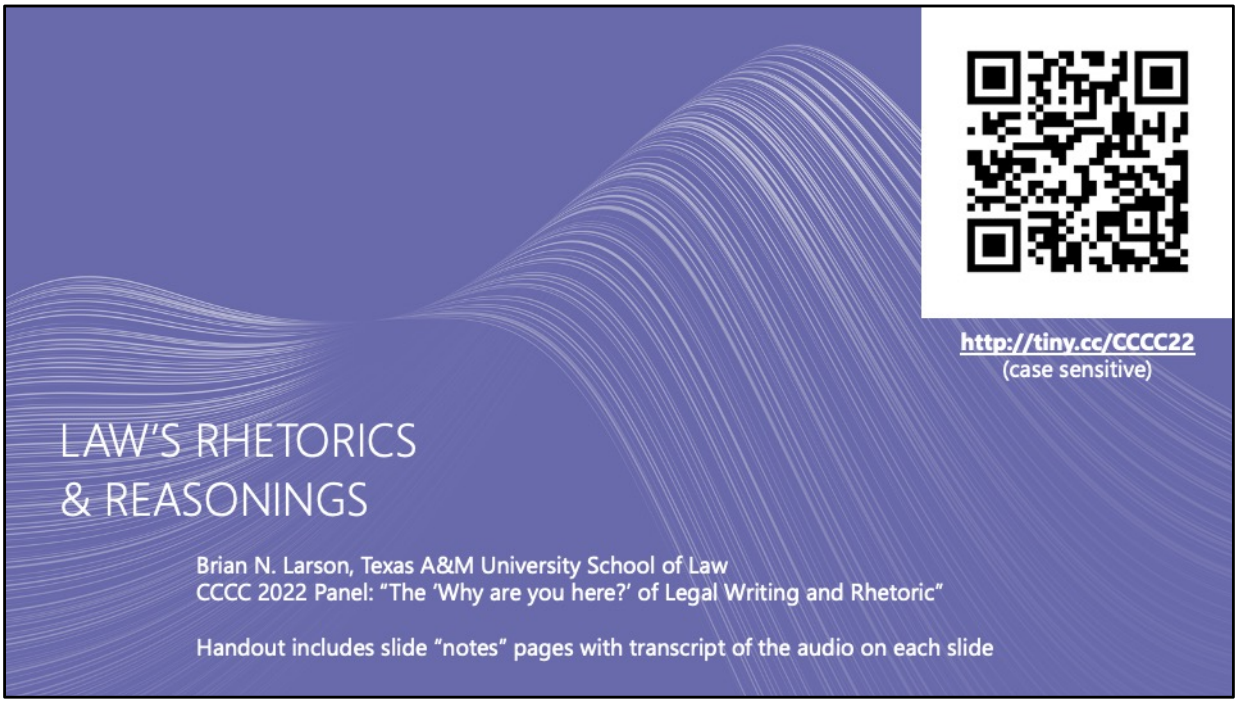
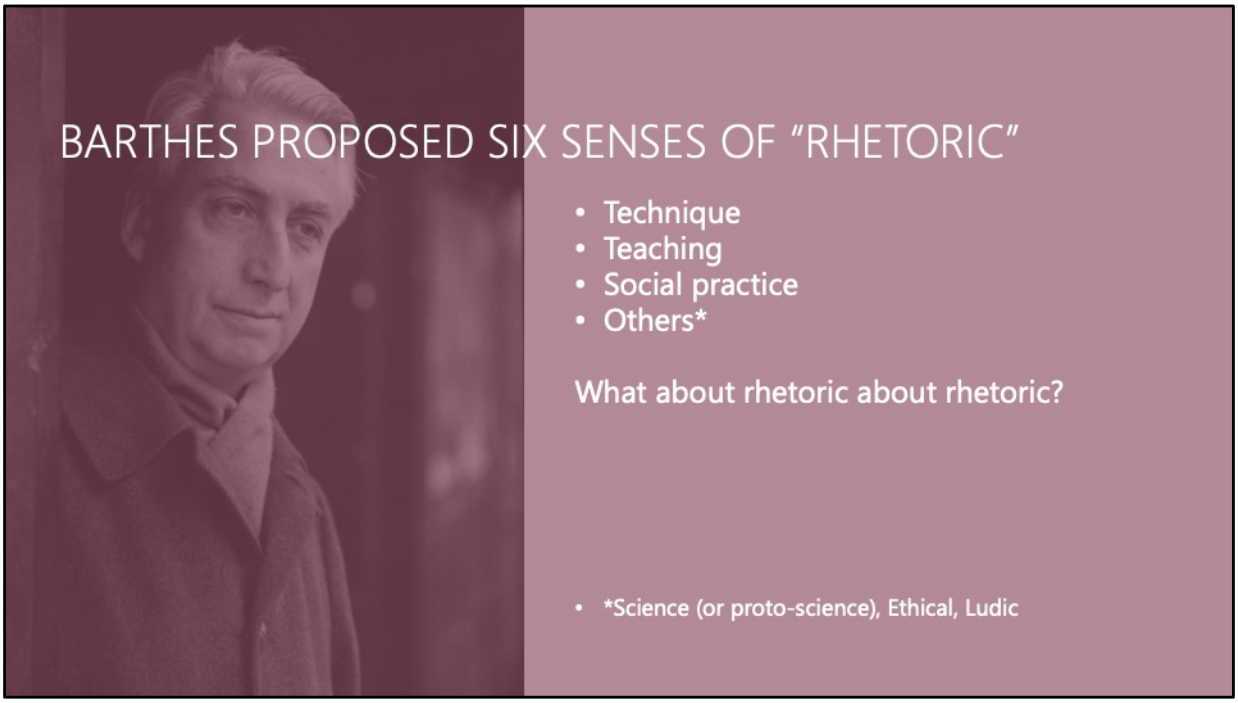


