Logical Reasoning "Obviously"[1]

*Anita Schnee**

INTRODUCTION

I have often wanted a dollar for every time a first-year student writer quotes a rule, recites the facts from the assignment memo, and then confidently asserts that the desired result is "obvious." How rich I would be, for every time I have to read this kind of thing:

> The Fourth Amendment clearly protects a reasonable expectation of privacy. Obviously, this defendant's expectation was reasonable. He was hiding *drugs*!! Therefore, it is self-evident that the police absolutely and patently violated defendant's clear Fourth Amendment rights.[2]

But our jobs as Legal Writing professors require that we do many things for inadequate or no pay, so, to forestall the endless marginal notes of "Analyze, you must analyze the *facts*!!," I have found the deductive syllogism an exceptionally useful tool.[3]

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[1] I dedicate this article to the brothers Hon. Richard and Morris Arnold, of the United States Circuit Court of Appeals for the Eighth Circuit — legal writers and voices of reason. I am also greatly indebted to Hon. Ruggero J. Aldisert, Senior Chief Judge, United States Circuit Court of Appeals for the Third Circuit; Professor James A. Gardner, Western New England College School of Law; Professor Jonathan Gordon, Case Western Reserve University; Professor Thomas H. Seymour, University of Michigan Law School; my father Edward C. Schnee, who would have been a good lawyer; my brother Daniel J. Schnee, who is a good one; and Shane P. Raley, who will be.

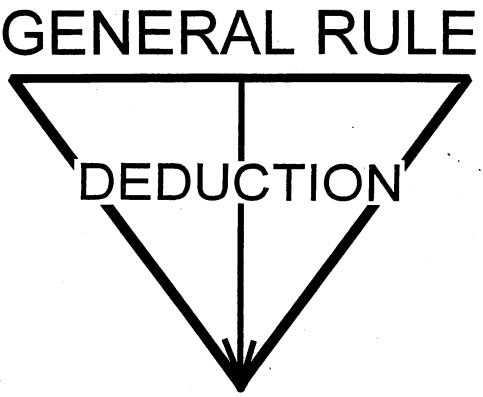
[2] In case anybody needs prompting about what we wish we would get from our students instead, a desirable rewrite would delete "clear" and "clearly," "obviously," "self-evident," "absolutely," and "patently." Instead, the writer would include the express language of the Fourth Amendment, the gloss on reasonable expectation of privacy, examples from the precedent cases to demonstrate reasonableness, selected facts from the problem at hand to demonstrate similarities to or differences from the prior cases, and, only then, the conclusion that the police violated the defendant's rights.

[3] Actually, my colleague Michael J. Lynch, at the University of Toledo Law School, found for me James A. Gardner's LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY (1993), and thus began my adventure into logic. Without this text, I doubt I would have had the fortitude to tackle the subject. Gardner's book is invaluable: short, simple, clear, and practically grounded. Until I write my own textbook, I will re-

Deductive reasoning, however, is not the whole story. It has a near-mirror image, which is the inductive process. The two work in unison, to create the singular tongue of advocacy. Both can help smoke out the necessary law and facts, to yield the essential, pared-down selectivity that is the hallmark of clean, crisp reasoning and writing. The inductive inquiry encompasses rule development and choice, and the principles and policies that contribute to development of law. The deductive inquiry applies that law, focussing on facts and cutting down on the thicket that can result when first-years, not knowing which are the important facts, throw them all in. So I decided that this presentation would be incomplete without a treatment of both induction and deduction.[4]

THE DEDUCTIVE PROCESS

The nomenclature of formal logic can be chilling, but competent lawyers eventually learn to follow the underlying principles, even if they are not aware that that is what they are doing. For example, "IRAC" is just another way of saying "the deductive syllogistic process."[5] The following is a schematic representation of a deductive syllogism.[6]



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quire Gardner for all first- and second-year students, academic support and otherwise.

[4] This is not the only way to look at legal analysis. It is one way that my students and I have found particularly illuminating because of its unified, inclusive character. It explains a lot, but it is only one of a host of paradigms. *See, e.g.*, the "rule proof" paradigm expounded by Richard Neumann. RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 83-98 (2d ed. 1994).

[5] IRAC is the acronym many of us were taught in our first days of law school: Issue, Rule, Application, Conclusion.

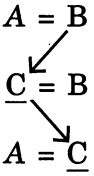
[6] Thanks to Laurie Schacherbauer and Tracy Reynolds, devoted staff members at the University of Arkansas School of Law, without whose kind help the diagrams would have been hand-done and cheesy.

The inverted triangle, with its broad base at the top, represents the deductive movement from the general to the specific.[7] Deduction begins with a broad statement of general applicability, a "rule." The thinker then studies how the rule should apply to specific situations, looking back at carefully selected facts of precedent cases, to judge and then to illustrate how the rule should bear on the particular situation at hand. This is the use of precedent that is so familiar to us yet so elusive to our students, in which the thinker ferrets out similarities or differences in the facts of the case at hand, to determine and explain whether the result of the prior cases should apply or not apply.

Whether the nomenclature you use is "major premise," "general rule," or "statutory provision" — whether you call deductive elements the "minor premise," the "application of the rule," or "the facts section" — the exercise is aimed at the same goal. Emphasizing the logical *process*, however, makes the thing come so much clearer in the end.

In a seminal textbook on the subject,[8] Professor Gardner begins with the simplest classical syllogism to "prove" that Socrates is mortal. There, the thinker takes up the prior-established rule that all humans are mortal, applies it to Socrates's case, includes the particular individual within the general category of human, and concludes that Socrates will therefore die.

The key is what Gardner calls "transitivity." I call it "equivalency." Whatever you call it, it is essential that "all terms must match."[9]



a. All HUMANS are *mortal*.[10]

b. Socrates is a HUMAN.

c. Therefore, Socrates is *mortal*.

