ARTICLE

Lessons of Legal Reasoning

Explicit, Implicit, and Hidden

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Legal reasoning—"thinking like a lawyer"—is the fundamental skill taught and learned in law school, particularly in the first year of law school. For lawyers, legal reasoning is essential to predicting legal outcomes and to advocacy in litigation. In this article, I argue that the lessons of legal reasoning—those taught by professors, learned by students, and inculcated in lawyers—occur at three levels: explicit, implicit, and "hidden."

- The explicit lessons constitute the mainstream account of legal reasoning and legal doctrine as taught in law schools and that becomes second nature to lawyers. These lessons address the forms of legal reasoning and the substance and structure of doctrine, from simple deductive rule application through sophisticated policy analysis.
- The explicit lessons also carry implicit lessons about the deeper structure and function of legal doctrine and legal reasoning.
- The hidden lessons are embedded in the explicit and implicit lessons but are seldom part of the conscious understanding of legal reasoning, either by students or by lawyers. The hidden lessons reveal the shortcomings of legal reasoning and the political and ideological nature of legal reasoning and of the doctrine that is its context.

Section I outlines the content of each of the three lessons. Section II goes through the vehicle for the article's analysis, an exam question and writing assignment I have used in my first-semester Torts class. Section III uses the assignment to illustrate the elements of each lesson.

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What legal reasoning entails, its strengths, and its limitations have been at the center of debates about legal theory and legal education for generations. One might suppose there is little more to be said. Even the political dimensions of legal reasoning and legal doctrine explored in the hidden lessons are sometimes subjects of discussion in law schools and, rather remarkably, in public discourse through the attack on Critical Race Theory.[1] It is therefore possible that the explicit and implicit lessons of legal reasoning are well understood and the hidden lessons are not all that hidden. But I doubt it. The vibrant contemporary literature critiquing legal reasoning suggests that there is still more to learn.[2] And just as the common refrains that "We are all Keynesians now" or "We are all Legal Realists now" misunderstand the nature of the scholarship to which they refer, the insights here, many of which grow out of the Critical Legal Studies movement, are occasionally discussed in the legal literature and the classroom but have not been fully absorbed.

I. The Lessons of Legal Reasoning Outlined

A. The Explicit Lessons

1. Legal reasoning takes several forms, including classification of legal problems, simple deductive application of rule to facts, standard-based rule application, analogical reasoning, policy analysis within rule application, and policy analysis to develop new rules.
2. Legal reasoning, in form and content, constitutes a distinctive form of analysis.
3. The substance of legal doctrine and its application fall on a rough spectrum of relatively clear to relatively open-ended and of law to policy.
4. At some point the forms of legal reasoning and the doctrine and policy they use "run out," and any further discussion of the problem requires political judgments that are beyond the scope of ordinary doctrinal analysis. In a rough, nontechnical sense, this is the distinction between

1 *See* CRT Forward, *Tracking the Attack on Critical Race Theory*, UCLA School of Law Critical Race Studies, https://crtforward.law.ucla.edu/wp-content/uploads/2023/04/UCLA-Law_CRT-Report_Final.pdf (last visited May 17, 2024).

2 Some of that literature is cited throughout this article. *See also* Larry Alexander & Emily Sherwin, Advanced Introduction to Legal Reasoning (2021); Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 Harv. Latinx L. Rev. 205 (2020); Kenneth Chestek, *Dimensions of Being and the Limits of Logic*, 19 Legal Comm. & Rhetoric 23 (2022); Phoebe C. Ellsworth, *Legal Reasoning*, *in* The Cambridge Handbook of Thinking and Reasoning 685–704 (Keith J. Holyoak & Robert G. Morrison Jr. eds., 2005); Mark A. Geistfeld, *Unifying Principles Within Pluralist Adjudication*, *in* Reflecting on Torts: Essays in Honor of Jane Stapleton (Sandy Steel, Jonathan Morgan, Jodi Gardner & Kylie Burns eds., 2023); Dan Hunter, *Reason is Too Large: Analogy and Precedent in Law*, 50 Emory L.J. 1197 (2001); Harold Anthony Lloyd, *Balancing Freedom and Restraint: The Role of Virtue in Legal Analysis*, 32 S. Cal. Interdisc. L.J. 315 (2023).

legislation, which appropriately makes political judgments, and adjudication, which rarely does so.

B. The Implicit Lessons

1. Legal reasoning mostly works.
2. There is a substantial core of legal reasoning and legal doctrine that is distinctly legal and a smaller periphery that is substantially nonlegal.

C. The Hidden Lessons

1. Legal reasoning doesn't work, and the extent of core and periphery is reversed.
2. All legal reasoning and legal doctrine reflects broader social and political conflicts.
3. The process of legal reasoning and the forms it takes obscures law's political nature.

II. The Problem

The vehicle for this article's analysis—the "problem"—is what was originally an exam question and then became a writing assignment in my first-semester Torts class. Because it is a hypothetical exam question and classroom exercise, it is a useful means of discussing legal reasoning. It raises a variety of issues, jurisdictional variation is minimized, and the questions can assume away many complications. In questions 1 and 2 for example, we can focus on the liability of only one party at a time. Proof problems can be acknowledged and then put aside, in order to move on to other doctrinal issues.

Here is the exam question:

> **Camdenosis**
> The biochemistry department at Hudson University,[3] a private university renowned for its research. One of its projects is an investigation of camdenosis, a lung disease caused by a bacterium known as CM. The CM bacterium occurs only in certain African plants. Camdenosis is caused by the interaction of CM with some bacteria commonly occurring in the air.
>
> The biochemistry department is experimenting with ways to neutralize the interaction of CM and other bacteria. Because of the danger of camdenosis if CM is mixed with the other bacteria, the lab in which the research is being conducted has special features. All of

3 Fans of the television program *Law and Order* will recognize Hudson University as the fictional university in New York City often mentioned on the program.

this research is conducted in a sealed room. Air in the room is supplied through a special ventilation system designed to filter bacteria out of the air, preventing interaction with CM.

Much of the work on camdenosis in the lab is carried out by research assistants. From 2017 through mid-2022, four of these research assistants contracted camdenosis; fortunately, all of them recovered after extensive hospital stays.

Four other university labs have conducted research on camdenosis during the same period and used the same type of sealed room and the same ventilation system as Hudson. No research assistants contracted camdenosis at these labs.

Under state law, student research assistants are not covered by the workers compensation law. Hudson does not have charitable immunity.

