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On the Legal Syllogism

Luís Duarte d’Almeida*

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Abstract: In this essay I argue against rule-deductivism. Rule-deductivism is the view that the justification of law-applying decisions is adequately understood on the model of a deductive argument—a “legal syllogism”, as it is often called—with a statement of an applicable rule as the “major premise” and a statement of the relevant facts as the “minor” one. Rule-deductivism—not to be confused with formalism—has long been a popular view in legal argumentation theory. Endorsed by Kelsen, Hart, MacCormick, and Alexy, it continues to be accepted by authors such as Gardner, Leiter, and Marmor, among many others. This paper begins by offering a characterization of rule-deductivism; goes on to argue that rule-deductivism is not, even in its stronger version, a view that should be accepted; and concludes by sketching and motivating a new model of the justification of law-applying decisions that overcomes the flaws of the model of the legal syllogism.

1. INTRODUCTION

My goal in this chapter is to argue against one popular idea about the role of legal rules in legal argument: that the justification of law-applying decisions is adequately understood on the model of a deductive argument—a “legal syllogism,” as it is often called—having as its “major premise” a statement of an applicable legal rule, and as a “minor premise” a statement of the relevant facts.

Before you object that this is a naïve, old-fashioned idea that nobody endorses anymore, let me be clear that my target is not what Brian Leiter has labelled “vulgar formalism”. Vulgar formalism is the view that “judicial decision-making involves nothing more than mechanical deduction on the model of the syllogism”.¹ This is not, as Leiter points out, “a

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¹ Leiter (2010: 111). “Mechanical” was Pound’s label for the view that applying the law is purely a matter of fitting cases to rules that are already “at hand in a fixed and final form”: see Pound (1908: 607).

view to which anyone today cares to subscribe”.² Maybe no one ever really did. But Leiter goes on to say this:

It is true enough that deductive reasoning on the model of syllogism is a characteristic feature of most well-done judicial opinions—that is, the conclusion can be reconstructed as following deductively from a statement of the applicable rule of law and the statement of the facts.³

True enough? I don’t think it is true at all. Unlike vulgar formalism, however, the view expressed in this passage is one that many authors do adopt. Some, like Leiter, seem to take it for granted. Here is Andrei Marmor, in a piece in which he proposes to “explore some structural aspects of legal syllogism”:

It is . . . the regular business of lawyers and judges to draw legal inferences. Many of those inferences look like an ordinary syllogism whereby a conclusion is derived from some premises about the normative content of the law and statements describing facts or events.⁴

Another recent endorsement comes from John Gardner:

In a legal argument, an existing legal norm is a major premise, and a new legal norm is the conclusion. The legal arguments in everyday . . . examples [i.e. those in which a court makes its ruling by applying existing legal rules to the case in hand] are, of course, very simple. They go something like this:

Tortfeasors are liable to pay full reparative damages to those whom they tortuously injure;
Jones tortuously injured Smith to the tune of \$50;
therefore, Jones is liable to pay Smith \$50 in reparative damages.⁵

Many other prominent authors have subscribed to this picture—with only minor variations—over the past decades. Kelsen appears to have been one, at least in the second edition of the *Pure Theory of Law*.⁶ Hart was certainly another.⁷ And Neil MacCormick and Robert Alexy

² Leiter (2010: 111).

³ Leiter (2010: 111).

⁴ Marmor (2014: 61).

⁵ Gardner (2004: 186).

⁶ See Kelsen (1967/1960: 202, 237).

⁷ See, for example, Hart (1955: 258-262), Hart (2012/1961: 126-127), and Hart (1967: 99-108).

stand out among those who have offered full defences of the view that, in the words of the former,

the legal reasoning advanced to justify legal claims or legal decisions can sometimes be entirely, and must always be in part, deductive in its essence. The thesis [is] that legal rules are properly conceptualized as hypothetical in form, prescribing that if certain circumstances (certain “operative facts”) obtain, then certain normative consequences are to follow. Rules being so conceptualised, one who can establish in a given case that an instance of the relevant operative facts obtains can justifiably claim that the relevant normative consequence ought to follow, or indeed in the capacity of a judge can justifiably decide that it does follow, and can justifiably give a legal decision giving effect to that consequence. This is a form of deductive inference, or, if you like, deductive/subsumptive reasoning: you postulate a general hypothetical rule, you establish facts in a particular case subsumable within the rule’s hypothesis, and you draw the logical conclusion for the particular case from rule plus facts.⁸

This is the view I mean to reject. Some of its proponents call it “deductivism”,⁹ but I will refer to it instead as “rule-deductivism”, and to its defenders as “rule-deductivists”. For my quarrel is not, as I will explain, with the claim *per se* that the justification of law-applying judicial decisions can be understood as a deductive inference. My quarrel is with what rule-deductivists believe the inference should look like, and particularly with the role they think should be assigned to legal rules.

I speak of *the* rule-deductivist view, but in fact it is far from clear what exactly the claim is—or the claims are—that these authors endorse. Their own formulations are not always transparent, and there is in the literature no received account of rule-deductivism. So I will begin, in Section 2, by trying to assemble a sharper picture of what rule-deductivists hold. This will call for some charitable reconstruction: one thesis many rule-deductivists *say* they hold is plainly indefensible on logical grounds, as we will see in Section 3; but there is a stronger claim we can spell out on their behalf. I then go on to argue, in Section 4, that rule-deductivism, even in its stronger version, is not a view we should accept.

This chapter is therefore primarily critical rather than constructive; though meant to stand on its own, it is also the first part of a broader project. But I will conclude by briefly sketching and motivating, in Section 5, a new model of the justification of law-applying decisions—one capable of overcoming the flaws of the model of the legal syllogism.

⁸ MacCormick (1982a: 182).

⁹ See MacCormick (2005: Chapter 4).

2. RULE-DEDUCTIVISM

2.1. The “Legal Syllogism”

We need to piece together an account of rule-deductivism, and the just-quoted passage by MacCormick is a good place to start. One point he makes is that “legal rules are properly conceptualised as hypothetical in form, prescribing that if certain circumstances (certain ‘operative facts’) obtain, then certain normative consequences are to follow.”¹⁰ This is a fairly orthodox claim. It is also integral to rule-deductivism. Consider the following example—from a relatively well-known essay by A. G. Guest—meant to illustrate “deductive reasoning . . . in the sense of the application of a general [legal] rule to a particular instance”:

Let us take the words of a penal statute, in this case the Representation of People Act, 1949, s. 52: “Any person shall be guilty of an offence if, at a parliamentary or local government election, he fraudulently takes out of the polling station any ballot paper.” Here the legal process consists in the application of a fixed and ascertained rule to the facts of a particular case. The section of the statute constitutes the major premiss, the minor being “X (the accused) at a parliamentary or local government election fraudulently took out of a polling station a ballot paper.” This, it will be seen, comprises the words of the indictment. If the minor premiss is true, the offence is made out and X will be found guilty.¹¹

At first sight this looks straightforward. Guest’s point is not really, of course, that the accused *will* be found guilty. He does not mean that the conclusion of the inference is a prediction. Rather, as he goes on to explain, he takes the conclusion to be a “normative” statement that the accused *ought to* be found guilty.¹² So the inference Guest describes combines, as premises, two statements of different kinds. One is meant to be a statement of a statutory rule, its form presumably to be rendered along the following lines:

For every x : if x at a parliamentary or local government election takes out of a polling station a ballot paper, then x ought to be found guilty of an offence.¹³

¹⁰ See the quotation accompanying note 8 above; and see also MacCormick (2005: 24).

¹¹ Guest (1961: 182, footnote omitted).

¹² Guest (1961: 184-5).

¹³ One occasionally finds legal rules formalised more plainly as instances of the pattern “If p , then q ”; but it seems clear that we need at least the tools of predicate logic to represent the form of general norms. See

Note also that Guest refers to the relevant rule as one that is “fixed and ascertained”: it is fixed and ascertained by reference to the words of the statute. (Guest does not take much care to distinguish the rule from the “section of the statute”.) That is not meant to prevent the restatement of the rule in formally clearer terms, as in the formulation above. But the example is one in which the rule being applied is the legislated rule; and the application of legislated rules, as we will also see, is something that many rule-deductivists claim to be particularly well placed to explain.

The other premise in Guest’s example is a statement about the facts of some particular case. So the full inference can be displayed as follows:

- (1) For every x : if x at a parliamentary or local government election takes out of a polling station a ballot paper, then x ought to be found guilty of an offence.
 - (2) The accused at a parliamentary or local government election took out of a polling station a ballot paper.
- Therefore (from (1) and (2)),
- (3) The accused ought to be found guilty of an offence.