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[7] Logicians protest that in pure logic, it is also possible to deduce from the particular to the particular, the general to the general, and variations in between. In *legal* reasoning, however, we deduce from the general to the specific and induce from the specific to the general. Landau notes that it is "often" induction that involves the particular-to-general sequence of reasoning. Jack K. Landau, *Logic for Lawyers*, 13 PAC. L.J. 59, 68 n.39 (1981). Similarly, Judge Aldisert insists that we should "stick to [our] provincial guns" here. Letter from Hon. Ruggero J. Aldisert, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, to author 1 (Oct. 21, 1996) (on file with author).

[8] GARDNER, *supra* note 3.

[9] GARDNER, *supra* note 3, at 27-33. Since I am a visual learner, the diagrams, arrows, and variations in type font are my contribution to the classical canon. Alternatively, the more-familiar Venn diagrams are also useful to illustrate similar concepts.

[10] This proposition has been so thoroughly tested, *infra*, text accompanying note 28,

Similarly, Gardner offers an example that is more recognizably "legal" reasoning:[11]

a. Major premise (general rule):

A = B ↙ FIXTURES are *included* in the purchase price of a house. A FIXTURE is a "LARGE, BULKY OBJECT" that is "PHYSICALLY CONNECTED" to the structure.

C = B ↘ b. Minor premise:

A wood stove is a "LARGE, BULKY OBJECT" "PHYSICALLY CONNECTED" to the structure.

A = C c. Therefore, the stove must be *included* within the purchase price of the house.

The "wood stove" syllogism, expanded below to include precedent cases[12] — *and* their facts — looks like this:

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that it has become self-evident. Obvious, even. In contrast, instead of self-evident propositions, law uses propositions from statutes or cases, which must have been "proved" elsewhere. *Infra* note 13. Moreover, legal questions are always more complex than this. *See* examples following *infra* note 14; *see also* text accompanying notes 54-56.

Come to think of it, everything else is more equivocal too, excepting death and taxes. Leaving aside those two infelicities, any other time I encounter the word "obvious," I want to grab my wallet. Things generally are about as simple and "obvious" as the twenty-eight-word creed was at the time Jefferson wrote it: "We hold these truths to be *self-evident* . . . . " THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

[11] GARDNER, *supra* note 3, § 1.5.

[12] Strictly speaking, the precedent cases are not part of the syllogism, but they become necessary because the exactitude that equivalency requires rarely, if ever, exists. Or, if it did, there would be no issue to litigate. In the classical mode, a comparable situation would look something like this: The known rule is that all Macedonians are human. Socrates, an Athenian, is not Macedonian, but Athenians are enough like Macedonians in all important characteristics so as to make no difference. Therefore, since Macedonians are mortal, and Athenians are like them in all salient characteristics, Athenians must be mortal too. Since Socrates is Athenian, he is mortal. Sorry, Socrates, judgment to the Reaper. And then the next time the question arises as to Athenians, the law's settled, there's no need to litigate, and the judges are now free to consider the case of the Spartans. Maybe those Spartans *were* different enough from the Athenians . . . .

Perhaps the analogical recourse to case law may be conceived of as ammunition against a contrary proposition. In the wood stove example, the chandelier and the carpet from the case law (following) are proof against the contrary argument that a wood stove is not bulky and not attached. "Oh yes it is," the advocate says, "it's enough like the chandelier and the carpet; these were fixed and bulky enough for the prior judges and they should be fixed and bulky enough here too." *See also infra* note 26.

In any event, if advocates must take recourse to analogy, and we usually must, the syllogism loses something of its absolute, compulsive force, but it is still extraordinarily powerful.



a. Major premise (general rule):
FIXTURES are *included* in the purchase price of a house. A FIXTURE is defined as a "LARGE, BULKY OBJECT" that is "PHYSICALLY CONNECTED" to the structure.

b. Factual examples from cases, as transitions to minor premise:
For example, in *Allen*, the court held that a large, ornate chandelier hanging in the front entry was a FIXTURE. The result was the same in *Charles*, in which the FIXTURE was wall-to-wall carpeting.[13]

c. Minor premise, linking caselaw facts to facts at hand:
Like the chandelier in *Allen* and the carpeting in *Charles*, the wood stove in this case is a "LARGE, BULKY OBJECT" "PHYSICALLY CONNECTED" to the structure.

d. Thus, the stove must be *included* within the purchase price of the house.[14]

In the deductive model, if the terms of the syllogism are "transitive" or "equivalent," and if you accept the major premise, the conclusion is irresistible.[15] The syllogism is, thus, a powerful advocacy tool.[16]

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[13] These are "proved" propositions, *e.g.* by previously adduced evidence that the chandelier weighed a lot and was connected to the structure by rivets and wiring (testimony of lighting contractor); the carpet was glued and nailed down (testimony of finish contractor); the stove, thus, is similarly bulky and connected (testimony of Sears salesperson and opinion of expert witness construction engineer).

[14] Subsequent syllogisms would establish that an item included in the purchase price becomes the property of the buyer after title to the house passes. Whoever takes the property of another must pay damages. Thus, if the facts show that the seller removed the stove after title passed, then he took the buyer's property and he is liable.

[15] *But see supra* note 12.

[16] It is especially so because there usually is a great deal of play in the manner in which the facts can be conceived and emphasized. For example, consider a hypothetical Fourth Amendment question that could arise in connection with a seizure and search of a trash bag, on garbage collection day, that a homeowner left briefly by the side of his car, in an open carport; the trash collector spotted the bag, took it, and turned it over to police. The U.S. Supreme Court has held that there is no reasonable expectation of privacy in trash. *California v. Greenwood*, 486 U.S. 35 (1988). In the hypo, prosecutors would emphasize that the bag was left in plain view, under circumstances making it objectively reasonable to assume that the bag's contents were unprotected trash. Defendants, on the other hand, would argue that the bag concealed its contents and that be-

SO WHAT'S WRONG WITH THIS PICTURE?

