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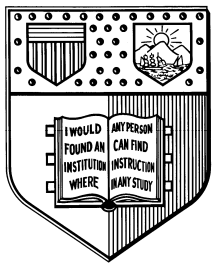

Demystifying Legal Reasoning: Part II

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Demystifying Legal Reasoning

Legal reasoning, meaning reasoning about the requirements and application of law, has been studied for centuries.[1] This is not surprising: legal decisionmaking is tremendously important to peace, prosperity, human dignity, and daily life. *Yet, at least since Sir Edward Coke described the common law as "an artificial perfection of reason," legal reasoning has been surrounded by an air of mystery.*[2] *More recent works on legal reasoning have produced neither clarity nor consensus on what legal deliberation entails; if anything, they have compounded the problem.* Legal decisionmaking is frequently described as a "craft" involving special forms of reasoning that are accessible only to those with long experience in applying law.[3] Seasoned judges and lawyers are said to reason analogically from one case to another and to discover or construct "legal principles" *that differ from the moral principles that govern decisionmaking in other areas of life.*[4]

Our own contribution to the subject of legal reasoning is fairly simple: we believe that legal reasoning is ordinary reasoning applied to legal problems.[5] Legal decisionmakers engage in open-ended moral reasoning, empirical reasoning, and deduction from authoritative rules. These are the same modes of reasoning that all actors use in deciding what to do. Popular

descriptions of additional forms of reasoning special to law are, in our view, simply false. Past results cannot determine the outcomes of new disputes. Analogical reasoning, as such, is not possible. Legal principles are both logically incoherent and normatively unattractive. Nor do legal decisionmakers engage in special modes of interpreting texts. To the extent that judges purport to discern meanings in legal texts that differ from the meanings intended by the authors of those texts, they are making rather than interpreting law.[6]

We recognize that, as a descriptive matter, legal actors purport to apply special decisionmaking techniques. They study prior outcomes, seek analogies, and search for principles. We offer a limited defense of traditional legal methods of this kind. Our defense, however, is indirect, based on the capacity of traditional methods to counteract the situational disadvantages that affect judges as appliers of rules and as rulemakers for future cases. We explain these techniques as ingrained practices that may have instrumental value for imperfect reasoners, not as specialized forms of reasoning.

Part I describes the circumstances that give rise to law and sets out our understanding of the most important problems of jurisprudence. This is familiar ground but nevertheless important as background for our analysis of legal reasoning. As will be clear, we owe significant debts to others who have

studied the subjects we address here, in particular H.L.A. Hart and Frederick Schauer.[7]

Part II addresses legal reasoning in the application and development of common law. We have several aims in this part of the book. We hope to clarify the reasoning methods judges use, to demonstrate that a variety of other supposed methods of legal decisionmaking are illusory, and to explain the different roles judges occupy within the legal system, as adjudicators and as lawmakers. In presenting our view of what common law reasoning entails, we face a descriptive problem: courts often insist that they are reasoning in ways that we say they are not. To defend our limited view of legal reasoning and at the same explain the apparent behavior of courts, we propose that a number of time-honored judicial techniques function not as actual decisionmaking tools but as indirect strategies to avoid the disadvantages that judges face in their dual capacities as adjudicators and lawmakers.

Part I: Law and Its Function

Chapter One: Settlement

Moral Controversy

The need for legal reasoning comes about when members of a community confer authority on certain individuals to settle moral controversies.[1] The controversies that concern us arise in a community whose members agree on moral values at a fairly high level of generality and accept these values as guides for their own action.[2] Individuals who are fundamentally like-minded and well-intentioned may nevertheless differ about the specific implications of moral values, or they may be uncertain about the best ways to realize shared values. Recognizing that controversies of this kind are inevitable, the community can reduce the moral costs of disagreement and uncertainty by delegating *a power of settlement* to a chosen authority.

Settlement, as we use the term, is not simply choice of a solution. It entails reasoning, by which we mean conscious, language-based deliberation about reasons for the choice ultimately made.[3] The members of our imagined community have not agreed to flip a coin; they have selected a human authority to translate the values that serve as reasons for action within the community into solutions to practical problems. Given the flaws of human reasoning, the solutions the authority endorses may not

be justified in the sense that they are morally correct. But, because the authority's task is to settle what the community's values require in practice, its conclusions must be susceptible to justificatory argument. They cannot refer to intuition alone.

