in a large number of cases that one charged with being the father of a child could not be. Scientific methods may determine that one is not the father of the child by the analysis of blood samples taken from the mother, the child, and the alleged father in many cases, but it cannot be shown that a man is the father of the child. If the negative fact is established it is evident that there is a great miscarriage of justice to permit juries to hold on the basis of oral testimony, passion, or sympathy, that the person charged is the father and is responsible for the support of the child and other incidents of paternity. . . . There is no need for a dispute among the experts, and true experts will not disagree. Every test will show the same results. . . .

[T]his is one of the few cases in which judgment of court may be absolutely right by use of science. In this kind of a situation it seems intolerable for a court to permit an opposite result to be reached when

the judgment may scientifically be one of complete accuracy. For a court to permit the establishment of paternity in cases where it is scientifically impossible to arrive at that result would seem to be a great travesty on justice. (Uniform Laws Annotated, 9 Miscellaneous Acts, 1955 Pocket Part, p. 13.)

In the present case the evidence showed without dispute that the pertinent type of tests were made of the blood of the husband, the wife, and the child on two separate occasions by different qualified pathologists, at separate laboratories, and that such tests yielded identical results, as follows:

	3/17/55	9/29/55
	Blood types	
Robert Prochnow (Husband)	AB	AB
Joyce Prochnow (Wife)	O	O
David Prochnow (Child)	O	O

There is no evidence whatever that the persons who made these tests were not fully qualified experts in the field of blood testing, nor that the tests were not made properly, nor that the results were not correctly reported to the court. . . .

Two qualified experts in the field also testified that it is a physical impossibility for a man with type AB blood to be the father of a child with type O blood, and that therefore appellant is not and could not be that father of the child David. Both testified that there are no exceptions to the rule. One stated[,] "There is no difference of opinion regarding these factors amongst the authorities doing this particular work. None whatsoever." The evidence thus summarized was not discredited in any way and stands undisputed in the record. Indeed, there was no attempt to discredit it except by the wife's own self-serving statement that she had not had sexual relations with any other man during the period when the child might have been conceived. . . .

QUESTIONS ABOUT THE CASE

1. This case requires the Court to interpret several statutes. Which are they? The case also involves a procedural rule that differentiates the work of appellate courts from that of trial courts. What is that rule?
2. Which factual assertions about this dispute did the trial court accept as proved? Which factual assertions did it reject?

3. What are the social background facts at issue here? What choice did the appellate court have to make about social background facts in order to decide this case?³⁴
4. Does not the majority's decision to reject the conclusive proof of the blood tests rest on some value choices? What values do you think are involved in this case? Does the Court articulate them? Does this decision depend on a religious conviction that God can always alter nature if God wishes? Or might the Court have believed that, in the interest of giving the child any father at all, it was best to assign paternity to Robert despite science?³⁵
5. Why was the law ambiguous in this case?
6. Do you find that the majority or the dissenting opinion does a better job of legal reasoning? Why?
7. How does this opinion change the law? That is, if the dissent had prevailed in this case, how would the reading of the rules of law at issue in this case change?

34. Hint: don't discount the social background fact that medical practitioners make mistakes. In 1995, a Harvard School of Public Health research team studying two well-regarded Boston hospitals found 334 errors in drug delivery to patients over a six-month period. "Drug Errors Found to Be Common in Hospitals," *New York Times*, July 6, 1995.

35. A twenty-first-century Massachusetts case may offer a clue to the *Prochnow* court's thinking. The Massachusetts Supreme Judicial Court rejected a man's motion to be released from paying child support to his seven-year-old daughter after DNA tests revealed several years after her birth that the man was not in fact the father of the child. The court reasoned that "Cheryl's" interest in having the "legal rights and financial benefits of a parental relationship" outweighed the man's interests, particularly because he had delayed contesting a paternity agreement for several years. *In Re Paternity of Cheryl*, 746 N.E. 2d (Mass. 2001). Most state courts, faced with a wave of DNA-based lawsuits, have ruled similarly, fearing the consequences of leaving children "fatherless." Kathleen Burge, "SJC Says Fatherhood Goes Past DNA Test," *Boston Globe*, April 25, 2001.