In the following, there's nothing wrong with the analytical structure; it is a valid, logically consistent syllogism, taken from the law as it once was.[17]

> 1. Major premise:
> A husband has a right to maintain his authority by inflicting bodily injury on his wife, provided that the circumstances justify it. The circumstances justify a beating if the wife accuses the husband of being a liar and refuses to back down even on repeated warnings.
>
> 2. Minor premise:
> This wife accused and refused.
>
> 3. Conclusion:
> Therefore, the beating was justified and may not be held grounds for a divorce.[18]

Judge Aldisert further notes that even thirty-odd years after this case was decided, it was thought that "[o]bviously[19] a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results."[20] Justice Cardozo's and

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cause it was in close proximity to a private car and home — within the curtilage — it was objectively reasonable to insist on constitutional protection. *See United States v. 987 Fisher Road*, 719 F. Supp. 1396 (E.D. Mich. 1989) (expectation of privacy found when search extended behind house); *see also* text accompanying notes 36-41.

[17] *Joyner v. Joyner*, 59 N.C. 322, 324-26 (1862), *quoted in* RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 6-19-20 (1992). The Aldisert text is the mirror image of Gardner, *supra* note 3, and is similarly valuable in the inductive area. It is full of examples, many taken from Judge Aldisert's own opinions, and these are well worth reading. Aldisert also explores logical fallacies in some detail, but I generally don't get that far; I feel I will have done plenty if I communicate the structure of sound reasoning only. I don't require this book, but I draw from it myself, to understand and to teach the inductive aspects of the process.

[18] At least the author of *Joyner* was shamed enough to add: "[This] is not an agreeable subject, and we are not inclined, unnecessarily, to draw upon ourselves the charge of a want of proper respect for the weaker sex." *Joyner*, 59 N.C. 322, *quoted in* ALDISERT, *supra* note 17, at 6-19. Heaven forbid!

[19] That word again. It doesn't help that our students study law by immersing themselves in judicial decisions, which frequently do everything we beg our students not to do. Judges can call things "obvious" because their word is law, but this is not so for our students, nor for lawyers, nor for us, alas.

[20] *Gluck v. Baltimore*, 32 A. 515, 517 (Md. 1895), *quoted in* ALDISERT, *supra* note 17, at 2-9. "Ulterior" means further, more distant, beyond, coming at a subsequent point; lying beyond what is openly stated, avowed, or evident [*again*!]; or intentionally concealed. Oxford English Dictionary 815 (2d ed. 1989). Even if the *Gluck* author meant "ulterior" in its most benign sense, something's still not quite right here. Surely if reasoning is valid but it leads to "ulterior" results, then the principle can no longer be "sound," at

others' contribution was to object that blind adherence to formalism — insisting on the inevitability of deductive outcomes and disregarding the consequences — can produce extreme and unfair results and must, under those circumstances, yield.[21]

It is the major premise that must yield.[22] The question in the common law process is how to do this, with due regard for stability, predictability, and the avoidance of arbitrariness. The answer can be found by studying how Cardozo applied the inductive process. Unlike Archimedes, who merely wished for a leverage point from which he could move the world, Cardozo actually did create a place of common ground in the otherwise-contrary precedent, from which he shifted entire bodies of law.

As noted, the inductive process is the mirror image of the deductive process.[23] The deductive process works from the general to the specific; the inductive process works from the specific to the general.[24] The deductive process deploys equivalencies;[25] the inductive process deploys inductive generalization, in which the terms of the premises match in a more general sense, in that they can be "induced" into unity within a harmonizing generality.[26] In this kind of logical sequence, the conclusion *may* fol-

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least under the particular circumstances in question.

[21] *Hynes v. New York Cent. Ry. Co.*, 131 N.E. 898, 900 (N.Y. 1921) (Cardozo, J.), discussed in ALDISERT, *supra* note 17 at 2-9. Aldisert quotes Cardozo as describing this process as an "extension of a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme.' The approximate and relative become the definite and absolute." *Id.*, *quoted in* ALDISERT, *supra* note 17 at 2-9. Professor Gardner points out, however, that the formalism deduction can engender is not a defect in the deductive process. Rather, "[d]eduction is strict, but it is also blind; or, to use a different metaphor, garbage in, garbage out. The formalism that Aldisert condemns is [not inherently too rigid;] rather[, it is] a blind obedience to received rules of legal relevance given by some arbitrarily conceived taxonomy of legal categories." Letter from James A. Gardner, Professor of Law, Western New England College School of Law, to author (Oct. 30, 1996) (on file with author). *See also infra* text accompanying notes 34-42.

[22] *Supra* note 10.

[23] Introduction *supra*.

[24] *See supra* note 7.

[25] *Supra* text accompanying note 9.

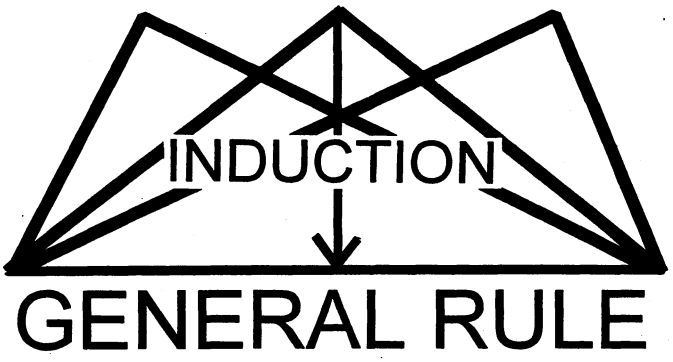
[26] Judge Aldisert notes that

> [i]n legal reasoning, when we move from [the] many to the general, we call it "induced generalization" by enumeration of instances. When we move from a particular to a particular, we call it "analogy." In analogy we compare the resemblances in the facts. The reasoning process is the same. In induced generalization we depend on the *quantity* of instances; in analogy, the *quality* of the resemblences in the particulars compared. And sometimes we use both methods of induction.