This inference, an example of what is normally called a “legal syllogism”, is an instance of the following valid form:

- (1) For every x : if x is F , then x ought to be G .
 - (2) a is F .
- Therefore (from (1) and (2)),
- (3) a ought to be G .¹⁴

Perelman (1961: 603), Alexy (1989/1978: 221-222), White (1980: 741-742), Wilson (1982: 283-284), Brewer (1996: 943-944), and MacCormick (2005: 68-70).

¹⁴ This form—sometimes called “universal *modus ponens*”—can be analysed as a complex inference involving two deductively valid steps: (1) entails

(1') If a is F , then a ought to be G

by universal instantiation; and (1') and (2) together entail (3) by standard (i.e. propositional) *modus ponens*. See Kalinowski (1964: 277-278), Alexy (1980: 189), and also Engisch (1963: 8-10).

The so-called “legal syllogism”, then, is a deductively valid inference in which one premise (the “major premise”) is a general statement of law, another premise (the “minor” one) a particular statement of fact, and the conclusion a particular statement of law.¹⁵

2.2. A Model

Rule-deductivists claim that the legal syllogism is a *model* of the justification of law-applying judicial decisions. This claim, though, needs some unpacking.

Let us start by introducing a distinction between two senses in which we can speak of the “justification” of a judicial decision. In one sense, to say that a judicial decision is justified—legally justified—is to say that it is correct according to law: it is to say that the court ought legally to have issued it, or at least that it is not the case that the court ought not legally to have issued it. Courts, however, are normally required to do more than simply issue decisions that are justified in this “objective” sense (as we may call it). Courts are normally required to *justify* their decisions: required, or at any rate expected, to give reasons—to offer arguments—showing that their decisions are indeed justified in that first, objective sense.

So there are two things we can ask of any given judicial decision. We can ask whether the decision *is* (or was) justified, issued according to law. And we can ask whether the court justified it, and if so whether the justification it offered was a good one—whether the decision was well justified *by* the court.

It is this second sense of “justification” that rule-deductivists have in mind when they speak of the legal syllogism as a model of the justification of law-applying decisions. They are concerned with justification in the sense of reason-giving—with “legal reasoning . . . purport[ing] to *show* that a decision (or a claim) *is* justifiable according to the law in force”.¹⁶

¹⁵ Why “so-called”? Because what rule-deductivists have in mind is not the (categorical) syllogism of traditional logic; nor does it matter that there be only three terms (“major”, “middle”, “minor”), each occurring exactly twice. As traditionally used by lawyers and legal theorists, the term “major premise” just stands for the legal premise, and “minor premise” for the factual one. As for “syllogism”, the term is used, as Feteris (2007: 25-26) also notes, simply to mean a (deductive) argument regardless of pattern. The scheme in the text is just the simplest version of the legal syllogism; it could be refined to deal with more complex examples (e.g. rules with more intricate antecedents or consequents, including, of course, different subjects in the antecedent and the consequent): see Wróblewski (1974: 43-44), and Alexy (1989/1978: 222-225).

¹⁶ Alchourrón and Bulygin (1992: 252, emphasis added).

The thought is not, of course, that judges either do or should actually *present* their arguments in the shape of a syllogism. Rule-deductivists do not hold “that it is necessary or even best to set out real legal arguments in rigorously syllogistic form”.¹⁷ What they hold is that if a law-applying judicial decision is well justified by the court—if, as Leiter puts it, the opinion is “well-done”¹⁸—then the court’s argument can be *reconstructed* on the model of the syllogism. What does “well justified” mean? It cannot mean that the decision *is* justified in the objective sense—that is, actually correct according to law. To say that a law-applying decision is well justified is to say the argument given by the court is an argument of the right kind: an argument (a) aimed at showing that the decision is indeed legally correct; (b) whose premises are appropriately related, logically speaking, to the conclusion; and (c) which, *if* sound—if it has no false premises—succeeds in showing the decision to be legally correct. And what does it mean to say that such an argument can be *reconstructed* on the model of the syllogism? It means that the argument the court is in fact giving—however informal and enthymematic its presentation in the text of the opinion—can be fully brought out and fairly represented as an instance of that pattern.¹⁹

Now, rule-deductivists do not think that the legal syllogism exhausts the range of types of argument that courts could and normally do give in support of their decisions. There are many examples of well-made judicial decisions whose supporting arguments are not to be understood as legal syllogisms; rule-deductivists are concerned only with a certain class of judicial decisions. What class is that? Rule-deductivists are often unclear on that point. We need, however, to identify the relevant class—the class of the decisions that rule-deductivists take as their object of theorisation—if we are to be able to assess their claim that the legal syllogism is an adequate model of the arguments made by courts in decisions of that class. I have been using the phrase “law-applying judicial decisions” to refer to the relevant class. What I mean—what I take rule-deductivists to have in mind—is the class of decisions justified on the basis of existing law that applies to the case in hand. This is not yet a fully transparent description, but it is enough to get us started.

I will argue in Section 3 that rule-deductivism, thus understood, is manifestly wrong: that law-applying judicial decisions are *not* aptly understood on the model of the legal syllogism.

¹⁷ MacCormick (2005: 42-3).

¹⁸ Leiter (2010: 111).

¹⁹ See also Alexy (1980: 184), and Chiassoni (1999) 157-8.

But let me first go over three disclaimers standardly offered by rule-deductivists in clarification of their views.

2.3. Discovery and Justification

The first disclaimer is that the model of the syllogism does not purport to reflect the way by which courts *reach* their decisions. The point is often stressed—since Richard Wasserstrom first cast it in these terms in the early 1960s—by appealing to a traditional distinction from the philosophy of science: rule-deductivists are concerned with the structure of justification, not with the process of discovery.²⁰ Here, for example, is Hart’s gloss on this difference between “methods of discovery and standards of appraisal” and on its bearing on rule-deductivism:

[I]t is important to distinguish (1) assertions made concerning the usual processes or habits of thought by which judges actually reach their decisions . . . and (3) the standards by which judicial decisions are to be appraised. The first of these concerns matters of descriptive psychology, and to the extent that assertions in this field go beyond the descriptions of examined instances, they are empirical generalizations or laws of psychology; . . . the third relates to the assessment or justification of decisions.

These distinctions are important because it has sometimes been argued that since judges frequently arrive at decisions without going through any process of calculation or inference in which legal rules or precedents figure, the claim that deduction from legal rules plays any part in decision is mistaken. This argument is confused, for in general the issue is not one regarding the manner in which judges do, or should, come to their decisions; rather, it concerns the standards they respect in justifying decisions, however reached.²¹

2.4. Internal and External Justification

A second proviso is that the legal syllogism is not meant to be a *complete* model of the justification of law-applying judicial decisions. Recall how MacCormick presents his view: “legal reasoning advanced to justify legal claims or legal decisions”, he says, “can sometimes

²⁰ See Wasserstrom (1961: 22-30); and see also Wellman (1985: 54, 65), Alexy (1989/1978: 229), and Atienza (2005: 4-7); and, for discussion, Golding (1986: 124-140), Mazzarese (1996: 105-157), Rotolo (2001: 57-63), and Atienza (2013: 114-116).

²¹ Hart (1967: 105).

be entirely, and must always be in part, deductive in its essence.”²² The point, then, is that the justification of law-applying judicial decisions is at least partly a matter of deduction from legal statements combined with statements of fact.

When is legal justification *wholly* “deductive in its essence”? When neither the identification of the applicable rule, nor the presence of the relevant facts, nor the classification of the particular case as one to which the rule applies, is problematic or controversial. In such “easy cases”, writes David Lyons,

the law is clear enough so that [the case] can be decided in a more or less “mechanical” way, by applying relevant rules in a logically rigorous argument. A proposition of law that decides the case is then derivable by logically deductive methodology from a combination of rules of law and statements of facts about the case. The simplest model for such an argument may be termed a legal syllogism, which includes as its major premise a single rule of law, as its minor premise a statement of relevant facts, and as its conclusion the dispositive proposition of law.²³

But rule-deductivists do not think that all cases are “easy”. If there are doubts around either the identification of the applicable rule, or the description and classification of the relevant facts, or both, then, they grant, “subsumption and the drawing of a syllogistic conclusion no longer characterise the nerve of the reasoning.”²⁴ The judge will need to offer further reasons to justify her views on what the law or the facts are; and this aspect of the justification of judicial decisions need not be, as far as rule-deductivists are concerned, “purely deductive and logical in character”.²⁵ That is not to say, though, that the model of the legal syllogism does not capture an important aspect of the justification of the decision: it captures, rule-deductivists say, the (logically) last link, as it were, in the relevant argumentative chain.

This point is also often put in terms of a distinction, introduced by Jerzy Wróblewski, between the *internal* and the *external* justification of judicial decisions.²⁶ Internal justification concerns the logical validity of the inference from the relevant premises—the statement of the applicable legal rule, and the statement of the relevant facts—to the final conclusion. External justification concerns the truth of each of these premises, and therefore the

²² See the quotation accompanying n 8 above.

