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JUDICIAL METHOD AND THE CONCEPT OF REASONING*

THOMAS D. PERRY**

I

THE puzzle over judicial reasoning that has been haunting legal theory for two or three generations is typically and acutely philosophical. It arises from a conflict between two beliefs, both of which we wish to retain, and between which no empirical inquiry can apparently enable us to choose. People who have any close familiarity with law are likely to have high respect for the arguments of able judges and to feel that their work is eminently a work of reasoning. It seems to be reasoning not only in the sense in which any good craftsman can be said to reason as he selects and manages the materials of his craft to gain a certain end or make a certain product, but also in the sense that here the product itself is reasoning. A good judge produces arguments that cannot be denied the title of rational justifications of the judgments he renders. And yet, we must face up to the fact that many cases apparently have no uniquely correct decision under the law, even though it is just such a decision that we expect the judges to reach and which they almost always claim to reach. If we keep in mind the requirements of valid argument in other intellectual activities where reasoning is better understood than it is in law, it seems that our conviction about the rationality of judicial argument cannot be sustained. If it really is possible, as it often seems to be, for a judge to obtain either of two contrary results from the materials he has to work with—that is, from the existing body of law and the facts of the case before him—and if the judge is required, and claims, to render *the* legally correct decision, then how can his reasoning be valid? And how can the law be said to provide a rational system of controls? If it is legally possible for different judges to justify contrary dispositions of one and the same case, then isn't legal reasoning sham reasoning?

There are several main types of response to a philosophical problem, and most of them find familiar illustrations in the writings of legal scholars and philosophers on this problem. First there is the way of scepticism; we can simply give up one of our beliefs: here, perhaps, our belief in the rationality of the judicial process. If we have a taste for intellectual radicalism, we may choose this alternative straight off. But if we are really torn by the problem, that response will have little appeal, and we may try to show that one of the clashing beliefs is after all false. In the present problem, we might try to show that it *is* always possible to identify a uniquely correct decision. We might try

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to show this not mainly through an empirical inquiry but by an improved *analysis* of the judging process with which we are already well acquainted. For this approach to succeed, it obviously is not necessary to show that judges always manage to identify and render the one correct decision, or even that the ablest judges will be able to do so with any great assurance in the more difficult sorts of cases. It is enough if we can show that "in theory" or "in principle" it is always, or nearly always, possible for them to do so.

If such an analysis should not succeed, still another approach to a philosophical problem is to try to show that the conflict is illusory. By getting clearer on the concepts involved, we may be able to show that the beliefs they were used to express are not incompatible after all. In the present problem, one might try to show that the unavailability of a uniquely correct result under the law does not necessarily preclude the giving of a rational legal justification for some result which the court does reach. Perhaps it was only a distortion or misapprehension of relevant concepts—here, perhaps, the concept of justification—which made us think the two things were incompatible. This way of attacking and getting rid of philosophical problems has had many champions during the past couple of decades; while their earlier ambitions for it were rather extravagant, it just might be a good approach to *some* problems including this one. But if it fails us, a further alternative is to make some *adjustment* in our concepts which will enable us to retain something *like* both of the conflicting beliefs. Many classical philosophers have taken the route of conceptual revision, although their reconstructions have sometimes been as radical and paradoxical as the first approach mentioned, that of simply rejecting one of our cherished beliefs. Perhaps the most famous example is Berkeley's idealism, in which our claim to have knowledge of physical objects is saved by rejecting the idea of an external world. In order to be worthwhile, a solution of this sort should therefore involve only a *mild* conceptual adjustment, one that is relatively easy to get used to and, more important, that does not sacrifice other important intellectual needs. If we are not able to produce such an economical adjustment of concepts to solve our dilemma, then we may have to admit in all honesty that some cherished and apparently true belief is actually false. Even common sense undergoes change, and some parts of common sense were themselves only first acquired via this painful route. In the present problem, this would be to admit that the judicial process does not involve a rational method of justification, at least not in a good many cases.

This paper examines each of these responses to the problem of judicial reasoning in the order just given, with the hope of finally arriving at a response that will solve it.

II

The first response is not really available to anyone for whom this problem is a live or serious one. Those who can adopt the sceptical or debunking view of

judicial reasoning without trying out any of the other approaches that I have mentioned have perhaps never had to learn to follow legal arguments and make some of their own, or at any rate they have not been impressed by legal arguments. This paper will be of little interest to such people because it is addressed to a problem which they do not really have, although it may be possible that they ought to have it, that they ought to have been impressed by the rationality of a Cardozo or Holmes or Learned Hand, or of a hundred other skillful practitioners of the judge's art. If we are going to hold that legal reasoning is sham reasoning it will only be at the end of our inquiry, not at the beginning.

The second approach attempts to show that, contrary to the opinion of most legal scholars, the law always or nearly always does determine a uniquely correct decision. Those who try to demonstrate this approach, sometimes begin by asserting that at least it is true of the vast majority of cases; accordingly the problem can be confined to a small number of very difficult cases in which we know that competent judges can very well disagree. But this is very doubtful. Certainly there are myriads of easy legal *questions*; but what of litigated *cases* in which the parties think enough of their arguments and chances in court to risk the expense of bringing or defending an action? Of course, there are easy *parts* of almost any case: subsidiary legal questions on which no one is in doubt as to the correct answer. But the principal issues will more likely be *problematic* legal questions, if they are legal questions at all. There are many cases that are primarily or exclusively disputes over questions of fact, over "what actually happened" between the parties. In such cases, there will be hardly any need for legal argument at all: no reasoning will be involved other than a simple and obvious rule application once the facts of the case have been determined. For one thing, it is a rare case in which the parties can agree to stipulate the applicable law. Moreover, it is often hard to draw a clear line between questions of law and fact; matters are further complicated in that certain questions that are both factual and legal in character can never be separated into their factual and legal components for decision but must be left to a general verdict. Thus, while we have to admit that there are such things as very easy legal cases which clearly have but one permissible decision under the law once we have been given some definite statement of the facts, this takes us very little distance toward establishing the thesis that all or nearly all cases have such decisions.

But someone arguing for that thesis will rightly point out that a case may very well have but one permissible decision even though it is not a "very easy" case. In the very easy case we have a situation in which almost any competent lawyer would recognize that a certain authoritative rule fits the salient facts of the case, and that there appears to be no reason why it should not be applied. But one could imagine a second type of case involving a complex of rules or other legal standards that seem at first to lead to two or more contrary decisions,

but on which a similar widespread agreement as to the proper outcome might be expected among lawyers who are competent in the field(s) of law concerned. If they had sufficient opportunity to reflect on the case and had no personal interest in its outcome, they would be able to sort out the several applicable standards and recognize the legally correct procedure or priority for applying them, and the resulting disposition of the case. A case of this type might also involve questions of classification—of correctly identifying the standards that are applicable in the first place—but none on which a trained lawyer would be very long in doubt. This is the type of case that bar examiners will mainly want to set, although they may also put some questions of the first sort which only test the candidate's memory of rules and his ability to recognize simple fact situations in which they individually apply.