Aldisert letter, *supra* note 7, at 1.

low from the premises, but not necessarily.[27]

To mirror the deductive inverted triangle, the inductive process can be symbolized as numerous upright triangles, sharing the same base:



Induction focusses on the "rule" component ("all humans are mortal"). Again, this is the inverse of deduction, which focusses on the rule's application. Induction examines enough particulars, which are similar enough, to begin to generalize a new rule out of them, *e.g.*:

	i.	Moses was a human and he died.
Rule evolution—	ii.	Eric the Red. Joan of Arc. Attila the Hun. Ramses II. Boadicea. Both my grandmothers. All these have died. Pompeii; graveyards everywhere, full of deceased persons. No living humans over 150 years old.[28]
	iii.	Probably true that all humans are mortal.
Rule application—	iv.	So, since Socrates is a human, he is mortal.

Induction can rectify the situation when a prior-established rule, if applied without regard to context or changed social circumstances, yields "ulterior" results.[29] Aldisert offers Cardozo as induction's prototype. In *Hynes v. New York Central Railroad*

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[27] *See supra*, note 26; *see infra*, Chart.

[28] *See supra*, note 10.

[29] *Supra* note 20. *See generally* ALDISERT, *supra* note 17 at 2-1-16.

Company,[30] a boy was killed when railroad power lines struck him as he stood on a makeshift diving board that was fixed to railroad-owned land and that extended out over a public waterway. The trial judge held the railroad to a lower standard of care, because the boy had climbed onto the board from the railroad's private land. If, on the other hand, the boy had climbed up from the public river instead, the rule would have directed the railroad to have been held to the ordinary care standard.

Cardozo considered the context and widened the focus. He emphasized that the old rule would lead to an absurd result if, for example, the wires had killed two boys, one on the board and one in the water — possible liability for the latter but not the former. Cardozo thus developed a new rule, which stated, roughly, that where private and public lands are contiguous, the owner of private lands has constructive notice of public use and therefore must satisfy the higher standard of care.

That was Cardozo at a resting heartrate. He must have broken into a gentle sweat in *MacPherson v. Buick Motors*,[31] in which he rejected a rigid privity-of-contract analysis and, instead, found General Motors liable for a collapsed wheel that had caused injury to the auto's owner. Cardozo considered the varying results of sixteen products liability cases, as different as mislabeled poison and a vicious horse, to come up with a new rule that remains essentially good to this day. He reorganized the cases, identified the significant unifying principles and differences, and rerouted the river of law into a different channel that centered around the common theme of "invitation":

> The contractor who builds the scaffold *invites* the owner's workmen to use it. The manufacturer who sells the automobile to the retail dealer *invites* the dealer's customers to use it. The *invitation* is addressed in the one case to determinate persons and in the other to an indeterminate class, but in each case *it is equally plain*, and in each its *consequences must be the same*.[32]

The "invitation" may have been "equally plain" — *i.e.*, "obvious" — to Cardozo, maybe, but it was not so obvious to anyone

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[30] 131 N.E. 898 (N.Y. 1921), *cited in* ALDISERT, *supra* note 17, at 2-9.

[31] 111 N.E. 1050 (N.Y. 1916), *cited in* ALDISERT, *supra* note 17, at 5-3, 6-9-11.

[32] *MacPherson*, 111 N.E. at 1054, *cited in* ALDISERT, *supra* note 17, at 5-3-6, 6-9-11 (emphasis added).

else until he enlightened us all.[33]

It is an oversimplification, however, to assert that Cardozo applied induction alone. Before working induction's "magic," it is necessary to establish a field of relevant cases in which to exert the "magic." Cardozo remains controversial to this day because we may describe what he was up to in at least two ambivalent ways. One is to say, in suitably hushed and reverential tones, that he established a carefully conceived taxonomy of legal categories and then reorganized them — induced them — into a new and more functional order. Or, we may accuse him of having manipulated the set of relevant decisions until he reached the result he wanted all along.[34]

Still, even if we admire Cardozo only reluctantly or not at all,[35] we should use him to teach the process by which legal decision makers choose the category of cases from which to extract a rule. Cardozo could do in one opinion what it takes panels of lesser souls, and split decisions, to accomplish. We can all recog-

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[33] Well, maybe not always enlightened. Cardozo is awesome to contemplate, but he can also be maddening. *See generally* Alfred S. Konefsky, *How To Read, Or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 BUFF. L. REV. 645 (1987). In a thoroughly entertaining analysis of what some say was Cardozo's "oscillation" in *Allegheny College*, in the "shadow world" of the law of contracts and the consideration doctrine, Konefsky calls up the evocative image of a "Thaumatrope":

> [an] ingenious and philosophical toy . . . in which two objects are painted on opposite sides of a card — for instance, a man and a horse, [or] — a bird and a cage; the card is fitted into a frame with a handle, and the two objects are, "by a sort of rapid whirl [of the handle], presented to the mind as combined in one picture — the man *on* the horse's back, the bird *in* the cage."

Id. at 653, *quoting* Leon Lipson, *The Allegheny College Case*, 23 YALE L. REP. 8, 11 (1977). Konefsky notes, "[s]ome lawyers think that what emerge[d] instead [in *Allegheny College*] is a picture of a bird on the horse's back." *Id.* Or maybe that was really a man in a cage on horseback.

Konefsky calls Cardozo's fluency "legerdemain" or "magic" and notes that while he greatly admires Cardozo for "[knowing] exactly what he was doing," "every once in a while, Cardozo gets under my skin, and I may momentarily lapse into cynicism or sarcasm, though I quickly recover and reclaim the high road." Konefsky, *How to Read Cardozo*, 36 BUFF. L. REV. at 654.

[34] I am indebted to Professor Gardner for these observations. Gardner letter, *supra* note 21, at 1-2.

[35] Judge Aldisert notes that Cardozo's work is a "prototype" and "apologia"

> for decision making based on sociologically oriented judicial concepts of public policy. The philosophical underpinnings of what Cardozo described as the sociological method of jurisprudence run counter to the widely held notion that public policy should be formulated and promulgated only by the legislative branch of government. When judges utilize this organon, laymen and lawyers label them "activists," "liberals," "loose constructionists," and host of other epithets, gentle and otherwise.