²³ Lyons (1984: 180).

²⁴ Hart (2012/1961: 127).

²⁵ MacCormick (1978: 36-37).

²⁶ See Wróblewski (1971: 412) and Wróblewski (1974: 39).

soundness of the inference. What the legal syllogism purports to model, as Wróblewski and others point out, is the internal justification of law-applying decisions.²⁷ So while it may often be true that “[t]he Judge does not and cannot reach his decision *solely* by applying transformation rules to a conjunction of a statement of the legal rule invoked by the parties and a statement of the facts”, it remains the case, rule-deductivists say, that once the judge “has decided whether the legal rule includes or excludes the present case . . . his reasoning [can] take a syllogistic form.”²⁸

2.5. Questions of Law and Questions of Fact

A final, closely related caveat concerns a distinction upon which the very idea of the legal syllogism seems to be predicated: that between questions of law and questions of fact. The caveat is that rule-deductivism is *not* wedded to the view that there is a strong divide between these two kinds of questions.

Consider the familiar point that “almost every rule can prove to be ambiguous or unclear in relation to some disputed or disputable context of litigation.”²⁹ Faced with a case whose classification under the terms of the rule is doubtful, what must a judge establish? Not merely whether certain events took place, but whether they *count as* instances of the relevant legal predicates. That, though, is no longer a mere question of fact; as Hart puts it:

What looks like a pure question of fact: Did he sign the document? Did they rescue a vessel? turns out in such cases (not in all cases) to be the hybrid question: Is what was done to count as signing a document, rescuing a vessel, for the purpose of this rule?³⁰

The rule-deductivist account does not depend on there being a clear-cut distinction between questions of law and questions of fact. For one, the term “fact” is equivocal, and the rule-deductivist’s claim is not that the minor premise of the legal syllogism must always be a description of empirical facts; there is after all no reason to think that the antecedent of the applicable rule will itself include only descriptions of empirical facts. Second, and more to

²⁷ See Wróblewski (1974: 39), Alexy (1989/1978: 221), Soeteman (1995: 743-744), Comanducci (1999: 48, 56-57), or Bäcker (2009: 408-9).

²⁸ Hart (1955: 260, emphasis in the original).

²⁹ MacCormick (1978: 65-66, footnote—to Hart’s *The Concept of Law*—omitted).

³⁰ Hart (1955: 260).

the point, rule-deductivists need not deny that the external justification of the minor premise may have to involve normative judgments about whether the facts of the case in hand do count as instances of the relevant general terms “for the purpose” of the rule. For that, again, is a matter of what goes into deciding to adopt a certain premise, rather than a matter of how one’s premises, once adopted, must relate logically if the court’s decision is to be justified.

It is true that some authors suggest that the scheme of the legal syllogism be expanded to reflect this point about the legal classification of the facts of the case. Andrei Marmor, for example, proposes that we make room for *two* “factual” premises rather than just one: one premise describing “something that happened in the world”, another asserting that such facts count as instances of the general terms featured in the antecedent of the rule.³¹ Chaïm Perelman had once advanced a similar view.³² And Robert Alexy points out that we could supplement the simpler scheme of the syllogism with as many steps as needed to address any potentially controversial classificatory issue:

(1) For every x : if x is F , then x ought to be G .

(2) For every x : if x is M_1 , then x is F .

(3) For every x : if x is M_2 , then x is M_1 .

...

(4) For every x : if x is H , then x is M_n .

(5) a is H .

Therefore (from (1) to (5)),

(6) a ought to be G .³³

Premise (1) would be the formulation of the applicable legal rule (for example, a rule as “stated” in some valid statutory provision³⁴). As to premises (2) to (4), Alexy remarks, they are not necessarily derived from any positive legal rules; but they are also not descriptions of empirical facts. Rather, they can be understood as statements of whatever rules underlie the court’s decision to classify the facts of the case in hand under the relevant legal predicates.

³¹ See Marmor (2014: 83-84).

³² Perelman (1961: 603).

³³ Alexy (1989/1978: 227); my notation differs slightly from Alexy’s. See also Alexy (2003) 433-4.

³⁴ Alexy (1989/1978: 224).

Premises (2) to (4) “bridge the gap”, as it were, between the statement of the legal rule in (1), and the factual description in (5).³⁵

But of course, as Alexy also notes,³⁶ (2), (3), (4) and (5) together entail

(5') *a* is *F*,

which together with (1) entails (6). So we might just as well say that we have here one simple syllogism with (1) as the major premise and (5') as the minor one; and that the role of statements (2) to (5) is that of providing external justification for (5'). Alternatively, but by the same token, given that (1), (2), (3), and (4) together entail

(5'') For every *x*: if *x* is *H*, then *x* ought to be *G*,

we might say that what we have is a simple syllogism with (5'') and (5) as premises; and that premises (1) to (4) provide external justification for (5''). (Note, though, that in neither case can the full justification dispense with the statement, in (1), of the relevant “applicable norm”, as Alexy calls it.³⁷ That is the statement that specifies the terms or predicates under which the facts of the case are to be classified.) And the same point holds with regard to Perelman’s and Marmor’s suggestions.³⁸ A judge’s claim that the facts of the case satisfy the relevant legal predicates may be the product of a normative judgment; but rule-deductivists remain free to hold that once such a claim is adopted, the conclusion will follow logically under the basic scheme of the legal syllogism.

2.6. In Summary

With all these caveats and qualifications, is rule-deductivism starting to sound like a trivial thesis? Its endorsers would deny the charge. Rule-deductivism, they say, provides the best picture of what is involved in the requirement that judges—in accordance with their proper role—apply existing law to the case at hand. Here is how Torben Spaak puts the point:

³⁵ Alexy (1989/1978: 229).

³⁶ Alexy (1989/1978: 227 n. 41).

³⁷ Alexy (1989/1978: 225).

³⁸ I discuss Marmor’s claims in further detail in Duarte d’Almeida (2016).

The primary task of judges is to *decide* cases, not to expound the law. The natural starting-point, in keeping with the separation of powers, is that the judge has, in virtue of his office, a duty to judge in accordance with the law, that is, to apply existing law rather than create new law. Accordingly, deciding a case involves (i) finding and clarifying the law, (ii) determining the facts, and (iii) applying the law to the facts.

If we assume that law is a system of norms, we may view legal decision-making as a matter of applying legal norms to facts. On this analysis, deductive justification in the form of syllogistic reasoning will play an important role in legal reasoning.³⁹

The ideal of the separation of powers, of course, also loomed large behind Beccaria's original mention of the syllogism as a model of the judicial application of the law:

Nor can the authority to interpret the laws devolve upon the criminal judges, for the same reason that they are not legislators . . . The judge should construct a perfect syllogism about every criminal case: the major premise should be the general law; the minor, the conformity or otherwise of the action with the law; and the conclusion, freedom or punishment. Whenever the judge is forced, or takes it upon himself, to construct even as few as two syllogisms, then the door is opened to uncertainty.⁴⁰

Beccaria's wording here is too strong, even slightly nonsensical. But we need not tie rule-deductivism to so simplistic a view of the separation of powers. Some rule-deductivists do claim that legislated rules have a "single and uniquely authoritative [linguistic] formulation"⁴¹ to be found in the words of the statute; and that the legal syllogism is *especially* well-suited to represent the application of statutory rules.⁴² But one does not need to endorse these claims to agree, as all rule-deductivists do, that the model of the syllogism does aptly capture the justification of judicial decisions that apply legislated rules.

So there you have it. Rule-deductivists do not think that there is nothing more to legal reasoning or judicial decision-making than applying existing law to particular cases. They do not claim that the justification of every judicial decision issued in accordance with law stands to be represented on the model of the legal syllogism. Some cases, though, are indeed governed by existing legal rules; and rule-deductivists claim to have the best account of what

³⁹ Spaak (2003: 236-7).

⁴⁰ Beccaria (1764: 14).

⁴¹ MacCormick (1978: 58).

⁴² See Alexy (1980: 186).

an argument for applying existing rules to particular cases involves. As again MacCormick puts it:

when particular facts of particular cases do fit uncontroversially or after non-deductive resolution of controversy into the categories stipulated in universally quantified legal rules, then the universally prescribed legal consequence has particular application in the particular case. So if a judge ought to do justice according to law . . . he ought to implement that consequence here.⁴³

The court's argument in such cases, in short, is, properly reconstructed, one in which a statement of the applicable rule features as a premise that "combined with [a description of] the facts of the case, suffices to yield the ruling".⁴⁴ Or so rule-deductivists say.

