

Free Will and the Law

New Perspectives

Edited by
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First published 2019
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
52 Vanderbilt Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

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British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

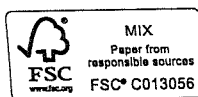
Library of Congress Cataloging-in-Publication Data
A catalog record has been requested for this book

ISBN: 978-1-4724-8144-3 (hbk)
ISBN: 978-1-315-58312-9 (ebk)

Typeset in Galliard
by Apex CoVantage, LLC

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Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

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Christopher Birch

Introduction

David Hodgson produced a substantial body of published work developing a distinctive libertarian conception of free will. In arguing for that libertarian view, Hodgson places significant reliance on an argument about the nature and importance of plausible reasoning. This chapter will seek to challenge Hodgson's view that plausible reasoning is a ground for accepting the libertarian conception of free will. However, I will argue that Hodgson's work has nevertheless provided an important insight into the nature of rationality.

In his 1991 work *The Mind Matters*, Hodgson discusses the nature of plausible reasoning, which he contrasts with formal reasoning (1991: 114). Plausible reasoning seeks to establish reasonable beliefs. It involves the use of more than deductive reasoning. Plausible reasoning extends to all those non-formal modes of inductive reasoning and probabilistic reasoning which go beyond the mere application of the calculus of probabilities. It includes all those methods of inference, from common sense reasoning about matters of daily life, to the reasoning of scientists and other investigators, such as historians, archaeologists, and the like.

The philosophy and methodology of science have been a central area for the investigation of the nature of plausible reasoning. Hodgson builds his account of plausible reasoning on the work of philosophers of science such as George Polya (1954) and Karl Popper (1972a, b) and philosophers of induction such as David Hume. However, his goal is the development of a broader theory than one concerned with scientific knowledge. The general conception of plausible reasoning developed by Hodgson is as applicable to the decision-making of a judge, as it is to the methodological choices of a scientist.

Hodgson contrasts plausible reasoning, or what he also calls informal reasoning, with formal reasoning. The latter includes not just formal logic, based on the propositional or predicate calculus, and any of the other so-called logics, but all mathematical reasoning and probabilistic reasoning, such as that using the Bayesian calculus. This all neatly interacts with the philosophy of mind, because we can construct machines to draw inferences in accordance with any of the formal systems. It remains, at least for the present, an important distinction between formal

and plausible reasoning that plausible reasoning is something that can, Hodgson argues, be engaged in only by conscious minds (1991: 163).

Apart from the claim that the ability to engage in plausible reasoning is a capacity of conscious minds, Hodgson makes two other important claims about plausible reasoning. First, that it is rational. Hodgson treats rationality as pre-eminently concerned with decision-making, but he holds a broad view of its scope and considers the holding of beliefs to be within the field of matters to which rationality applies. Further, in describing rationality as concerned with making reasonable decisions, holding reasonable beliefs, or drawing reasonable inferences, Hodgson is speaking about the ability to weigh up reasons, especially where they conflict, and to produce judgements or decisions.

Where we are concerned about the rationality of our beliefs concerning things of which there is a truth or fact of the matter, the starting point, and frequently the finishing point, of rational appraisal of such beliefs will be a concern with the extent to which our beliefs reliably track truth. Hodgson accepts that rational appraisal may also apply to practical and not merely epistemic concerns, and in practical contexts rationality extends beyond a narrow means/ends prudential calculus, since we may rationally appraise our ends and our desires, and reasonableness can apply to our beliefs about what we should value.

Hodgson argues that plausible reasoning produces reasonable beliefs because it could not be the case that the outcomes from engaging in plausible reasoning are no more favourable than we could obtain from outcomes determined randomly. It may at first blush appear circular to suggest that plausible reasoning produces reasonable beliefs, if we have only plausible reasoning itself to warrant its level of success. However, this objection can be met in part by recognizing that plausible reasoning, like science, involves a temporal aspect, and in a loose sense both prediction and confirmation. Hindsight provides an opportunity of judging the degree of success of plausible reasoning, in precisely the fashion in which, in scientific enquiry, the same assessment process is continuously undertaken.

Hodgson concludes that from our capacity to engage in plausible reasoning, we derive reasonable beliefs, or what some philosophers have called knowledge. This could not be produced simply by the mechanical application of conclusive rules (2012: 39). Our conscious minds thus give us the capacity to engage in a form of reasoning which, in turn, produces reasonable beliefs, or knowledge, that could not be obtained in any deterministic fashion. This then becomes an argument for the possession of a form of libertarian free will; indeed it becomes something of a description of libertarian free will.

It is not a co-incidence that in propounding these philosophical arguments in regard to the nature of mind, David Hodgson spent the greater part of his working life as a lawyer, first as a barrister and then for thirty years as a judge, initially as a Judge of the New South Wales Supreme Court, and then a Judge of Appeal.

At many points David Hodgson's work discusses the reasoning of judges in order to make good his claims about the nature of plausible reasoning and human minds (2012: 27, 38). Judicial decision-making provides an excellent case study for exploring the nature of plausible reasoning. Like scientific methodology, but

unlike normal common sense reasoning in everyday life, judicial decision-making involves a self-conscious exercise of legal reasoning, in which judges lay out, sometimes at great length, the reasoning processes that they have undertaken. Further, the exercise is not a purely theoretical one. The purpose of judicial reasoning is to arrive at a judicial decision which is practical in the most full-blooded sense of the word. The judicial decision culminates in a verdict or orders directed to legal officials and citizens as to what must be done on pain of a sanction.