ALDISERT, *supra* note 17, at 2-9.

nize the disorientation that results, even without Cardozo's mischievous offices, when we let ourselves be convinced by a majority decision and then a dissent makes an equally powerful case for the opposite result, based on an altogether-different taxonomy of cases.

An example of this is the *Greenwood* hypothetical, noted earlier.[36] The federal and some state courts follow the standard announced in the *Greenwood* majority opinion: There is no privacy expectation in trash left curbside for collection.[37] The judiciary of a few other states, however, interpreting their own constitutions, have chosen instead[38] to follow the "container" line of precedent cited in the *Greenwood* dissent.[39] The unstated reasoning of the *Greenwood* majority is that police are entitled to assume that containers hold trash when the circumstances justify that assumption — *i.e.*, the containers look like those commonly containing trash and they are left curbside on garbage collection day. This reasoning permits the Court to rely on the "set" of cases finding no privacy in items that have been discarded or exposed in a place or manner that is readily accessible to the world.[40] In contrast, the reasoning of the dissent and progeny is that containers shield their contents from view and therefore should establish a privacy interest.[41] Thus, *Greenwood* jurisprudence here serves as an example of how judges can

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[36] *Supra* note 16; *California v. Greenwood*, 486 U.S. 35 (1988).

[37] *But see United States v. 987 Fisher Road*, 719 F. Supp. 1396 (E.D. Mich. 1989) (finding privacy expectation in trash when search extended into area behind house).

[38] *E.g.*, *State v. Hempele*, 576 A.2d 793 (N.J. 1990).

[39] 486 U.S. at 46-49, 53 (Brennan, J., dissenting); *see Robbins v. California*, 453 U.S. 420, 426-27 (1981) (quoted in *Greenwood*, 486 U.S. at 47) ("[w]hat one person may put into a suitcase, another may put into a paper bag . . . . And . . . no court, no constable, no citizen, can sensibly be asked to distinguish the relative 'privacy interests' in a closed suitcase, briefcase, portfolio, duffelbag, or box.").

[40] *E.g.*, *Smith v. Maryland*, 422 U.S. 735 (1979) (exposure of telephone numbers on pen registers); *United States v. Reicherter*, 647 F.2d 397, 399 (3rd Cir. 1981) (garbage discarded in an area "particularly suited for public inspection and . . . consumption"). Or, as the Indiana Supreme Court has noted, "if you do not want others to know what you drink, don't put empties in the trash." *Moran v. State*, 644 N.E.2d 536, 541 (Ind. 1994) (no privacy interest in trash).

[41] Evidently personal experience makes a difference. Chief Justice Shepard of the Indiana Supreme Court recused himself from a trash case after his own trash had been searched by a colleague, writing that "[f]or the moment at least, I do not feel dispassionate on the subject . . . ." *Moran*, 644 N.E.2d at 543. However, a majority of his brethern justices (including the searcher?), under no such taint of personal experience, decided against finding a privacy expectation. See also the public outcry and personal distress when members of the tabloid press searched then-Secretary of State Henry Kissinger's trash. *Greenwood*, 486 U.S. at 40 n.4, 51-52.

reach opposite results depending on which line of cases they choose as the relevant "set" from which to derive the applicable rule of law. As noted, this can be a disorienting experience.

Our students feel this disorientation many times over. Thus, to help them negotiate their way through what can seem like chaos, we should teach them to spot the underlying decisional assumptions of relevancy, the strong "sway" that the often-unexplained prior choice of a class of cases exerts on the result.[42]

If we teach them in this manner, we also honor a duty that I think we owe to the judiciary, now and future. After all, the common law demands of judges that they understand and apply the process of spotting, choosing, and explaining the sets of applicable cases. Yet when they exercise the inductive power and, thereby, do no more than that which the common law process asks them to do in the first instance, they are called names.[43] Let others grumble that judges are irresponsible, unaccountable loose cannons wreaking havoc on our tripartite governmental institutions. We should teach the tools of the trade, properly employed with due self-restraint, as part of the legitimate role the judiciary occupies in the process of law-making. If we fail to do so, we do a disservice to all parties concerned, especially our students.

In sum, we should be teaching the sequences of logical reasoning. We should make plain the process by which induction works, its underlying allocations of "relevancy," its inducement of newly revealed rules, and, thus, induction's prior contribution to the complementary process of deduction. Induction loosens the belt of hitherto-established rules, when the demands of an increasing press of circumstances strain the rules's competency. Induction is a more approximate process than deduction, because it reaches wider and includes more. It is therefore vulnerable to criticism and revision because of its indeterminate character,[44] but it is nevertheless an essential part of the law's growing process.

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[42] Thanks again to Professor Gardner, who further notes that if we want our students to be Cardozos and Aldiserts, we must "show them how to spot their underlying assumptions, and to experiment with relaxing or justifying them." Gardner letter, *supra* note 21, at 2.

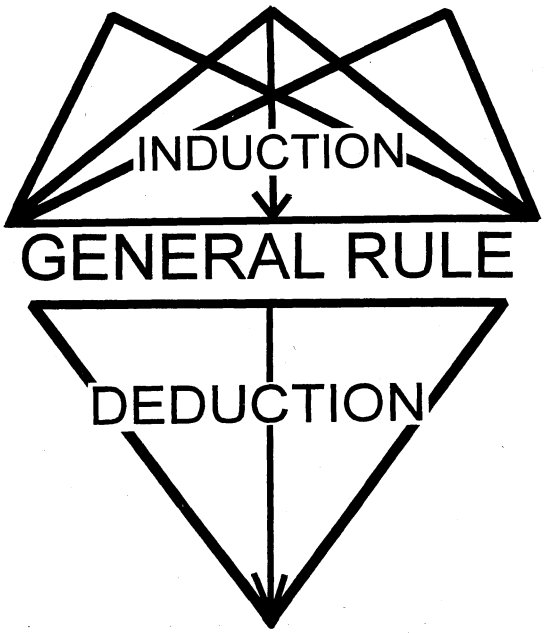
[43] *See supra* note 35.