3. RULE-DEDUCTIVISM AND THE JUSTIFICATION OF LAW-APPLYING DECISIONS

What they say, though, is not convincing—certainly not if we take them at their word.⁴⁵

Rule-deductivists often claim to be concerned with the *application* of rules to cases, and primarily with judicial *decisions* that apply rules to cases. Wróblewski, for example, refers to the judicial decision "as an application of a general legal norm (a statute) to the concrete facts of the case", and to the legal syllogism as "a suitable way of justifying [the] judicial decision".⁴⁶ Hart is clear that what is at issue is "the reasoning involved in the *application* of legislative rules to particular cases", and that it is "the court's *decision*"—my emphases—that

⁴³ MacCormick (1982b: 289).

⁴⁴ Gardner (2007: 76).

⁴⁵ Rule-deductivism has not been without some critics. Wellman (1985: 68-80), for example, argues that the deductivist model cannot account for situations in which there are several, conflicting rules applicable to the case in hand; and that it is unwarrantedly committed to the philosophically controversial view that legal statements must be truth-apt. Neumann (1985: 19-28) argues that the reconstruction of legal arguments in the form of the syllogism does not adequately represent the structure of legal argumentation; he thinks we would do better to adopt Stephen Toulmin's schemes (and Toulmin's distinctions among "data", "claims", "warrants", and so on: see Toulmin (2014)). And Zuleta (2005), more recently, argues that rule-deductivism is committed to an inadequate conception of the logical form of general norms. I do not mean to either endorse or reject any of these criticisms; my own discussion of rule-deductivism takes a different tack.

⁴⁶ Wróblewski (1974: 34, 38).

is “represented as the conclusion of a syllogism”.⁴⁷ Gardner says that the conclusion of the inference is a judicial *ruling* that *applies* the “existing legal norm” featured as the “major premise”.⁴⁸ Bäcker speaks of the “syllogistic formalisation of rule-application”.⁴⁹ And MacCormick goes as far as to claim that it is the framework of the legal syllogism that allows us to make sense of “what could possibly count as applying a statute at all.”⁵⁰

But the legal syllogism cannot model this. Let us go back to the passage by A. G. Guest that I briefly discussed in Section 2:

Let us take the words of a penal statute, in this case the Representation of People Act, 1949, s. 52: “Any person shall be guilty of an offence if, at a parliamentary or local government election, he fraudulently takes out of the polling station any ballot paper.” Here the legal process consists in the application of a fixed and ascertained rule to the facts of a particular case. The section of the statute constitutes the major premiss, the minor being “X (the accused) at a parliamentary or local government election fraudulently took out of a polling station a ballot paper.” This, it will be seen, comprises the words of the indictment. If the minor premiss is true, the offence is made out and X will be found guilty.⁵¹

At first glance, I said, this seems straightforward. Not so much at second glance. Consider Guest’s last sentence. “If the minor premiss is true,” he says, “the offence is made out and X will be found guilty.” We already know we should substitute “X *ought* to be found guilty” for Guest’s “X *will* be found guilty.” But it is odd that Guest should state the conclusion of the inference the way he does. Take as premises of the relevant inference the two following statements, as Guest explicitly says we should:

- (1) Any person shall be guilty of an offence if, at a parliamentary or local government election, he fraudulently takes out of the polling station any ballot paper.
- (2) X (the accused) at a parliamentary or local government election fraudulently took out of a polling station a ballot paper.

⁴⁷ Hart (1967: 99).

⁴⁸ Gardner (2004: 186).

⁴⁹ Bäcker (2009: 406, my translation).

⁵⁰ MacCormick (2005: 42).

⁵¹ Guest (1961: 182, footnote omitted).

What follows from the conjunction of (1) and (2) is that:

(3) X shall be guilty of an offence.

This claim, however, is importantly different from what Guest says the conclusion should be:

(3*) The offence is made out and X ought to be found guilty [of an offence].

This claim—the claim in (3*)—is a conjunction; and the second conjunct bears no relation to the rest of the inference. The claim in (3), that *X* shall *be* guilty of an offence, is not the same as the claim that *X* ought to (or shall—it makes no difference) *be found* guilty of an offence, which is what we find in (3*). (As to the first conjunct—the claim that “the offence is made out”—it is also unclear that it does follow from (1) and (2). To say that the offence is made out is to say that *X* committed—*is* guilty of—the offence; and that is not obviously the same as saying that *X* shall *be* guilty of the offence. But let that pass.) Where then could this reference—to *X*’s being *found* guilty of an offence—have come from?

The answer is not hard to find. Guest, too, is explicitly concerned with the *application* of statutory rules: concerned, in his own words, with “deductive reasoning . . . in the sense of the application of a general rule to a particular instance”.⁵² So that—the application of the relevant rule—is what the inference is aimed at justifying. But then we must keep in mind something that Guest manifestly overlooks: that the application of a legal rule is an action; it is something that someone—paradigmatically a judge or court—does.⁵³ What action? That will vary from case to case. In Guest’s example, the relevant action would be the court’s *finding* the accused guilty (and indeed proceeding to *convict* him) of the relevant offence. That is the action that counts as applying the statutory rule to the case in hand. It is, therefore, what stands to be justified by the inference. That is why Guest’s conclusion, the claim in (3*), plausibly mentions *X*’s being *found* guilty.

What Guest misses is that if his inference is to provide justification for the court’s finding the accused guilty, then the conclusion would have to be something like this—a claim that the relevant action is one that the court ought to perform:

⁵² Guest (1961: 182).

⁵³ I come back to this point in Section 5.

(3') Court *C* ought to find the accused guilty of an offence.

This is the sort of claim that has to be argued *for* if one wants to justify one's application of the provision to the facts in an example such as Guest's. But that means that (3') is also the kind of claim that would have to feature as the consequent of the relevant "major premise": otherwise the inference won't run. The major premise, then, would have to read, not as (1), but as follows:

(1') Court *C* *ought to find guilty of an offence* any person who at a parliamentary or local government election fraudulently takes out of the polling station any ballot paper.

The problem is that this can no longer serve as a statement of the relevant rule—the statutory rule that the court is supposed to be applying. Why not? Remember that Guest is clear that it is "the section of the statute" (or in any case the corresponding "fixed and ascertained" rule) that features *as* the major premise of the inference. But while the formulation in (1)—Guest's own statement of the major premise—is not, at least *prima facie*, an implausible way of stating the content of the relevant rule, the claim in (1') is neither equivalent to, nor entailed by, the claim in (1); and does not plausibly stand as a statement of any rule that that provision could be taken to express.

It is normally the case, of course, that courts have a duty to—under certain conditions—find guilty, and convict, and sentence, criminal wrongdoers. And it seems sensible to say, as Guest does at one point, that "in the example cited, upon proof that the accused took out of the polling station a ballot paper, the courts are commanded to apply certain sanctions to the wrongdoer".⁵⁴ That is not what I am denying. My point is simply that this is something that does not follow from the statement of the rule that the court is supposed to be applying. The action that counts as applying the rule to the case cannot be found in, or derived from, any statement of the applicable rule itself. The legal syllogism, therefore, cannot model the justification of any such action.

It is purely for the sake of convenience that I have been focusing on the passage by Guest; the error I have just tried to bring out is far from being specifically his. Take the

⁵⁴ Guest (1961: 184).

passage by Neil MacCormick that I quoted in Section 1. It included the following two sentences:

Rules being so conceptualised [as hypothetical in form], one who can establish in a given case that an instance of the relevant operative facts obtains can justifiably claim that the relevant normative consequence ought to follow, or indeed in the capacity of a judge can justifiably decide that it does follow, and can justifiably give a legal decision giving effect to that consequence. This is a form of deductive inference . . . : you postulate a general hypothetical rule, you establish facts in a particular case subsumable within the rule's hypothesis, and you draw the logical conclusion for the particular case from rule plus facts.⁵⁵

But this is wrong on two counts. First, given a statement of some relevant rule, what someone who establishes an instance of the relevant facts can justifiably claim is that the consequence *does* follow—it follows logically, if, as MacCormick claims, the reasoning is “deductive in essence”⁵⁶—not that it *ought* to follow. Second, and more important, it certainly does *not* follow from those two premises that a judge can justifiably *give effect* to that consequence. Giving effect to the consequence is indeed one way of applying the relevant rule; but again it is not something that can be justified on the model of the syllogism.⁵⁷

Or take John Gardner's views on the matter; he makes the same mistake in a different way. Gardner says that a legal argument is “an argument about what to do (e.g. what ruling to make)” in which “at least some legal norms figure among the major premises”.⁵⁸ He agrees, then, that a ruling—making a ruling—is an action; something a judge *does*. Gardner also says that “a legal ruling is a legally binding decision on the application of a legal rule to what lawyers call a ‘case’: to a situation-token rather than a situation-type”.⁵⁹ To make a ruling is

⁵⁵ MacCormick (1982a: 182).

⁵⁶ MacCormick (1982a: 182).