There are still more difficult cases which involve a *genuine* conflict between applicable rules or other standards, i.e. a conflict that cannot be relieved by invoking recognized exceptions to one or more rules, or some definite priority for their application which the law somehow makes clear. Equally difficult is the sort of case in which *no* existing rule seems to indicate how the case should be decided, even though it is accepted as a judicable case, a "justiciable" controversy. As to these sorts of cases, it is a good deal more difficult to defend the thesis that the law nevertheless provides a uniquely correct decision. In deciding them, it seems that the judge is forced to "legislate," to revise existing standards or to devise a new standard. Or, he must at least ignore one of the applicable standards, in effect authorizing and using a new exception to it. Still other apparent instances of judicial legislation occur when the judge undertakes to revise existing law not because it is silent or inconsistent with respect to the case at hand, but because it would require a decision that he regards as grossly unjust and somehow within his official competence to avoid.

It can be argued, however, that even in these situations there may still be but one correct decision under the law. Even though the relevant rules are in conflict, or fail to make any provision for the case, or yield a grossly unjust result, there may still be other standards of law that indicate clearly enough how the judge ought to proceed in this creative phase of his work. These are very general "principles" and "policies" of law that are reflected in many specific rules, or frequently announced in the judicial literature. While they function as guides rather than as strict norms of decision, so that a case in which a certain principle is relevant will not necessarily be decided in the way that principle would tend to indicate, still the total effect or preponderance of such general standards in a given case might clearly indicate how the applicable rules ought to be revised or supplemented in that case. Thus the law itself, in the form of legal principles and policies, and standards of good judicial technique, may be said to determine the best or correct way to decide even this third type of case.¹ It appears that we would usually have trouble

1. For a rather similar but more fully developed argument, see Dworkin, *Judicial*

deciding whether a difficult case which we thought had but one correct decision should be assigned to this ideal type or to the preceding one. But I suspect that one could find some plausible illustrations of it, especially among cases in which a court has rather plainly made a *mistaken* decision by *failing* to modify some accepted rule formulation or to rationalize the precedents suitably. Of such a case, we are apt to say that the judge applied these standards "unimaginatively" or "mechanically," and if we were asked to say precisely what we meant by this, we would find ourselves invoking some wider objectives or values in the law which could and should have guided the judge to the result we prefer.

But we must ask ourselves how a case of this third type could be identified beyond doubt. If we can say that there is but one legally correct theory and result in a case where logically applicable norms are in conflict, or where there is serious doubt as to which competing norm does logically apply, is it not because the great majority of competent and disinterested lawyers would find a certain argument from principles and policies convincing in that case? If we are to speak of uniquely correct decisions in such cases, the notion of a consensus of competent lawyers seems indispensable. Of course, even in speaking of the easiest sort of rule application we presuppose the notion of competence to apply a general rule or classification to a concrete subject matter. Rules do not apply themselves, as it were, except in purely analytic studies. Someone must recognize that these and only these facts of the case are the salient ones—every case having many factual aspects that are legally irrelevant—and that *therefore* such and such a rule is relevant to it. But this kind of presupposition becomes far more obvious and important when we move away from semi-automatic rule applications in cases of type one and toward the application of "principles" and "policies" in cases of type three. Since these "guiding" standards are very numerous and various and likely to conflict, someone must decide which of them are really significant for the case—more than "barely relevant"—and which of *these* are entitled to greater weight when they tend toward contrary results. Here we really have a second presupposition of a second sort of competence, namely the ability to "weigh" or evaluate competing standards "correctly." So, even apart from the requirement that the concrete case should be properly classified and correctly related to all of the existing standards, it still would not make sense to speak of legal principles and policies as *by themselves* entailing one and only one revision of the more specialized rules, and one and only one decision of the case. Even if all the principles and policies and rules that are relevant to a given case were identified, it could not be seriously maintained that there exists in the law the sort of conceptual

Discretion, 60 JOURNAL OF PHILOSOPHY 624-38 (1963) and *The Model of Rules*, 35 U. CHI. L. REV. 14-46 (1967-68). For some interesting points on how a principle or policy may be said to be part of the law even though it draws upon extra-legal standards or values, see Sartorius, *The Justification of the Judicial Decision*, 78 ETHICS 171-87 (1967-68), especially sections II and III of his paper.

apparatus that is required for such an entailment. Will anyone claim that there is a general legal standard for assigning specific and commensurate weights or degrees of importance to each and every principle and policy and rule and precedent in each and every concrete case? And can anyone believe that there is a standard calculus implicit in the law for then obtaining the uniquely correct revision of specialized standards?² In the absence of such apparatus, it seems clear that by a uniquely correct evaluation of this sort we can only mean the one in which all, or most of the competent and disinterested lawyers in the field or fields of law concerned would concur. In summary, we could only *know* that a case involving conflicting or doubtfully applicable legal standards has a uniquely correct result by knowing that the experts do or would agree on some particular result for that case.

It is practically certain that there are many difficult cases on which there would be no such consensus. If this is so, then it follows that there can be no way to identify the uniquely correct or best decision in such cases, and very little point in even speaking of such a decision in such cases. I leave it to students of the law to say whether there is not a serious division of expert opinion on many cases which involve a sharp conflict of legal standards or a problem as to which of the competing standards the case is to be brought under. I have little doubt of their answer. And so we have a fourth type of case in which neither the law nor a consensus of experts can serve to identify the correct decision. Thus I think the second approach to our problem must fail. For while the foregoing argument may offer some assurance against the most extreme scepticism in legal theory which claims that *no* case ever has a uniquely correct decision, it is the reasoning of the judges in more difficult cases, after all, on which the problem turns. In *many* difficult cases, it would appear, there is no uniquely correct decision.³

2. In his paper cited in note 1, Sartorius has clarified these difficulties and tried to suggest a method of coping with them. It is a method similar to the general method of scientific and ethical justification suggested by Scheffler in his *Justification and Commitment*, 51 THE JOURNAL OF PHILOSOPHY 180-90 (1954), which in turn is indebted to some well known theories of Pierre Duhem and W. V. Quine. In Sartorius' version, it is a method of maximally preserving "judicial obligations," *i.e.*, precedents, rules, principles, policies, etc. —all the bits and pieces of the existing materials of the law which it is the judge's duty to preserve and apply in virtue of his office. The correct decision in any case would be "that decision which would cohere best with that standard system of decisions, rules, principles, etc. which achieves a maximal degree of correspondence to the members of the general class of judicial obligations." Sartorius, *supra* note 1, at 183. With this type of method, the details of which cannot be repeated here, Sartorius claims to dispense with the need for a universal substantive standard or "supreme political or moral principle" for adjudicating among competing principles and policies. Sartorius, *supra* note 1, at 183. But he does not claim to be explicating any existing method in law and, along with certain other difficulties which he mentions, he admits that it would be "most difficult" to construct "some sort of *comparative measure* of the relative weights of particular commitments." Sartorius, *supra* note 1, at 184.