My name is Brian Larson. I'm associate professor at Texas A&M University School of Law, and my paper is titled "Law's Rhetorics and Reasonings."
You can find a video for this and the other presentations on this panel, as well as a video of a Zoom chat among the panelists and our panel chair via the link or QR code displayed here.



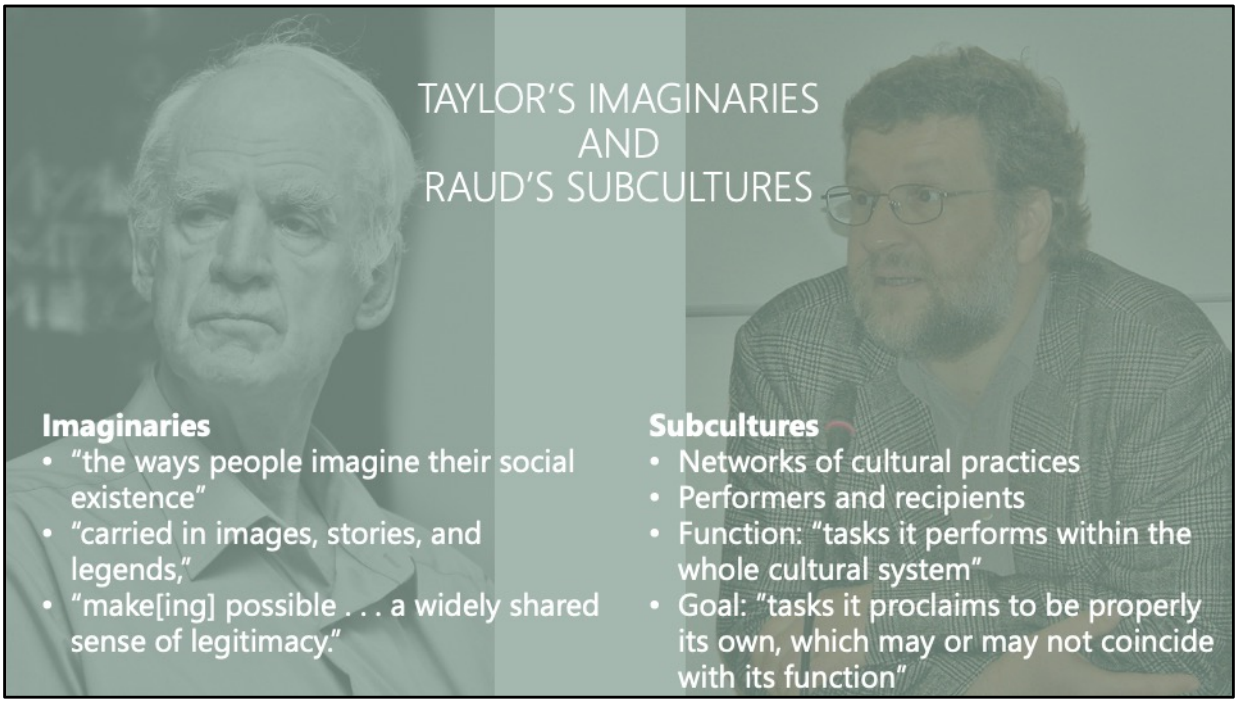
In his essay *The Old Rhetoric: An Aide Mémoire*, Roland Barthes (1988) identified several senses in which we use the term 'rhetoric' (pp. 13–14). In the context of legal rhetoric, I'd like to focus on three of Barthes' senses and to add a sense that Barthes at most only implies. There is first the "*technique, "*the art of persuasion, a body of rules and recipes whose implementation makes it possible to convince the hearer of the discourse . . . ." This is the knowledge of the practitioner—the lawyer or the judge—and this knowledge may take the form of tacit expertise. There is also the "*teaching*" that transforms the technique "into material for examination." This is the teacher's knowledge of what and how to teach rhetoric. It must usually be made express and taught through experience and practice. This includes the kind of teaching described by my co-panelists here, taking place at the undergraduate level, but also the teaching that law students receive, both in their legal rhetoric and writing courses and in other courses about the law. The last of Barthes' senses of rhetoric I'll discuss is the "*social practice,* . . . that privileged technique (since one must pay in order to acquire it) which permits the ruling classes to gain *ownership of speech.* Language being a power, selective rules of access to this power have been decreed . . . ."