Questions:

1. Assume that the ventilation system is subject to monitoring and adjustment by Hudson personnel. The research assistants who became ill bring actions against Hudson. Discuss these actions.
2. Ignore the facts in Question 1. Assume that the ventilation system is manufactured by Penn, Inc., and has not been altered since its installation. The research assistants who became ill bring actions against Penn. Discuss these actions.
3. Ignore the facts in Questions 1 and 2. Assume that the ventilation system is manufactured by Penn, Inc., and is subject to monitoring and adjustment by Hudson personnel. The research assistants who became ill bring actions against Hudson and Penn. Discuss these actions.

A. Question 1

Question 1 focuses on the liability of Hudson University.

The first step is to assign the problem to one or more of the three doctrinal areas of torts: intentional torts, negligence, or strict liability. We immediately understand that no intentional tort is involved. If we need to justify the understanding, first the presence of personal injury makes battery the relevant intentional tort, then application of the elements of battery explains that Hudson did not intend that the research assistants come into contact with CM.

The next step is to determine whether the liability rule is negligence, which is the usual default rule in cases of personal injury, or strict liability. The general rule is that strict liability attaches for "abnormally dangerous activities." An activity is abnormally dangerous if it bears a foreseeable and highly significant risk of harm even if reasonable care is exercised by the actor, and the activity is not of common usage.[4]

Whether the activity is of common usage depends on characterization of the facts—so on the application of the rule: Is the activity laboratory research, laboratory research involving dangerous materials, or laboratory research involving an obscure, hazardous bacterium? Either way, the ability of the four other university labs to conduct similar research without causing injury suggests that the activity does not bear a significant risk if conducted with reasonable care. If this were a real situation, the suggestion likely would not be enough. Detailed factual investigation would be needed, four labs out of five might not be a large enough sample, and other factors might be in play. In the classroom setting, it is sufficient to recognize the possibility of strict liability, do a simple analysis, and move on.

Therefore, on to negligence. In considering whether Hudson might be liable in negligence to the research assistants, the elements of the negligence cause of action provide the rule to be applied. The elements of the cause of action for negligence are

a. Duty

b. Breach of duty

c. Harm

d. Causation

e. Scope of liability.[5]

Conclusions are easy under some elements of the rule. Conduct of the lab is a risk-creating activity to which the ordinary duty of reasonable care applies, and the problem states that workers compensation and charitable immunity are not relevant. The research assistants have suffered physical injury, which is the paradigmatic type of harm in a negligence case. Within the scope of Question 1, if Hudson was negligent, its negligence caused the harm. Assuming negligence and injury, the harm was precisely the type of harm that made Hudson's conduct negligent, so it was within the scope of liability. Therefore, simple doctrinal analysis resolves those issues.

The only significant issue is whether Hudson breached its duty of reasonable care. Hudson breached its duty of care if there was a foreseeable risk of harm to the research assistants that the reasonable person would take account of in engaging in its conduct and the reasonable person would have engaged in alternative conduct to eliminate or reduce the risk.[6] The application of this element of negligence depends on facts not stated in the exam problem, but there are three possibilities:

4 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 20 (Am. Law Inst. 2010).

5 *Id.* § 6 cmt. b.

6 *Id.* § 3.

a. The facts establish that Hudson acted reasonably.

b. The facts establish that Hudson acted negligently.

c. The facts are insufficient to decide if Hudson acted reasonably or negligently.

If either (a) or (b) is correct, then the question is over, and this is a simple application of facts to law. If (c) is correct, the analysis is not over. There is a class of cases in which the plaintiff cannot prove the defendant's negligence, but there is a subrule that creates an exception to the ordinary proof requirement that potentially provides the plaintiff a way forward. That subrule is, of course, *res ipsa loquitur*.

Under *res ipsa*, a plaintiff may be relieved of its burden of production with respect to the elements of breach of duty and causation.[7] There are different formulations of the rule, both as to what triggers it and what its procedural effects are, but in general, *res ipsa* applies when the harm is more likely than not the product of the defendant's negligence. If so, the plaintiff has met its burden of production, though not necessarily the burden of persuasion.

In sum, if the research assistants can prove specific causal negligence, Hudson is liable. If they cannot find specific causal negligence, they may be able to persuade the court that the safety of the other four labs establishes that their harm was more likely than not caused by Hudson's negligence, so they are entitled to the *res ipsa* inference and its consequences under the law of different jurisdictions. If they cannot persuade the court, there are no further rules, subrules, or doctrinal moves to avoid the situation. More on their next steps in response to Question 3.

B. Question 2

Here Penn is the defendant. Because it is the manufacturer of the ventilation system, categorization moves the problem from a field defined by the defendant's level of culpability (intent, negligence, or strict liability) to a field defined by factual similarities among the cases: products liability.

Three subfields constitute products liability: manufacturing defects, design defects, and information defects. No facts suggest an information defect—a failure by the manufacturer to warn of the dangers of the ventilation system—so Penn's liability could be a result of a design defect or a manufacturing defect.

As to design defect, in the four labs other than Hudson's, the ventilation system operated safely. This suggests but does not prove that there was no design defect. Even if a product is defectively designed, every

7 *Id.* § 17.

instance of the product will not necessarily manifest the defect. An auto recall involving defective brakes may involve hundreds of thousands of vehicles, but not all of them will incur a brake failure that causes an accident.

The appropriate liability rule for a design defect varies widely and controversially among the jurisdictions.[8] Section 402A of the Restatement Second states that a product is defectively designed if it is in "a defective condition unreasonably dangerous" in terms of the expectations of the ordinary consumer of the product.[9] Some courts moved from § 402A to a risk–utility analysis as an alternative or substitute, and the Products Restatement adopted risk–utility with the added requirement that the plaintiff prove the existence of a reasonable alternative design.[10] Particularly in jurisdictions that apply the reasonable-alternative-design requirement rigorously, the research assistants would have a high burden of proof. But the problem does not offer sufficient facts to resolve the design defect question under any of the tests.

The problem also could be examined as a manufacturing defect. Here the ventilation system might fail under the § 402A standard, the Restatement Third's rule that the product "deviate from its intended design," or some other variation.[11] All of the rules are similar in effect, focusing not on the manufacturer's conduct—whether it was negligent in designing or manufacturing the product in a certain way—but on the variation in the product itself, under a rule of strict liability.

Once again, the proof is uncertain. Is the inference from the other four labs sufficient? Can the research assistants establish that the defect was present when the ventilation system was installed and has not been subject to subsequent action that affected its performance? As with Hudson, here the research assistants can either satisfy their burden of proof, or not. If they cannot, they are in the same position as at the end of the Hudson analysis—without a remedy.

C. Question 3

Questions 1 and 2 are rather typical examples of doctrinal application. They ask students to determine the relevant doctrinal category and the issues within that category, define the elements of the rule structure, apply the elements to the facts, and, to the extent possible, reach a conclusion,

8 Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 Seattle U. L. Rev. 1, 35–39 (2004).