If the authority chosen to settle controversies could be on the scene whenever a dispute or uncertainty arose, there would be no need for anything more than a series of decisions about what outcome is best in each instance, all things considered. Normally, however, it is neither practical nor desirable for authorities to be constantly on hand; therefore, the community will need a form of settlement that can guide future decisionmaking. The way to accomplish this broader form of settlement is through authoritative rules.[4]

A rule, for this purpose, is a general prescription that sets out the course of action individual actors should follow in cases that fall within the predicate terms of the rule. To settle potential controversies effectively, the rule must prescribe, in understandable and relatively uncontroversial terms, a certain response to a certain range of factual circumstances.[5] It must claim to prescribe, and be taken as prescribing, what all actors subject to the rule should do in all cases it covers. It must also require its subjects to respond as prescribed without reconsidering what action would best promote the reasons or values that lie behind the rule. We call rules of

this kind "serious rules," as distinguished from advisory rules or "rules of thumb" that purport to guide but not to dictate action.[6]

For example, suppose that a rulemaking authority enacts the rule "No one shall keep a bear in within 1000 feet of a private residence."[7] The motivating reason for this rule may be to protect the safety and peace of mind of the inhabitants of residential neighborhoods. At a deeper level, the rule may reflect the assumptions that human interests rank higher than the interests of bears and that the liberty of property owners to use their property as they wish is subject to a duty not to inflict harm on others. In some situations, the rationale for the rule may not apply with its ordinary force: the bear may be a gentle, declawed former circus animal, kept in a sturdy double cage. But the rule makes no exceptions: its upshot is that bear owners must keep their bears elsewhere, irrespective of the underlying purpose of the rule.[8] Rule subjects therefore need not consult the rule's purposes in order to determine the what the rule requires of them.

We use the term rule in a fairly inclusive way.[9] The rules we are interested in are posited by human beings; in this respect, they differ from non-posited moral principles. The rules' prescriptions are serious in the manner we have just described. Aside from these characteristics, the rules we are

concerned with may be quite general or fairly specific, so long as they are general enough to settle some range of future cases. They may be posited in canonical form or implicit in material such as judicial opinions, as long as they are traceable to human decisionmaking and determinate enough to guide action without the need for further assessment of the reasons that motivate them.[10]

Communities designate authorities to make rules because and to the extent that they deem authoritative settlement to be superior to individual decisionmaking. The preference for settlement derives from the moral costs of controversy and uncertainty and from the ability of the chosen authorities to design rules that further the community's values and ends. In particular, settlement avoids strife; it solves coordination problems that arise when one person's reasons for action depend on the actions of others; and it limits the need for costly deliberation.[11] If rulemaking authorities are wiser than most members of the community, or have more deliberative resources at their command, authoritative settlement is also more likely than unconstrained reasoning to resolve controversy in morally desirable ways.[12]

We emphasize that authoritative rules address the problems of controversy and uncertainty, not the problem of misbehavior. In a non-ideal community, disputes may occur because particular individuals defect from prevailing values or refuse to accept

moral constraint. We set aside disputes of this kind because we wish to show that settlement is necessary even in the most auspicious social circumstances. In any event, when the problem is defection from well-defined values rather than moral uncertainty, rules are not necessary: the community can refer directly to the values it accepts and, guided by those values alone, punish or exact reparations from errant individuals.

Conversely, doubt and disagreement make rules essential even when all members of the community agree on the values they wish to pursue. Everyone may agree that private property is morally justified and socially valuable, that owners should have the greatest possible freedom to use and enjoy their property that is compatible with the interests of others, and that human safety is of great importance, and yet differ about whether keeping a pet bear interferes unreasonably with the enjoyment of surrounding land. This type of disagreement provides the motive and justification for authoritative rules.[13]

In a well-developed legal system, rulemaking power will not be confined to in a single official. The community may designate different rulemakers or rulemaking bodies for different domains, and rulemakers themselves may establish secondary rules that vest power in other sources.[14] Delegation of rulemaking power from one authority to another may also be implicit in institutional arrangements. For example, when a primary rulemaker designates

others to adjudicate disputes that arise under rules, the interpreter has power, at least presumptively, to supplement the rules when they prove to be incomplete or indeterminate.[15] The interpreter then becomes a rulemaker in its own right. An implicit delegation of rulemaking authority also occurs when the primary rulemaker chooses to promulgate a standard - that is, a vague prescription that is likely to be indeterminate in many of its applications - rather than a determinate rule of conduct.[16] The vagueness of standards typically stems from their use of evaluative terms about which there is disagreement or uncertainty and therefore a need for settlement. Yet the standard itself, because it uses these terms, fails to provide settlement. Therefore the standard functions as a delegation by the rulemaker to actors in the first instance, and then to adjudicators called on to apply the standard, to act as rulemakers.