Legal cases are almost paradigmatic instances of matters for judgement in which the evidence or reasons point in different directions. A crucial aspect of judicial decision-making is the weighing and reconciliation of these conflicting reasons (Hodgson 1991: 138 and Hodgson 2012: 38). Legal reasoning usually involves some reasoning about matters of fact, as to which there will be a truth of the matter. Most legal decisions also include some reasoning about law, which may involve legal interpretation and conceptual analysis. Jurists would be divided as to whether there is necessarily a truth of the matter in regard to these legal and conceptual issues. These two aspects of legal reasoning are not isolated from each other, and both constitute reasons for the ultimate judicial decision.

It is necessary, at this point, to enter a qualification. Much legal reasoning, of the sort we read in the judgements of courts and tribunals, represents examples of plausible reasoning. Nevertheless, one might take a completed judgement by a court and translate that judgement into a set of propositions that are, in turn, capable of being viewed as logically valid deductive arguments (see, for example, Tammerlo 1978 and Schauer 1988). Reconstruction of legal reasoning as deductive argument is, however, possible only because the court that has produced the judgement has already made a number of important decisions and choices about what to treat as relevant, and what to treat as premises for the justification of its conclusions. Any such reconstruction may also need to postulate further premises where these have been suppressed in the reasoning of the court. Such a reconstruction may demonstrate that the court has not violated the laws of logic in reaching its conclusion. It does not demonstrate that the laws of logic alone would have permitted the court to arrive in the first place at the conclusion, from the evidence and established legal principles.

I will argue that David Hodgson's claim that plausible reasoning is rational is defensible for many of the reasons that he gives. It can give rise to reasonable beliefs arrived at through the weighing of reasons and reconciliation of conflicting reasons. Hodgson argues that such reasonable beliefs are rational in large part because they enjoy a sufficient measure of success. This concept of success is ultimately a pragmatic conception looking to the extent to which our reasonable beliefs allow us to interact with the world in a fashion which at least partially satisfies goals and desires.

I will use legal reasoning as an example of plausible reasoning to examine Hodgson's claims. I will argue that plausible reasoning may, at least in many instances, be rational, and that is because it enjoys success in Hodgson's sense. However, I will argue that this success, and hence rationality, can be explained deterministically, and it is not therefore ultimately an argument that establishes

the existence of libertarian free will. I will, however, argue that the success Hodgson attributes to plausible reasoning as a rational activity depends upon the capacity of conscious minds to bring forth new ideas or hypotheses (which I shall refer to as the "creativity thesis"). The creative capacities of conscious minds could possibly emanate from a libertarian free will; however, this need not necessarily be so, and the creativity thesis alone does not establish the possession of libertarian free will.

Using legal reasoning as an example, the chapter will examine how one may describe plausible reasoning as successful in Hodgson's sense. Nevertheless, the chapter will also seek to show that this success does not depend upon assuming the existence of libertarian free will. Also borrowing from the philosophy of science, this chapter will argue that all activities involving the accumulation of reasonable beliefs or knowledge must be understood as practices operating through time with a history, and evolving in a fashion akin to natural selection. Once viewed from this perspective, the success of plausible reasoning ought not to surprise us, nor call for any assumptions regarding the existence of free will.

Plausible legal reasoning

Lawyers frequently distinguish between reasoning about law and reasoning about fact. This is a notoriously difficult distinction to consistently maintain. Whether the meaning of a word is a question of fact or a question of law is a perennial problem. Nevertheless, it is clear that when one is concerned with factual issues concerning whether or not people are engaged in particular conduct, different reasoning tools are deployed to cases where one is concerned with ascertaining law through an interpretative process such as resolving a conflict between legal rules or principles, or seeking to determine the ambit of a legal doctrine.

In regard to facts, law does not generally deploy any special legal methodology, but rather, relies upon the same modes of inference that might loosely be called common sense reasoning about facts (Hodgson 2012: 34ff.). What distinguishes legal reasoning about facts is a set of technical rules of evidence governing what matters can be admissible reasons, and a concern for teasing out and testing inferences with greater care than most of us would use for everyday matters. However, there are in contemporary Anglo-Australian law virtually no rules governing the types of inferences that may be drawn from evidence, or to put it slightly differently, the weight that might be attributed to evidence. This is left to the intuition of the judge or tribunal member. For example, rules requiring corroboration of particular matters have virtually all been repealed. Consequently, there is little difference between the reasoning processes that would be deployed by a judge upon the admissible evidence, in determining a set of facts, and those that would be relied upon by an investigative journalist, or a member of any other profession or occupation, engaged in detailed consideration of factual circumstances.

Law is usually concerned with ascertaining what happened on a specific occasion, rather than looking for deep underlying patterns of the sort investigated by the natural sciences. It might be thought that statements of legal proof, as to

whether a fact in issue or a legal conclusion has been established on the balance of probabilities or beyond reasonable doubt, are not amenable to the statistical analyses of mathematical probability. This view is increasingly rejected by contemporary jurists who accept that the subjective interpretation of mathematical probability permits even the probability of a unique event to be expressed within the calculus.

While deploying the subjective interpretation of mathematical probability, which some jurists have come to call Bayesian probability, offers the prospects of formalizing some part of the process of drawing inferences concerning factual matters; nevertheless, as David Hodgson argues (2012: 43–45), to deploy Bayes' theorem requires one to have made estimates of the prior probabilities of what is going to count as evidence for one's conclusion, and an informal estimate of those probabilities will therefore be necessary before one gets to apply Bayes' theorem. Only in very unusual cases, where the only matters in dispute are amenable to some form of precise probabilistic calculation, could one avoid the need for a preliminary phase of plausible reasoning. Even in those cases, the reasoning process rests on assumptions in turn derived from more general theories which have, in turn, been founded upon plausible reasoning.