9 Restatement (Second) of Torts § 402A (Am. Law Inst. 1963).

10 Restatement (Third) of Torts: Products Liability § 2(b) (Am. Law Inst. 1998).

11 *Id.* § 2(a).

which may be that the result depends on facts yet to be discovered. Each question addresses a single defendant. And the liability of one would presuppose no liability of the other.

But there is a problem. Because of the possibility of a manufacturing defect by Penn, Hudson's negligence as the cause of the harm is less probable, defeating the *res ipsa* inference. And because of the possibility of Hudson's negligence, it is less likely that a manufacturing defect caused the harm. Now what?

The presence of both defendants changes things in Question 3. Question 3 involves multiple actors, one of whom presumably caused the harm by violating the relevant liability rule. In one sense, this is, as in the earlier questions, a matter of rule application. Other situations involving multiple actors can be used as precedents, so we can use analogical legal reasoning. We look at other situations in which the courts have faced similar problems and the solutions they have devised. Typically, one would begin with close analogies well-established in the law and then broaden the inquiry as necessary.[12]

Several classes of cases involve two or more defendants, each of whom potentially or actually has engaged in tortious behavior, but the causation element cannot be satisfied.

One class involves concert of action.[13] Two teenagers are drag racing at excessive speed on a public street, and one of them strikes and injures a pedestrian. That driver is liable under the ordinary negligence rules. The other driver also is liable for negligently causing the harm through their agreement to enter into the race, even though, in a narrower sense, that driver has not caused the harm by striking the pedestrian. In the problem, however, there was no agreement between Hudson and Penn to engage in negligent behavior, so that analogy fails.

A second class of cases is alternative liability, exemplified by the casebook classic *Summers v. Tice*.[14] Two hunters were negligently shooting, simultaneously, with identical weapons, and a shot from one hunter's gun injured the plaintiff, but it was impossible to determine which one. The court nominally shifted the burden of proof on causation from the plaintiff to the defendants. In fact, neither defendant would ever be able to meet the burden of proving lack of causation, as it was impossible to prove whose shot struck the plaintiff. The result was not just burden

12 On analogical legal reasoning, see, e.g., Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J.L. & Pol'y 147, 149 (2013); Mark Cooney, *Analogy through Vagueness*, 16 Legal Comm. & Rhetoric 85 (2019); Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. Chi. L. Rev. 249 (2017).

13 Restatement (Third) of Torts § 876 illus. 2.

14 199 P.2d 1 (Cal. 1948).

shifting but liability shifting. In *Summers*, both defendants engaged in identical wrongful conduct, but in the problem, the assumption is that either Hudson or Penn, but not both, engaged in wrongful conduct; even if both did, the conduct was not like that of the hunters in *Summers*, in which the hunters engaged in exactly the same conduct, only one instance of which caused the harm.

The *Summer*s principle has been extended in several cases involving serial control. In *Collins v. Superior Air-Ground Ambulance Service, Inc.*, the plaintiff was transported by ambulance to and from a nursing facility.[15] When she returned several days later, she had suffered an injury. Either the ambulance service or the facility caused the injury, but the plaintiff could not prove which one had done so. In *Collins*, the court concluded that one but not both of the defendants was negligent. Using the information-forcing rationale that underlies some *res ipsa* cases, the court shifted the burden of proof to the defendants. That incentivizes the innocent one to come forward with proof of its reasonable conduct, which would usually allow an inference of negligence by the other. In the problem, if the information is exclusively in control of the defendants, then *Collins* might apply, although the time lapse is much greater than in *Collins*. But it is even more likely that the research assistants simply are not able to prove their case.

A final analogy involving multiple parties is market-share liability adopted in the DES cases.[16] In those cases, defendants engaged in equally wrongful conduct in distributing DES that caused harm to the daughters of women who took the drug, but which defendants caused harm to which individuals cannot be ascertained. Through different rules, courts used statistical probability to impose liability. For example, even if it cannot be proven that a particular defendant injured a particular plaintiff, a defendant that had a 40% share of the market for DES likely injured 40% of the plaintiffs, so apportioning partial liability to that defendant is appropriate. Once again, the problem does not assume equally wrongful actors, and certainly not actors who were wrongful in an identical way.

At this point, doctrinal reasoning through rule application and analogical thinking have both failed the research assistants. But there is one more move. Doctrinal rules, subrules, and analogies all rest on policies that tort law seeks to advance, and sometimes courts resort to

15 789 N.E.2d 394 (Ill. App. Ct. 2003); *see* Restatement (Third) of Torts § 17 cmt. f.

16 Diethylstilbestrol—a synthetic form of estrogen. *Diethylstilbestrol (DES) Exposure and Cancer*, Nat'l Cancer Inst. (Dec. 20, 2021) https://www.cancer.gov/about-cancer/causes-prevention/risk/hormones/des-fact-sheet. *See* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989).

explicit policy analysis to formulate doctrine and achieve appropriate results.

A conventional and useful statement of the policies underlying tort law separates the arguments into three types: morality or corrective justice, social utility or public policy, and process.[17] Morality focuses on individual accountability, positive and negative: a defendant should be liable for harm it wrongfully caused but *only* for harm it wrongfully caused. Social utility involves compensation to injured victims, providing incentives for proper conduct and disincentives for wrongful conduct, and distribution of risks among relevant groups. Process requires that tort doctrine be realizable, providing an adequate amount of guidance to judges and private actors and a fair and efficient process for implementing the doctrine.

In the policy analysis, the assumptions and proof problems that give rise to Question 3 present challenges for the research assistants. They can make persuasive arguments within each category, but only within limits, and the sum of the arguments likely still leaves them without a remedy. Briefly, the research assistants will argue that they are the innocents in this situation and Hudson and Penn are responsible parties, one of whose behavior may be wrongful. Even if their behavior cannot be proven to be wrongful, both entities profit from the situation, and risk-bearing activities ought to bear their costs. Compensation is particularly needed for employees in a workplace where dangers are created by their employers and the entities that provide elements of the workplace, such as Penn and the ventilation system. Most broadly, this is a question of responsibility and not fault. Concepts of fault-based, individual, relational liability fail to respond to the needs of society and its members, and the law ought to create social obligations that reflect an ethic of caring and mutual responsibility.