⁵⁷ In *Legal Reasoning and Legal Theory*, MacCormick is more careful. He writes at one point that we would actually need “a further premise” in order to “complete the justification of the argument”; but then he says that this further premise would simply convey “what is on the face of it a seemingly obvious proposition about the judicial function”—“that there are rules of law, and that a judge's job is to apply those rules when they are relevant and applicable”: see MacCormick (1978: 32-33, 53). This, however, does not solve the problem: none of the premises (or their conjunction) in the legal syllogism implies the claim that the relevant rule is applicable to the facts of the case; the complex argument would simply not run. I return to this crucial point in Section 5.

⁵⁸ Gardner (2004: 188).

⁵⁹ Gardner (2007: 73).

therefore not merely to assert that the legal rule applies to the case. To make a ruling, Gardner says, is to exercise a normative power, and thereby to bring about changes in other people's normative positions.⁶⁰

But consider Gardner's example of a "very simple two-premise legal argument that could be made by a judge":

Rule: Any person who calls another person a liar has a duty to pay \$50 to that other person.

Fact: Barnewall (a person) called Adolphus (another person) a liar.

Ruling: Thus, Barnewall has a duty to pay \$50 to Adolphus.⁶¹

This is a valid inference. But its conclusion is not, *pace* Gardner, a ruling. The conclusion is simply a claim in law—a proposition of law. It is the proposition that Barnewall has a certain duty. It is true if the premises are both true. But propositions are not actions, and therefore they are not rulings. And while asserting a proposition (or *making* a claim) is, of course, an action, it is also not the sort of action that Gardner calls a ruling. Simply asserting something does not amount to the exercise of any power, and brings about no changes in anyone's normative positions.

The main problem, though, is not that the ruling itself—being an action rather than a proposition (or a sentence)—does not follow logically from the conjunction of those (or any) premises. The main problem is again that the court's ruling cannot be *justified* on the basis of what is asserted in Gardner's premises. If indeed a legal argument is, as Gardner says, "an argument about what to do (e.g. what ruling to make)", then the conclusion in his example would have to be something like the claim that *the judge ought to rule that Barnewall has a duty to pay \$50 to Adolphus*—which is not something that those premises entail.

What, you may ask, turns on all this? Am I not making too much of a trivial point? Could rule-deductivists not simply reply that any legal syllogism may of course be coupled with a further premise of the relevant sort? Perhaps something like this (to keep to Gardner's example):

- (0) If Barnewall has a duty to pay \$50 to Adolphus, then the judge ought to rule that Barnewall has a duty to pay \$50 to Adolphus.

⁶⁰ Gardner (2007: 74).

⁶¹ Gardner (2007: 76).

The complex inference would then validly establish the relevant proposition—which, if true, would then justify the judge’s ruling. Would this not do?

No, it wouldn’t. For the challenge here is not to come up with an expansion of the syllogism that would yield a valid argument for the conclusion that the judge ought to rule that Barnewall has a duty to pay to \$50 to Adolphus. The challenge, if we take rule-deductivists at their word, is to come up with an argument that can plausibly be said to capture—to model—the justification of such a ruling (as a law-applying decision). As we have just seen, the legal syllogism cannot model *that*. So the question becomes this: *What* is it exactly that the legal syllogism can with minimal plausibility be said to model? In other words, how should we re-interpret the rule-deductivist’s thesis that there is *something* the legal syllogism can adequately model? We need first to answer that question—and then we need to ask whether *that* reinterpreted thesis is itself defensible. For if it isn’t, then no expanded version of the syllogism will succeed as a model of the justification of law-applying decisions.

4. RULE-DEDUCTIVISM AND THE JUSTIFICATION OF PARTICULAR LEGAL CLAIMS

I think we should charitably re-interpret rule-deductivism as the view that the legal syllogism suitably models the justification of particular legal claims—particular propositions of law—when these are put forward on the basis that a certain legal rule applies to the relevant particular case.

To see this more clearly, take Gardner’s example again:

Rule: Any person who calls another person a liar has a duty to pay \$50 to that other person.

Fact: Barnewall (a person) called Adolphus (another person) a liar.

Ruling: Thus, Barnewall has a duty to pay \$50 to Adolphus.⁶²

The conclusion of this inference is a particular legal claim—it is, more precisely, a proposition about the normative position of a particular person, Barnewall, vis-à-vis another

⁶² Gardner (2007: 76).

person, under existing law. And is the sort of proposition a judge would need to put forward, and be prepared to defend, as part of some more complex argument that would justify her ruling. According to how I now propose we understand rule-deductivism, then, what the legal syllogism adequately models is the justification of claims of that sort—propositions assigning some legal normative consequence or status to some particular case—when indeed they are made and justified on the basis that there is some existing rule that applies to the relevant case. In other words: when a judge properly justifies—argues for—a claim of that sort specifically on the basis that that is what some existing rule as applied to the case demands or warrants, her argument to that effect can be adequately reconstructed under the scheme of the legal syllogism.⁶³

Does this revised version of rule-deductivism hold up to scrutiny? It is no longer open to the sort of logical objection presented in Section 3. But it fails for different reasons. Thus understood, the model of the syllogism is, I think, inadequate in even the easiest of easy cases, when there is no doubt that the relevant rule applies to the case in hand. Those are cases that the model only seems to capture well; the appearance is deceptive. But the problems with the model are more easily and effectively brought out if we look at an example of an actual judicial opinion that the rule-deductivist picture is clearly unable to capture.

4.1. *R v Luffe*

In *R v Luffe* (1807) 8 East 193, the defendant, one H. Luffe, was appealing against an order of filiation made by two Justices of the Peace judging him the father of a child conceived with a Mrs Mary Taylor, who was married to another man. The order of filiation had been made under the statute of 6 Geo. 2. Cap. 31, § 1, which provided that:

[I]f any single woman shall be delivered of a bastard child which shall be chargeable or likely to become chargeable to any parish [. . .], and shall, in an examination to be taken in writing, upon oath, before one or more Justices of the Peace [of that parish] charge any person with having gotten her with child; it shall and

⁶³ Rule-deductivists sometimes speak, somewhat casually, of “the legal reasoning advanced to justify *legal claims or legal decisions*”—MacCormick (1982a: 182, emphasis added)—or of arguments aimed at showing that “*a decision (or a claim)* is justifiable according to the law in force”—Alchourrón and Bulygin (1992: 252, emphasis added)—as if the model of the legal syllogism were equally suited to justify both. My suggestion is that we take them to be focusing solely on claims, understood in the way just explained.

may be made lawful to and for such Justice or Justices [. . .] to issue out his or their warrant or warrants for the immediate apprehending such person so charged [unless he gives security to indemnify the parish].

It was not disputed that this statutory provision gave “jurisdiction to magistrates to take examinations for making orders of filiation in case of bastards likely to become chargeable” to a parish.⁶⁴ But the defendant argued that the provision concerned children of *single* women, and that his child “being the child of a married woman, the Justices of the Peace had no jurisdiction to make an order of filiation”.⁶⁵

The Court dismissed this objection. Lord Ellenborough CJ appealed to the “general purposes of the Act”—which were (as indicated in its Recital) “to provide for the securing and indemnifying parishes and other places from the great charges frequently arising from children begotten and born out of lawful matrimony”—and argued as follows:

[W]hen the question is whether this were a child born out of lawful matrimony, that is, out of the limits and rights belonging to that state, it is the same in substance whether it be a bastard. It is so for the general purposes of the Act. The matrimony does not cover the child if it be in other respects (according to the rule of law applicable to this subject) a bastard. And so it seems that a child born by adulterous intercourse is as much within the provision of the Act of Geo. 2, as one which is born of a single woman.⁶⁶

There is no doubt that Lord Ellenborough CJ’s view was that the provision in 6 Geo. 2. Cap. 31, § 1 was applicable to the case of the defendant. Therefore, the court concluded, the Justices of the Peace did have jurisdiction to make the order of filiation in the case of the defendant. So can that argument be modelled on the scheme of the legal syllogism?

What could the major premise be? Perhaps something like this—closely following the statutory language?

- (1) For every x and every y : if x is a single woman delivered of a bastard child chargeable to a parish, and y is a man charged on oath with being the father of the child, then the Justices of the Peace of the parish have jurisdiction to make an order of filiation judging y to be the father of the child.

⁶⁴ *R v Luffe* (1807) 8 East 193, at 196.

⁶⁵ *Ibid.* at 194.

⁶⁶ *Ibid.* at 204.

But then the argument could not run unless the court relied on the following statement:

- (2) Mary Taylor is a single woman delivered of a bastard child chargeable to a parish, and the defendant is a man charged on oath with being the father of the child.

That was not, though, a statement on which the court based either its view that the statutory provision in 6 Geo. 2. Cap. 31 did apply to the case, or its conclusion on the point in issue. The statement in (2) was plainly false on the facts of the case, and the court did not suggest otherwise. In fact, the court made no effort to bring the case under the language of the statute. As far as the court was concerned, the relevant facts stood to be described by saying that:

- (2') Mary Taylor is a married woman delivered of a bastard child chargeable to a parish, and the defendant is a man charged on oath with being the father of the child.