In regard to reasoning about law, as opposed to fact, lawyers and legal philosophers have brought forth a substantive body of theory, some of which purports to be uniquely about the problems of reasoning about legal rules and concepts, although generally such theories could be used in regard to reasoning about many other rule systems.

These theories of legal interpretation, in turn, often seek to resolve whether the law consists of rules, principles, or overarching interpretative theories. This sort of legal theory frequently uses a theory of legal truth, according to which there may be a right legal answer in regard to some or all issues, or alternatively that law is indeterminate or that the concept of legal truth is simply inapposite.

So much legal reasoning about the law involves conceptual or interpretative questions, whether or not in the sense conveyed by Ronald Dworkin, that it is difficult to envisage how it could be amenable to formalism. Expert legal systems have sought to create what might loosely be called "legal diagnostic systems", which can be run on computers. Even the keenest supporters of such expert systems accept that there are important interpretative issues that need to be resolved by those designing the systems, and, in any event, their usefulness does not lie in their ability to totally formalize the process of reasoning about law, or to produce judicial decisions (Susskind 2010).

Legal reasoning contains many examples of what lawyers would describe as discretionary judgements. An example, which I will consider in further detail later, would be a sentencing decision in criminal law. Determining the appropriate sentence for someone convicted of an offence will involve drawing together disparate relevant factual matters concerning the offence and the offender, and applying those rules and principles which govern the determination of a sentence. I argue later that this form of reasoning is the least reducible to rule-based reasoning, and hence the most resistant to any formalization. This difficulty in formalizing the

reasoning processes about matters such as sentencing explains in part the criticisms often made of so-called grid sentencing, an approach to sentencing which has had some popularity in some parts of the United States in the last few decades.

Despite the difficulties that will be discussed later regarding the formalization of legal reasoning around matters such as sentencing, it remains the case that experienced criminal defence counsel can, and frequently do, make reliable predictions about the sentences that will be given to an offender for some specific offence, and sentencing decisions frequently form strong patterns. This also requires explanation.

Is plausible legal reasoning successful?

David Hodgson argues that human beings are possessed of rationality in the sense of a capacity to discover truths about the world and make sound judgements about what to believe (2012: 26). Hodgson accepts this ability is fallible, subject not only to *ad hoc* error, but to an ever present danger of systematic error through bias, cognitive illusion, or the like (2012: 29).

Insofar as our beliefs concern matters about the state of the world or the universe, then Hodgson believes, in accordance with the correspondence theory of truth, that our beliefs are capable of having at least degrees of truth. Our rational capacity for reasonable beliefs about the universe thus involves us aiming to hold beliefs that are true through correspondence with reality (2012: 21). Further, Hodgson recognizes that our capacity for rationality in holding reasonable beliefs will extend beyond merely those intellectual pursuits where our beliefs may have a truth value through a correspondence with reality, and will extend to reasonable evaluative judgements (2012: 26). Ultimately Hodgson contends that the human capacity for rationality extends to the whole field of beliefs. Clearly what contributes to the reasonableness of a belief will vary, so that the reasonableness of a scientific belief may depend upon one's degree of confidence that the belief possesses a measure of truth about some aspect of the universe, while an evaluative belief (such as what ought to be the degree of punishment inflicted on an offender) will depend upon the extent to which the belief properly applies our moral and legal frameworks, and the extent to which our moral and legal frameworks themselves have a reasonable basis.

Hodgson's principal concerns are not epistemological nor about the formulation of some specific theory of value. Nevertheless, he does not take for granted that we possess a capacity for rationality, and in his 2012 work takes some time to deal with those who advocate radical scepticism regarding our capacity for rationality. The arguments for the existence of our rational capacity are themselves examples of plausible reasoning, and that capacity will in turn apply plausible reasoning to produce reasonable beliefs. It will, of course, be aided where possible by formal reasoning.

For Hodgson, rationality and plausible reasoning are intimately linked. Our capacity for acquiring reasonable beliefs is usually exercised by engaging in plausible reasoning. Nevertheless, that it is rational to hold beliefs arrived at by

a process of plausible reasoning is because of the extent to which plausible reasoning establishes beliefs that are frequently true, or frequently possessed of the appropriate nomic value of the discipline or framework within which we are conducting enquiries. These arguments of Hodgson support the claim that plausible reasoning is successful in giving rise to reasonable beliefs.

Apart from arguing that plausible reasoning is successful in the sense of giving rise to reasonable beliefs, and displaying the rational capacity of human beings, two other aspects of plausible reasoning are important. As already described, it is of its nature non-formalizable. I have already referred to a number of the points Hodgson makes in this regard. His critics have not generally suggested that plausible legal reasoning is a covert formalizable system that Hodgson and other philosophers have simply failed to decode. A more potent criticism is the suggestion that to the extent plausible reasoning is not formalizable, it is explicable by causal determination or random elements in the inference drawing processes of the plausibly reasoning subject. Hodgson suggests that the success of plausible reasoning would be inexplicable if its non-formal aspects were simply the result of random processes (Hodgson 2005). This contention appears still to be held by Hodgson in his 2012 work, although it is less explicitly stated (2012: 112).