Hudson and Penn will respond that the research assistants' aims may be sound but that there are other sides to each of the fairness and policy accounts. The research assistants cannot establish that Hudson or Penn have done something wrong, nor are they the appropriate entities on which to impose enterprise liability. Innocent victims of harm caused by others may in some sense deserve compensation, but desert in tort law is relational; the victim is entitled to compensation only from a wrongdoer or from one who engages in an activity to which the risk logically and effectively can be assigned. Because it cannot be established which of the two supposed wrongdoers, Hudson or Penn, has caused the harm, corrective justice does not lead to liability for either. Imposing liability

17 Dan B. Dobbs, Paul T. Hayden & Ellen Bublick, 1 The Law of Torts §§ 10–14 (2d ed. 2011).

on either, without determining fault, would provide improper incentives without logically assigning responsibility to a risk-creating activity. The policy rationales that permitted exceptions in *Summers v. Tice* or in the other multiple-party cases do not apply when it is assumed that one of the defendants is without fault and neither has obviously unique access to the information about fault. As an institutional matter, it would be hard for the courts to formulate a general rule here and, if there is liability to be imposed without fault, it is the task of the legislature, not the courts, to do so.

For the student and for the law in general, this poses an ultimate question: What is the right answer to the exam question? Existing tort doctrine and policy do not impose liability on either Hudson or Penn, but should they be liable?

The answer is the law professor's favorite: It depends.

Depends on what? Not on legal reasoning and the doctrinal structure. Not on the goals structure. It depends on choices about the allocation of values through law, which is another definition of politics. The research assistants can argue that we ought to transcend the existing doctrinal structure to impose liability because it is fair, or because it is in the public interest, or both. Hudson and Penn dispute the fairness and public interest arguments. Fairness and the public interest are embedded in the goals of tort law, but the scope of fairness and public interest that courts applying tort law can legitimately address is limited. Hudson and Penn also make an institutional argument. If liability is to be imposed here, especially as a no-fault responsibility scheme, it is the task of the legislature, not the courts, to do so. Because the problem stipulates that the research assistants are outside the workers-compensation system, the legislature has made the judgment that tort law with its focus on individual wrongdoing and responsibility provides the only remedy, which is to say no remedy, at all.

III. The Lessons of Legal Reasoning

A. The Explicit Lessons

The explicit lessons of legal reasoning address its forms and the substance and structure of doctrine, from simple deduction through sophisticated policy analysis. They constitute the mainstream account of legal reasoning and legal doctrine we all learned in law school and with which we are familiar as lawyers. Their formal statement in this article should be noncontroversial.[18]

18 The literature is vast. Canonical works include Duncan Kennedy, A Critique of Adjudication (*fin de siècle*) (1997); Edward H. Levi, An Introduction to Legal Reasoning (Frederick Schauer ed., 2d ed. 2013); Karl Llewellyn, The Bramble Bush (1930); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L.

1. Legal reasoning takes several forms, including classification of legal problems, simple deductive application of rule to facts, standard-based rule application, analogical reasoning, policy analysis within rule application, and policy analysis to develop new rules.

The problem, a typical law-school exercise or exam, illustrates many of the forms of legal reasoning. It begins with classification of Hudson's potential liability as involving intentional torts, strict liability, or negligence. It includes several examples of deductive rule application, such as whether Hudson owes a duty of reasonable care when engaging in a risk-creating activity that causes harm. These issues may be factually complex but, once the facts are determined, the rule application is rather simple. It suggests that doctrine can take the form of rules (whether Hudson owes a duty of reasonable care) and standards (whether Hudson acted reasonably).[19] Some rules require deduction supplemented by policy (whether *res ipsa* should apply if the information-forcing rationale is not present). When simple deduction is not enough, legal reasoning can involve analogical reasoning, as in the cases involving multiple actors. Finally, it demonstrates how policy analysis is used to develop new rules (market-share liability).

2. Legal reasoning, in form and content, constitutes a distinctive form of analysis.

The first thing students learn in law school is that legal reasoning is distinctive, distinguishable from other forms of analysis. It employs a unique legal vocabulary, including the particular meaning of common words such as "negligence," the meaning of unique legal terms, such as *res ipsa loquitur*, and the meaning of legal concepts, such as the elements of a cause of action for negligence. Legal reasoning also takes distinctive forms, including the ability to situate problems within rule systems, deductive legal reasoning, analogical legal reasoning, policy-based rule application, and policy analysis. Employing these forms requires the ability to use judicial opinions and statutes, including generating broad and narrow holdings of cases.[20]

Of course, although legal reasoning is distinctive, it is not unique. Deductive and analogical reasoning are common across all fields of inquiry and in daily life, and forms of policy analysis are used formally and

Rev. 1689, 1712 (1976). Many contemporary works are designed for teaching. *E.g.*, Christine Coughlin, Joan Malmud Rocklin & Sandy Patrick, A Lawyer Writes ch. 8 (3d ed. 2018); R.A. Robbins, S. Johansen & K. Chestek, Your Client's Story 104–06, 173–76, 225–35 (2d ed. 2019).

19 *See* Ward Farnsworth, The Legal Analyst ch. 11 (2007).

20 Kennedy, *supra* note 18, ch. 5; Jay M. Feinman, *The Future History of Legal Education*, 29 Rutgers L.J. 475 (1998); Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 Geo. L.J. 875, 891–92 (1985).

informally to weigh many kinds of decisions. The legal forms, however, *are* distinctive, involving the understanding of legal vocabulary, rule systems, analysis, and argument in systematic ways and recurrent categories.

3. The substance of legal doctrine and its application fall on a rough spectrum from relatively clear to relatively open-ended, from law to policy.

Experienced lawyers are often able to identify immediately the key doctrinal issue involved in a situation and to analyze the application of the facts to address the issue. A lawyer for an accident victim recognizes that two parties who have agreed to engage in dangerous conduct are involved in a "concert of action," potentially creating liability even for the party who does not directly cause harm. An advantage of the problem is that requiring students to work through the doctrine methodically reveals there are many forms of legal reasoning, and the forms are not just a list but a list with a degree of order.

The issues in the problem demonstrate that the spectrum of legal analysis links form and substance. Simple, well-established rules that can be applied deductively lie at one end of the spectrum and open-ended issues that need to be addressed by policy analysis lie at the other. The initial analysis of Hudson's potential liability, for example, begins with the deductive application of law to facts, which may be clear (whether the research assistants suffered cognizable harm) to more open (whether Hudson breached its duty of reasonable care). When Penn enters the picture in question 3, the research assistants move to analogical reasoning in trying to apply the multiple party cases. The rules in the analogies (alternative liability, concert of action, serial control, and market-share liability) are themselves the products of earlier cases in which courts applied principle and policy to develop new rules.

4. At some point the forms of legal reasoning and the doctrine and policy they use "run out," and any further discussion of the problem requires judgments that are beyond the scope of ordinary doctrinal analysis. In a rough, nontechnical sense, the need for such judgments distinguishes the reach of adjudication and legislation.

