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Legal Determinacy and Moral Justification

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INTRODUCTION

Since this is a conference on law and morality, and the topic of this panel is theories of contract law, I thought it particularly appropriate to ask how a theory of contract law can provide a moral justification for contract law. That question can be answered only by providing a more general account of how a legal theory can provide a moral justification for any area of the private law. In this preliminary Essay, I argue that in order morally to justify the private law, a theory of the private law must derive reasons from a normative political theory that determine the outcomes of adjudication in cases within the private law.[1] I reject the claim that legal theories can provide a moral justification merely by demonstrating a correspondence or coherence between a normative political theory and the doctrinal statements found in cases, treatises, restatements, and the like, leaving the question of whether and how those doctrines determine outcomes unanswered. In short, my claim is that moral justification requires legal determinacy.[2] At the outset,

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1. I take no position on the question of whether normative political theories can or must derive their justifications of state coercion from a general moral theory (as, for example, classical utilitarianism maintains), or whether they must instead derive them from a normative theory that is independent of any comprehensive moral theory (as, for example, Rawls's political liberalism maintains). Througout this Essay, I use the term "moral justification" loosely to refer to both kinds of justification.

2. This claim builds on an argument I advance elsewhere that explanatory legal theories are subject to a more modest version of the determinacy criterion that prefers more determinate to less determinate explanations. *See* Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. (forthcoming Apr. 2007).

let me be clear that I am not talking about causal determinacy. Rather, the claim is one about justification: an area of law cannot be justified unless it provides reasons that epistemically warrant the conclusion that its adjudicatory outcomes are uniquely justified. After developing the argument for this view, I conclude by considering three of its implications of this view. The first is that theories that purport to provide a moral justificant of any area of law must proceed by first explaining how the law in that area determines adjudicative outcomes. Explanatory theories of the private law are therefore methodologically prior to the moral justification of the private law. The second is that John Rawls's theory of public justification in *Political Liberalism*[3] requires normative theories of the private law to identify the content of the private law with the express judicial reasoning in decisions governed by the private law. Therefore, if that reasoning cannot be interpreted as providing reasons that determine the outcomes of private law adjudication, then the private law is not morally justified. A third implication is that whether the private law can be justified ultimately will depend on what jurisprudential theory of law turns out to be correct. Those that share Rawls's commitment to treating express judicial reasoning as constitutive of the law, for the same or different reasons, will have to interpret that language to make it outcome-determinative in order to justify the private law. Jurisprudential views that treat express judicial reasoning as mere theories of the law that are not constitutive of law will have a better prospect of demonstrating the determinacy of the reasoning in the private law.

I. THE ARGUMENT FOR LEGAL DETERMINACY

Let us begin by asking what a normative theory must demonstrate in order to provide a moral justification of the private law. At a minimum, it must demonstrate that the exercise of state coercion to enforce the outcomes of common law adjudication is justified. Rather than justifying the diffuse threat of coercion underlying political society generally, an adjudicative outcome produces a judicial order backed by the threat of state coercion directed

3. *See* JOHN RAWLS, POLITICAL LIBERALISM 212-54 (1993).

specifically at an individual litigant. The need for the justification of the coercion exercised on behalf of an adjudicative outcome is therefore especially acute. Thus, if a normative theory of the private law cannot provide an adequate justification of outcomes of private law adjudication, it fails in its essential purpose.

Normative theories of the private law, however, often take the moral justification of the private law to consist in the endorsement of a defensible normative theory combined with a demonstration that the rough outlines of, for example, contract or tort law, would be justified by that theory. Consider corrective justice theorists, who provide a normative justification of contract or tort law by demonstrating how the structure of adjudication in contract and tort, as well as the abstract content of the pre-theoretically defined "core" doctrines, cohere with the requirements of corrective justice.[4] Yet they fail to explain how those doctrines determine outcomes particularly in hard cases. I have argued elsewhere that the surface meaning of the language of private law doctrine is often too vague to be of use to determine the outcomes of adjudication in hard cases.[5] At best, the language of those doctrines determines a set of reasons judges may not use to decide the outcome of their cases. But it fails to direct or constrain the judicial choice among the reasons not prohibited by the doctrinal surface language, even though those reasons can support an outcome in favor of either litigant.[6] For this reason, the corrective justice justifications are inadequate: they fail to provide justifying reasons that explain why the losing party lost.[7] My claim, then, is that the justification of the private law requires an argument based on a normative political theory demonstrating that the outcomes of private law adjudication are justified. And further, I maintain that these outcomes cannot be justified by anything short of justifying reasons that determine them. Normative theories that do not provide determinative justifying reasons are to that extent defective. Though they may be

4. *See, e.g.*, sources cited *infra* note 24.