[44] *Supra* text accompanying note 27.

TWO EARS, TO SPEAK WITH ONE TONGUE

In the ever-shifting process that is judicial jurisprudence, then, both induction and deduction work together. Induction is needed when there is no rule, or when there is a choice between rules,[45] or when the neat categories on which deduction relies have become eroded,[46] or when social circumstances change. Deduction is the method of choice when the question is not which or what kind of rule should apply, but how a given rule should apply to a new set of facts and circumstances. Induction creates and evolves rules; deduction applies them.

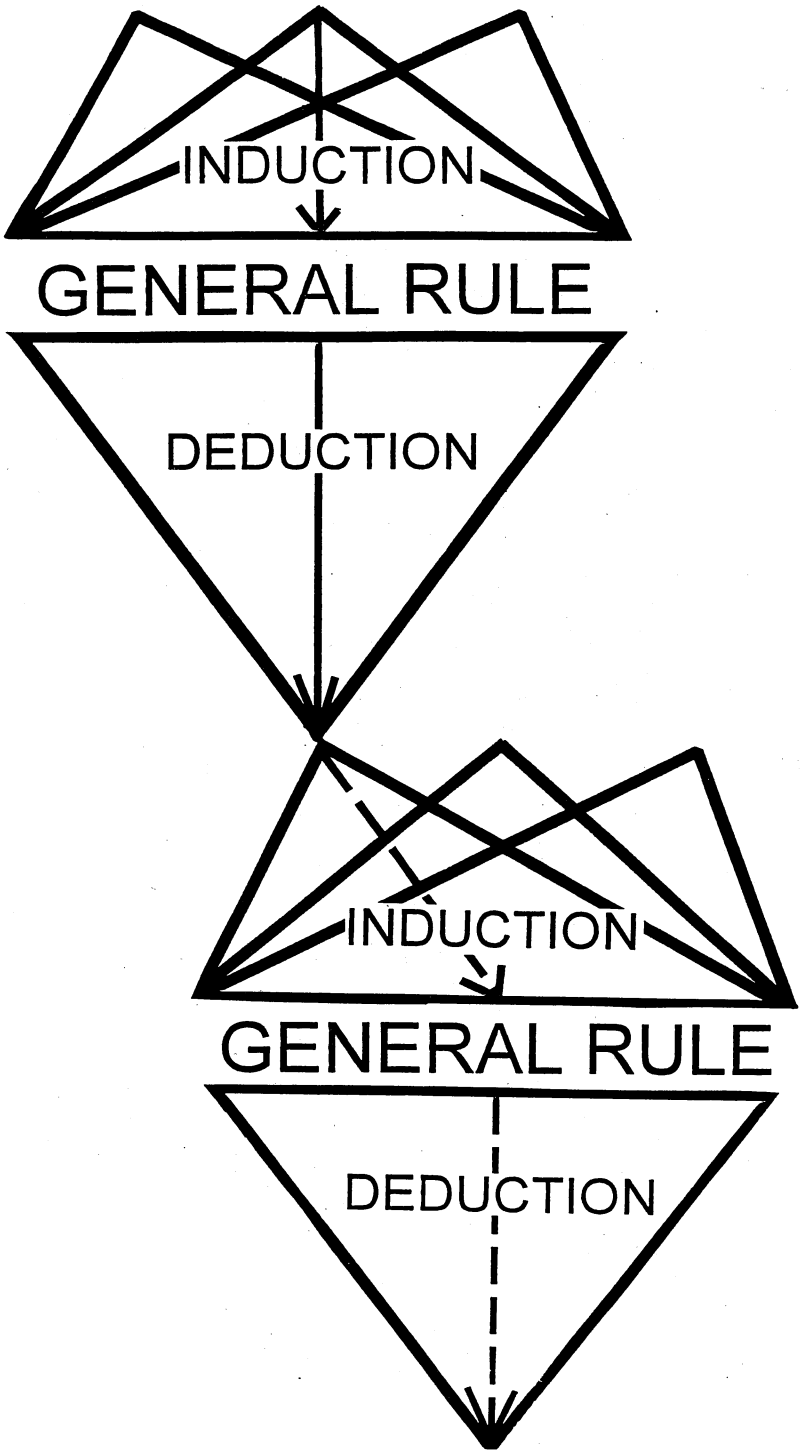
The two mirror each other and, together, create a kind of pulsation: Induction's reach is wide and open, deduction's reach is narrow and precise. Deductive precision works until it doesn't any more; induction's expansiveness is then called in to remedy rigidity. This essentially living interaction can be schematized as follows:



[45] *See supra* text accompanying notes 36-41. Also *e.g.*, see the enlarging application of the *McDonnell Douglas* shifting-burdens analysis. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - e-17 (1988); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This rule was initially formulated in Title VII cases, but it has been extended to, *e.g.*, claims arising out of retaliatory discharge for exercise of rights under workers' compensation statutes. *E.g.*, *Wiedower v. ACF Indus. Inc.*, 715 S.W.2d 303 (Mo. Ct. App. 1986). *See generally* Jean C. Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 HASTINGS L.J. 551, 554 (1986).

[46] *Supra* note 21 and text accompanying notes 30-32.

The end point of this diagram may, in time, become just one more case for future induction:



Similarly, the relationship between the two processes can be charted (roughly) as follows:

DEDUCTIVE	*INDUCTIVE*
A. Situation	
Rule's OK.	Rule's shot.
B. Locale; Function	
Minor premise.	Major premise.
Rule applied to facts.	Development of rule.
C. Elements of Choice; Result	
Choice of facts.	Principles and policies.
Specific, compelled result.	Broadly fair, durable result.
D. Movement	
General to particular.	Particular to general.
E. Scale	
Small-scale; case at hand.	Large-scale; greater and greater inclusiveness; larger number of variable cases harmonized under same rule.
F. Nature of internal relationships	
Connections are equivalent, the same (transitivity); result is compelled.	Connections are similar enough that rule will probably be good.
G. Advantages	
Stability, reckonability, predictability; citizenry can conform conduct to law or face expected consequences.	Law must not stand still, especially where old rule produces absurd result.