Legal reasoning and policy analysis provide distinctive forms of coming to answers in a whole range of questions, but sometimes the answer is "no" or at least "not here." This happens in two very different ways: In ordinary cases, the appropriate doctrinal issues are identified and applied, and sometimes that application denies a plaintiff a remedy. In Question 1, if Penn is proven to have acted reasonably, the research assistants lose. Likewise regarding Hudson in Question 2 under the product-liability doctrines. The appropriate legal rule has been applied to

achieve a result. In Question 3, because none of the analogies for multiple defendants fit the situation, the research assistants lose again. But the issue here is not that a single rule (negligence) has been applied to reach a result. Instead, the whole range of potentially applicable doctrines have been examined and none of them fits sufficiently to address Hudson's and Penn's potential liability. Legal doctrine and the forms of legal reasoning have done their work, and if the research assistants are to have a remedy, it resides elsewhere; the rule that would give it to them is within the nonlegal, political allocation of values by the legislature.

B. The Implicit Lessons

The explicit lessons of legal reasoning certainly are useful in laying out elements that are basic to the lawyer's toolkit (as well as to the core of the first-year student's experience). But the explicit lessons are not the whole story of what is communicated by the mainstream view of legal reasoning. That view also carries two implicit lessons about legal reasoning.

1. Legal reasoning mostly works.

Stepping back from the doctrine, some of the law and its application to the problem appears to be clear and correct, and some of it is less clear and up for grabs. At the relatively clear end of the spectrum, the law expresses consensus social values through clear rules; the values are so clear that they rarely require explication or can be stated in a simple, widely understood form. Hudson is liable if its negligence has caused the research assistants' injuries, and Penn is liable if a manufacturing defect in its ventilation system has caused the injuries. At the less-clear end of the spectrum, the distinctively legal form of policy analysis applies familiar general categories and substantive principles to reach results. Policy analysis in tort law entails rigorous use of principles of corrective justice, social utility, and process that are not just restatements of the type of arguments made outside of law. That type of legal policy analysis establishes categories of liability such as alternative liability and market-share liability.

In these ways, the forms of legal reasoning apply the underlying principles and policies to achieve results that conform to social values, though not in every case or with every rule, of course. Sometimes courts make mistakes in particular cases, and some rules are poorly formulated, outmoded, or just wrong. But most of the time the process of legal reasoning gets things right, and when it does not, the system has the capacity to correct itself.

The problem that the research assistants face in Question 3, with multiple actors, is not a failure of legal reasoning. Instead, legal reasoning

and the doctrines it has generated have run out. There are no rules, standards, or analogies through which Hudson or Penn can be held liable, so their remedy, if any, lies "outside" law, at least at the moment. Some of the doctrines discussed in the problem show that legal reasoning with doctrinal principles and policy analysis can expand to encompass new situations such as theirs. At different points in time, victims such as the plaintiffs in the origin case for *res ipsa*, *Byrne v. Boadle*,[21] *Summers v. Tice*,[22] and the DES cases[23] also had no remedy within law. Courts expanded liability through the development of new rules, exceptions, or counter-rules that covered those victims and others within the newly defined classes. For the moment, however, legal reasoning has done its job and courts cannot reasonably fashion a rule that would help the research assistants.

2. A substantial core of legal reasoning and legal doctrine is distinctly legal; a smaller periphery is substantially nonlegal.

Along with the spectrum of legal reasoning, a second physical metaphor is helpful in understanding the nature of law and legal reasoning, that of core and periphery. As we move along the spectrum, from simple rule application to policy and from ordinary negligence to, say, market-share liability, we get the sense that we are moving from the purely legal to the less legal. Because "We are all Legal Realists now," we understand that the classical conception of law as formal and, in Langdell's view, scientific, is invalid. But there remains a sense that some rules and techniques are closer to what it means to do "law" and others are farther away.

If the core is law, then the periphery is something outside the sphere of law. That something is politics. As post-realists, we understand that law is not entirely separate from politics, that legal rules involve the allocation of values, and that the struggles over legal rules sometimes are as motivated by interest and ideology as are electoral politics. Still, there is a sense that doctrines and forms can be more legal or less legal. Ordinary negligence is different than market-share liability. Liability for a defectively manufactured product is well established, but it rests on an enterprise-liability rationale that is less firm than fault-based liability, so a risk–utility test is more appropriate for design defects than a fuzzier standard of consumer expectations.

21 159 Eng. Rep. 299 (Exch. 1863).

22 199 P.2d 1 (Cal. 1948), discussed *supra* note 14.

23 Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989), discussed *supra* note 16.

The core of determinacy occupies most of the sphere of law, with the periphery only a mantle of indeterminacy close to the surface. As process, the overwhelming majority of legal issues can be settled by deductive or analogical reasoning, with some additional quantity addressed by deduction supplemented by policy. Only a very few require pure policy analysis, a process that is to a substantial extent nonlegal. As substance, the lawyer advising about potential tort liability can confidently predict the outcomes in the vast number of cases once their facts are known, with the result that many cases do not need to be litigated. Among the litigated cases, even those that are uncertain have solutions that rest within a relatively narrow range, often requiring the application of uncertain facts to clear rules of law. Penn may or may not be liable for a manufacturing defect, but the company clearly is neither liable for all injuries its product causes nor immune from liability under any circumstance.

C. The Hidden Lessons

The explicit lessons of legal reasoning clearly communicate the forms of legal reasoning and the substance and structure of doctrine. The implicit lessons add some ideas about how well law works in achieving its objectives and on the limits of law. But there is more to the story—about the shortcomings of legal reasoning, its political meaning, and how and why those features are hidden.[24]

1. Legal reasoning doesn't work, and the extent of core and periphery is reversed.

A hidden lesson of legal reasoning is that the claim that legal reasoning produces a substantial core of law that is clear, correct, and "legal" is false. This is most obviously true in constitutional law. The current Supreme Court may provide an extreme example, but it is well understood that the Court's decisions about constitutional law almost always operate within a realm of broad indeterminacy, where lawyers can make plausible arguments for different results and individual justices will choose among those arguments based on principle and politics. But constitutional law is not exceptional: private law offers the same possibilities for different results employing different legal-reasoning techniques.

24 Much of the analysis in this part III has its origins in the Critical Legal Studies movement. I have generally avoided specific citation to that work. Among so many other works, see The Politics of Law: A Progressive Critique (David Kairys ed., 1998); Mark Kelman, A Guide to Critical Legal Studies (1987); Kennedy, A Critique of Adjudication, *supra*, note 18; Roberto Mangabeira Unger, The Critical Legal Studies Movement (1983); Jay M. Feinman, *The Jurisprudence of Classification*, 41 Stan. L. Rev. 661 (1989); Peter Gabel, *Reification in Legal Reasoning*, 3 Rsch. L. & Socio. 25 (1980); Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 18. For more recent work, see Susan A. McMahon, *What We Teach When We Teach Legal Analysis*, 107 Minn. L. Rev. 2511, 2523 (2023).