5. *See* Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420, 431-36 (2001).

6. *See id.*

7. *Id.*

of use to constrain judicial decisions, they nonetheless fail to provide sufficient guidance to determine and thereby justify them.

In response, moral philosophers familiar with Robert Nozick's discussion of moral theory might argue that this conception of justification misconceives the role of normative theory in regulating human conduct. Nozick conceives of morality as providing what he calls "side constraints" only: that is, restrictions prohibiting interference with the liberty of others without their consent.[8] American employment law illustrates side constraints. Private employers are free to fire "at will" employees for no reason whatsoever or for any reason other than a discriminatory one.[9] Employment discrimination law only imposes limits on employer firing decisions, leaving them unfettered discretion within the bounds of those constraints. Rawls's claim that the principles of justice apply only to the basic structure of society provides a possible example of a normative political theory that sets side constraints only: it appears to render the theory of justice agnostic about the normative principles governing choice among non-basic structures.[10] Of course, one could accept the claim that the principles of justice should apply only to the basic structure of society, but still insist that a complete theory of justice must supply additional principles to assess the justness of society's non-basic structures as well. Rawls's position on the justice of non-basic structures is not clear.

The conception of morality as providing only side constraints is a definitive feature of many deontic theories. It finds its most philosophically profound and influential expression in the deontic credo that the Right is prior to the Good.[11] By defining the Right independently of the Good, deontic theory leaves individuals free to pursue their own conceptions of the Good as long as they do not violate the rights of others to do the same.[12] Individual conduct

8. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28-35 (1974).

9. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 1.27 (3d ed. 2005).

10. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 10-12 (Erin Kelly ed., 2001); JOHN RAWLS, A THEORY OF JUSTICE 7-11 (1971); John Rawls, *The Basic Structure as Subject*, 14 AM. PHIL. Q. 159 (1977).

11. WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 21-40 (1989); RAWLS, A THEORY OF JUSTICE, *supra* note 10, at 31; MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 2-7 (1982).

12. *See* RAWLS, A THEORY OF JUSTICE, *supra* note 10, at 31.

within the set of deontically permissible activities is left to the unfettered discretion of the individual.[13] Theories of the Good can offer guidance on the virtues of different conceptions of the Good, but morality leaves individuals free to choose among those conceptions.[14] Given this view of morality, it is tempting to claim that normative political theory only limits the exercise of state coercion. Like the individual, the state may exercise unfettered discretion in choosing among the various actions it might take so long as it does not act for an impermissible reason. Although the state's actions might be subject to evaluation under a theory of the good, it nonetheless has the right to act as it pleases within the constraints provided by normative political theory.

The view that normative political theory provides only side constraints on state action is, however, deeply mistaken. It is based on a false analogy between the individual and the state. Individuals have independent rights. As moral philosophers sometimes put the point, they are self-originating sources of valid moral claims.[15] States are not. The phrase "state rights" in moral theory is merely a figure of speech; state rights are entirely derivative of individual rights.[16] The state has no claim in its own right. Every state action, by definition, constitutes an exercise of coercion. Unlike individuals operating within the confines of deontic constraints, the state—without exception—requires an affirmative justification for all of its actions. Normative theories that fail to demonstrate that particular state actions are supported by justifying reasons that determine those actions thus fail to justify. Political justification cannot remain aloof, approving abstract concepts and institutional frameworks while remaining neutral on the details. In political philosophy, as elsewhere, the devil is the details. And that is precisely the perspective of the litigant who finds to her dismay that the judge ruled against her based on the details of the facts of her case and the doctrines of the private law. If the doctrines are not justified by

13. *See id.*

14. *See id.* at 30-31.

15. *See, e.g.*, John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 546 (1980).