Barthes neglects to describe the possibility of a rhetoric *about* legal rhetoric. That is

to say, rhetorical performances aimed at shaping the audience's beliefs about a rhetoric. I take the position that various players in the legal landscape have constructed and are reinforcing a rhetoric about legal rhetoric, a socio-cultural imaginary that I call the "determinist imaginary."

(I assert fair use in the use of the photograph of Roland Barthes, which I obtained at https://rhystranter.com/2016/12/07/roland-barthes-and-poetry/.)

Barthes, R. (1988). The Old Rhetoric: An aide mémoire. In R. Howard (Trans.), *The Semiotic Challenge* (pp. 11–94). Hill and Wang.

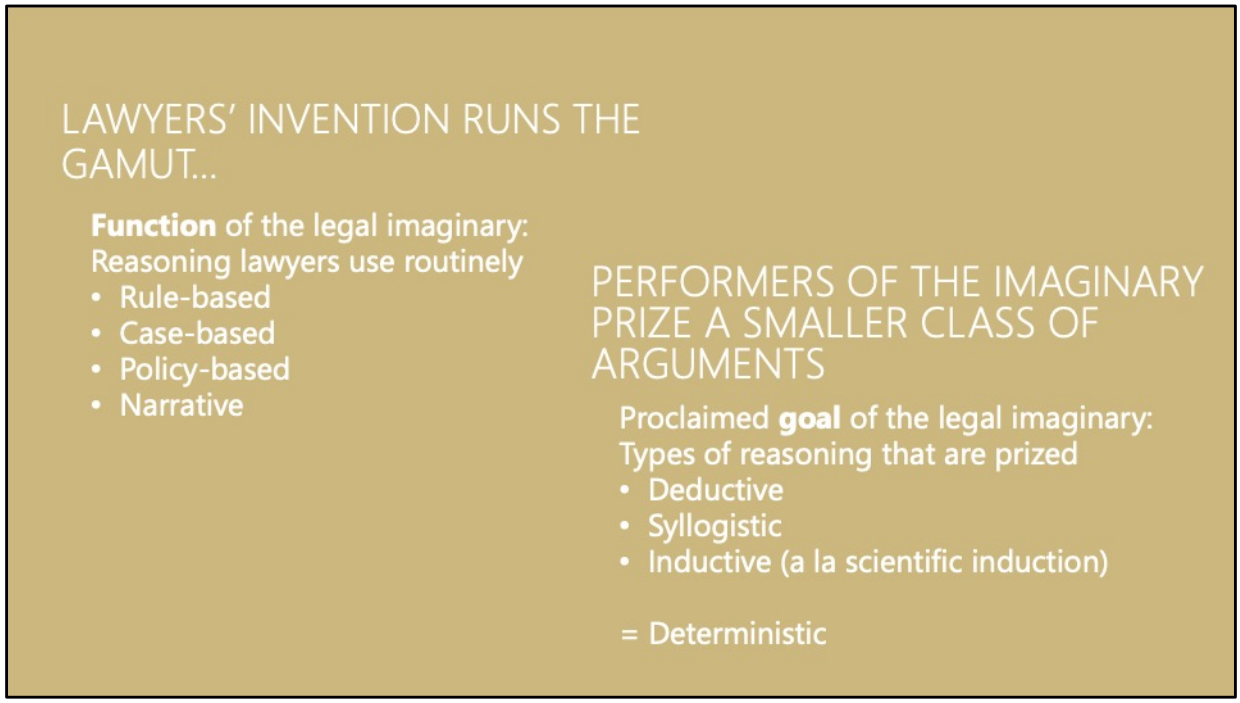


An "imaginary" is what philosopher Charles Taylor (2004, p. 23) labels "the ways people imagine their social existence, . . . how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations." The imaginary is "carried in images, stories, and legends," and it "makes possible . . . a widely shared sense of legitimacy."