This does not mean that, in practice, every legal issue is up for grabs all the time. Obviously, lawyers can often confidently predict the outcome of cases. Just as obviously, the resolution of some issues cannot be resolved based on ordinary legal reasoning: whether the constitutional right to privacy encompasses a woman's right to choose to have an abortion, for example. The claim that legal reasoning doesn't work is that a huge portion of legal issues is indeterminate, so that most of the time lawyers would be justified in asserting contrary positions and courts would be justified in reaching contrary results.

Indeterminacy penetrates every form of legal analysis. Doctrinal systems contain rules, sub-rules, counter-rules, and exceptions that create issues of fit; a fact situation can be treated under one doctrinal element or another, and the choice is often both open and outcome-determinative. Doctrines are aligned on a spectrum from simple rules that appear to permit simple deduction to standards that are vague, that allow a broad range of possible results in their application, and the latter are much more common than the former. Doctrines rest on principles and policies, and the principles and policies can be deployed to achieve different results in particular cases and for the rule system more broadly. These features can be employed in a very large number of cases in support of different results—so many cases in fact that the core–periphery model fundamentally misstates the nature of law and legal reasoning; much more *within* the law's sphere is indeterminate. That result is embedded in the problem, as much in Questions 1 and 2 as at the end of Question 3.

The first issue in any doctrinal problem is one of fit: where in the doctrinal structure the issue belongs. The problem is set as one of tort law, but it could as easily involve a contract. Even in the absence of an express provision about safety in the contract between the research assistants and Hudson, there could be an implied term based on words and conduct or just the assistants' reasonable expectation of a safe workplace, especially when working with dangerous materials. This approach would further the fundamental purpose of contract law, which is the protection of reasonable expectations.[25]

Within tort law, the first issue in Question 1 is whether Hudson's conduct is governed by a rule of negligence or strict liability; if the research assistants cannot prove negligence, a move to strict liability would change the result.[26] The test for strict liability is stated in deductive form: If an activity bears a foreseeable and highly significant risk of harm

25 Arthur Linton Corbin, Corbin on Contracts §1, at 2 (1952).

26 Since the rise and generalization of negligence liability in the mid- to late-nineteenth century, negligence has been the baseline rule of liability, so it also can be seen as a rule–exception question.

even if reasonable care is exercised by the actor, and if the activity is not of common usage, then the actor is strictly liable for resulting harm. But the terms of the doctrine are standard-like rather than rule-like: defining "the activity," "foreseeable risk," "highly significant risk," "reasonable care," and "common usage." Is the "activity" operating a laboratory, operating a laboratory with potentially dangerous materials, or operating a laboratory involving CM? Is the risk involved merely "significant" or "highly significant?" And so on. Each of these choices is open for resolution within a very broad range, and a variety of answers arguably would advance tort law's purposes of corrective justice, incentives, and risk allocation.[27]

If the relevant rule is negligence, the result also is wide open. Whether Hudson has acted with reasonable care is a "question of fact" only in the sense that is to be decided initially by a jury, because reasonableness involves conflicting policy dimensions. Reasonableness is a judgment, not a fact; the conduct of the average person may or may not be reasonable. Learned Hand's risk–utility test for determining reasonableness makes clear that balancing is involved, but the elements that factor into the balance are typically incapable of being fixed in numbers that allow algebraic precision.

If the research assistants cannot establish negligence and Hudson cannot establish reasonableness, the research assistants may shift to a rule–exception mode and invoke *res ipsa loquitur*. *Res ipsa* is well-established, but what is less clear is how far its rationale extends. Its essential aim is to allow the plaintiff an inference when negligence is likely but proof is unavailable; as in the foundational case *Byrne v. Boadle*, proof often is unavailable because it is solely within the defendant's knowledge.[28] It is more controversial whether the doctrine applies when the defendant lacks superior knowledge and, at the extreme, when the plaintiff has failed to make sufficient efforts to determine the available facts.[29] Thus the availability of an exception may be determined both as a factual matter—whether the facts fit within the exception—and as a policy matter—what the underlying policies of the exception are and whether those policies would be served by its application on the present facts.

The factual assumptions in Question 3 require the research assistants to use analogical legal reasoning. Concert of action, alternative liability,

27 *Compare* Toms v. Calvary Assembly of God, Inc., 132 A.3d 866 (Md. 2016) (commercial fireworks display is not an abnormally dangerous activity), *with* Klein v. Pyrodyne Corp., 810 P.2d 917, amended by 817 P.2d 1359 (Wash. 1991) (commercial fireworks display is an abnormally dangerous activity).

28 2 H & C 722, 159 Eng. Rep. 299 (1863). In *Byrne*, a witness testified that the plaintiff was struck by a flour barrel that fell from defendant's shop, but no evidence was presented of the defendant's negligence in causing the barrel to fall.

29 *E.g.*, Howard v. Wal-Mart Stores, Inc., 160 F.3d 358 (7th Cir. 1998); District of Columbia v. Singleton, 41 A.3d 717 (Md. 2012).

serial control, and market-share liability, like the problem facts, involve multiple defendants, each of whom potentially or actually has engaged in tortious behavior, but the causation element of negligence cannot be satisfied. In each of these situations, the limits of the existing negligence rule stymied plaintiffs, and courts created an exception to permit liability because the courts' balance of the underlying principles or policies suggested the rightness of doing so. This ability to create exceptions based on policy is itself a source of indeterminacy because seldom is it clear when or to what extent courts will create exceptions. If an exception is created, its application seems to come through a form of deductive reasoning, in which the principle established by the exception becomes a new doctrine capable of application to other fact situations. That deductive application is often open as well. For example, in *Collins*, where the plaintiff's injury was caused either by the ambulance ride or by the facility to which the plaintiff was driven, the information-forcing policy led to the *res ipsa* inference. But in other serial-control cases such as the research-assistant problem, where that policy may not be as strongly served, the plaintiff is not relieved of its burden of production.[30]

The most obvious point of indeterminacy comes at the end of Question 3—in resorting to explicit policy analysis to formulate a new doctrine to achieve appropriate results. This reinforces a lesson implicit in the doctrines available in the multiple-party cases: Whether a court will resort to policy to create an exception or new rule is most often up for grabs. Often this is empirically true, as when an observer simply cannot predict with any confidence in which direction a court will go. How to frame arguments about morality, policy, and process in a particular case, what weight to give to each factor, and by what means to balance them are so wide open that different courts will go in vastly different directions. Other times the result may be more predictable even if it is not logically necessary; at some point in the development of products liability law, the weight of exceptions and subrules that imposed liability on manufacturers of defective products made the turn to strict liability, at least for manufacturing defects, more likely. But likelihood is far from certainty and the ebbs and flows of products liability illustrate the indeterminate nature of the rules and process.