16. For a brief discussion of the relationship between the individual and the state, see KYMLICKA, *supra* note 11, at 24.

a normative political theory, or the doctrines are justified but do not determine the outcome, then the justification for the coercive enforcement of the judgment is quite literally lost in the details. Political justification must start at the top and go all the way down. That means that normative theories of the private law must provide affirmative reasons that justify the outcomes of private law adjudication, not merely endorse the idea of the private law without weighing in on how judges do or should decide cases. Normative legal theory is applied political philosophy, but it is all or nothing. There is no going half way.

One might object that we may have no choice but to go half way. The best normative legal theory may be indeterminate. Its justification might be based on concepts or terms that are ineliminably vague or indeterminate, or it might require trade-offs and balancing between competing values but lack a meta-principle to assign weights to competing values and to define what constitutes a proper balance of values. This indeterminacy constitutes an inherent limitation on the justificatory force of the theory and renders it vulnerable to an equally plausible but more determinate normative theory. But assuming there is no such competitor, the best normative theory may lack the capacity to determine the justification of some acts of state coercion. We might therefore conclude that, although state actions falling within the indeterminate range of the normative theory cannot be given a full justification, they have been given a partial justification—one that demonstrates that those actions are not prohibited by the justificatory theory—and that partial justification is all that individuals can demand of the state under those circumstances.

This seems to be the view that Rawls embraces in *A Theory of Justice*.[17] According to Rawls, the test for determining the precise form just institutions must take is given by the outcomes of idealized constitutional conventions and legislatures:

> This test is often indeterminate: it is not always clear which of several constitutions, or economic and social arrangements, would be chosen. But when this is so, justice is to that extent likewise indeterminate. Institutions within the permitted range

17. RAWLS, A THEORY OF JUSTICE, *supra* note 10.

> are equally just, meaning that they could be chosen; they are compatible with all the constraints of the theory.... This indeterminacy in the theory of justice is not in itself a defect. It is what we should expect. Justice as fairness will prove a worthwhile theory if it defines the range of justice more in accordance with our considered judgments than do existing theories, and if it singles out with greater sharpness the graver wrongs a society should avoid.[18]

Rawls is surely correct that indeterminacy constitutes an unavoidable fact of life that does not undermine the force of the determinate results of a normative political theory such as justice as fairness. But it is a nonsequitur to conclude, as Rawls does, that when indeterminacy does obtain, "[i]nstitutions within the permitted range are equally just."[19] If institutions fall within the indeterminate range of the theory of justice, then the theory provides no reason for concluding either that those institutions are just or unjust. An indeterminate answer is no answer at all. Rather than concluding such institutions are equally just, we can conclude only that their justness, under that theory, is equally indeterminate.

Perhaps a better argument for settling for partial justifications under conditions of irreducible indeterminacy is that the state in some instances simply cannot fail to act. When the state is compelled by sufficient moral reason to take action but lacks a determinate reason for choosing among all the possible alternative actions it could take, we might think that the moral maxim "ought implies can" should apply to states as well. We might concede that when states have good moral reason to act, but lack justifying reasons that determine their choice among the possible actions that are not prohibited by the correct normative political theory, they are, like the employer of an "at will" employee, free to choose among those alternatives for any non-prohibited reason or no reason at all. Consider a state that has good moral reason to construct roads but has no good moral reason for choosing whether to require drivers to drive on the right or on the left. To ensure the question of justice is engaged, suppose that some individuals rank the two possibilities differently. Surely the indeterminacy of the available justifying

18. *Id.* at 201.
19. *Id*.

reasons for making this choice cannot entail that the state is not justified in making the choice anyway. Perhaps the presence of good moral reason to act under conditions of indeterminacy provides the only defensible instance in which political philosophy is properly regarded as providing side constraints only.

But even this reasoning is misleading. When a state has good moral reason to act, but lacks a reason for acting in a particular way, its good moral reason for taking action gives the state sufficient reason to choose a second-order decision procedure for selecting a particular action to take. It might appear that the state is still left to exercise its discretion in choosing among possible second-order decision procedures that do not select actions based on impermissible reasons. But since the occasion for invoking such a procedure will always be the lack of affirmative reasons that justify a particular action, only a random decision procedure would qualify. For justificatory purposes, there is no difference between random decision procedures. Thus, the action selected by a state under conditions of indeterminacy will be fully determined by justifying reasons. It will be determined by the combination of the first-order reasons that ruled out any actions affirmatively prohibited by the normative political theory, and the second-order random decision procedure that is justified by whatever good reasons the state had for taking some action or other in the first place, such as the welfare enhancement of its citizens that will result from building roads and having a rule about which side to drive on. In cases of genuine indeterminacy of justifying reasons, any random decision procedure qualifies. There is, by hypothesis, no justification for using democratic decision procedures to decide what action the state should take. If democratic decision procedures were justified by the correct normative political theory, then the democratic majority preferences would supply the determinate reason for preferring one course of action over the others.