Hodgson's primary contention as to why plausible reasoning is successful and yet informal lies with his argument that it utilizes a capacity of conscious minds which is indeterministic but allows people to respond appositely when engaged in decision-making. This is Hodgson's theory of the gestalt. This is central to Hodgson's work and involves an analysis of the decision-making process at the intersection between theories of reasoning or rationality on the one hand, and neuroscience on the other. Hodgson is right that this is a field of enquiry that has been underdone by philosophers (2012: 72). Even the theories of legal philosophers that purport to be theories of legal reasoning often stop short of an account of how the judicial mind engages with the relevant body of doctrine to produce a decision on a specific matter.

Chapter 6 of *Rationality + Consciousness = Free Will*, entitled "How Gestalts Promote Rationality", provides the core of Hodgson's account of the way conscious decision-making contributes to rationality. The core of that theory involves a focus on individual judgements, and in regard to plausible reasoning, it is the mind's ability to consciously grasp feature-rich gestalts which, Hodgson argues, contributes to plausible reasoning's success. The task upon which plausible reasoning is brought to bear involves feature-rich wholes, which must be grasped as wholes, or combinations, in order to give rise to a relevant judgement.

Hodgson's approach envisages that a mental act in which a mind consciously grasps a feature-rich gestalt permits, or aids, the formation of a reasonable belief, or the making of a reasonable decision. Assuming that this cannot be redescribed in a way that reduces the mental operation to a causally deterministic process, or a random process, then Hodgson envisages that one can, nevertheless, have a rational belief or judgement arrived at through this process of plausible reasoning. This argument also seems to envisage that we can speak of an individual judgement or belief (as opposed to a series of judgements or beliefs) as being rational,

although clearly we may increase or improve our command of the truth, or evaluative success, through a process of judgement or decision-making.

I wish to argue that the success of our plausible reasoning activity in the law, as well as in more mundane common sense fact-finding, is always the success of a sequence of reasoning processes or, more simply, a reasoning practice. Such success can be enjoyed over the course of a practice, even if individual judgements enjoy no more than a random prospect of success. Before turning to explain this point in more detail, it is useful to consider a specific example of plausible reasoning. In order to display what I shall call the fine-grained nature of legal reasoning I have chosen a legal case decided by David Hodgson.

A case study: *R v Mumberson*¹

R v Mumberson was a decision of the New South Wales Court of Criminal Appeal. The Court was constituted by Justice David Hodgson as the presiding Judge, together with Justice Adams and Justice Hall. Mumberson had pleaded guilty in the District Court to a charge of recklessly inflicting grievous bodily harm. He had been sentenced to one year and eight months' imprisonment, but the sentence had been suspended so that it did not need to be served if Mumberson was of good behaviour for a fixed period. The sentence was appealed by the prosecution on the ground that the sentence was inadequate.

At the time of the offence Mumberson, and the victim, Ms Munro, were in a domestic relationship, although not co-habiting. Following a telephone call, Ms Munro had collected Mumberson and a friend from hotel premises where the two had been drinking, to drive each of them home. During the journey Mumberson, who was significantly affected by alcohol, had made a telephone call which had been upsetting to him, he had become angry and erratic, and he ultimately grabbed the steering wheel, pulling it to the left and causing the car to swerve violently. The victim had lost control, the car had crashed, and the victim had suffered serious injuries, although Mumberson was relatively unhurt. Mumberson had a number of prior traffic offences, but no other prior criminal convictions.

The sentencing Judge found Mumberson to have been a man of very good character, loyal to his family and friends, a hard worker, and that the offence was totally out of character. Mumberson pleaded guilty, and was found to be remorseful and to have accepted responsibility. Importantly, the sentencing Judge found that the case was unique and that, after twenty-seven years of judicial experience, he could gain little assistance by comparison or analogy with other matters in arriving at the correct sentence. A 15% discount was allowed on what the sentence might otherwise have been for the plea of guilty pursuant to sentencing guidelines.

The prosecution appealed against what it claimed was the inadequacy of the sentence, contending that the motor vehicle had been used as a weapon and this was an aggravating factor, that the discount for the plea of guilty was excessive in

1 [2011] NSW CCA 54 (8 April 2011).

light of the guilty plea coming so late in the proceeding, that the Judge had not given reasons for concluding that the objective seriousness was less than typical for such an offence, that viewed objectively the offence was very serious, that the cause of the offence appeared to lay in an un-addressed binge drinking problem, and that there were inadequate reasons to justify the leniency of suspending the sentence.

At the appeal Mumberson essentially relied upon the reasons of the trial Judge, and further suggested that the sentence was within the scope of the discretion available to the trial Judge, particularly in light of his subjective characteristics and especially his good character.

Justice Hodgson gave the judgement of the Court which upheld the appeal. He held that it was a very serious offence involving a deliberate act (grabbing and twisting the steering wheel of the car) knowing that this carried the risk of grievous bodily harm to the victim. He thus found it was an unexplained act of violence, albeit committed intentionally, with knowledge of the risk of serious injury.

Justice Hodgson discounted some of the sentencing Judge's findings on the respondent's good character; the offence appeared to have originated in an episode of binge drinking, and the respondent had not accepted the need to seriously address that.

Hodgson found that the finding of remorse should also be discounted through the respondent's failure to give oral evidence, or make any form of reparation to the victim. Hodgson considered the subjective factors relating to the offender's character were substantial, but insufficient, having regard to the objective seriousness of the offence to justify a starting point, before any discount for the plea of guilty, of the two year period adopted by the sentencing Judge, and the suspension of the sentence was also considered by Hodgson to be overly lenient.

Nevertheless, Hodgson found there were mitigating factors and, while upholding the Crown appeal, considered the circumstances permitted a more lenient sentence than would have been justified at first instance. The Court imposed a non-parole period of fifteen months of imprisonment with the balance of the sentence thus being one year, but also permitted the time served on the good behaviour bond to count toward satisfaction of the sentence, thus creating an effective non-parole period (minimum prison sentence) of nine months.