Alternatively, official rulemakers may decline to issue a prescription in any form, leaving individual actors free to choose their own courses of action within a certain domain. Or, if pluralism in interpretation of values and ends appears more important than settlement, the community may decline to confer rulemaking authority within a domain. Even within an unregulated domain, however, rules may guide action as individuals formulate general propositions to govern their own deliberations. In situations of this kind, individual actors act as their own

rulemakers.[17]

The Dilemma of Rules

Serious rules are necessary for effective settlement of moral and practical controversy. At the same time, serious rules generate a dilemma that renders authoritative settlement a psychological mystery, if not an impossibility. We have discussed this dilemma at length elsewhere; our present purposes require only a brief summary.[18]

If a rule is to settle doubt and controversy, it cannot simply track the values it is designed to promote. Instead, it must simplify moral and practical problems and translate disputed concepts into concrete terms. As a consequence, the rule will sometimes dictate a result that differs from what its motivating reasons require.[19] The rule "No bears within 1000 feet of a private residence" will prevent some bear lovers from rescuing circus animals, or result in their punishment, when the bear in question is unlikely to cause harm.

Nevertheless, from the point of view of the rulemaking authority, as well as the community it governs, the best form of settlement may be a *per se* rule: no bears. The reason is that unconstrained decisionmakers make mistakes. Bear owners may make more errors, or errors of greater magnitude, in assessing potential harm case by case than they would make by following the

rule consistently. If so, then it is rational and morally correct for the authority to issue a serous rule and insist on full compliance.

The dilemma of serious rules arises when one shifts to the perspective of individuals who are governed by the rules, the rule subjects. Setting aside for the moment the possibility of sanctions for disobeying the rule, if a bear owner believes that his bear is unlikely to cause harm and needs a home, he may believe that following the rule is not the morally correct course of action, and it will not be rational for him to follow it.[20]

Yet, if we return to the perspective of the authority, the matter looks different because the bear owner may be wrong. By hypothesis, the moral and practical costs of potential mistakes are higher than the costs of full compliance with the rule; this is why the authority issued the rule. Therefore, it continues to be rational and morally correct for the authority to insist on compliance by all owners of bears. There is, in other words, a gap between the rational and morally correct course of action for the rulemaking authority (issue and enforce the rule) and the rational and morally correct response on the part of the rule subject (disobey).[21]

We do not believe this gap can be closed, at least as long as rule subjects act rationally. Rule subjects might adopt the attitude Frederick Schauer calls rule-sensitive particularism,

taking into account the impact that failure to comply would have on the settlement value of the rule (the value of peace, coordination, expertise, and decisionmaking efficiency).[22] Rule-sensitive particularism is rational, and probably required as a matter of correct reason. But it will not close the gap between the authority and rule subjects as long as some rule subjects may conclude that the reasons for violating rules outweigh all the reasons that motivate the rule, including the value of settlement. Indeed, rule-sensitive particularism is always threatened with unraveling and becoming nothing more than case-by-case all-things-considered particularism. For in a community of rule sensitive particularists, everyone would realize that no one was treating rules as serious rules. Therefore, the settlement value of rules would be reduced, which in turn would mean less expected compliance with rules and therefore less settlement value, and so on until the rules collapsed completely as serious rules.

Alternatively, rule subjects might resolve to follow rules unless the action prescribed by a rule is obviously wrong in a particular case - an attitude Schauer describes as presumptive positivism.[23] This attitude, however, is not fully rational: the rule subject must resist acting on his or her best judgment unless the moral mistake in the application of the rule is not just likely, but overwhelmingly likely.[24] In any event, even if

we assume that a limited inquiry into reasons for action is psychologically feasible, there remains a possibility that rule subjects will err in applying the presumption called for by this approach. If so, the gap persists, particularly when the primary value of the rule lies in coordination.[25]

The rulemaking authority can attempt to close the gap by providing for sanctions against those who violate rules. In terms of rationality, if not morality, enforcement may close the gap between rulemakers and actors deciding whether to obey the rules, if violators are uniformly punished, and if avoiding punishment counts as a reason for action.[26] However, a secondary gap arises when judges are asked to impose sanctions on subjects who have done what the judge perceives (or what the subjects perceive) to be right in a particular situation. In such a case, it is morally and rationally problematic for the judge to enforce the rules.[27] Moreover, to the extent that this secondary gap between rulemaker and judges prevents uniform punishment, the primary gap between rulemaker and subjects recurs.[28]

In fact, people do follow rules. They comply with rules they have designed for themselves and with rules imposed by authorities they recognize as legitimate, without reassessing underlying reasons for action. We suspect that the explanation for compliance lies in habit, socialization, and an element of self-deception. In our present inquiry into legal reasoning, we

shall assume that some such combination of psychological mechanisms allows subjects and judges to follow and enforce rules in most cases. Nevertheless, the dilemma of serious rules remains in the background as we discuss deduction of legal conclusions from rules.