3. It would be easy to list a great many reported cases in which the relevant precedents, rules, principles and policies that can be cited for opposite ways of deciding the case seem to strike a rough balance. But in view of the suggestion considered in the text that a more refined, legally authoritative evaluation can definitely award the decision to one side or the other even in such apparent "toss up" cases, we needed a general argument rather

III

What about the third type of response to our problem, then? Can we "dissolve" this puzzle and get rid of our anxiety about the rationality of the judicial process, perhaps by showing that they grow out of some conceptual error and vanish when that error is pointed out? There is one prominent strain or tendency in recent legal theorizing which can perhaps be taken as such a

than a long list of doubtful cases to show that this is *not* always possible. It is difficult to cite reported cases cleanly illustrating any one of the three types in which, as the argument concedes, a uniquely correct result is possible. This suggests to me, not that the three types are inappropriate tools of analysis, but that the percentage of cases that are law-determined in their substantive outcome is considerably *lower* than the three-of-four ratio suggested by the four types. I think they are appropriate tools because they spell out in a rough but orderly way what we *mean* by a law-determined case; they summarize the ways in which a case *could* have a uniquely correct decision under the law.

The four types and the outcome of the argument in the text might be illustrated with *Mazzolini v. Mazzolini*, 168 Ohio St. 357, 155 N.E.2d 206 (1958), a case I came across in Zelermyer's primer, *THE PROCESS OF LEGAL REASONING* (1963). A husband, suing for an annulment of his marriage to his first cousin, cited a statute which read:

Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage.

The couple were residents of Ohio; this was an Ohio statute; and the suit was brought in an Ohio court. If this were all the pertinent law and facts of the case, it would be of type 1. But the couple were actually married in Massachusetts, and another rule of Ohio law provided that the validity of a marriage shall be determined by the law of the place where it is contracted. Under Massachusetts law, there was no impediment to marriages of first cousins. However, the Massachusetts law also forbade and declared void any marriage in which one of the parties is a resident of another state and intends to continue to reside there, if the marriage would be void if contracted in such other state. Mr. Mazzolini, a widower and long-time resident of Ohio, had gone to Massachusetts, married his cousin and then returned to live with her in Ohio. If *these* were all the facts and law in the case, we could classify it as type 2. By an easy chain of reasoning, the Ohio court is again brought back to the Ohio statute originally cited, and it shows that this marriage would have been void if contracted in Ohio. Thus it was void under Massachusetts law. Thus the Ohio court will declare it void because it is void under the law of the place where it was contracted. But actually there were other relevant provisions of law. For instance, there was the fact that "common law marriages" had been recognized in Ohio; also, the Ohio criminal statutes did *not* make sexual relations between "cousins" incestuous. Attention was also drawn to the words in the statute, "may be joined in marriage," which suggest that the reference is to ceremonial marriages. Thus a doubt is raised that this couple *could* have become legally married in Ohio. And this in turn makes relevant some general principles or policies of the law favoring the validity of existing marriages unless their invalidity is clearly and unequivocally shown. In this connection, the court went so far as to cite out-of-state cases holding that even a marriage forbidden by statute will not be declared void unless the statute expressly says it is; instead it will be held to be "voidable." In view of these latter considerations and the ambiguity of the statute when read against the full context of the case, the court refused to declare the marriage void and grant the annulment. This might be offered as an illustration of type 3. Three of the seven judges disagreed with this result, however. They cited such points as that the hypothesis of this couple getting married in Ohio would contemplate a ceremonial marriage such as they actually had in Massachusetts, and not a common law bond. They thought, moreover, that the Ohio statute in any case forbids and invalidates all marriages contracted between first cousins.

Now, suppose that no other legal or factual considerations (e.g., the legislative history of the statute) were deemed relevant by either party or any of the judges. My point then is that there apparently is nothing else in the law from which it can be determined whether the majority or the minority were right. Perhaps the bulk of lawyers expert in the law of "domestic relations" would vote for one side against the other; I have no idea whether they would or not. But that would be the only sense in which the case could be held to have but one correct decision.

response. There are different standards or models of justificatory reasoning which are appropriate to different fields of argument. The law, after all, may have its own standard. In stating the problem at the outset of this paper, perhaps I was mistakenly holding judicial argument up to the standards of valid deduction. While deduction unquestionably has a role to play in legal argument, perhaps there is some non-deductive standard of reasoning which is fundamental for legal arguments, at least in cases where the law provides no clearly controlling standard from which one and only one decision can be deduced.⁴ This suggestion is reminiscent of certain offers to "dissolve" the traditional problem of induction. Not only do we all *inevitably* make many inductive inferences every day, as Hume pointed out when first formulating that problem, but more and more philosophers are coming to accept the view that induction (or rather, scientific induction) is itself a separate standard of rationality that is independent of deduction and basic for its own field, namely, for the formation and defense of beliefs about unobserved facts and about general facts or laws of nature. In this view, the failure of an inductive inference to satisfy deductive standards (the origin of the traditional problem) is really of no consequence. The tendency today is to drop the traditional problem and turn to the so-called "new problem of induction," i.e. the problem of working out the particular methods of induction that can be regarded as sound, and then beginning to build up a systematic account of such methods that will enable us to determine the absolute and comparative strengths of inductive arguments in a precise way.⁵ Similarly, it might be thought that once philosophers of law have recognized that the deductively inconclusive arguments given by able judges in cases of type four are what we *mean* by good reasoning *in law*, they can give up worrying about the bogus question of the rationality of such arguments in general and turn to more useful studies of particular modes of argument, and *why* they are regarded as professionally acceptable or unacceptable. After all, every kind of judicial legislation or creativity is no more acceptable than is every kind of inference from observed to unobserved facts or laws of nature. Just as inductive logicians have already made some progress in clarifying, explaining and even improving the intuitive standards of science and common sense, so the legal methodologist might hope to perform a similar service for lawyers and judges.⁶

4. Perhaps the best known work in this vein is S. Toulmin's *THE USES OF ARGUMENT* (1958).

5. Some leading works are N. GOODMAN, *FACT, FICTION AND FORECAST* (1955); G. H. VON WRIGHT, *A TREATISE ON INDUCTION AND PROBABILITY* (1960); R. CARNAP, *LOGICAL FOUNDATIONS OF PROBABILITY* (1962); W. C. SALMON, *THE FOUNDATIONS OF SCIENTIFIC INFERENCE* (1966). For an introductory discussion, see B. SKYRMS, *CHOICE & CHANCE* (1966).