The claim that the state must have justifying reasons that determine all state actions may appear wildly impractical. Indeed, if the "ought implies can" principle applies to states at all, surely, one might argue, it would relieve states of such an onerous requirement on the ground that complying with it would be utterly disabling. No state could satisfy it. I want to resist this claim as well. Its plausibility stems from the implicit assumption that every

state actor would have to justify every possible decision every day. It also supposes that the justification of discrete actions is extraordinarily complex, even if the normative standard for justified action is clear. Moreover, if the standard itself is not clear, then every state official would appear to be required to earn a Ph.D. in political philosophy, and another Ph.D. in institutional design and decision making. Even then, they would spend their entire official lives analyzing the possible justifications for their actions and would never get around to taking action. State actors, and therefore the state, would be disabled.

Let us call this the "impracticality objection" to the determinacy criterion for justification that I have been urging. My response to it relies on Gerald Gaus's distinction between inconclusive and indeterminate reasoning. According to Gaus,

> [t]he justification for accepting (or rejecting) a belief is inconclusive if the justification meets the minimum standard of proof for acceptance (rejection) but falls short of some high standard of proof for conclusiveness, certainty, knowledge, and so on. A justification for accepting (or rejecting) a belief is indeterminate if it falls short of the minimum degree of proof required for either justified acceptance or rejection.[20]

Thus, Gaus takes indeterminacy of reasons to occur when "the system of beliefs does not determine a response to [a particular proposition] because neither its acceptance nor rejection can be justified."[21] Indeterminate reasoning, therefore, cannot produce a result no matter how much intelligence and energy is brought to bear on it. When reasons are indeterminate, the correct answer is that the reasons do not provide an answer. Note that when officials know that justifying reasons are indeterminate, the demands of justification are easily met. If the state lacks good moral reason for acting at all, then it should not act. If the state has good moral reason for acting, but lacks determinate justifying reasons for choosing among the particular actions it could take, then the state must use a random decision procedure (assuming the affected individuals are not indifferent among the possible actions).

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20. GERALD F. GAUS, JUSTIFICATORY LIBERALISM 153 (1996).
21. *Id.*

Inconclusive reasons, however, are not indeterminate.[22] Inconclusive reasoning yields a determinate result, but that result might be wrong.[23] The available justifying reasons might in fact determine what action is justified if the necessary time, energy, and intelligence could be brought to bear on them. Yet it does not follow that a belief about the justified actions must be based on conclusive reasoning about what that action is. So long as the state's inconclusive reasoning yields a determinate answer, that is enough to satisfy the determinacy requirement.

I therefore maintain, with Gaus, that state coercion is justified if it is supported by inconclusive but determinate reasoning that meets a threshold of epistemic responsibility. So long as the state acts on the basis of inconclusive but determinate reasoning that justifies its belief that its action is justified, the state has discharged its justificatory burden. That means that even if correct reasoning demonstrates that the state lacks a justification for acting because the available justifying reasons are in fact indeterminate, the state nonetheless would be justified if it acts on the basis of inconclusive, justified, yet erroneous reasoning. Thus, legal justification does not require that the correct justifying reasoning yield a determinate result. Instead, even if the correct justifying reasons are indeterminate, the state acts with justification provided it acts on the basis of epistemically justified, inconclusive, but determinate justifying reasons. On this view, should that reasoning later be refuted, the state's decision would have to be reversed if possible, but individuals harmed by the mistake would have no claim against the state. In that event, the state would have acted on the basis of responsible justificatory reasoning and that is all that can be required of it. Even though the correct normative political theory, in principle, prohibits a particular state action, either because it provides a determinate answer prohibiting that action or provides no determinate answer and therefore cannot justify that action, the state nonetheless can be justified in acting on the basis of inconclusive but determinate justificatory reasoning.