The Possibility of Determinate Rules

Another important background feature of our analysis of legal reasoning is the assumption that rules can provide determinate answers to legal questions in a significant number of cases. The purpose of rules is to settle controversy about what shared moral values and societal ends require in particular cases. To perform this function effectively, the rules must be understood by most of their subjects in a similar way. Because the premise that rules have determinate meaning is vital to our understanding of legal reasoning, we must briefly address rule-skepticism.[29]

Critics of rule-oriented legal theory have challenged the assumption that rules can communicate determinate instructions to their subjects in various ways. Some are broadly skeptical about the capacity of law to constrain decisionmaking.[30] Others believe in the possibility of legal constraint but argue that constraint comes not from rules but from professional norms or specialized modes of reasoning such as reasoning by analogy.[31]

Particularly among proponents of analogical reasoning, the claim of indeterminacy often takes the form of an assertion that legal rules, being general, cannot determine their own application to particular cases.[32] This argument obviously runs contrary to our own conception of rule-oriented decisionmaking, in which the critical feature of serious rules is precisely their capacity to dictate their application to particular cases. It might also seem puzzling to an ordinary rule subject, for whom many rules appear to provide comprehensible instructions about what to do.

What, then, does it mean to say that rules cannot determine their own application? One way to understand this claim of indeterminacy is that the full extension of a rule - all cases to which it applies - is never clear from the rule's terms. This is true as far as it goes. If a rule prohibits bear owners from keeping their bears in "residential neighborhoods," cases are sure to arise involving mobile homes or hotels that may or may not be residential and may or may not count as neighborhoods. Ambiguity at the margins of usage, however, is not fatal to rule-governed legal reasoning if the meaning of the rule is clear in a significant number of cases. Rules will sometimes leave important controversies unsettled. How often this will occur is a difficult empirical question, but common experience suggests that indeterminacy is not pervasive.[33]

Another interpretation is that the claim that rules are indeterminate is a general claim about language. It may be that in a certain technical sense, the words of a rule have no "meaning" apart from their use in particular cases because there are no facts in the world that correspond to the meaning of abstract language.[34] This argument is linguistically interesting but unimportant for purposes of legal reasoning. Whatever the true nature of linguistic meaning, basic social understandings allow courts and rule subjects to make sense of the language of rules.

Assume, for example, that the governing rule prohibits the keeping of bears "within 1000 feet of a private residence without the owner's consent." This rule contains some tricky words: ownership is a complicated legal construct, and a full definition of consent involves contestable moral conclusions.[35] Yet, the more typical forms of ownership are widely known, and most people understand that in a case of disputed land use, consent normally means express permission. Thus, in at least some instances, and probably in many, the words of the no-bear rule, coupled with minimal linguistic and social expertise on the part of rule-subjects, dictate the rule's application. As Frederick Schauer puts it, among members of a community who share a language and a sense of its "universal context," words and their intended meanings have "semantic autonomy."[36] (For us, if not for

Schauer, semantic autonomy does not imply the autonomy of words from the author's intended meanings - an autonomy we reject.[37] Semantic autonomy means only the autonomy of those intended meanings from the purposes the words and their meanings are intended to achieve. Autonomy in this sense is enough to make rules determinate in core cases.)

A more significant version of the claim that legal rules cannot determine their own application is the claim that the meaning of any rule depends on its purpose. On this view, rules are promulgated as means for realizing certain underlying values and ends, and the only way to ascertain their application to particular cases is to ask what those values and ends require in the circumstances.[38] Assuming the no-bear rule is designed to protect the safety of surrounding residents, a bear owner, or a court, might conclude that it should not apply to a very docile, well-caged bear 999 feet from a single residence occupied by a retired lion tamer. Thus, even in a linguistically simple case, the words of the rule do not determine whether an entry is legally permissible.