The sentencing judgement reflects a classic example of the form of plausible legal reasoning engaged in by courts on a daily basis. The reasoning exercise displays many of the characteristics that would not make it easily amenable to any type of formal reasoning. First, while the goal is to establish the correct sentence, it is difficult to suggest that there is a single and precisely ascertainable period of imprisonment that represents the correct answer to the question regarding sentencing. Even if there is a hypothetically correct answer, there will be difficulties in determining it, and difficulties in resolving any disagreement about what it may be.

In Australia the High Court has expressly rejected the suggestion that in determining the correct sentence for a convicted offender, there is any necessary path of reasoning that must be followed by the sentencing Judge, as opposed to the

ultimate conclusion merely being a reasonable one, supported generally by the grounds relied upon.²

Although the Court expressed some reservations in the *Markarian* decision about using the phrase "process of instinctive synthesis" to describe the manner in which a Judge aggregates the disparate factors that bear upon sentencing, the Court accepted that it was unnecessary to identify the degree or quantum to which each relevant factor contributed in a sentencing decision. Indeed, it recognized there could be a degree of artificiality in seeking to adjust an objective sentence by some mathematical value for each of the relevant specific features of the case. The Court in *Markarian's* case was clearly wrestling with the difficulty of reconciling the obligation upon Judges to articulate their reasons for decisions on the one hand, with the difficulty of providing any complete account of the weighing and judging process in a discretionary decision such as the sentencing of an offender on the other.

The decision in *Mumberson* involved weighing up reasons, all of which bore weight, not one of which was decisive. The objective seriousness was measured in part by the harm to the victim and the possibly serious harm that was apparent to the respondent at the time of the offence.

Also, having an ambivalent effect on the decision in *Mumberson* is the affectation by alcohol. This undermines the respondent's capacity for rational choice, but on the other hand, it was a result of his having voluntarily engaged in binge drinking. The role of anger in the offence may have undermined its voluntariness, but the respondent's failure to address in his plea his desire to control his drinking and anger undermined his claim of remorse.

Finally, there were many subjective characteristics of the respondent that were treated as mitigating factors by both the sentencing Judge and the Court of Criminal Appeal such as the respondent's prior good character, his devotion to his family and friends, his hard work, and his concern for his children's welfare. The offence appeared to have been an irrational outburst, out of character, and not done from a devious or wicked motive. The sentencing Judge clearly gave greater weight to the subjective factors; Hodgson and his fellow Judges gave greater weight to the objective seriousness of the offence, and saw some of the subjective factors as possessing less weight, or more ambiguity, than did the sentencing Judge.

A common characteristic of legal reasoning, and of much plausible reasoning, is that one appears to be able to go on endlessly elaborating the reasons, making them more precise, and constructing ever more nuanced explanations. For example, it appeared to be a mitigating factor that the offence was an irrational act of violence rather than a scheme. On the other hand, Hodgson considered that it was still committed with knowledge of the high risk of serious injury, and not entirely impulsive, although planned only for a short time. Had the sentencing Judge a right of reply, he may have pointed to the influence of alcohol and anger, and that these render the offence less serious than a plan of harm for

² *Markarian v The Queen* (2005) 228 CLR 357 at 374.

self-enrichment. On the other hand, there was the respondent's apparent failure to fully address his drinking and anger issues, but against this there was some evidence that the respondent had attempted to drink less. This process of dividing the issues into a more and more finely grained set of considerations makes the ultimate task of weighing the reasons, and deriving a correct sentence, difficult. The criminal law encourages this ever more detailed dissection of causes and motives, with the unintended effect of frequently appearing to dissolve away or undermine responsibility.

The reasoning in a sentencing case like *R v Mumberson* also represents a classic example of legal reasoning in regard to a discretionary matter where the Court is called upon to weigh up a series of reasons which are qualitatively different, although all are being offered because they are thought to be reasons for either increasing or decreasing the sentence. While they may be commensurable to the extent that they can be said to rationally bear upon the sentence length, no formal method of weighing or aggregating these reasons offers itself.

One can make the following reflections upon the reasoning in *R v Mumberson*. Although the appeal was upheld, few lawyers would suggest that the sentencing Judge's decision should be branded irrational, or non-rational. Both he and the Court of Criminal Appeal offered reasons for their conclusions, which appeared to have justificatory weight in regard to their final conclusion on sentence. However, one ought not to draw the sceptical conclusion that it is sufficient to be rational, that one simply has reasons that could be pertinent. Most would accept that a ten year sentence of imprisonment for Mumberson or a \$100.00 fine would have both been false answers to the question of what sentence was appropriate. If one moves from the extremes, it may become harder to say what would or would not be a right answer in regard to the question of sentence, but one could envisage models in which the rightness or wrongness of the answer becomes an issue of gradation rather than assuming a single point of correctness with error on either side.

Formulation and justification: two aspects of the creation of knowledge

A detailed analysis of a case such as *R v Mumberson* highlights a lot of the essential attributes of plausible as opposed to formal reasoning. Nevertheless, concentration upon a single case and its line-by-line analysis carries with it a danger for a proper understanding of plausible reasoning, and of its grounds for success. It also goes without saying that the decision in *R v Mumberson* was for all of the legal practitioners involved merely one case in their lifetime's legal work. That lifetime's legal work was in turn a part of an ongoing practice of legal reasoning in which humans have been engaged for as long as they have been arguing and disputing about rule-governed behaviour.