A UNIFIED PEDAGOGY

Law school pedagogy seems to have evolved in this rough fashion: The doctrinal professors focus on the inductive process. They explore the approximate, shifting challenge of doctrinal evolution, which underlies the Socratic method, appellate dialectic, and the entire common law tradition. Conversely, we LRW types contribute by working the deductive process, developing the focus, sensitivity, and precision necessary for skillful reading and use of the particular cases.[47] LRW problems, especially in

[47] Distinguished Professor Mort Gitelman, a colleague of mine at the University of

the first semester, are designed to get our students started on the simplest rule application. Doctrinal classes are designed to delve into rule evolution. The two work together; the key for students seems to be to establish the right balance between the narrow, razor-like analysis of deductive reasoning and the more intuitive, global inquiry of the inductive process.

And not just the key for the students. It seems that we teachers may also have lost sight of the interaction between induction and deduction. There is a vigorous debate, for example, as to the usefulness of the IRAC model, which, as noted, is an acronym that roughly stands for the deductive process.[48] The November 1995 issue of the Legal Writing Institute's *The Second Draft*[49] was devoted to the pros and cons of IRAC. An anti-IRAC writer protested that he had re-read Cardozo opinions and found not a trace of IRAC. He commented that he hoped Cardozo would have received good grades on law school exams, noting how unsatisfactory it would have been to ram Cardozo into the IRAC mold.[50]

But the "pro" or "con" schism is no longer necessary once you appreciate that IRAC is but a partial formulation, encompassing deduction only. And deduction is simply the obverse — the complement, but *not* the antagonist — of the inductive process, of which Cardozo was the acknowledged master.

Moreover, the decisions Cardozo wrote that are still studied today are the ones in which he made new law — using induction. I wonder: For every great inductive blue-blooded leap Cardozo made, how many deductive workhorse decisions did he have to write?

Some call deduction "IRAC." Some call it TRAAC or CRAC; Jill Ramsfield wittily calls it extinct ("Iracassaurus Wrecks").[51] Richard Neumann calls the thing "rule proof" and application and points out that the IRAC form, useful for exam-taking but not memorandum-writing, simply omits the "proof" component.[52] The variations and the debate seem endless.

Shakespeare wrote, "What's in a name? that which we call a

Arkansas, quips that we teach our students to be "master manipulators of the minor premise."

[48] *Supra* note 5.

[49] 10 SECOND DRAFT 1, Nov. 1995.

[50] *Id.* at 16-17.

[51] *Id.* at 18-19.

[52] NEUMANN, *supra* note 4, at 83-86, 229-31.

rose, By any other name would smell as sweet."[53] Whether we call the thing "IRAC" or "deduction," the same fragrance seems to linger, but with one important difference: Unpacking and explaining to our students the deductive process on which IRAC is based, instead of merely labelling it, emphasizes the active, evolving nature of the inquiry. Teach deduction and you will be teaching the students *why* it is important to choose from a wide variety of facts and *how* to go about doing it. You will be teaching a verb instead of a noun.

Ultimately, of course, the deductive inquiry deploys the same strategy no matter what you call it: Movement from the general — the rule — to the specific — the facts. How quickly our students come to that understanding, however, makes all the difference in their (and our) experience.

There should be no doubt whatsoever about the LRW challenge. The deductive process is far from obvious to our students. They have difficulty with even "simple" cases such as, *e.g.*, the one Helene Shapo offers in the first fifty pages of her basic legal writing text.[54] There, Shapo identifies the holding — the major and minor premises combined — of a prisoner's diversity action as

> [a] prisoner may rebut the presumption that he retains his pre-incarceration domicile, but he does not allege facts sufficient to raise a substantial question of his intent to change his domicile to the state of incarceration if he maintains property and a business in the state of his original domicile, and alleges no supportive facts.[55]

This statement, however, is an end product. To arrive at it, the students must first have grasped as many as *six* subsyllogisms.[56] They are:

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[53] WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2 (Juliet, wondering wherefore Romeo art).

[54] HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 31-32, 41-45 (3d ed. 1995), based on *Jones v. Hadican*, 552 F.2d 249 (8th Cir. 1977).

[55] SHAPO, *supra* note 54, at 31.

[56] Gardner calls these "nested" syllogisms. GARDNER, *supra* note 3, at 42-46.

A. Background Facts

Jones lived in Missouri before he was convicted of a federal offense. He is incarcerated in the federal penitentiary in Kansas. He wants to sue his lawyer, Hadican, a Missouri resident, for malpractice, under federal diversity jurisdiction in Kansas.

B. Plaintiff Jones's Side

1. Desired end syllogism:
    a. Major Premise:
    Diversity jurisdiction permits Jones to sue Hadican in federal court if Jones is domiciled anywhere but in Missouri.
    b. Minor Premise:
    Jones is domiciled in Kansas.
    c. Conclusion:
    Jones can sue Hadican in federal court.
2. First syllogism:
    a. Major Premise:
    A prisoner's domicile is presumed to be where he lived before incarceration.
    b. Minor Premise:
    Before incarceration, Jones lived in Missouri—same as Hadican.
    c. Conclusion:
    Uh-oh, Jones's domicile would be presumed to be Missouri, not Kansas, and he will have failed to show diversity if that is the end of the inquiry.
3. Second syllogism:
    a. Major Premise:
    If prisoners can show a *bona fide* intent to remain in the place of incarceration on release, they can rebut the presumption that they will return to their prior home state.
    b. Minor Premise:
    It would help if Jones could show that his family has moved to Kansas to be near him.
    c. Conclusion:
    If so, Jones might rebut the presumption that he will return to Missouri.