It does not, of course, follow from (1) and (2') that the Justices of the Peace have jurisdiction to make an order of filiation judging the defendant to be the father of the child. Yet that did not prevent the court from arguing that the statutory provision did apply to the facts. The court bypassed, as it were, the supposed antecedent of the statutory rule—whether formulated as in (1) or indeed in some other way—relying instead on a different sort of consideration: the “general purposes” of the Act. What that means is that the court’s argument for the claim—the particular legal claim—that the Justices of the Peace did have jurisdiction to make the order of filiation with respect to the defendant cannot be reconstructed on the model of the syllogism. So rule-deductivism is wrong.

You may think this is too quick. What could rule-deductivists say in response? I see three possible lines of defence.

4.2. Is *Luffe* Representative?

First, rule-deductivists could try to dismiss Lord Ellenborough CJ’s remarks in *R v Luffe* as a poor example of the kind of argument with which they are concerned. Courts do not normally sidestep classificatory questions or apply statutory rules on the sole grounds that that would serve the “purposes” of the statute. Why think that the *Luffe* court was even purporting to decide in accordance with law? Isn’t it more plausible to see *Luffe* as an outlier case—

perhaps even a legally deviant one—and to exclude it from the class of cases that rule-deductivists aim to account for?

The fact is that *Luffe* is a perfectly representative specimen. It is true that courts do not often apply statutory rules to cases not encompassed by the language of the statute. But it does not follow that when they do, they are acting impermissibly—or that they are not applying the relevant statutory rules. Moreover, my point is conceptual, not normative. My point is that *Luffe* is an example of a court appealing to considerations of a certain sort—considerations of “purpose”—in order to justify its view that a statutory rule applies to a certain case. Whether courts were then, or are now, permitted to appeal to such considerations is, therefore, immaterial. Even in a legal system in which decisions such as *Luffe* were always impermissible, such decisions would still count, conceptually, as rule-applying decisions. They would simply be examples of illegitimate ways of applying the law. It is, after all, a contingent matter whether considerations of purpose do feature among those that can permissibly be appealed to in any given jurisdiction; and rule-deductivists are concerned with providing a general jurisprudential account of the structure of the justification of legal claims on the basis of existing legal rules, rather than an account of some jurisdiction-specific set of permissible ways of applying or appealing to such rules.

In any event, there is evidence that decisions of this sort, though comparatively rare, are generally regarded as legitimate in contemporary legal systems. Consider, for example, how another, more recent decision—the Queen’s Bench Division’s in *Smith v Hughes* [1960] 2 All ER—has been described in a couple of recent texts:

A classic illustration where the scope [of criminal liability] was expanded [relative to the literal scope of the provision] is that of *Smith v Hughes* where a prostitute was charged with “soliciting *in* a street for the purpose of prostitution” [which were the exact words of the relevant statutory provision, s. 1(1) of the Street Offences Act, 1959]. It was held that the offence was committed even where the woman was not in a street but was soliciting from a balcony *above* the street. The provision was obviously interpreted neither literally nor strictly, but according to the purpose of the Act, namely to remove the nuisance and offence of solicitation.⁶⁷

In [*Smith v Hughes*] the court did not use the plain, ordinary grammatical meaning of the words “in a street or public place”. Instead, the judges looked to see what the mischief the Act was aimed at.⁶⁸

⁶⁷ Wilson (2014: 22).

⁶⁸ Huxley-Binns and Martin (2014: 78-79). Glanville Williams, who dedicated a whole essay to *Smith*, says that the court “dismissed the wording of the Act with unlawyerly brusqueness”, but notes that “[t]he

Smith is—literally—a textbook example of a court justifying its view on the applicability of a provision to a case by turning to considerations of statutory “purpose” (or “mischief”) rather than language. And *Luffe*, too, was reported at the time without any suggestion that there had been anything untoward about it; and described, rightly, as a decision on the application of the 6 Geo. 2. statutory provision:

Upon the 18 Eliz. c. 3, which has the words “bastards begotten and born out of lawful matrimony”, and the 6 Geo. II., which refers only to the case of a single woman, it was doubted whether these statutes applied if the mother was a married woman; but they were finally decided [in *R v Luffe*] to have that application.⁶⁹

Why should we care about how the *Luffe* court, or the *Smith* court, or any doctrinal commentators, viewed these decisions? Is it not possible for at least some courts and commentators to be mistaken about what counts as law-application? Or am I implying that if a court or a lawyer refers to some particular judicial decision as a decision on the application of a rule to a case, then that decision *is* an instance of a decision on the application of a rule to a case? That is not my suggestion. But the way in which courts and lawyers refer to their own activities does constitute good pre-theoretical evidence—not irrefutable evidence, but strong evidence nonetheless—for how we as theorists should regard such activities. It is, therefore, not open to rule-deductivists to shoo away counterexamples such as *Luffe* on the sole grounds that they do not fit their account—especially given that, as I noted in Section 2.1, we would be hard-pressed to find in their writings any attempt to provide a clear characterisation of their own object of theorisation.

In order to successfully dismiss such counterexamples, then, rule-deductivists would have to show not merely that opinions such as Lord Ellenborough CJ’s in *Luffe* are not examples of what *they* take—pre-theoretically—the relevant kind of claim or decision or argument to be, but also that such a restrictive understanding of their object would actually be justified. I do not think that rule-deductivists would want, upon reflection, to make even the first of these two points. But if they did, then I do not see that they would be able to defend the second. For although it is true that we should not just take courts and doctrinal commentators at their word no matter what, I cannot see what other considerations rule-

reasoning in *Smith v Hughes* was sufficiently plausible to enable the decision to have passed entirely without criticism, and moreover to be followed and extended by the courts”. See Williams (1981: 74, 79).

⁶⁹ Theobald (1836: 416).

deductivists could offer that would warrant the pre-theoretical exclusion of cases such as *Luffe* from the scope of their inquiry. Such cases may be infrequent in actual practice; but there is nothing theoretically atypical about them *qua* instances of decisions on the application of existing law to particular cases.

4.3. A Different Major Premise?

There is, though, a different reply that rule-deductivists—some of them, at least—might offer. I seem to be assuming, they might say, that rule-deductivism is committed to the idea that the formulation of the major premise in the legal syllogism should match, or at least track very closely, the text of the relevant statutory provision. But why assume that? Why think that formulation (1) above is the correct way of rendering the relevant rule? True, *some* rule-deductivists do take the view—as I mentioned in Section 2—that legislated rules have fixed formulations to be found in the language of the relevant statute. This goes back to the point about separation of powers and about legislative authority and its role in the justification of law-applying decisions. Here, for example, is Neil MacCormick:

That it is an essential consequence of appointment to judicial office that a judge must apply valid rules of law in exercising his jurisdiction indicates the interrelationship between adjudication and legislation—because legislation is *par excellence* the process whereby valid rules of law are made . . .

I have said that “legislation is *par excellence* the process whereby valid rules of law are made”; that for two reasons. Legislation is unique as a source of law in that it yields what have been felicitously called [by Twining and Miers] “rules in fixed verbal form,” rules which have a single and uniquely authoritative formulation, their formulation in the *ipsissima verba* of the legislature . . .⁷⁰

These authors—a subset of those who endorse rule-deductivism—think that “the authoritative statement of an enacted rule remains static”⁷¹; that “legislation presents us with more or less ready-made norms”⁷²; that statutory rules are thereby “fixed and ascertained”.⁷³

⁷⁰ MacCormick (1978: 57-58, footnote omitted).

⁷¹ Burton (2007: 43).

⁷² Spaak (2003: 237).

⁷³ Guest (1961: 182). Compare also Alexy (1980: 186), and MacCormick (2005: 36), both of whom remark that statutory norms are typically universal norms, and suggest that when the rule being applied is a statutory rule, the relevant “universals” that must be instantiated in the particular case are those “deployed in the statute” (as MacCormick puts it).

Such rule-deductivists will therefore find themselves in trouble when faced with decisions such as *Luffe*. But did I not also say in Section 2 that we should *not* think of rule-deductivism as being necessarily coupled with such strict and unduly reductive views on legislative authority, on the position of judges vis-à-vis lawmakers, and on the separation of powers?

Would it not be open to rule-deductivists, then, to point out, with regard to *Luffe*, that we should differentiate between the text of the provision, and the rule brought into existence by the valid enactment of a statute? And do courts not have to interpret statutory texts in order to grasp the rules they express? So why think that the court in *Luffe* was doing anything different? Why not say instead that what Lord Ellenborough CJ's argument reveals is that he took the provision in 6 Geo. 2. Cap. 31, § 1 to express a rule whose formulation does *not* track the statutory text *verbatim*? Which rule? Maybe one along the following lines:

- (1') For every x and every y : if x is a woman delivered of a bastard child chargeable to a parish, and y is a man charged on oath with being the father of the child, then the Justices of the Peace of the parish have jurisdiction to make an order of filiation judging y to be the father of the child.