The important point here, for present purposes, is that the state is never justified in acting in the absence of justifying reasons that

22. *Id.* at 152-53.
23. *See id.* at 154.

determine its actions. In the event its first-order justifying reasons are indeterminate, it can act only if there is a justifying reason to act in the absence of first-order reasons that select a particular action. In that event, it will use a random decision procedure to select the action it will take. If there are reasons that determine whether a given state action is justified, but the state cannot reasonably determine what those reasons are, it acts justifiably when its inconclusive reasoning meets a threshold of epistemic responsibility and determines the action it should take. In all cases, then, that state is justified in acting only on the basis of justifying reasons that conclusively or inconclusively determine the actions it takes. The state is therefore never at liberty to exercise discretion in choosing among possible state actions. But contrary to the impracticability objection, the state can justify its decisions without undertaking relentless and debilitating Herculean analyses. All it must do is act in an epistemically responsible manner. That means that it can act on the basis of inconclusive but determinate reasons, which might include reasons that justify it acting according to pre-established routines, rules, principles, or procedures that obviate the need to undertake constant and de novo analyses. We can, then, insist that the state act only on the basis of justifying reasons that determinate its actions without insisting that those reasons correctly determine whether the state action is justified. The state can be justified (epistemically) in choosing an action that turns out to have been unjustified. So long as we allow that the determinacy criterion can be satisfied by inconclusive (and therefore possibly erroneous) reasoning, the determinacy criterion no longer threatens to impose an impossible burden on the state.

We have come some way from the theory of the private law, to which I would like now to return. My claim is that a theory can justify the private law only by adducing justifying reasons that determine the outcomes of private law adjudication. The deontic theories of contract and tort purport to justify those bodies of law by establishing the normative credentials of the reasoning evidenced in the express explanatory language of judicial opinions, treatises, and restatements.[24] At the same time, they often

24. *See, e.g.*, JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 1-64 (2001); CHARLES FRIED, CONTRACT AS

acknowledge that this language is insufficient to determine which litigant should win in the cases decided under these doctrines.[25] I maintain that doctrinal statements that do not determine outcomes are not the proper object of justification. Ultimately, it is judicial outcomes and not doctrinal statements that stand in need of justification. Establishing the normative credentials of express judicial reasoning in the private law serves to justify the private law only if that reasoning in fact determines the results of private law adjudication. Any theory that falls short of identifying justifying reasons that determine the outcomes of private law adjudication fails to justify the private law.

II. THREE IMPLICATIONS OF THE DETERMINACY REQUIREMENT

Although there are many implications of the claim that the justification of the private law requires justifying reasons that determine outcomes in private law adjudication, I want here to focus on just three. The first is that normative theories of the private law cannot avoid the jurisprudential labor of first constructing an explanatory theory of the private law: a theory that explains the reasons that determine private law outcomes. The only way to justify the outcomes of private law adjudication is to demonstrate that the reasons that determine them justify state coercion according to the correct normative political theory. The reasons that determine private law outcomes must be identified by a *theory*. If the express doctrinal justifications for outcomes do not suffice to determine outcomes, then some jurisprudential theory is needed to explain the reasons that do determine them. If the best jurisprudential theory concludes that the private law in fact does not provide reasons that determine adjudicative outcomes, the determinacy requirement holds that the private law cannot be justified. At a minimum, the private law can be justified only if the outcomes of private law adjudication are determined by reason. Only then can

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PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981); STEPHEN A. SMITH, CONTRACT THEORY 24-32 (2004); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995); Peter Benson, *The Unity of Contract Law*, *in* THE THEORY OF CONTRACT LAW 118, 118-205 (Peter Benson ed., 2001).

25. *See, e.g.*, COLEMAN, *supra* note 24, at 26-27.

we ask if those reasons constitute justifying reasons according to the correct normative political theory.

The second implication of the determinacy requirement is that the private law can be justified according to the theory of political justification in Rawls's *Political Liberalism* only if the express judicial reasoning in private law adjudication can be given an interpretation that renders it outcome-determinative. Recall that, on Rawls's view, state coercion can be justified only by public reasons, and those reasons must be made public.[26] Under political liberalism's publicity requirement, it is not enough that public reasons justifying state coercion merely exist even if they are not made public.[27] Individuals charged with responsibility for choosing state action must publicly offer public reasons to justify their choices.[28] Adjudication is the paradigm instance in which state action requires such public justification.[29] So Rawls's political theory could not provide a justification of the private law without demonstrating that the express judicial reasoning in the private law provides sufficient public reason to justify the outcomes of private law adjudication. There is no room in Rawls's theory for a jurisprudential view that does not identify the private law with the express judicial reasoning in private law cases. If those reasons, properly understood, do not justify private law decisions, then for Rawls, private law decisions are not justified. Given the determinacy criterion I have defended,[30] if the public reasons judges provide in their express reasoning fail to determine the results of private law adjudication, the coercion exercised in accordance with that adjudication is not justified.