Literary theorist Rein Raud in *Meaning in Action* (2016) proposes a framework for understanding how such imaginaries, what he would call "subcultures," include networks of practices by "performers" that are directed at "recipients." I'll use the terms "imaginary" and "subculture" interchangeably here. On Raud's account, the American legal imaginary or subculture consists of performers such as lawyers, judges, and law professors, and recipients, including those same folks but also those of us who are subject to the American legal system. Incumbent on the performers is the task of performing the function of the subculture, "that is, the tasks it *performs* within the whole cultural system" (emphasis added) while also representing "its goal—the tasks it *proclaims* to be properly its own, which may or may not coincide with its function" (emphasis added). Critical legal theory has long argued that the legal subculture functions as a tool for dominance and control, while it represents itself has having the goal of justice.

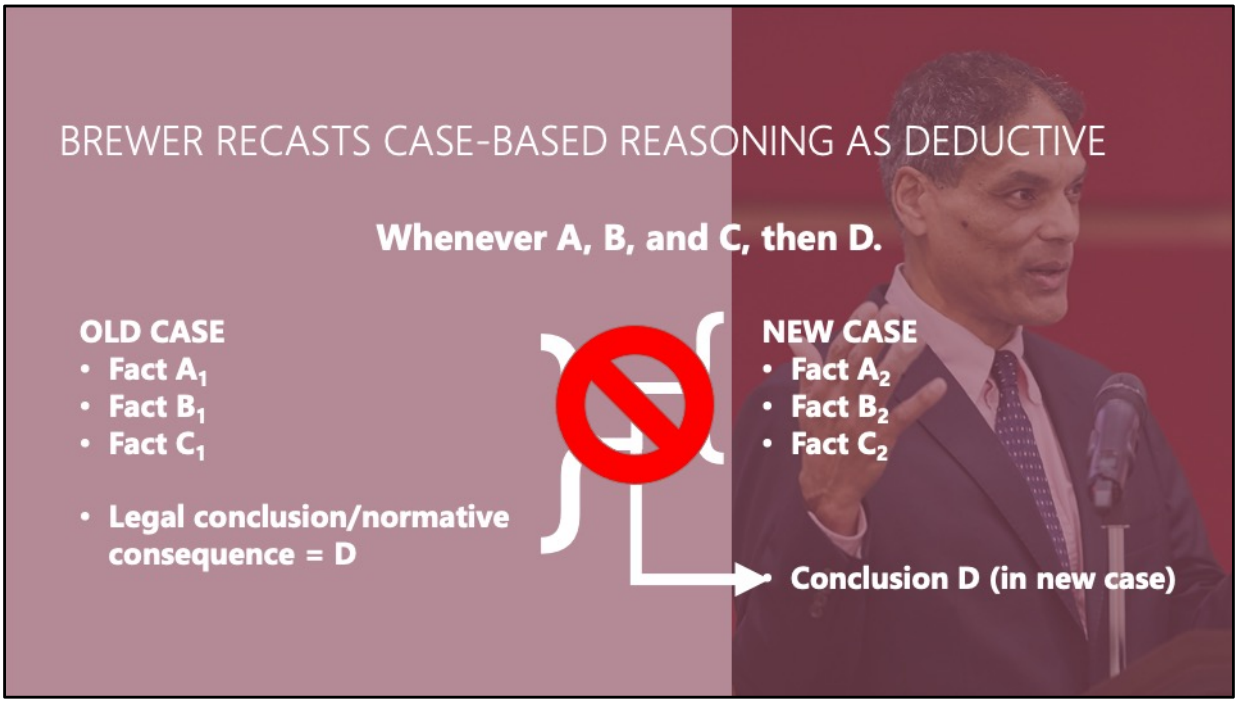
(Taylor photo: https://www.britannica.com/biography/Charles-Taylor#/media/1/939950/234453 Creative commons license; Raud photo: https://commons.wikimedia.org/wiki/File:ReinRaud2007.jpg Creative commons license.)