2. All legal reasoning and legal doctrine reflects broader social and political conflicts.

Part of the reason that law doesn't work is that principles do not determine doctrinal results. If we try to apply carefully and fully the

30 Restatement (Third) of Torts § 17 cmt. F.

principles and policies underlying tort law, for example, in most instances we still cannot reach clear results on the choice of rules or the decision of cases; both the research assistants on the one hand and Hudson and Penn on the other can make credible arguments.

A useful way to think about this issue is to recognize that law is both coherent and contradictory. It coheres in the sense of the term's dictionary definition: a substantial portion of the policy, principles, doctrine, and forms sticks together and forms a whole. Although individual doctrinal elements of tort law are not logically compelled by the underlying principles and policies, they are strongly associated in a way that gives coherence to the whole. At the same time, law is contradictory because there are conflicting coherent structures. This coherence and conflict within the law reflects broader social and political conflicts about the social good, and even the most fundamental conflicts about social life.

To illustrate, again begin by situating the problem in doctrinal context: Hudson suggests that contract law is about individuals' choices to make promises or enter into agreements that may create legal liability; in the absence of evidence of agreement on issues of safety or compensation for injury, contract law is not an appropriate venue. Tort law is better suited, given its aims of providing compensation for harms wrongfully caused in order to achieve optimal levels of investment in safe conduct. The research assistants respond that contract law is not about choice. In concept and in doctrine, contract law is about manifest assent and reasonable expectations. Assent is manifested and reasonable expectations are created by words, conduct, and context, particularly in relational contracts, such as the employment contracts between Hudson and the research assistants. Contract law might therefore be applied to the problem to construct reasonable expectations about a safe workplace.

Within tort law, the requirement that liability be imposed only for wrongful conduct and the objective of providing optimal deterrence dictate that negligence is the baseline liability rule; only special circumstances call for strict liability or strict products liability. Given the spare facts in the problem, there is no clear resolution of the choice between negligence and common-law strict liability, but the ability of the four other university labs to conduct similar research without causing injury suggests that the activity does not bear a significant risk if conducted with reasonable care. The research assistants can argue that the potential scope of strict liability is much broader. At an individual level, tort law is about social responsibility, and at a system level, it is about providing reasonable compensation and protection against injury; in many circumstances, including this one, the desirability of enterprise liability as a source of compensation leads to a more expansive role for strict liability.

Penn's potential liability is determined in part by the rule for design defects, and the historical and contemporary dispute about the better liability rule is reflected in the problem. The research assistants argue that Restatement Second § 402A better captures the need for design defect to protect users of products; risk–utility balancing may supplement the test where consumers may not have particular expectations about safety, but it does not fully capture the concerns of consumer expectations of safety and the ability to spread the risk. Penn supports risk–utility balancing—negligence—or even negligence-plus, with the added requirement that the plaintiff prove a reasonable alternative design. These rules produce socially optimal results by balancing all of the costs and benefits of a product's design.

If the research assistants cannot establish either negligence by Hudson or products liability against Penn, *res ipsa* or the doctrines about multiple-party liability may be relevant. As a general matter, these moves demonstrate a feature of tort law beyond their immediate application: courts sometimes are willing to expand the rules in favor of plaintiffs where process fails or for other reasons when the doctrine does not adequately capture tort law's aims. The research assistants have a credible argument that the same should be done in the problem. But Hudson and Penn respond that the structures of the rules at present, properly defined, serve tort policies in denying the research assistants a remedy.

Hudson and Penn on the one hand and the research assistants on the other each present a coherent account of elements of the doctrinal analysis of the problem. Yet the two accounts are contradictory on the individual issues. As we step back from the competing accounts, the differences reflect a much broader conflict. Underlying Hudson's and Penn's arguments is a vision of a world of independent actors pursuing their own goals, often through the market. In this world, tort law's role is limited to providing remedies when and only when someone has wrongfully invaded the interests of others in a manner that imposes a net social loss. That role for tort law appropriately defines the scope of individual autonomy and produces all the benefits of net social welfare that arise from the market. The research assistants reflect an orientation that posits a world made up not of self-interested isolates but of social beings who share the benefits and responsibilities of living with others. In the social world, the law, including tort law, properly allocates the benefits and burdens of communal life not limited by narrow conceptions of fault and cost-benefit analysis.

These different orientations speak to the form of legal reasoning as well as to the substance of its doctrine. A world in which liability is imposed only where it is clear and for limited reasons, such as wrongdoing

or net social loss, is a world mostly of rules. Parties need to know their potential liability in order to calculate the consequences of their actions, and clear rules provide the necessary guidance. This approach therefore hews much more closely to pure deduction from clear rules as the dominant form of legal reasoning; even analogies are helpful only if a clear rule underlying the analogous case can be identified. A social world is more diffuse, however, and courts need more flexibility in considering the social contexts and effects of their decisions, so standards are the common form of legal doctrine. This approach leaves more room for policy-inspired doctrinal reasoning and policy application itself.

The elements of each of the competing doctrinal accounts coheres with the other elements in that account—the elements hang together to form a whole—even though the elements are not logically compelled by the others, nor by the underlying principles and policies of law in general and tort law in particular. Indeed, they cannot be compelled by the underlying principles and policies because both of the accounts rest on the same base of fairness, policy, and process.

Each doctrinal account also coheres with a more general social theory: individualism for Hudson and Penn and collectivism or communitarianism for the research assistants. Individualism and communitarianism do not require, say, narrow and broad spheres of strict liability in tort law. But an individualist philosophy and the defendants' doctrinal account and a communitarian approach and the research assistants' arguments cohere in the same way that the pieces of each account cohere. They appear to fit together, and we often see people who hold one general approach to the world make the corresponding specific arguments about tort law.

The problem deals with tort law but the analysis applies more broadly, across private law and beyond. In contract law, for example, the individualist world is one in which freedom *to* contract and freedom *from* contract are equally important to self-interested, welfare-maximizing individuals. The law's role is to define the forms through which contractual obligation may be assumed, and those forms tend toward clear and unambiguous expressions of consent. Unless a party has invoked those forms, it is not bound to a contract. The market, as the sum of freely chosen contracts, is the measure of all things, and society benefits as resources gravitate to their highest and best use. The social world, by contrast, is one in which contracts are not simply the expression of individual choice. Contracts always are situated in relations, networks, and communities, and parties contract in the context of those social situations. The law's role is to support reasonable expectations set by words, conduct, and context, and those expectations often include relational bonds.