Hodgson saw the literature generated by debates about scientific methodology as an important source of argumentation regarding the nature of plausible reasoning, at least in the scientific context. Debates in regard to scientific methodology

sought to grapple with two apparently obvious features of scientific knowledge. First, it appeared to enjoy substantial success in the pragmatic sense. Second, the debate, since the time of David Hume, regarding the nature of induction suggested that scientific reasoning was not formalizable. The attempts at formalization by Karl Popper, and the scientific methodologists who criticized his approach, are discussed at length by Hodgson (1991: 116ff., 2012: 42). However, Popper and the other scientific methodologists offer an explanation for the success of plausible reasoning, without the necessity for postulating a capacity of conscious minds to make rational judgements by the application of an undetermined capacity to make rational judgements.

In understanding the success of plausible reasoning, we should start by recognizing that choices with no better than a random prospect of success may through a long process be aggregated in such fashion as to produce knowledge. Popper's account of science as a process of conjecture and refutation was built upon this principle.

Popper argued that scientific theories had increasing epistemological content or value, even though it could not be shown that any of the particular conjectures at the time they were made enjoyed any particular probability or likelihood of truth (1972b: 255). Popper initially considered that he could provide a formal description of the logic of scientific discovery which overcame the problems that had bedevilled attempts to explain science by a formal inductive logic. However, Popper's approach involved concentration upon the second or justificatory step in the creation of scientific knowledge. The invention or postulation of scientific theories Popper relegated to the field of the psychology of knowledge. This field would examine the wellsprings of scientific creativity and what might have given scientists the inspiration that led to their conjectures. Popper considered this aspect of little interest to anyone concerned with "the logic of knowledge", and for whom all interest focused on the second aspect (1972b: 31).

Popper's early work carried the hope that a single formal principle such as his doctrine of falsificationism would unpack the logic of knowledge. This early formalistic approach suffered its own refutation at the hands of historians and theorists of science who showed that any credible account of the history of science revealed scientific theories were not abandoned when refuted in a Popperian sense; rather they were abandoned only in the light of non-formalizable plausible judgements that it was time to cease working on an old scientific theory and embrace a new one.

In his later work, Popper (1972a) described knowledge as a third world separate from the human mind or the spatio-temporal world. It possessed its own objective qualities reflecting the logical and theoretical relationships between concepts. Further, Popper emphasized, without abandoning falsificationism, that knowledge was the result of a process conducted over time in which the methodology of falsificationism brought about the elimination of error from theories. Popper compared this to the process of Darwinian selection in which the growth of knowledge was seen as a form of evolution. This has the virtue of emphasizing the long term perspective in assessing any advance in the growth of knowledge.

One of the sources for David Hodgson's concept of plausible reasoning was the work of George Polya (1954), referred to at the beginning of this chapter. A pupil of Polya's was Imre Lakatos, whose theory of the methodology of scientific research programmes still remains one of the most persuasive accounts of how science works (Lakatos 1970).

Lakatos outlined a scientific methodology based on his concept of a research programme. Lakatos was keen to avoid the pitfalls of Popperian falsificationism while recognizing the importance of its evolutionary principles in understanding rationality. He saw the pitfalls as lying in part in the demand that a formal criterion could be specified in advance of the test of a theory, specifying the conditions in which it would or would not continue to be rational to support the theory. Lakatos had his own criteria for determining whether a research programme was "progressive" or "degenerating", but eschewed any attempt at specifying a formal criterion for abandonment of a programme.³

Lakatos did not offer his theory as a means for assessing and choosing between scientific research programmes. For Lakatos, the success of research programmes was something that could be spoken of only with historical hindsight when one could look back and assess the comparative success of competing theories. From Lakatos' perspective there could be no crucial experiments or critical choices. This brought, in Lakatos' terms, the "end of instant rationality" (Lakatos 1970: 154).

The evolutionary theories of scientific methodology just discussed have analogues in broader fields of decision theory. These might be regarded as attempts at a general theory of plausible reasoning; few, however, are as well-developed as Hodgson's.

Many other philosophers have proposed theories regarding the growth of knowledge in which an indeterminate or random step of theory generation is succeeded by a second step of rational appraisal. Thus, Daniel Dennett proposes a compatibilist theory of decision making in which a consideration generator whose output is undetermined produces a series of considerations subjected to assessment and deliberation by the agent. The process of deliberation is not itself random, and will be determined by the objective structure of the criteria of appraisal (Dennett 1978: 295). Importantly, Dennett does not dismiss the parts of the process prior to rational appraisal as mere psychology. Those considerations that our mind generates in the first place will reflect our prior education and intelligence, and in the elimination of possible considerations without detailed appraisal, these qualities will again be deployed in the preliminary steps of the deliberative process, and will shape the ultimate choices posed for rational appraisal.

Many theorists have proposed theories of choice in regard to the free will debate involving a preliminary undetermined step where ideas are postulated, followed by a determinant process of rational appraisal. None of these theories

³ Some of Lakatos' concepts, such as "explanatory power", reflect virtues of research programmes and have echoes in legal theory; see the recent discussion of "explanatory power" in Lakatos' sense as a model for constitutional interpretation in Aroney (2013).

require us to postulate, in order to explain the growth of knowledge, that conscious minds possess a rational ability to make judgements with a better-than-random prospect of success. The growth of knowledge or of rational choices is explained through the accumulation of judgements that have proven successful, where success is simply measured by a hindsight judgement of success, which then incorporates the successful judgement into the increasing body of knowledge.