6. Chaim Perelman and his collaborator, Mme. Olbrechts-Tyteca, began to do something roughly similar to this by examining various techniques of argument in law, morals and politics. See their *TRAITÉ DE L'ARGUMENTATION* (1958). More detailed studies of the "logic" of legal argument have recently been made by a group of (mostly) European scholars including Perelman. See *LES ANTINOMIES EN DROIT* (C. Perelman ed. 1965) and

As it stands, this response to our problem is clearly inadequate. The weakness of the "paradigm case argument" in other areas of philosophy is now a familiar story. As various people have pointed out about the corresponding argument for the rationality of induction, a similar argument could be given for astrological reasoning or for contra-scientific induction. Suppose we discovered a group of people who informed us truthfully that believing the astrologer is what *they* meant by being rational in their expectations of the future. If we accept the foregoing type of argument, we would have to concede that these people were being rational in forming their expectations in such a way. Or, more precisely, we would be in a poor position to claim that it is better to be rational in our sense than in their sense.⁷ As those who advance that argument for induction point out, it would be silly to ask for the justification of a basic standard of rationality in terms of another standard proper to some independent field of reasoning. But if we claim that two standards are both standards of reasoning, and that the word "reasoning" is more than a homonym here, then we ought to be able to give a more fundamental account of both of them, showing some more general traits which they have in common. Such an account might include what philosophers have called pragmatic "vindications" of the several basic standards, demonstrations of their usefulness, even though there could be no "justification" of them in terms of some more fundamental standard of justificatory reasoning. Only in such a way, it seems, could we test the heuristic worth of what we commonly *say* is good reasoning. In the present problem, we would need to investigate the relation between existing judicial methods and the concept of justificatory reasoning. We would have to try to spell out the existing standard for good decision-making and justificatory argument in law, and then try to see whether the notion of *rationaly adequate* justification applies to it. If we found that it does apply, then we might also be in a position to pin-point the cause of our initial mistaken impression that it does not apply. Let us try to see what can be done along this line. And let us first clarify the sort of method that is involved in making and justifying decisions in cases of type four where there is no uniquely correct decision, for that is where our problem lies. We can get a general outline of judicial method, and locate the treatment of type four in that outline, by considering our foregoing typology of cases along with some familiar requirements of the good judge and good judicial work.

While there is an important methodological distinction between type four and the other types, we should be aware at the outset of certain characteristics which they all share. It might be thought that in the easier types of cases a deductive method will suffice, whereas in type four, and probably in type three,

LE PROBLEME DES LACUNES EN DROIT (C. Perelman ed. 1968). Of course, there is every good reason to pursue such studies without waiting for a solution to the broader conceptual problem dealt with in the present paper.

7. Cf. SKYRMS, *supra* note 5, at 43-48.

it will not. But this is a misleading over-simplification. Actually, in *none* of the four types of cases can the judicial method be purely deductive, and in *all* of them there will be a simple deductive element in the justification. Even in the simplest of the four types there is the pre-deductive step of *selecting* the premises: the legally relevant facts of the case and the controlling standard. We are apt to overlook this step with regard to routine rule applications, i.e. cases of type one, just because the choice is there so automatic or unproblematic. Such a selection must be made in types two and three as well, and there we have such further pre-deductive steps as identifying the existing exceptions and priorities of the relevant rules in type two, and identifying and weighing the relevant legal principles and policies in type three. It is only after the controlling standard has thus been identified or shaped that the decision of the case (or more precisely, the legal conclusion on which the decision will be based) can be deduced from that law and the facts. And the same is true in type four, the difference there being that such identification or shaping of the law will be professionally controversial or even a forthright innovation. In point of the applicability or inapplicability of a deductive method, the difference between type four and the other types might be stated more correctly as follows. In types one, two and even three, a deductive method is possible in the same sense that it is possible in other concrete subject matters. That is, we may know well enough how to classify the concrete particulars with which we are dealing; and the authoritatively applicable rules to which our classifications relate these particulars may also be clear, or they can be made clear by a more careful survey of the law. But in type four, it remains unclear which classification should be adopted or which rule should control until the court *fixes* the classification or *makes* a rule controlling by exercising the restricted legislative authority which the law gives to the court.

There are important controls upon these pre-deductive phases of the judge's work that are binding in every type of case. We can lump them all together under the heading of the "judicial temperament" or the "judicial point of view." First of all, the judge is expected to study the case carefully, including the precedents and statutes invoked by the parties as well as any other legal standards that are directly relevant, and to be attentive to all the facts of the case that might have legal significance. Second, he must be impartial; his decision must be one that he would be willing to render no matter who the parties to the case were, as long as the legally relevant facts remained the same. Third, he is supposed to disqualify himself if any interest of his own is directly involved, and he must not give any special advantage to the interests of his own social, economic or professional class, or of his own racial or religious group, and so on. A fourth and most important requirement is that the judge be sincerely rational. That is, he is not free to reach any result he pleases as long as he is able to give some legally plausible argument for it; on the contrary, he must make the decision that he honestly thinks is best, and reasons which he

sincerely regards as the best reasons he is *able* to give.⁸ While these features of the judicial method apply in every case, there are differences of emphasis as we move across the four types. That is, the judicial point of view becomes increasingly important as we move away from type one. Even in type two a biased or corrupt judge has leeway to make his argument and judgment appear at the worst legally unskilled, whereas in type one there is hardly any way that he can avoid the legally correct result without raising suspicions of dishonesty. In type three, we are even more dependent upon the satisfaction of these requirements if the correct decision is to be assured. For according to the definition of this type, lawyers who are competent, reflective and disinterested would be in substantial agreement on how the relevant standards should be reworked or supplemented and what decision should be reached. Hence, it would appear that an honest and professionally competent judge could still go wrong if he failed to study the case and the law carefully enough and in a sufficiently disinterested spirit. In type four, finally, the judicial point of view takes on its greatest importance, for there we can only intelligibly *mean* by a legally correct decision that it is not definitely incorrect and that it has been made in the way demanded by this methodic standard.