In our view, this argument overlooks the settlement function of serious rules. Given the possibility That those who apply rules will err in assessing the implications of a rule's purposes for individual cases, the best way to promote those purposes may be to identify a course of action that, if universally followed,

will result in fewer errors overall. In other words, the benefits of the rule as a means of advancing purposes to realizing certain values come precisely from its semantic autonomy - the independence of what it prescribes from the purposes it serves. At best, the argument that rules are indeterminate because their meaning in particular cases depends on their purposes expresses a contestable view about the best way to pursue social ends rather than a logical implication of rules.[39]

Another variant of the indeterminacy argument takes a different form but is ultimately similar in effect. Rule skeptics sometimes assert that rules cannot determine the outcomes of particular cases because the application of any rule depends on a prior classification of facts.[40] For example, Steven Burton states that at the point of application of a rule, "[t]he connection between the abstract class and the case remains to be drawn... Drawing this all-important connection - placing a case in a legal class - requires a judgement of importance to mark the particular facts that justify the classification."[41]

Burton has something more in mind than the obvious truth that the outcome of any decision depends on the decisionmaker's skill and integrity in finding facts.[42] Rather, his claim appears to be that the decisionmaker must judge which facts count as important features of the case in order to determine whether

the case fits within the words of the rule. But why should this be so? If we are correct that the words of a rule, read in light of common social understandings about usage and context, have semantic autonomy, it should follow that rules themselves pick out the important features of individual cases. Burton may be using the term "classification" to refer to an assessment of the relationship between specific facts and the underlying purposes of the rule: if, and only if, certain facts are important to the purposes of the rule, or to the overall question of what outcome is best, they should be classified as falling within the terms of the rule.[43] If this is the argument, however, it suffers from the same weakness as the argument from purposive interpretation of rules: it depends on an inadequate view of the operation of rules.

The last indeterminacy argument we address is an argument about the body of legal rules as a whole. Centuries of legislative and judicial rulemaking have produced a tangled accumulation of rules. Even if we assume that individual rules have a degree of semantic autonomy, the number and complexity of existing rules, combined with a certain amount of interpretive play, makes it likely that in a case of any difficulty two or more different rules will point to different outcomes. As a consequence, legal rules do not determine the outcome of particular cases: decisionmakers face a choice among rules, a

choice for which the rules themselves provide no guidance.[44]

This claim of indeterminacy is significant, but we do not think it seriously threatens the possibility of governance by rules. As Frederick Schauer has pointed out, the extent of overlap among rules is an empirical question.[45] Moreover, rather than simply choosing among rules that appear to conflict, judges can and do avoid conflict by ranking and refining the rules. . The very fact that legal actors try to reconcile conflicting rules belies the suggestion that the multiplicity of rules undermines legal constraint.[46]

The Nature of Law

Legal reasoning is, of course, about law. So it might seem that to properly address the subject of legal reasoning, we must first specify what we mean by law. We do not think this is the case: nothing in our analysis of legal reasoning requires an answer to the jurisprudential question what counts as law. Nevertheless, it may be useful to summarize briefly how we might respond to that question.

In classic debates about the identity of law, the principal divide has been between natural law and positivism.[47] Those who support the natural law position hold that because law purports to guide action and impose obligations, the validity of any proposition as law depends on its conformity to moral standards.

Positivists, on the other hand, hold that the status of a norm as law depends on social facts, and in particular on the fact that the norm was posited by a source generally recognized as a lawmaking authority. Moral evaluation is not necessary - and, on some versions of positivism, not permissible - in determining the identity and content of law. Another difference between natural law and positivism is methodological: natural law theorists look at law from the committed stance of insiders, who look to law for their own practical guidance, whereas positivists look at law from the external position of observers analyzing the practices of those who are committed to law.[48]

In some ways, our understanding of the function and operation of law fits more comfortably within a positivist theory of law than a natural law theory. Communities recognize lawmaking authorities because they want the benefits of settlement; effective settlement requires serious rules; and serious rules, even the best serious rules possible, produce morally defective outcomes in some cases.

At the same time, however, our view of law is linked to morality in several ways. We recognize that the positivist's route to settlement relies on insiders' recognition of lawmaking authority and insiders' compliance with particular laws, both of which are moral matters. The settlement function that justifies legal authorities and their posited norms - the very phenomena

that are the focus of positivism - is itself a moral function. Its aim is to reduce the moral costs of anarchy, coasts that will occur even among those who are morally motivated. Moreover, as we stated at the outset, the act of settlement entails moralreasoning: the authority's rules, if not actually justified, must be the product of a conscious process that is susceptible to justificatory argument. Only then can members of the community view them as an exercise of the authority they have conferred, authority to settle what the community's values require.

Thus, for us, positivism and natural law are complementary rather than conflicting positions that describe two different facets of "law." Indeed, a central feature of our analysis of law is the dilemma of rules described above, a dilemma that arises from the dual "natural law/positivist" character of law and raises doubts about the possibility of law in the positivist sense.

In this book, we approach the problem of legal reasoning within a mainly positivist framework. We focus on how judges respond to posited law and how they distinguish between reasoning from posited law and reasoning in the absence of posited law. Moreover, our analysis proceeds from a detached perspective of the kind associated with positivism.