This can be explained by an analogy with someone using an algorithm to solve a maze of forking paths; they might apply an arbitrary rule (or make random choices) wherever paths fork, in order to choose a way, but by properly recording the results of each "choice", they will slowly acquire knowledge sufficient to solve the maze.

Such maze-solving techniques are clearly formalizable. However, the production of conjectures, whether as part of a research programme within science, or as part of a developing body of law, is not simply a choice between existing alternatives; rather, it requires the creative production of fresh alternatives. However, these alternatives do not need anything greater than a non-trivial prospect of likely success to become part of an evolutionary growth of knowledge within that practice. The contribution by Neil Levy in this volume argues that even the creative generation of new conjectures can be explained by computational models based on stochastic algorithms without the need for postulating the sort of mental powers proposed by Hodgson.

Legal decision-making and the evolutionary growth of legal knowledge

Legal philosophers have discussed versions of the two-step process in regard to judicial decision-making. Richard Wasserstrom (1961) argues that in regard to a judicial decision there will be a process of discovery reflecting the generation of ideas that may constitute the premises of an argument, and a process of justification in which rational appraisal is brought to bear upon the products of discovery. Wasserstrom, however, like so many of the two-stage theorists (already discussed), focuses on the evaluative stage rather than the creative stage (1961: 27).

One must, however, guard against seeing the idea generation step as a wholly indeterminate phase, prior to and separate from the process of rational appraisal. Just how these two phases should be properly characterized can be better understood by returning to consider the reasoning in *R v Mumberson*.

Episodes of legal reasoning, such as that set out in the decision in *R v Mumberson*, are clearly imbedded within long-standing legal practices. Dworkin has given in his many works a detailed and illuminating account of what might be described as the interpretative practice of understanding law, but a sentencing decision such as *R v Mumberson* demonstrates that legal reasoning involves more than just the sort of interpretative practice considered by philosophers like Dworkin. A decision like *Mumberson* requires the proper characterization and understanding of the facts, the determination of psychological facts, such as the insight or remorse of the offender, the judging of what are essentially

sociological criteria, such as the punishment necessary to achieve a deterrent effect and, perhaps, appease public demands for some form of retribution, coupled with the other sentencing criteria which, although embedded within the law, reflect moral principles. These many factors can all be inscribed within an overall theory, or to use Lakatos' term, "research program", of determining how properly to punish offenders.

Each sentencing of an offender is, of course, not merely an experiment in the process of perfecting a wider theory; nevertheless in judging the success of the decisions in individual sentencing cases, it is the success of a long term practice that is judged. Thus, the last forty years have seen many important changes in the approaches to sentencing in Australian and United States legal practice, with the adoption of so-called truth in sentencing legislation, followed by decisions emphasizing retributive and deterrent factors at the expense, perhaps, of rehabilitative factors. The rise of the voice of victims in the sentencing process has had to be integrated into theories of sentencing. Viewed from the perspective of current sentencing law, the decisions of courts thirty years ago might be viewed as having been consistently lenient; consider, for example, the changed tolerance of certain sorts of sexual offence, or domestic violence.

In teasing apart the plausible legal reasoning displayed in *R v Mumberson*, first, it is clear that the legal problem, namely, what sentence to impose, was viewed through a grid of legal knowledge. This can be described as a deterministic process in which the concepts were applied to relevant factual situations simply in consequence of the legal knowledge and training of the judge and advocates involved. Second, the posing of the legal problem does not take place within one single mind. The judge hearing a matter will be presented with alternative cases by prosecution and defence counsel. The judicial mind does not pose the problem as an original problem, but picks up the process already begun by advocates.

No doubt many ideas will occur to a judge during the course of the hearing of a matter, including the consideration of alternative conceptual ways of characterizing the legal choices before him or her, additional to those already posed by the advocates. These alternatives may be generated in a non-rational creative process. They may occur to the legal mind by processes of analogical reasoning, or by recognition of patterns or similarities from past legal problems. However, the generation of these alternative conceptual analyses is merely a presentation to the judicial mind of ways of framing the legal problem that need to be decided. This is an indeterminate process; subconscious influences may cause fresh ways of seeing the legal problem to "pop" into the mind (as *gestalts*). These processes may also involve an indeterminate element where randomness may produce novel legal solutions. Such tentative conjectures will, however, be viewed through the grid of legal knowledge.

The evaluative stage will allow the judge to rely upon accumulated legal knowledge. Some of this will simply involve the application in deterministic fashion of principles of logical inference. To the extent that the legal mind tracks down paths of logical inference, arguments and concepts may be accepted or rejected on the basis of their consistency with other aspects of legal knowledge.

However, hard cases represent instances where conflicting considerations cannot be resolved by appeal to more general rules and modes of logical inference. These will involve cases that call for the weighing and resolution of conflicting considerations. In a case such as *R v Mumberson* these reflect questions involving the relative weight to be attributed to, for example, subjective factors concerning the defendant's good behaviour as against judgements of his personal responsibility, and still further considerations such as the extent to which the punishment needs to deter future offences. To the extent that there is no possibility of a deterministic evaluative process undertaken in regard to some element in the resolution of the matter, we can postulate that the decision to that extent reflected an indeterminate or random choice, but that does not prevent the case from forming part of a successful practice of plausible legal reasoning.

In describing such decisions as involving random choice, it must be kept in mind that the choices will have been greatly narrowed by the grid of legal knowledge to which reference has been made. The choices are themselves presented within a process of reasoning in which evaluative, deterministic, and formalizable inference drawing has already taken place both by the reasoner and by others involved in the practice.