Another shift of emphasis can be seen in the different sorts of *explicit justification* that are most appropriate in the four types of cases. In type one, a mere statement of the relevant facts of the case and the controlling standard will suffice because almost any lawyer will recognize that the right standard and facts have been singled out. In type two, however, the judge would need to go farther and explain his subsumption of the case under such and such standards, as well as tracing through the system of exceptions or other reasoning that he has for accepting a certain standard as the controlling one for the case. In type three, he should give that "convincing argument from principles and policies" which justifies the new or partly new standard which he offers as the law immediately controlling this case. And in type four, the judge ought to give his reasons for settling the unsettled law, or changing the archaic law, or filling the "gaps" of the law in such and such a way. What frequently happens is that a judge will not admit to himself that it is a case of this type that he is judging, and will try to give a justification that would be appropriate in a case of type three, or even a speciously neat solution of type two. And he may be perfectly sincere in this. But as many writers—including some of our

8. As one writer puts it, "the integrity of the process in which the judge is engaged depends not only on distinctions he may make reasonably, but also on his own belief in the legitimacy and decisiveness of these distinctions." E. H. Levi, *The Nature of Judicial Reasoning*, in *LAW AND PHILOSOPHY* 266 (Sidney Hook ed. 1964). Incidentally, the fact that people claim to be entitled to "the best" decision can hardly show that there is a uniquely correct decision in every case. Cf. Dworkin, *supra* note 1, at 632-33. Such a claim might make sense most of the time but not in cases of type four. And people *are* always entitled to the decision which the judge *regards* as best. Another point: the fact that it is possible in every case to reject arguments as legally incorrect by no means implies that there is a uniquely correct argument or result in every case. MacCallum, *Dworkin on Judicial Discretion*, 60 *JOURNAL OF PHILOSOPHY* 640 (1963).

greatest judges—have urged, it would be far better for the rational development of the law if the judges could be as conscious and candid as possible concerning the extra-legal grounds on which their truly innovative decisions rest.⁹

We should also notice that the judicial method appears to have a number of underlying purposes beyond that of settling particular civil disputes and criminal accusations. The respective importance, or at least prominence, of these purposes also shifts as we move from the less to the more difficult types of cases. Thus, in type one the purpose is to see to it that the clear and controlling law is duly applied. In type two, an obvious purpose is to explain to the parties, especially to the losing party, how the law actually does dictate the result reached. In type three, a prominent purpose is to clarify, reshape and create legal standards in ways that the more general principles and policies of the law require, and of course, to explain how they do require the change which the court adopts. Finally, an outstanding purpose of the judicial method in the fourth type of case is to settle, change or supplement the existing law and to give fair and carefully considered reasons for doing so. It is evidently these background objectives of judging and opinion-writing that make different types of explicit justification appropriate in the different types of cases.

Summing up the foregoing observations, the following general method for making and justifying judicial decisions is indicated:

I. The judge should (a) survey the facts of the case that may have legal relevance, together with the legal standards that may be relevant; and (b) decide in a disinterested, impartial and sincere way which facts and standards *are* relevant, and which ones ought to control the disposition of the case.¹⁰ (Once this is done, the decision of the case follows "automatically," i.e. deductively. Step (b) is made in all four types of cases, but it requires increasing intellectual effort and skill as we move from type one towards type four.)

II. The judge should cite the controlling standard and relevant facts of the case which together entail the legal conclusion on which his decision is

9. The statement in the text needs qualifying to this extent. It often will not be obvious whether a case is of type four or not. And surely, if a judge is convinced that he has worked out the correct legal theory and result in a difficult case, then he ought to give that theory and result even if he suspects or even knows that expert opinion would be badly divided on such a case. But neither should a judge close his mind to the apparent fact that the case before him *lacks* a uniquely correct result under the law when mature study convinces him that this is so. It is then appropriate and indeed unavoidable that he rely on "extra-legal" grounds for his decision. What these grounds may be can range all the way from the judge's mere feeling or conviction that such and such legal and factual considerations in the case "are entitled to more weight" than certain others, to his disinterested forecast as to which decision would have the best consequences for the society he lives in. It depends on the case and the court.

10. This simple account applies most easily to the work of a trial judge in a non-jury case. It is subject to many qualifications for jury trials, and various complications would have to be added even for appellate decisions and opinions. Thus, "the facts" always means the facts as disclosed in the appeal record; and only certain parts of the record may be relevant; and they may have to be read or interpreted differently according to the types of law question that the appeal presents and the procedural posture of the case; and appellate decisions are usually collegial, etc.

based. Except in cases of type one where it is superfluous, the judge should also give appropriate reasons (see above) for his selection of such standard as the controlling one for the case.

III. If and only if a decision has been made in accordance with I, it is justified in sense 1.

IV. If and only if a decision and the reasons given for it are "legally correct" in the sense that the bulk of competent and disinterested lawyers would concur in them, it is justified in sense 2.

V. Decisions in cases of type four can be justified in sense 1 but not in sense 2. Decisions in the other three types of cases can be justified in both senses, and in either sense without the other.¹¹

The foregoing treatment of judicial method is, of course, brief.

I have not discussed any of the sorts of arguments on which lawyers *can* agree. I have not considered the sorts of distinctions that are held to be legitimate ones or illegitimate ones, according to the lawyer's tradition and craft, for resolving those crucial "pre-deductive" questions of classification or of conflicting standards, and by means of which the law may sometimes be said to determine *the* correct resolution of a problematic case. But I hope I have at least caught in crude outline the main distinction between the operation of the judicial method in cases of type four and its operation in the other types of cases.

IV

The next task, then, is to see how the judicial method for the fourth type of case stands in relation to the concept of justificatory reasoning. Does that concept apply to that method or not? Can we show, contrary to the impression we will probably have at the outset, that it does apply? And can we identify and explain the conceptual error giving rise to the impression that it does not? This will be necessary if we are going to make good the third approach to our philosophical problem, the so-called dissolution approach. Or more exactly, this will be required if we are to complete and render adequate the "paradigm

11. Judges will rarely if ever attempt to show that their decisions are justified in sense 1, and serious critics will fault them far less frequently on the score of judicial temperament or integrity than for alleged imperfection in their arguments. This may seem to undercut our analysis as follows. In a case of type four, there is no point in criticizing the judge's opinion if we admit that it is justified in sense 1; yet, we frequently find scholars criticizing the judges' arguments even in very difficult cases which would seem to fall into that type if any cases do. Thus, either they are seriously confused or type four is unnecessary. Apart from the fact that scholars have been confused before, this criticism overlooks several things. (1) It is perfectly possible to give *incorrect* arguments in a type four case, and scholars should point them out. (2) One scholar might think he has a convincing solution to a difficult case, while another scholar might think he has another; and there might be a serious division of opinion among scholars generally. Thus the champions of this or that theory of the case might regard it as a case of type three when it is actually of type four. (3) Even if the scholar-critic believes the case is of type four, he can still consistently and usefully criticize the court's reasoning. He may think he has a better idea for a just or more coherent development of the law in that court's jurisdiction, or in the theory of the "common" law.

case" argument for the rationality of the judicial process. The latter argument is only one possible device for trying to dissolve this problem.