Ultimately, we argue that courts function in two ways: they reason deductively from rules posited by others, or they posit

law, relying on moral and empirical judgement as any lawmaker must. For us, there is no middle ground in which courts discover non-posited law in past decisions or texts, or combine morality and posited law to construct legal principles. At the same time, however, we are sensitive to both the moral ends of law (settlement and its benefits) and the dilemma that judges and rule-subjects face when posited law appears to dictate morally erroneous results.

1. Early works include The Treatise on the Laws and Customs of the Realm, Commonly Called Glanville 1-3 (ca. 1187-1189) (G.D.G. Hall, ed., London: Nelson 1965); 2 Bracton, On the Laws and Customs of England 19-28 (ca. 1230-50) (Samuel E. Thorne & George E. Woodbine, eds. & trans., Cambridge: Harvard University Press: 1968); Christopher St. German, Doctor and Student (1523) (T.F.T. Plucknett & J. L. Barton, eds., London: Seldon Society 1974); Sir Edward Coke, The First Part of the Institutes of the Law of England, §138 ¶97b (1628), reprinted in II The Selected Writings of Sir Edward Coke (Steve Sheppard, ed., Indianapolis: Liberty Fund 2003) 577, 701 (reprinting 1639 edition); Thomas Hobbes, A Dialogue Between and Philosopher and a Student of the Common-Lawes (1681) (Joseph Cropsey, ed., Chicago: University of Chicago Press 1971); Sir Matthew Hale, The History of the Common Law of England 39-46 (1713)(Charles M. Gary ed., Chicago: University of Chicago Press 1971); 1 William Blackstone, Commentaries on the Laws of England 38-73 (Oxford: Clarendon Press 1765).

More recent works focusing on legal reasoning include Steven J. Burton, An Introduction to Law and Legal Reasoning (Boston: Little, Brown 1995); Steven J. Burton, Judging in Good Faith 35-68 (Cambridge; New York: Cambridge University Press 1992); Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press 1949); Ronald Dworkin, Law's Empire (Cambridge: Harvard University Press 1986); Ronald Dworkin, Taking Rights Seriously 14-130 (Cambridge: Harvard University Press 1978); Melvin Aron Eisenberg, The Nature of the Common Law (Cambridge; London: Harvard University Press 1988); Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (William N. Eskridge, Jr. & Phillip P. Frickey, eds., New York: Foundation Press 1994); Oliver Wendell Holmes, The Common Law (New York: Dover Publications 1991); Edward H. Levi, An Introduction to Legal Reasoning (Chicago: Chicago University Press 1948); Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals (Boston; Toronto: Little, Brown 1960); Roscoe Pound, Law Finding Through Experience and Reason (Athens: University of Georgia Press 1960); Cass R. Sunstein, Legal Reasoning and Political Conflict (New York: Oxford University Press 1996); Lloyd L. Weinreb, Legal Reason: The Use of Analogy in Legal Argument (New York: Cambridge University Press 2005).

2. "[T]he common law itselfe is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason..." Sir Edward Coke, The First Part of the Institutes of the Law of England, §138, ¶ 97B (1628), reprinted in II The Selected Writings of Sir Edward Coke 577, 701 (Steve Sheppard, ed., Indianapolis: Liberty Fund 2003); see Prohibitions

Del Roy, 12 Edward Coke, Reports 63 (1607) reprinted in I The Selected Writings of Sir Edward Coke, supra at 478 (maintaining that the King cannot not render legal judgments because he lacks "the artificiall reason and judgment of Law").

For helpful discussions of Coke and of early understandings of legal "reason," see J.W. Tubbs, The Common Law Mind: Medieval and Early Modern Conceptions (Baltimore: Johns Hopkins University Press 2000) 45-52, 148-68 (suggesting that Coke's term "artificial reason" referred to reasoning skills obtained through special training, reasoning developed through debated among learned persons, or a combination of the two); Gerald J. Postema, Classical Common Law Tradition, Part I, 2 Oxford U. Commonwealth L.J. 155, 176-80 (2002); Gerald J. Postema, Classical Common Law Tradition, Part II, 3 Oxford U. Commonwealth L.J. 1, 1-11 (2003) (describing artificial reason as pragmatic, public-spirited, contextual, non-systematic, discursive, and shared).