Raud, R. (2016). *Meaning in Action: Outline of an Integral Theory of Culture*. Polity Press.
Taylor, C. (2004). *Modern Social Imaginaries*. Duke University Press.



There is ample evidence that, in carrying out the legal imaginary's function, its performers use the full panoply of rhetorical invention available to construct argumentation: rule-based, case-based, policy-based, and narrative reasoning, among others. But in representing its goals, many of its performers, often judges and law professors, attempt either to confine rhetorical invention in the law to what they refer to as "deduction," "syllogistic," and "induction" (a la scientific induction); or to emphasize those types of arguments as "valid," "stronger," or preferred to other types. It is this sense in which the imaginary is "determinist" or "deterministic."

Some examples may be helpful.

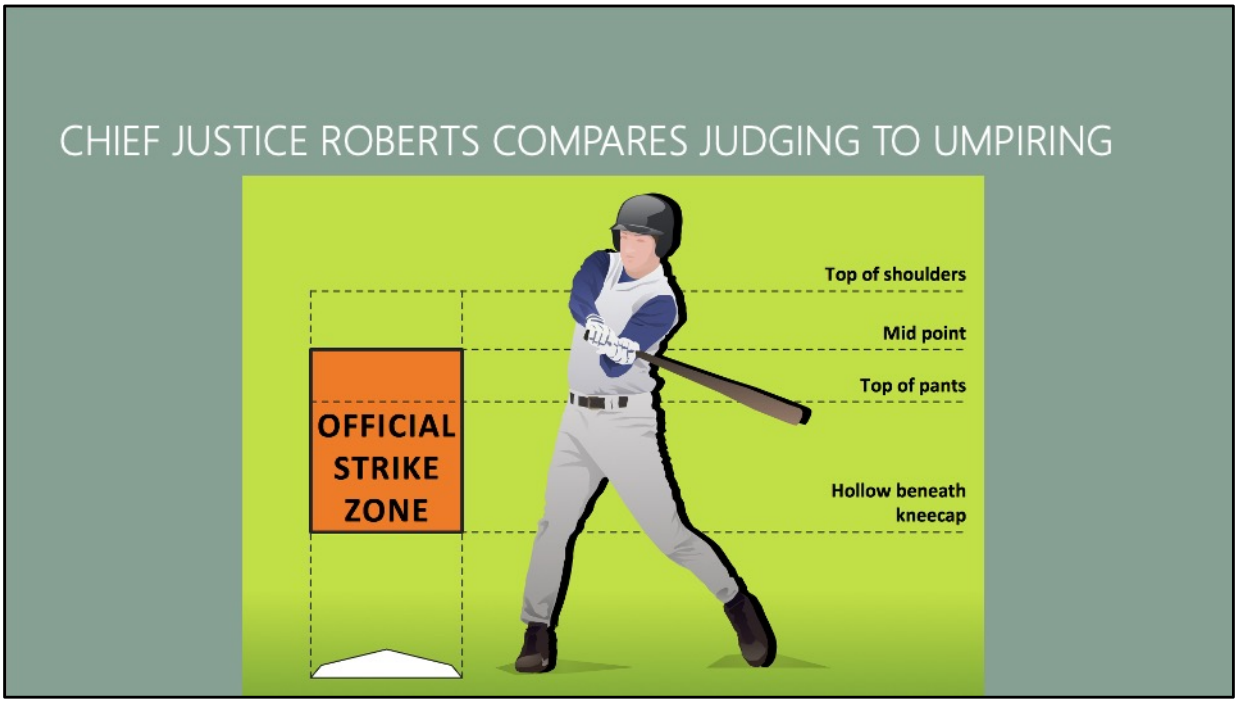


Scholars of legal philosophy or jurisprudence often argue for deterministic justifications of forms of legal reasoning. For example, Professor Scott Brewer, writing to explain and justify case-based reasoning in the law, recast it as a form of deductive reasoning. Case-based reasoning can in theory satisfy the "principle of justice," the notion that "like cases should be treated alike." If a cited court opinion, subject to the same laws as some instant case under consideration, had factual characteristics that are relevantly similar to the instant case, [click] we should conclude that the instant case will be subject to the same legal conclusion as the cited case. Brewer argued that for such an argument to have "rational force," the reasoner must first posit a general