In this task, I am going to assume that inductive justifications can be rationally sound, for I want to consider deduction and induction as independent paradigms of justificatory reasoning and then see whether the judicial method outlined above (speaking always of its use in cases of type four) would fall under the same concept with them or not. I could hardly be allowed this assumption if my purpose were to give a general theory of reasoning. But no one should object to it if I limit the inquiry to the question whether the judicial method is a form of justificatory reasoning *if* these others both are. Incidentally, while the concept of justificatory reasoning might conceivably be built up in some other way, I think there is ample warrant for such a procedure in the context of the present problem. For one thing, we can scarcely doubt that the deductive and inductive sciences do construct justificatory arguments that are rationally sound or adequate in their respective spheres. And our concern over the rationality of judicial argument probably stems in large measure from the recognition that, fundamentally, it does not exemplify either a deductive or an inductive form; nor is it merely a combination of such forms. It should therefore be interesting to consider whether it at least exemplifies some more general concept of rational justification which deduction and induction may also be said to exemplify.

Three questions are considered. First, what features common to deduction and induction does the judicial method share? Second, what obvious objections are there, nevertheless, to classifying it as a type of justificatory reasoning? Third, do these objections stand up under scrutiny, or do they involve some sort of conceptual mistake or distortion?

In answer to the first question, all three types of method seem to share the following important characteristics. First, in all three of them one gives reasons to support conclusions; second, in all of them this must be done in accordance with restrictive rules which discriminate between good and bad reasons; and third, these rules are vindicated by the purposes of the reasoning activity concerned. That is, they are well calculated to enable us to achieve those purposes.

The main purpose of deductive reasoning is to spell out the meaning and implications of given statements or sets of statements, be they statements of what we know, believe, guess, suspect or postulate. A rule of deductive inference will be acceptable only if it assures accuracy in such explications. We have such assurance in such a rule as *modus ponens*, for example, since its validity is directly apparent from the meaning of "If . . . , then" Similarly, the purpose of inductive reasoning is to settle on true beliefs about objective matters of fact, or at least to maximize our chances of doing so. And there is no doubt that the inductive rules of common sense and science do en-

able us to do these things. While the rules discriminating between sound and unsound inductions have not been clarified as much as the rules of deduction, and while the debate continues among philosophers as to *how* we know that the rules of either sort enable us to achieve our purposes, no one can doubt that they really do.¹²

In the judicial method, the judge gives reasons for his conclusion which consist of facts of the case and legal norms which together entail that conclusion; and he gives further reasons for choosing those norms as the controlling ones for the case. The restrictive rule here is that in offering reasons of the latter sort he can only offer those on which he has settled in a process of reflection which satisfies the requirements of the judicial point of view. If it seems a strange reasoning rule that introduces "biographical" requirements concerning the reasoner, we must be careful not to backslide into an exclusively deductive model. For there is also a biographical requirement in the basic rule for induction. Even if probability is a "logical relation" between our data and hypothesis, we are justified in taking the probability coefficient as the measure of the credibility of the hypothesis only if we have included in the data all the relevant evidence that has come into our possession to date.

Turning to the vindication of the rule for judicial reasoning, we have already seen how this rule is supported by the purposes of judicial activity. With respect to cases of type four, we saw that one purpose (beyond settling the immediate dispute) is to fix the unsettled law, or to create needed law, or to change undesirable law, and to give persuasive reasons for the way these things are done. It may be added here that it is also plainly a purpose of judicial argument in such cases to give assurances to the losing party, the profession and the interested public that full and fair attention has been paid to the interests of all concerned and to the considerations that can be advanced for shaping the law in this or that way. Now, it seems fair to suppose that the reasons advanced are more likely to be persuasive—and in any event we will have the best assurance that the problem *has* been considered fully and fairly—if the judge has satisfied that rule in selecting and advancing his reasons. Perhaps we can go a little deeper here and ask why these *are* among the purposes of our existing judicial institutions. It would no doubt be possible to devise a legal system and decision-making procedure that would yield one and only one answer for any sort of controversy that might be presented for judgment. When legal scholars and theorists assure us that it is humanly impossible

12. The problem, of course, is that it would be circular reasoning to claim that we know from experience which rules of induction are reliable, at least if we have to rely on those very rules in making such judgments on the basis of our experience, as would seem to be the case. And it would also be circular reasoning to claim to know via deductive tests that our rules of deduction guarantee accurate explications of the implicit meaning of statements. To avoid being misunderstood here, I should emphasize the point that my discussion of judicial reasoning *assumes* that deduction and induction are both methods of rational justification and that they enable us to do certain things that we want to do, such as those mentioned in the text. To *show* that they enable us to do these things would be to solve some unsolved puzzles in the philosophy of logic.

to devise a code of laws to cover all possible controversies that may ever arise in the infinitely varied contingencies of life, this is not literally true; after all, the code could always direct the judge to toss a coin as a last resort. In other words it is apparently impossible to do this and regulate life more or less as we would like to see it regulated. Even a vast code consisting of thousands of rules, each with dozens of explicit exceptions or priority indexes, would either fail by a wide margin to provide a clear outcome for every case that could arise, or else it would undoubtedly require many decisions which we would reject if we could foresee them. And there is not merely the problem of foreseeing cases that we would not now wish to see governed by the rules which we are presently laying down. Our general evaluations expressed in those rules may *themselves* gradually undergo important changes. Furthermore, the rules we formulate today may even become generally unsuited to the realization of their original purposes because of changes in economic, technical or other cultural conditions. These are some of the reasons why a method of the sort we have sketched seems to be necessary and desirable for law. When the substantive law is not logically controlling in such a way as to produce a uniquely correct result, a condition which must often obtain under any *practicable* system of law, then we need as our control a methodic norm of the sort here labeled "the judicial point of view."¹³

Despite these broad similarities, there will still seem to be a great chasm separating the judicial method from our two paradigms of reasoning. If we ask why this is so, perhaps the most obvious answer will be that the judicial method is not a form of inference and is not designed to enable us to reach or approximate the truth. Both of these features would seem to be essential to a method of justificatory reasoning, even if not to a rational method of settling disputes and clarifying the law. There is a difference, after all, between a method of rational justification and a rational method. The way courts argue for their decisions in the fourth type of case may possibly count as a rational method of attaining certain objectives of the judicial process. But, lacking any form of inference or any connection with truth, how can it be a method of rational justification? We needn't accord it that title merely because it involves the giving of "reasons" in the sense of stating considerations that have influenced the court to settle or revise the law in a certain way.