The same is true far beyond private law. In laying the foundation for the modern law of negligence, Holmes famously wrote,

> The general principle of our law is that loss from accident must lie where it falls. . . . The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. . . . The state does none of these things, however.[31]

That was 1881. Today, of course, the state in many respects makes itself a mutual insurance company. The Affordable Care Act, Medicare, and Medicaid distribute the burden of healthcare among society's members, subsidizing those of lower economic means and the elderly at the expense of those with greater ability to pay. The federal government provides a "pension for paralytics" under Social Security disability payments, and those who "suffered from tempest" are supported through a subsidized National Flood Insurance Program and grants from the Federal Emergency Management Agency. The debate about the extent to which the community through the state ought to tax some to relieve the burdens of others continues, and the voices of modern heirs of Holmes' individualism remain strong.

In this sense, law and debates about public policy are both coherent and contradictory, and coherent and contradictory precisely because they reflect deeply held and often unexamined beliefs. And they are contradictory in an even more powerful way. The conflict of approaches is not simply between people with differing philosophies. The conflict is internal to each individual, and universal. People are both individuals and members of communities, and they experience the conflict that comes from holding both roles at the same time.[32]

3. The process of legal reasoning and the forms it takes obscure law's political nature.

Law's political nature presents a problem. Since the era of legal realism, the law has largely abandoned the claim of absolute formalism, in which objectively correct answers to legal questions can be deduced from fundamental principles. But the concept of legality requires that

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31 Oliver Wendell Holmes Jr., The Common Law 76–78 (Mark Howe ed., 1963) (1881).

32 In what Mark Kelman has deemed "the most widely cited passage in Critical Legal Studies," Duncan Kennedy describes the "fundamental contradiction" that underlies the competing social visions:

> The goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. . . . [A]t the same time it forms and protects us, the universe of others . . . threatens us with annihilation. . . . Numberless conformities, large and small abandonments of self to other are the price of what freedom we experience in society.

Kelman, *supra* note 24, at 62–63 (citing Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205, 2211–12 (1979)); *see also* Peter Gabel, The Desire for Mutual Recognition (2018); Robert W. Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 114 (1984).

legal reasoning and doctrinal results still possess a substantial degree of certainty. The explicit lessons of legal reasoning teach that legal reasoning is a distinctive form of analysis, and the doctrine and case results it produces are a distinctive social product. The implicit lessons add that most of the time, deduction or deduction-plus-policy is employed to produce predictable results that represent a consensus of social values or at least are within the limited range of choices that are consistent with consensus social values. That is, law is distinct from and autonomous of politics, at least relatively.

The problem of uncertainty is addressed through a hidden lesson of legal reasoning: law's ideological function. Legal reasoning obscures law's political nature, reinforces the idea of legality itself, and legitimates the status quo. Law is not autonomous from politics, but most of the time, it appears to be so, especially within the realm of private law. The forms of legal reasoning and the results they generate are presented as of a different order than political decisions.

Law first legitimates itself through the claim that it is relatively autonomous.[33] The research assistants have suffered harm while working in Hudson's lab, in which Hudson and Penn sought to control the risk of injury. The forms of legal reasoning and the legal doctrine abstract from that social fact in order to frame how their harm is to be addressed. The substance of tort law and the process of legal reasoning are presented as the product of deliberation over decades, even centuries, that together present a structured and effective means of addressing problems such as how to respond to the research assistants' harm. Legal reasoning is not formalistic, its results are not always certain, and it may even produce results that appear to be unfair; but by and large the process works in the sense described in the explicit and implicit lessons.

More broadly, law and legal reasoning legitimates the status quo in economy, polity, and society.[34] That status quo is not fixed and discrete, but it *is* limited. For example, the economy works best with substantial areas of self-regulation, supplemented by state intervention to provide structure and correct market failures. Hudson and Penn make their own choices about the activities in which they will engage and how much they will invest in different parts of those activities, subject to limitations on risk creation provided by tort law and direct regulation.[35] Law is highly

33 *See, e.g.*, Kelman, *supra* note 24, at 289.

34 Kennedy, *supra* note 18, ch. 1.

35 Not implicated in the problem but highly relevant to present-day discussions, another belief is that society reflects individual biases about race, gender, and class, but less so than at previous times, and that the biases can be overcome by education and limited regulation. *See* Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 19–22 (3d ed. 2017) ("[I]dealists" hold that racism is a product of beliefs that can be corrected.).

functional for the operation of the economy and society in that it has created structures Hudson and Penn can invoke to engage in their activities. Their relationship with the research assistants can be structured through contract and employment law, and any risk of harm inherent in their activities can be allocated through tort law and regulation. At the same time, law is considerably autonomous from immediate political forces. Autonomy depends on a rationalist method of legal reasoning and the expertise of the courts in traditional common-law areas. Law's functionalism is expressed in flexible doctrine and a flexible method of applying the doctrine. The research assistants' claims will be addressed in a court system and through law that is different than political decision-making or the exercise of economic or social power. Although the lack of a remedy is unfortunate, that result is either correct or at least within the realm of reasonable.

IV. Conclusion

The exam question that poses the problem this article addresses had dual purposes: to evaluate and to teach. And it is useful for thinking about legal reasoning and legal doctrine by illustrating the explicit, implicit, and hidden lessons involved in both. These are not new lessons, but at least some of them only lurk in the background of our understanding of the law. The last hidden lesson explains why this is so; the day-to-day experience of learning, practicing, or teaching law almost requires us to suspend what we may know to be true about the indeterminacy and political nature of law.

There is a risk to bringing into the open what ordinarily is hidden. One reaction to the hidden lessons can be despair. The infinite questions and answers in the first-year law-school classroom cause some students to experience a "dark night of the soul." They come to see law and legal reasoning as hopelessly indeterminate, with a counterrule for every rule and a set of inevitably conflicting "policy arguments" that reduces ethical discourse to a meaningless game in which lawyers' craft and guile and the caprice of judges, not a sense of justice, determine the outcome.[36]

But an alternative reaction, rather than disabling, is empowering. The explicit and implicit lessons of legal reasoning teach that law mostly works, and therefore change is desirable and possible only around the edges. The hidden lessons in turn teach that the world does not have to be the way it is. Precisely because so much of law is open and ultimately

36 Feinman & Feldman, *supra* note 20, at 878.

political, lawyers have the capacity to envision and create, to correct injustices, and even to formulate new conceptions of justice and new law to advance those conceptions.