4. Third syllogism:

    a. Major Premise:
    Prisoners can show a *bona fide* intent to remain in the place of incarceration if their families have moved to join them in that place.
    b. Minor Premise:
    Uh-oh, Jones's marriage has irrevocably deteriorated. That might be some evidence to show that his ties to Missouri have been severed — but his family certainly isn't about to move to Kansas to be near him there.
    c. Conclusion:
    Therefore, Jones's marital situation does not help much to show *bona fide* intent to remain in Kansas. All that's left seems to be Jones's unsupported assertion of intent.

C. Defendant Hadican's Rejoinder

1. Desired end syllogism:

    a. Major Premise:
    A prisoner's showing of *bona fide* intent to remain in the place in which he is incarcerated may be defeated if he maintains significant ties to the preincarceration domicile.
    b. Minor Premise:
    Jones has maintained significant ties to Missouri, his preincarceration domicile.
    c. Conclusion:
    Hadican has defeated Jones's showing of *bona fide* intent to remain in Kansas.

2. First syllogism:

    a. Major Premise:
    Ownership of real property and a business in the preincarceration domicile are significant ties, sufficient to trigger the presumption that the prisoner will return there.
    b. Minor Premise:
    Jones has retained ownership of real property and a business in Missouri.

c. Conclusion:
Therefore, Jones's retention of significant ties to Missouri defeats his showing of *bona fide* intent to remain in Kansas; Jones will be presumed to return to Missouri; Jones, like Hadican, is a "resident" of Missouri, not Kansas; and thus Jones may not sue Hadican in federal court because Jones has failed to establish diversity jurisdiction.

We experienced lawyers can arrive at the final step of this analysis with (relative) ease — but often with little awareness of how we got there. My own experience with this very case, when I began my syllogism work, makes my point. I had reconfigured Shapo's brief into the syllogism format, initially writing:

1. Major Premise:
To establish diversity of citizenship necessary for federal jurisdiction, prisoners may rebut the presumption that they retain their prior domicile by showing facts sufficient to raise a substantial question as to whether, on release, they possess a *bona fide* intent to remain in the place of incarceration. However, the contrary presumption that they will return to their original domicile will remain in force nevertheless, if prisoners retain significant ties to the preincarceration domicile.

2. Minor Premise:
The only fact in support of the prisoner's asserted intention to stay in Kansas seems to be his irrevocably deteriorated marriage in Missouri. Most importantly and adversely, he has retained ownership of a business and real property in Missouri, and these have been deemed sufficiently substantial ties to the preincarceration domicile to defeat federal diversity jurisdiction. So the prisoner, despite being currently incarcerated in Kansas, is still a "resident" of Missouri.

3. Conclusion:
Since the putative defendant is also a resident of Missouri, federal case dismissed.

I proudly showed my work to my colleague Mike Lynch, and it was he who pointed out how complex the analysis really was.

I think this underlying, unrecognized complexity may account for that baffled feeling many LRW teachers, myself in-

cluded, might recognize: Why aren't they getting this? It's so obvious!

LOGIC: FRIEND, NOT ENEMY, OF CREATIVITY

In sum, the process of teaching law should be essentially interactive: Induction has to do with rule evolution and is largely in the domain of the "doctrinal" professors. Deduction tends to be the focus of many LRW problems. Both areas are extraordinarily challenging and demanding. Both should command equal respect. At a minimum, if our students understand the nature of the differences, they may be less inclined to mix hemlock cocktails for their Socratic professors. Similarly, the students will respect what we do in LRW.

Induction works to open our minds; deduction can be said to keep our brains from falling out.[57] Both processes work together, to free our students from the vise-like grasp of doctrinaire certainty. Yet this point is not generally appreciated. The eighteenth-century English statesman and orator Edmund Burke remarked that a legal education sharpens the mind by narrowing it.[58] In the same vein, when a prospective law student reportedly asked law professor and civil rights leader Eleanor Holmes Norton whether going to law school was a good idea, Holmes Norton asked in return whether the student thought of herself as creative. When the student replied "yes," Holmes Norton's counsel was "don't go."[59]

In the short-term, narrow view, Holmes Norton is difficult to refute. In the longer-term, I think she's dead wrong. To paraphrase Professor Robert Bone, creativity springs from an intimate familiarity with the law, an understanding of its workings at a deep and structural level, so that new ideas will become born of themselves.[60] The law is too complex and demanding an enterprise for most of us to expect our students to become creative thinkers in the short span of three to five years of legal education. For many, creativity does not visit in a lifetime. But if it comes at all, as Professor Bone intimates, it must come from a strong base of foundational understanding.

I believe the framework of logic provides the necessary structural understanding — the vine — on which creativity can

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[57] Daniel J. Schnee, *quoting* Rabbi Joe Weizenbaum of Tucson, Arizona.

[58] *Quoted in* Steven Keeva, *Opening the Mind's Eye*, ABA Journal, June 1996, at 50.

[59] *Id.*

[60] *Id.* at 53.

eventually flower. Or, to switch metaphors and quote Judge Aldisert: "[I]t's great to play the piano without being able to read music, but unless you're Irving Berlin, you're not going to reach your full potential by merely memorizing tunes that you've heard somewhere before."[61]

To push this image, it seems to me that the discipline of logic is the sheet music. Creativity and inspiration can come later — but with one important proviso: that both constraint *and* inspiration are explained, nourished, and encouraged, *simultaneously*. Professor Gardner writes: "In law, as in jazz, you should feel free to be creative, but whatever you play must always be recognizable as the underlying tune."[62] In the music world, Irving Berlin may not have needed to be taught to write songs; being born was enough. The rest of us need to be taught.

In the end, this seems obvious to me.

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[61] ALDISERT, *supra* note 17, at 1-3.

[62] Gardner letter, *supra* note 21, at 3.