This view of legal reasoning also reveals the importance of a prized virtue of legal reasoning. Lawyers commend legal reasoning where it displays a fine-grained consideration of the matters to be resolved. The caricature of the slipshod judicial decision is one where a judge is confronted by two diametrically opposed witnesses, and after recitation of their conflicting testimony says, having heard each, he or she prefers witness A and decides the case accordingly. In having failed to identify the multifarious factors that might have led one to conclude that witness A was the more reliable, the reasoning process leaves wide scope for the influence of determinate, albeit non-rational, factors, such as the judicial response to irrelevant aspects of demeanour (a pleasing voice or appearance), or perhaps a judicial mind that found the choice difficult and was oscillating in preference, settling on a final decision that may indeed have been simply the result of randomness at the level of the neurological processes that generated the decision. The more fine-grained the process of legal reasoning the more the elimination of scope for non-rational or random processes to determine the decision. Detailed and fine-grained reasoning does not merely provide the legal audience with a more satisfying explanation of the judicial decision; rather, it reflects a judicial decision in which the scope for irrational determinative processes, and random processes, has been narrowed to the smallest possible compass.

Returning to *R v Mumberson*, how was it a rational decision? I do not believe that it can be described as rational on the basis that it deployed an ability to synthesize the disparate reasons into a conclusion about the correct sentence using a mental ability or faculty that enjoyed a better than random prospect of success, and yet was not determined. The sentencing decision involved the deployment of various factors chosen as relevant because past experience had demonstrated their relevance, and that success could be shown by an appropriate rational reconstruction of the past. However, all this can be explained deterministically. Ultimately,

R v Mumberson was rational if it formed part of a successful practice of sentencing, and this is so even if elements of the decision-making process were random, since the random elements were confined in the manner just explained.

Remaining issues

The argument to this point has sought to show that we do not possess a mental faculty for making plausible rational judgements. However, it is important to understand precisely what is being rejected. Some intellectual tasks will involve assimilating a number of disparate pieces of evidence, and weighing up this material and reaching a conclusion. Some of the mental processes that judges or others would use in making such decisions will be formal modes of inference, whether logical inference or more specialized modes such as mathematical or probabilistic. Those mental processes are capable of a deterministic explanation if and to the extent that they have not been subject to randomly induced errors. However, it is the case that there are many decisions people make which cannot be arrived at solely by such formal modes of inference. Legal reasoning provides one clear example.

Apart from the assistance gained from formal modes of reasoning, in the making of decisions within the wider context of plausible reasoning, accumulated knowledge will profoundly affect the way in which any decision is made. It will frame the questions for decision, and govern, to a substantial extent, what may be considered possible answers. This, however, is likewise capable of a deterministic explanation. It is no more or less than the way in which all events prior to the relevant decision come to bear upon the decision.

When all the deterministic processes, whether inference driven or causal, that may bear upon a decision have been subtracted, what will be left will be those influences which are ultimately random. However, it should not be surprising that despite the fact that our decisions may involve random elements, our plausible reasoning processes result in the making of rational judgements on a significant number of occasions. This apparent paradox is quickly resolved when we appreciate the temporal aspect of practices and the evolutionary processes that generate knowledge, whether in the sciences or other areas, such as law.

Even if the process of gaining knowledge in the law, or any other field, may be explicable from a combination of deterministic and random processes, the account of plausible reasoning still clearly depends upon a conscious mind and, indeed, on the assumptions that I have made that such conscious minds engage in making judgements about feature-rich gestalts, in the fashion that David Hodgson has described. However, what is crucial for the understanding of rationality is not a mental faculty for making rational judgements; rather, it is an ability to proffer or develop theories that can then be tested through experience.

I am not sure how it could possibly be measured, but one imagines that the overwhelming number of potential ideas that could be proffered by random idea generation would be poor ideas. It might, therefore, be suggested that

any practice of plausible reasoning, whether legal reasoning or otherwise, will produce overall success only if fresh ideas can be regularly postulated that have a reasonable prospect of aiding the success of the relevant theoretical practice. It might, therefore, be suggested that I have not come up with a serious riposte to David Hodgson's conception, that I have merely substituted for an ability to make plausible judgements that are rational in his sense an ability to postulate theories upon which to work that have a better than random prospect of providing long term success.

I do not believe the possible objection just described is a telling one. There are many factors that constrain or suggest those alternative ideas upon which work should be done, while still leaving choices that might have no better prospect of success than a purely random selection. Further, such constraints can be explained deterministically. For example, past experience provides heuristic constraints and guidelines, but choices within those constraints may be no better than random.

It might also be suggested that knowing only with hindsight that a judgement is successful is simply confirmation of our rational judgement. However, that misunderstands the approach being suggested. Hindsight does not merely allow us to identify what succeeded and what failed in the past. We immediately incorporate the successful characteristics of any successful theory into our next sequence of theories. A successful sequence has an increasing ability to explain the things that matter.

Once again, have we merely displaced the problem of explaining the rationality of individual judgements, to a judgement about the success of a sequence of theories? I do not believe so. There is a difference between explaining past theoretical activity and its success (or lack of success) in producing rational judgements or decisions on the one hand, and the methodological problem of determining which theoretical framework should be deployed in the future. Some in the field of scientific methodology have sought an answer to this second problem. Lakatos eschewed the search for a criterion by which one could decide when rationally one ought to abandon a research programme and adopt a new one. Likewise, there is no reason to believe that we are possessed of a special faculty of plausible reasoning which would allow us to choose between competing theoretical frameworks in a way guaranteed to have more than a random prospect of success, other than those same processes which bear upon and explain the making of individual decisions.

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