rule that would govern both the cited case and the instant case, [click] then apply that rule deductively to the instant case. Other theorists have shown such a deductive approach is neither necessary nor sufficient to justify such a legal conclusion (Weinreb, 2016; Larson, 2019).

(I assert fair use in the use of the photograph of Scott Brewer, which I obtained at https://hls.harvard.edu/faculty/directory/10106/Brewer.)

Brewer, S. (1996). Exemplary reasoning: Semantics, pragmatics, and the rational force of legal argument by analogy. *Harvard Law Review*, *109*(5), 923–1028.

Larson, B. N. (2019). Law's Enterprise: Argumentation Schemes & Legal Analogy. *University of Cincinnati Law Review*, *87*(3), 663–721.
Weinreb, L. L. (2016). *Legal Reason: The Use of Analogy in Legal Argument* (2nd ed.). Cambridge University Press.

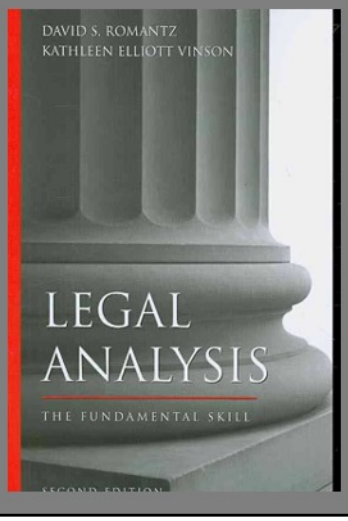


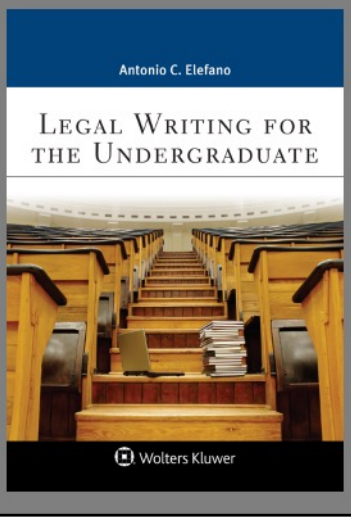
In a more prosaic example, during his confirmation hearings, Supreme Court Chief Justice John Roberts asserted that the job of judges was "calling balls and strikes" (2005). The analogy to baseball contributes to the representation of the legal subculture's function being that of finding the single determinatively correct legal outcome. Justice Roberts knows, of course, that characterizing the law in that fashion is at best a stretch, and at worst a lie.

(Image https://www.conceptdraw.com/How-To-Guide/baseball-pitching-and-strike-zone)

Roberts, J. (2005). *Chief Justice Roberts Statement—Nomination Process*. United States Courts. https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process

MANY (NOT ALL) STUDENT TEXTS URGE "DEDUCTIVE" ETC.