A final implication is that whether the private law provides determinate reasons for the outcomes of adjudication, and is therefore capable of justification, depends importantly on the jurisprudential view the private law theorist endorses. Rawls's political theory of justification, it turns out, has the interesting jurisprudential implication that the common law consists in the public reasons, suitably theorized, that judges offer on its behalf.

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26. RAWLS, *supra* note 3, at 212-54.
27. *See id.* at 66-71.
28. *See id.*
29. *See id.* at 215-16.
30. *See supra* note 2 and source cited therein.

Rawls appears to be committed to treating those reasons as constitutive of the law that decides a case. Similarly, Ronald Dworkin's jurisprudential theory holds that the law consists in the best interpretation of preinterpretive legal facts and appears to treat the express reasoning in judicial decisions as preinterpretive legal facts.[31] I have argued elsewhere, however, that the historical legal figures who championed the classical theory of the common law of contract, including Langdell, Holmes, and Williston, clearly viewed the express reasoning in common law opinions merely as fallible and often erroneous theories of the common law, rather than pre-theoretical data constitutive of the common law.[32] For them, the common law outcomes were the only data that needed to be explained. I have also argued that the contemporary economic analysis of law subscribes to this same view. On this concededly under-developed jurisprudential view, the prospects for explaining the private law as consisting in reasons that determine outcomes in adjudication are far better.

CONCLUSION

The idea that legal theories seek not only to explain but to evaluate the moral justification of particular areas of law is quite familiar. Yet little attention has been paid to the minimal criteria of adequacy for justificatory legal theories. Whereas many theories claim to identify the moral grounds that justify a particular area of law, such as contracts or torts, none of them explains how its justification determines the outcomes of adjudication governed by the law in that area. In this brief Essay, I have argued that a particular area of law can be justified only by identifying moral reasons that fully determine the results of adjudication. No matter how compelling the moral reasons a legal theory identifies, and how tight the fit between those reasons and the structure and content of the legal rules governing a judicial decision, a legal theory fails to justify a particular area of law if the reasoning it identifies falls short of fully determining the results in the judicial decisions

31. *See* RONALD DWORKIN, LAW'S EMPIRE 65-68 (1986).

32. *See* Jody S. Kraus, The Jurisprudential Origins of Contemporary Contract Theory (unpublished manuscript, on file with author).

governed by that law. Though this bold claim may seem unrealistic, I have argued that legal theories can satisfy this determinacy requirement by identifying determinate but inconclusive reasoning that explains outcomes in adjudication. While such reasoning may prove to be erroneous, that does not undermine its justificatory force.

Perhaps the most important implication of the determinacy criterion for justificatory legal theories is that the tasks of explaining and justifying a particular body of law cannot be regarded as analytically independent. Instead, theories seeking to justify a particular area of law must first explain the reasons that determine the outcomes of adjudication in that area of law and then explain why those reasons have justificatory force. In addition, legal theories must at least implicitly take a position on the jurisprudential question of whether the law consists in the express or implied reasoning judges use in deciding cases, or the best theory of the outcomes of adjudication irrespective of the correspondence between that theory and the reasoning used by the judges who decide the cases. Those theories, such as Rawls's *Political Liberalism*, already committed to the view that only public reasons can justify the exercise of political coercion, will have to demonstrate that the public reasons judges invoke actually determine the outcomes in adjudication. Other theorists, such as the classical contract scholars and contemporary economic analysts of law, might need only to identify morally justifying reasons that determine the outcomes of adjudication, even if those reasons do not correspond to the reasons the judges actually used to reach those outcomes. The determinacy criterion, therefore, requires legal theorists to uncover the jurisprudential foundations of their theories before advancing explanatory or normative claims on their behalf. That is the task of the next generation of legal theorists of the private law.