Now is this a good objection; or, on the contrary, can we destroy its force by pointing to some confusion? As a matter of fact, the objection as thus stated is quite misleading and ambiguous, and we can conceive of a clearer and more

13. Even if we supplemented the existing legal system and judicial method by laying down some universal standard or principle for assigning weight to individual principles, policies, rules, precedents, etc., would we be willing to abide by its results for all unforeseen cases, especially after some lapse of time during which the evaluations that were expressed in such standard may have changed? *Should* we be willing, in order to have a uniquely correct result in all or nearly all legal cases? Does *that* value bulk so large in the regulation of life?

tenable objection, and clarify the concept of reasoning itself, if we explain why this is so.

Consider first the matter of inference. Deduction and induction are actually very different sorts of inference; so different, in fact, that it is apt to be misleading to speak of inductive inference at all without calling attention to the difference. This is because the word "inference," like the words "logic" and "valid," is heavy with allusions to deduction, at least in the philosopher's lexicon. It would be better to speak of induction rules and deduction rules as two different types of *rules of support*, as some writers have. Now the judicial method involves a third kind of rule of support, and even if it differs widely from the others in some ways, it is like them in being a very reasonable rule given the very different purposes of the reason-giving or conclusion-supporting activity in which it figures.

There is considerable ambiguity in the objection that deduction and induction are tied to the notion of truth while the judicial method is not. In one way, all three of them are tied to *logical* truth. Thus, many philosophers would agree that induction and deduction are both connected to logical truth in that not only statements about the deductive validity of an inference, but also statements that a certain hypothesis has a certain probability on certain evidence are logically true or logically false.¹⁴ But of course the same can be said of statements to the effect that a certain judicial decision is justified in sense 1 in view of the way the judge has in fact reached and defended his judgment. Granting that the correct method of decision-making and reason-giving is such and such, the statement will be logically true or logically false.

While both deduction and induction are related to truth in ways that the judicial method is not, in some of these ways deduction and induction also differ from each other so that the relations in question cannot be regarded as essential features of reasoning. Consider material truth or agreement with objective states of affairs. Induction is pragmatically bound to this notion while deduction is not. Even if we can calculate the probability of an hypothesis from the statements constituting the evidence with the aid of the induction rules,¹⁵ so that to this extent such rules can be used independently of the truth of such statements, the whole purpose of induction is to increase our chances of settling on objectively true beliefs, so the truth of such statements has to be ascertained. This is not the case with deduction; its main purpose does not require that we establish the truth of the premises. Deduction of course has an essential role in empirical inquiries, and it may be that the deductive sciences would never have developed very far without the spur of such inquiries. But it is possible to carry on some of these sciences with complete indifference to any question of material truth. Hence, if we are to take deduction as one of

14. That is, on the supposition that the rules of induction were worked out well enough to enable us to calculate degrees of probability.

15. Note 14, *supra*, is pertinent here.

the paradigms of reasoning, it cannot be an essential aspect of reasoning that it be carried on for the sake of gaining materially true beliefs.

But what about truth in the general and minimal sense of unique correctness? Is it essential to a method of reasoning that it be designed to reach or justify a uniquely correct result? Applying the same procedure as before, we must ask whether induction and deduction are both so connected. Induction is, since material truth is a special case of unique correctness. But as to deduction the answer is more complicated. Actually, an indefinitely large number of *different* conclusions can be deduced from given premises, at least in many formal deductive systems. Even contrary conclusions can be deduced if the premises happen to be inconsistent. Also, there is a sense in which even the judicial method enables us to say definitely whether a given substantive conclusion can be asserted or not, given the existing law and the facts of the case. We need only ask, retrospectively, whether the judge in the case has reached such conclusion in obedience to the required method of judicial reflection. In this way we are actually able to identify the *only* substantive conclusion that is obtainable on that occasion from those "premises," something which the rules of deduction in most systems would not permit us to do. At least in these connections with the notion of unique correctness, the judicial method actually fares better than deduction does. Thus we have yet to see a clear basis for our intuitive reluctance to classify that method as a species of justificatory reasoning. And further analogies between the three types of method might be urged for doing so. For instance, there is often a failure of expert consensus on problems in empirical science, just as there is in law. And in mathematics too we have our "very difficult cases" in the form of undecidable statements and conjectural statements.

Were we mistaken, then, in refusing to classify the judicial method with deduction and induction as another species of justificatory reasoning? I think not, because there is still a most important difference separating it from them on the score of interpersonal checks on the substantive correctness of one's argument and result. In the (formalized) deductive sciences, one can at least always check a *proof* that has been advanced and determine that it certainly is, or certainly is not a good proof. In contrast, a judge's "proof" of "legal theoremhood" cannot be similarly checked in a type four case. There is no way in which it can be determined that his argument and decision are correct against conflicting theories of what the law requires, with their consequent rationales and judgments for the case at hand, although we can sometimes show that a type four case has been decided *wrongly*. And in the empirical sciences also, we have excellent means for checking the substantive correctness of each other's procedure and result. While such means may be lacking at the frontiers of science, where rational disagreement is certainly possible and indeed common, even there the conceptual situation is sharply different from what it is in type four legal cases. For in science the effort is made continuously and with con-

siderable success to develop such checks and advance the frontier; whereas in type four cases we do not even have the goal and concept of unique, interpersonal correctness. On the contrary, we can only try to reduce the number of type four cases in the future by settling unsettled questions of law as such cases present them.¹⁶

Thus, our initial impression that the concept of justificatory reasoning does not apply to the judicial method despite its similarities to deduction and induction seems to be traceable to the notion of interpersonal checks. And the requirement that such checks be possible in a method of justificatory reasoning certainly is no distortion of the concept of such reasoning; certainly not of a concept built up from the important common features of deductive and inductive reasoning. So this attempt to trace our philosophical problem to a conceptual error fails. While the judicial method does have its similarities to those two main paradigms, and while certain objections to calling it a kind of justificatory reasoning were seen to be less cogent than they at first appeared, it does have one important feature which seems plainly inconsistent with the concept of such reasoning.