3. See Anthony Kronman, The Lost Lawyer 170-85, 209-25 (Cambridge: Belknap Press of Harvard University Press 1995); Llewellyn, supra note 1 at 213-35, Charles Fried, The Artificial Reasoning of the Law or: What Lawyers Know, 60 Tex. L. Rev. 35 (1981); Brett G. Scharffs, The Character of Legal Reasoning, 61 Wash. & Lee L. Rev. 733 (2004). See also Weinrib, supra note 1, at 123-46 (suggesting that analogical reasoning depends on a combination of psychological hardwiring and legal training and experience); Daniel A. Farber, The Inevitability of Practical Reasoning: Statues, Formalism, and the Rule of Law, 45 Vand. L. Rev. 533 (1992)(discussing the need for "practical reason," gained from experience, in interpretation); Brian Leiter, Heidegger and the Theory of Adjudication, 106 Yale L.J. 253 ((1996)(finding support in Heidegger for learned methods of legal reasoning that cannot be articulated).

4. Efforts to explain and defend analogical reasoning in law can be found in Burton, supra note 1, at 25-41; Levi, supra note 1, at 1-6; Sunstein, supra note 1, at 62-100; Weinreb, supra note 1; Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 Harvard Law Review 925, 925-29, 962-63 (1996).

Legal principles are analyzed in Dworkin, Law's Empire, supra note 1, at 240-50, 254-58; Dworkin, Taking Rights Seriously, supra note 1, at 22-31. See also Hart & Sacks, supra note 1, at lxxix-lxxx, 545-96 (discussing "reasoned elaboration" of law).

5. See Kent Greenawalt, Law and Objectivity 197-202 (New York: Oxford University Press 1992). See also Eisenberg, supra note 1,

at 94 (suggesting that reasoning by analogy is "substantively equivalent" to reasoning from precedent rules); Joseph Raz, Ethics in the Public Domain 310 (Oxford: Clarendon Press; New York: Oxford University Press 1994)(application of law does not involve special forms of logic); Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Life and Law 187 (Oxford: Clarendon Press 1991) ("nothing about precedent-based constraint uniquely differentiates it from rule-based constraint").

6. Our views on these matters are set out in part in a variety of earlier writings. See, e.g., Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law 98-179 (Durham; London: Duke University Press 2001); Larry Alexander, The Banality of Legal Reasoning, 73 Notre Dame L. Rev. 517 (1998); Larry Alexander, Bad Beginnings, 145 U. Pa. L. Rev. 57 (1996); Larry Alexander, Constrained By Precedent, 63 S. Cal. L. Rev. 1 (1989); Larry Alexander & Emily Sherwin, Precedent, in Common Law Theory (Douglas Edlin, ed., Cambridge: Cambridge University Press 2005) Emily Sherwin, A Defense of Analogical Reasoning in Law, 66 U. Chi. L. Rev. 1179 (1999); Emily Sherwin, Judges as Rulemakers, 73 U. Chi. L. Rev. (2006).

7. See H.L.A. Hart, The Concept of Law (London; New York: Oxford University Press 1961); Schauer, supra note 5.

Chapter One

1. See Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law 11-15 (Durham; London: Duke University Press 2001); see also Melvin Aron Eisenberg, The Nature of the Common Law 4-7 (Cambridge: Harvard University Press 1988) (defending an "enrichment model" of the common law); Joseph Raz, Ethics in the Public Domain 187-92 (defending an "institutional" approach to law) (Oxford: Clarendon Press; New York: Oxford University Press 1994) .

2. See Gregory S. Kavka, Why Even Morally Perfect People Would Need Government, 12 Soc. Phil. & Pol'y 1 (1995).

3. The nature of "reasoning" and the degree to which reasoning guides human decisionmaking are much-debated subjects in the field of psychology. See, e.g., Steven A. Sloman, Two Systems of Reasoning, in Heuristics & Biases: The Psychology of Intuitive Judgment (Thomas Gilovick, Dale Griffin, & Daniel Kahneman, eds: Cambridge U. Press 2002) (surveying evidence of parallel systems of "reasoning:" associative and rule-based).

We do not intend to enter into or comment on this debate.

Our definition of reasoning as conscious deliberation is a working definition sufficient to describe what we believe is required by the notion of authoritative settlement. Reasoning, for us, is distinct from intuition or affective response. The point we wish to make is that when a community confers power on an authority to settle moral controversy, it calls on the authority to deliberate; to engage in an process that is at least susceptible to explanation and justification. Whatever the psychology of personal moral judgment may be, a political authority must bring its power of reason, in this sense, to bear in decisionmaking.

For a definition of reasoning that is similar to ours although offered from a different point of view, see Jonathan Haidt, The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment, 4 Psychological Review 814, 818 (2001) (moral reasoning is "conscious mental activity that consists of transforming given information about people;" "[t]o say that moral reasoning is a conscious process means that the process is intentional, effortful, and controllable and that the reasoner is aware that it is going on."). For a philosophical analysis of forms of reasoning, see Simon Blackburn, Think 193-232 (Oxford: Oxford University Press 1999).