Despite the fact that our law students use *all* the tools of rhetorical invention when they get out of school, many of our teachers of legal argumentation and writing—and law school teachers more generally—again exclude non-deductive arguments or privilege deductive ones. For example, legal theory and writing textbooks routinely refer to deductive and inductive reasoning and syllogism. In a popular textbook, Romantz and Vinson (2009) put considerable emphasis on "deduction." They assert that "deductive analysis . . . requires a lawyer to apply a set of facts to a stated legal premise . . . . The application of fact to a rule allows a lawyer to *deduce* a conclusion" (emphasis added). Like some other authors, they associate this practice with its ancient antecedents, using the "All men are mortal, Socrates is a man" example of what they describe as a "syllogism" and crediting Socrates himself "with developing or at least popularizing the syllogism and the deductive reasoning model." Romantz and Vinson go further, associating this form of reasoning in the law with *formal* deduction. They say, "The syllogism is a powerful analytical tool. If the two premises are 'true' and the form of the argument is correct, then the conclusion has to be true." They note that the "simple logic of reasoning belies its strength." Because their book is practice focused, Romantz and Vinson must, however, acknowledge some challenges and provide a more nuanced view of the ways in which a proposed rule can be defeated, including by identification of supervening considerations or an

exception or because the rule's language is ambiguous or vague.

There are other examples in many other texts. Some texts, on the other hand, appear to avoid this language. My co-panelist here, Antonio Elefano, has recently published a textbook for undergraduate legal writing classes, that avoids the inaccurate use of "deductive," "syllogistic," and "inductive" as terms to describe legal reasoning.

Elefano, A. C. (2022). *Legal Writing for the Undergraduate* (1st edition). Wolters Kluwer.
Romantz, D. S., & Vinson, K. E. (2009). *Legal Analysis: The Fundamental Skill* (2nd ed.). Carolina Academic Press.

I say "inaccurate," because, as I have noted in a review of Catarina Dutilh-Novaes's book *The Dialogical Roots of Deduction* (2021) and in my earlier work (Larson 2019, 2021), the terms "deduction" and "syllogism" cannot correctly be applied to reasoning about issues like legal problems. Legal arguments fail to satisfy the conditions that make deductions and syllogisms compelling in other fields, such as formal logic, mathematics, and theoretical physics. Legal arguments, even when framed as "deductive," lack monotonicity—the character of being immune to the introduction of new premises that might shake the inference in the original deductive form, what philosopher and logician John Pollock (1987) called "defeaters."

I have argued elsewhere that legal argumentation is always, or nearly always, defeasible—that is, subject to defeaters—that even if the present facts fit the requirements of some general rule—a minor premise satisfying the elements of a major premise—the conclusion may not be true. A wide variety of defeaters is always potentially around the corner. This is consistent with the framework legal philosopher Joseph Raz (1999) described as practical reason and with the well developed frameworks of contemporary argumentation theory, including argumentation schemes (Larson 2019, 2021).

(Image of Dutilh Novaes: https://www.cdutilhnovaes.com/)

Dutilh Novaes, C. (2021). *The Dialogical Roots of Deduction: Historical, Cognitive, and Philosophical Perspectives on Reasoning*. Cambridge University Press.
Larson, B. N. (2019). Law's Enterprise: Argumentation Schemes & Legal Analogy. *University of Cincinnati Law Review*, *87*(3), 663–721.
Larson, B. N. (forthicoming 2022). Endogenous and dangerous. *Nevada Law Journal.*
Pollock, J. L. (1987). Defeasible reasoning. *Cognitive Science*, *11*(4), 481–518. https://doi.org/10.1016/S0364-0213(87)80017-4

So what's the result of all this—why does it matter? Well, there is a disconnect between the ways that lawyers and judges must construct their arguments—the *function* of the legal subculture—and the ways that judges, law professors, and others represent the *goals* of the legal subculture. The former is necessarily a non-deterministic application of practical and defeasible reasoning; the latter portrays a practice governed by determinacy and deduction.

I don't have time to lay out arguments about all the pernicious effects of the disconnect. But one obvious one is that students arrive at law school expecting to learn the rules of law so that they can apply them—perhaps deductively—to the situations they will face as attorneys. They are often shocked to learn that knowing the facts and the rule is usually not enough to solve the legal problem. Some become disillusioned with the legal profession and nearly all must first unlearn the moral order of the socio-cultural imaginary—that the goal of the law is to be deterministic—before they can properly learn to assume the identity of the lawyer, who is always a practical reasoner making defeasible arguments.
Thanks!