V

This brings us to the fourth and next-to-last way of responding to our problem, namely that of trying to work out some revision of the concept of reasoning that will enable us to award this diploma to the judicial method without raising new problems. Many will look askance at this kind of "solution" as being a bit cheap, as not really playing the philosopher's game which they think of as a search for perfect reconciliations of conflicting ideas, much as one solves a bent nails puzzle by getting the nails apart without changing their configurations. But, after all, we have made an honest but vain effort to find that sort of solution. And don't forget the dismal paradox of the fifth alternative that awaits us. The prospect of having to admit finally that the judicial process does not involve a rational method of justification in a very important class of cases, perhaps in a majority of all appealed cases, may make the route of conceptual revision seem more attractive than it otherwise might. There is of course no guarantee that we can travel this route successfully either. The question is whether we can deliberately reshape the non-technical concept of reasoning by eliminating the requirement that interpersonal checks be possible in any alleged method of reasoning, and whether we can do this without sacrificing other intellectual needs. Perhaps our survey of the concept of reason-

16. I have heard it suggested that we ought to drop type four from our analytical equipment because it is just as plausible to claim that the correct decision of very difficult legal cases will be agreed upon in the long run as it is to say the analogous thing about disputed questions in science. But this claim or hope for scientific method is founded on the belief that there is an objective, intelligible order in nature. As to legal method, such a claim would seem to depend on the belief that the normative order known as law, which is haphazardly made by men and which difficult cases *seem* to show to be full of holes and contradictions, is really complete and coherent. I think a better example of mythical thinking based on a false analogy could scarcely be given.

ing in the preceding discussion will be of use to us in answering this new question.

As a first step, I would like to comment briefly on an objection to such a liberalized concept of reasoning that was alluded to earlier in this paper. If we are to allow as a form of reasoning any method of giving statements for the support of other statements, when this is done in accordance with rules that are suitable for achieving whatever purpose or purposes the method happens to have, doesn't this open the door to all sorts of irrational methods? Doesn't astrology, for example, have its own rules that are recognized and applied by those who devote themselves professionally to this "field of reasoning?" Or, to take a more respected discipline, is it not often said that theology has purposes that are quite different from those of science? Perhaps its peculiar modes of argument are appropriate to those purposes. Wouldn't such a concept of reasoning force us to admit that good theological arguments can successfully justify doctrines about the gods? In answering these queries, I think we have to ask what *are* the purposes of these reason-giving activities. If the purpose of astrology or palmistry is to foretell the future, then their methods are not suitable, for they do not actually enable us to accomplish that purpose. They would have to be ruled out in favor of the methods of common sense and science, with a corresponding restriction on the types of future events that we can rationally claim to foretell. But if their present purpose is to furnish amusement, then their methods might be very well suited or could be changed a little to make them suitable to this purpose. Who could then complain of them? And something rather similar can be said of theology, although our modernizing theologians seem to shy away from the point. If the purpose of theological argument is to certify beliefs about questions of fact, then its traditional methods are not suitable and must be replaced by the methods which we know are suitable to that purpose. This would no doubt end in severe restriction or abolishment of the traditional subject matter of theology. But on the other hand, if religious people were willing to say clearly that religious discourse has, say, purely expressive or poetic purposes, then they might be able to develop suitable rules or methods in aid of such purposes and go on talking about "God" in ways that no one could criticize as irrational.¹⁷ But, however that may be, you can choose whatever example of pseudo-science you like and it will not pass the foregoing test as a method of reasoning. If it did pass—if its methods actually were suitable for pursuing its goal, the goal of knowledge—it would not be a pseudo-science but a real science.

But let us ask why it is that the possibility of checking another person's

17. I suppose the rub is that cherished qualities of religious expression that have been realized through traditional ceremonies and believed myths would probably be lost, whatever other satisfactions people might hope to find under the new regime. It is understandable that religious modernists should be reluctant to say clearly what the purpose of theology now is. The traditionalist has no trouble choosing between supernaturalism and a banal literary genre, but the modernist must try to avoid that unhappy choice.

work seems essential to the idea of reasoning. Is it not because the clearest mark of an irrational method in *cooperative knowledge-gaining activities* or would-be sciences is the absence of such a possibility? The main purposes of the empirical and formal sciences would be frustrated if their methods did not even contemplate that two people applying them ought to arrive at the same conclusions. But such a feature does *not* interfere with the purposes of the judicial method in cases of type four. In fact, it seems to be a necessary feature if the judicial method is to accomplish the sorts of purposes it does have. As was noted earlier, if we had a judicial method that could certify a uniquely and interpersonally correct result in all cases, having it would no doubt prevent our having a law system and judicial system that could be used to regulate our affairs in anything resembling the ways in which we would like to see them regulated. Thus, the impossibility of having a uniquely correct result should not disqualify any and all methods of justification but only some of them. Of course, we *could* shape the general concept in such a way that only cooperative knowledge-gaining activities would be included. But why should we, since we have seen that this isn't necessary in order to keep irrational methods out? Or must we do so in order to keep out such things as astrology games or theological poetry? Nothing much would be lost by letting them in, but anyway their primary game-aspect or poetry-aspect would be enough to exclude them as forms of justificatory reasoning. In the existing concept of justificatory reasoning, the important requirement concerning interpersonal checks floats freely, as it were, through the general concept, while the refinement that I am proposing would serve to tie it down to those species of justification where it is actually needed. The advantage of this refinement is that it would let us go on saying something that we have wanted very much to say, namely, that judicial argument can always count as good reasoning if the judge lives up to the standards of his calling. And, while there is no space left to develop the point here, I think it would also allow us to say some other things that we are in the habit of saying and would like to go on saying. For instance, that there is such a thing as good moral reasoning, and that philosophical analysis and argument of the sort we have been pursuing here is itself a form of reasoning.¹⁸

18. I have argued that such a concept of reasoning does enable us to make sense of ethics or moral reasoning in *Moral Autonomy and Reasonableness*, 65 THE JOURNAL OF PHILOSOPHY 383, 383-401 (1968). For an argument that this fourth type of response, the method of conceptual economizing as one might call it, is the best approach to the problem of justification in ethics, see my *Conceptual Revision in Ethics*, 78 ETHICS 199 (1967-68).

Many recent philosophers have thought that it is not the business of philosophy to change existing language and concepts, and I agree that philosophers are badly situated to bring about such changes, although I disagree that such changes are never needed, or that philosophers might not suitably propose them. To anyone having such scruples, I propose the following alternative. Do we actually have to make the conceptual revision discussed in the text? Do we have to try to sell it to others; or do we even have to try to adopt it for our own account in order to be rid of the problem that has been bothering us? In seeing how an economical revision *would* be possible, have we not after all gained a solution of the third sort, a dissolution? We were unable to get rid of this problem by tracing it to some conceptual error, but I think we can be rid of it through the following

reflection. Our high respect for good judicial argument, a respect which we wanted to justify by assimilating such argument to logical and scientific reasoning, has really been explained and justified without such an assimilation. Because the judicial method is well suited to its proper purpose, and because we *could* reshape the concept of justificatory reasoning and apply it to the judicial method without interfering with the purposes for which we award this diploma to those other intellectual activities, we are as satisfied with this method as we are with them. Legal argument *is* generically different from valid deduction and scientific induction, but this should no longer be a cause of concern to anyone.