Here the formulation of the antecedent—which, apart from the suppression of the adjective “single”, is the same as the antecedent of formulation (1) in Section 4.1 above—is one that the particular facts of the case did instantiate: Mary Taylor was indisputably a woman. Therefore, rule-deductivists might say, *R v Luffe* can be brought under the model of the syllogism after all. All we need is to take the court to have relied on a rule such as (1'), based on some suitable interpretation of the relevant statutory provision.

The problem for this reply is that that was plainly not what the *Luffe* court was doing. The point of the *Luffe* challenge is not that the court did not justify its law-applying decision on the basis of a rule—understood, along rule-deductivist lines, as a universal conditional—that closely tracked the language of the statute. The point of the challenge is that the court did not justify its law-applying decision on the basis of any rule *at all*.

The *Luffe* court was concerned with one specific question: the question of whether the provision in 6 Geo. 2. Cap. 31, § 1 applied *to the case in hand*. Now, in order to both form and justify its view on that matter, the court had no need to identify the full range of cases to which that provision would also apply. That, however, is what rule-deductivists would have to say the court had to be doing. For rule-deductivists presuppose that in order to reach a decision on the applicability of a provision to a particular case, a judge needs to ask herself

what the conditions are that would have to be met by *any* case to which the provision applies. That is precisely what the major premise of the legal syllogism is supposed to specify. All Lord Ellenborough CJ claimed, however, was that the provision in 6 Geo. 2. Cap. 31, § 1 applied to the particular case in hand—a case in which the defendant had been charged with conceiving a child with a woman married to someone else. Why should that require him to articulate—let alone rely on as a premise in his argument—a universal conditional spelling out the common properties of the cases to which that provision applies? Indeed, why think that a judge would even be *capable* of answering such a question if she tried?

It is not simply that courts do not, and cannot reasonably be expected to, offer watertight descriptions of the properties that will have to be met by any case to which the relevant statutory provision applies. They cannot even be reasonably expected to offer watertight descriptions of the relevant properties *of the case in hand*—the properties by virtue of which the relevant provision applies to it. So even if rule-deductivists were to further qualify their views by claiming that the major premise of the legal syllogism does not really have to be a statement of *the* relevant applicable rule—provided it is a statement of *a* rule implied by the statement of *the* applicable rule—theirs would remain an inadequate model of the relevant kind of argument.

Rule-deductivists might be tempted to object that I am overlooking a basic point about law-applying decisions: their universalisability. How can I suggest that Lord Ellenborough CJ's decision that the provision applied to the case in hand did not bind him to any view about that provision's applicability to any other cases? Is it not a requirement of formal justice that like cases be treated alike? Does that not imply that Lord Ellenborough CJ must have been committed to at least the view that *all* cases that are similar in all relevant respects to the case before him are cases to which the provision in 6 Geo. 2. Cap. 31, § 1 applies? And does that not involve a commitment to the corresponding universal conditional?⁷⁴

That may be so, but it misses my point. I did not say that Lord Ellenborough CJ's decision was adopted on non-universalisable grounds. I did not deny that his decision—on whether the provision in 6 Geo. 2. Cap. 31, § 1 applied to the case in hand—committed him, rationally, to the claim that every other case that is similar in all relevant respects to the case in hand is one to which that same provision would apply. My point is that his decision did not commit him to any precise and definitive view on *what exactly those relevant respects*

⁷⁴ On the formal justice requirement that every judicial decision be justified by reference to a universal norm, see Alexy (1989/1978: 222) and MacCormick (2005: 75).

were.⁷⁵ (What would the correct universal formulation be? That *every* case of a man charged with being the father of a child conceived with a woman married to another man was one to which the provision applies? Would this not be overinclusive? And how would we know? Some other formulation then?)

The court did not commit itself to any such universal. That is simply not how courts support their views on the application of statutory rules to particular cases.⁷⁶ MacCormick writes that “one justifies particular implementations of the legal consequence [specified in a legal rule] by showing that the relevant operative facts do obtain in a particular case in hand”.⁷⁷ This is, I think, exactly wrong. One does not show—or argue—that *the* relevant operative facts—MacCormick means fact-types, not tokens—obtain in a particular case. What one argues is that the facts—the fact-tokens—that obtain in a particular case are relevant. This is not to say that we have a good jurisprudential understanding of what such arguments look like. Whatever they look like, though, it is not the legal syllogism.

4.4. A Different Minor Premise?

There is, I suppose, a third reply that some rule-deductivists might offer to try to defuse the *Luffe* challenge. Rule-deductivists might choose to insist that there really is a major premise in Lord Ellenborough CJ’s argument, and that it actually does track the authoritative language of the statutory rule with its explicit reference to single women:

- (1) For every x and every y : if x is a single woman delivered of a bastard child chargeable to a parish, and y is a man charged on oath with being the father of the child, then the Justices of the Peace of the parish have jurisdiction to make an order of filiation judging y to be the father of the child.

⁷⁵ This is the same point that underlies the reconstruction of analogical arguments in law: see Duarte d’Almeida and Michelon (2017). I cannot expand here on the relevance of this similarity.

⁷⁶ And even when they *do* offer general statements of what they take the applicable law or “rule” to be, such statements are not properly construed as universal conditionals on which such courts rely as premises. Evidence for this? The disclaimers that judges occasionally offer about what *they* themselves take such statements to mean, and more generally the way in which courts routinely refer to, and treat, similar general statements as made by *other* courts in previous decisions. But this is a point whose full defence I cannot undertake in this chapter.

⁷⁷ MacCormick (1982b: 287).

But they could maintain that the court did endorse, however implicitly, a minor premise of the relevant kind:

- (2) Mary Taylor is a single woman delivered of a bastard child chargeable to a parish, and H. Luffe is a man charged on oath with being the father of the child.

The point would not be that the *Luffe* court took this to be established as a matter of fact; Mary Taylor was not in fact single. But given that the court nevertheless held the view that the statutory rule did apply to the case of Mary Taylor, it must have adopted the view that she *counted as* a single woman for the purpose of the rule. *Luffe*, then, rule-deductivists could point out, was just one of those cases in which the adoption by the judge of the minor premise is the product of some normatively driven classificatory decision. But the model of the syllogism is perfectly capable—as we saw in Section 2.5—of accommodating cases like that. We should therefore take the *Luffe* court to have been committed to something along the lines of

- (2'') For every x : if x is a married woman delivered of a bastard child chargeable to a parish, then x is a single woman delivered of a bastard child chargeable to a parish,

which, together with the (factually true⁷⁸) claim that

- (2') Mary Taylor is a married woman delivered of a bastard child chargeable to a parish, and the defendant is a man charged on oath with being the father of the child,

deductively entails the claim in (2). Therefore, the rule-deductivist might say, the decision in *Luffe* can be reconstructed on the model of the syllogism after all.

The problem with this reply is that it is question-begging. It has no support in the decision itself. Lord Ellenborough CJ made no attempt, as I pointed out, to bring the facts of the case under the classificatory terms of the provision. It is, of course, how the argument would have to look like, and how we would have to interpret it, if the model of the syllogism

⁷⁸ I am disregarding the possibility of “bastard” being a thick term.

were, as rule-deductivists claim, a good one. But whether rule-deductivists are right is precisely what is at issue.

4.5. In Summary

What lessons should we glean from our discussion? There are two ways of interpreting the rule-deductivist view. On one reading, discussed in Section 3, rule-deductivists hold that the legal syllogism provides us with a suitable model of the justification of law-applying decisions. On another reading, discussed in this Section, what rule-deductivists hold is that the legal syllogism provides us with a suitable model of the justification of particular legal claims made on the basis that some existing legal rule applies to the relevant case. We saw that neither position is tenable.

Our discussion has therefore brought out that we need jurisprudential accounts of *both* those issues as well as a clearer understanding of the relations between the two. It has also begun, I hope, to provide insight into some crucial distinctions that the rule-deductivist model either obscures or overlooks. It is beyond the scope of this chapter, as I said in Section 1, to address all of the many questions that these topics give rise to. Still, to conclude, I will offer a sketch—no more—of an alternative model of the justification of law-applying decisions, and a few programmatic thoughts on the work that lies ahead.

5. WHAT SHOULD AN ALTERNATIVE MODEL LOOK LIKE?

I want to pick up and briefly expand on some remarks I made in Section 3 on what it means to say that a court applied a statutory rule in a certain case. “Applying a rule” is a phrase that is often loosely used. Courts are just as likely to say they are applying a statutory rule as to say they are applying a statutory *provision*—an article or section, for example—or even several related provisions at once. Rule-deductivists, too—although they would probably maintain they are concerned with the application of statutory rules rather than provisions—are not always consistent in how they use their terms, as some of the quotes above illustrate. And I myself have not taken much care so far to emphasise the distinction. But now—as the discussion in Section 4 will have made apparent—we need to be clearer. Unlike rule-deductivists, however, I think we should take courts more seriously. In order to make sense

of the justification of law-applying decisions, our focus should be, I believe, on statutory provisions rather than rules.

Applying a provision to a case is only one of two related notions that need clarification if we are to bring out the structure of the justification of law-applying decisions. The other is the notion of *a provision's applying* to a case. Both are familiar notions, notions we normally use when talking about the law and judicial decisions. It is not easy, however, to explain exactly what each involves—and how they are related.

Maybe we can start by noticing some immediately apparent differences between the two notions. To say that a given statutory provision *applies—is applicable—to* a case is, ostensibly, to say something about a relation between the provision and the relevant case. To say that a court *applied* a provision to a case, by contrast, is, as I pointed out in Section 3, to say something about what the court *does*. When we say that a court applied a statutory provision, part of what we mean is that the judge issued a certain decision. To issue a decision is to *rule* on an issue, and to rule on an issue is to perform a certain action: it is, for example, to *convict* a criminal defendant, to *instruct* one party to pay damages to the other, to *allow* the submission of additional evidence, and so on. Unless and until a judge has actually ruled on some issue before her, she has not applied any statute or provision. But when we say that the judge applied a certain provision, we also mean that the judge took and presented her decision as justified by reference to the relevant provision: that she believed her ruling to be in some sense warranted by—inter alia—the provision. That is what the judge will try to show in the part of her opinion in which she justifies—lays down the reasons for—her decision. Applying a statutory provision, then, involves two things: (a) the performance, by the court, of an action that (b) the court justifies by reference to the provision. What exactly does this justificatory link look like? What does it mean to justify an action “by reference” to a statutory provision? That is one of the things we need to clarify.

As to how the two notions relate to each other, it seems plausible to say that when a judge faces a case to which a certain provision *applies*—when there is a statutory provision that is applicable to the case in hand—then the judge ought *to apply* the provision to the case. That means that the judge ought to perform *whatever action* counts as the action involved in applying the provision to the case in hand. This begins to capture, I think, one central feature of the role of a judge. It also suggests the following simple point, with which rule-deductivists would, I believe, agree: in order to justify her decision—the decision she actually issues—by reference to any given statutory provision, a judge will need to claim both (a) that

the case in hand is one to which the provision applies, and (b) that the issuance of that decision is the action that counts as applying the provision in the case in hand.

I say rule-deductivists would agree—at least they should agree—because I think these two aspects of the justification of law-applying decisions are also what they are attempting to capture, whether or not they fully realise it. For them, as we know, to say that *a provision applies—is applicable—to* a case is to say that the case satisfies the antecedent of the rule that the provision expresses. We saw in Section 4 that this account cannot make sense of decisions such as *R v Luffe*, and one point I then made was that Lord Ellenborough CJ’s judgment that the case in hand was one to which the relevant provision applied was not justified by reference to anything even remotely like a wholly worked-out criterion for determining the full range of cases to which that provision applied. That is not a quirk of the *Luffe* judgment. It is a perfectly general feature of law-applying judicial decisions; *Luffe* just happens to be the type of case in which this feature becomes apparent. In cases in which the application of statutory provisions is at issue, what the court needs to tackle is the question of whether the relevant provision is applicable in the case in hand. “Is this statutory provision applicable in *this* case?”—*that* is the question, not “*When* is this statutory provision applicable?”

If this is correct, we want our model of the justification of law-applying decisions to reflect it. And that means, I think, that we need to sever the ties forged by rule-deductivists between the justification of the claim that a statutory provision applies to a case, and the claim that the case satisfies the antecedent of the rule (or any rule) that the provision supposedly expresses.

Here then is one first attempt at reconstructing the structure of the justification of law-applying decisions. The point I just made—that when a judge is tasked with deciding a case and there is a valid statutory provision that applies to that case, the judge ought to decide the case by applying the provision—can be put in relatively more precise terms as follows:

For every judge *J*, every case *C*, every provision *P*, and every action ϕ , if (a) *J* is tasked with deciding *C*, (b) *P* applies to *C*, and (c) ϕ -ing is what counts as applying *P* in *C*, then *J* ought to ϕ .⁷⁹

⁷⁹ Straying from convention for the sake of presentational clarity, I use capital letters as variables.

My suggestion is that we model the justification of law-applying decisions as an argument that takes a conditional such as the one above as a premise, and whose remaining premises are simply the individual statements needed to instantiate its antecedent. Here is the structure of the inference (with small case letters used as individual constants):

- (1) For every judge J , every case C , every provision P , and every action ϕ , if (a) J is tasked with deciding C , (b) P applies to C , and (c) ϕ -ing is the action that counts as applying P to C , then J ought to ϕ .
 - (2) Judge j is tasked with deciding case c .
 - (3) Provision p applies to case c .
 - (4) ϕ -ing is the action that counts as applying provision p to case c .
- Therefore (from (1)-(4)),
- (5) j ought to ϕ .

There are two general points to highlight about this scheme. The first is that it is still, of course, the scheme of a deductively valid inference. As I said in Section 1, my objection to rule-deductivism has nothing to do with the fact that its endorsers propose to represent the justification of law-applying decisions in the form of a deductive argument; it has to do with the fact that they think that the argument should incorporate, as a premise, a statement *of* the rule that the court is supposedly applying.

Indeed, the scheme makes clear—and this is the second, more important point—that premise (3) is a second-order statement about some statutory provision and its relation to a case. Premise (3) mentions, rather than states, the relevant provision (or any rule that the provision is taken to express). What premise (3) states is that the provision applies to the case in hand. Rule-deductivists, by contrast, seem to want to cash out in first-order terms the second-order idea that a statutory rule applies to a case. But how could that be right? If the justification of the court's decision—the justification of the court's *applying* a provision to the case in hand—turned, as rule-deductivists claim, on the fact that the case satisfies the antecedent of the corresponding statutory rule, then what we would need as a premise in the argument would be the second-order statement *that the antecedent of the rule is satisfied by the case*—not a statement *of* the relevant rule together with a statement *of* facts that satisfy its antecedent. Conversely, an argument that featured a first-order statement *of* the relevant rule as a premise, and combined it, as in the rule-deductivists' legal syllogism, with a description of facts that satisfy the antecedent of the rule, could not itself justify the second-order claim

that the rule applies to the facts. The rule-deductivist's legal syllogism, in other words, is incapable of justifying a statement such as (3).

What of the justification of a particular first-order claim in law on the basis that there is some provision that applies to the facts of the case in hand? The same thought applies. For convenience, take the *Luffe* case yet again. It seems plausible to say that the court justified the relevant first-order claim—the claim that the Justices of the Peace had jurisdiction to make an order of filiation regarding the defendant—on the basis of the second-order claim that the provision in 6 Geo. 2. Cap. 31, § 1 applied to the case of the defendant. But then what that suggests is that we reconstruct the relevant argument along the following lines:

- (i) If the provision in 6 Geo. 2. Cap. 31, § 1 applies to the case of the defendant, then the Justices of the Peace of the parish have jurisdiction to make an order of filiation judging the defendant to be the father of the child.
- (ii) The provision in 6 Geo. 2. Cap. 31, § 1 applies to the case of the defendant.
Therefore (from (i) and (ii)),
- (iii) The Justices of the Peace of the parish have jurisdiction to make an order of filiation judging the defendant to be the father of the child.

Here too the point is that content of the the relevant premise—premise (ii)—is an applicability claim: a second-order claim about the applicability of the provision to the case in hand, rather than a first-order statement of any rule that the provision is taken to express.

6. CONCLUSION

Let me finish by stressing that the schemes just offered are meant as only a first attempt at clarifying the structure of the relevant inferences. My primary goal in this chapter has been to take issue with the rule-deductivist model of the legal syllogism. That task is completed. But there is much work still to be done on these issues, and it is likely that my proposed schemes will have to be refined as a result. For one, the mere adoption of these schemes leaves open the question of how best to understand and justify statements that a provision applies to a certain case. The very notion of a *case*, indeed, is far from easy to explain—it is probably multiply ambiguous—and stands in need of clarification. We also need a better account of the notion of a legal rule, and of how rules relate to legal provisions and applicability claims.

And we need an account of both the meaning and the form of general statements of legal “rules” of the sort that lawyers commonly offer, given that we have reason to resist understanding such statements as universal conditionals. This chapter’s connection to the driving theme of this volume is therefore less direct than that of other pieces here included. It tries to clear some ground for future work on a range of metatheoretical topics; but the exploration of these matters I must leave for another occasion.

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