4. See Alexander & Sherwin, supra note 1, at 17-21.

5. On the need for determinacy to accomplish settlement, see id. at 30-31; Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Life and Law 53-54 (Oxford: Clarendon Press 1986).

6. For further discussion of the nature, function, and problems of "serious" authoritative rules, see Alexander & Sherwin, supra note 1, at 53-95; Joseph Raz, The Morality of Freedom 57-62 (Oxford: Clarendon Press; New York: Oxford University Press 1986); Joseph Raz, The Authority of Law 16-19, 22-23, 30-33 (Oxford: Clarendon Press; New York: Oxford University Press 1979); Schauer, supra note 5, at 42-52, 77-134.

7. This rule could take the form of a public regulation, such as a zoning ordinance; a private land use regulation, such as a covenant; or a judicial ruling that a bear in a residential setting is a nuisance *per se*. Cf. Lakeshore Hills, Inc. v. Adcox, 413 N.E.2d 548 (Ill. App. 1980) (preliminary injunction for removal of a 575 pound pet bear based on subdivision covenants).

8. See Alexander & Sherwin, The Deceptive Nature of Rules, 142 U. Pa. L. Rev. 1191, 1192-93 (1994) (suggesting that rules

deceive their audience by implying that the conduct they prescribe is the right course of action in all cases to which they apply).

9. For a careful analysis of the variety of forms rules can take, see Schauer, supra note 5, at 1-16.

10. We discuss canonicity and the possibility of implicit rules in Chapter Two, infra [33]. On canonicity as a criterion for authoritative rules, see id. at 68-72; Frederick Schauer, Prescriptions in Three Dimensions, 82 Iowa L. Rev. 911, 916-18 (1997). We agree with Schauer that authoritative rules need not be posited in explicit terms. Because we believe the meaning of rules is a function of the rulemaker's intent, we do not agree that rules can come into being without being created by a rulemaker. See Schauer, supra at 916-17. For us, rules must have authors; they may, however, have multiple authors, and interpreters of rules may become authors of rules. We take these matters up in detail in Chapters Five and Six, supra.

11. See Alexander and Sherwin, supra note 1, at 13-15; Schauer, supra note 5, at 137-55. On the value of coordination, see, e.g., Tom D. Campbell, The Legal Theory of Ethical Positivism 6, 50, 53, 58 (Brookfield, Vermont: Dartmouth Publishing Co. 1996); Heidi M. Hurd, Moral Combat 214-21 (Cambridge: Cambridge University Press 1999); Raz, The Morality of Freedom, supra note 6, at 49-50; Jules L. Coleman, Authority and Reason, in The Autonomy of Law: Essays on Legal Positivism 304-05 (Oxford: Clarendon Press; New York: Oxford University Press 1996); Neil MacCormick, The Concept of Law and *The Concept of Law*, in The Autonomy of Law, supra note 9, at 162, 182, 190; Gerald J. Postema, Coordination and Convention at the Foundation of Law, 11 Journal of Legal Studies 165, 172-86 (1982); Donald H. Regan, Authority and Value: Reflections on Raz's *Morality of Freedom*, 62 Southern California Law Review 995, 1006-10 (1989).

12. On the importance of rulemaker expertise, see Campbell, supra note 11, at 51, 58; Coleman, supra note 11, at 287, 305 Schauer, supra note 5, at 150-52;.

13. See Alexander & Sherwin, supra note 1, at 11-15.

14. On primary and secondary rules, see H.L.A. Hart, The Concept of Law 78-79, 89-96 (Oxford: Clarendon Press 1961).

15. See id. at 94-95.

16. On prescriptions in the form of standards, see, e.g., Cass R. Sunstein, Legal Reasoning and Political Conflict 27-28 (New York: Oxford University Press 1996); (Isaac Ehrlich & Richard A Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257, 261-71; Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 560-62 (1992); William Powers, Jr., Structural Aspects of the Impact of Law on Moral Duty Within Utilitarianism and Social Contract Theory, 26 U.C.L.A. L. Rev. 1263, 1270-93 (1979).

On deliberately indeterminate standards as delegations of authority, see Raz, The Authority of Law, supra note 6, at 193-945.

17. See Richard A. Fumerton, Reason and Morality: A Defense of the Perspective 208-223, 234-39 (Ithaca, London: Cornell University Press 1990) (discussing an act consequentialist's need for rules).

18. For a full analysis of the dilemma of rules, see Alexander & Sherwin, supra note 1, at 553-95. Frederick Schauer makes a similar observation in his discussion of the "asymmetry of authority." See Schauer, supra note 5, at 128-34.

19. See Schauer, supra note 5, at 31-34, 48-54.

20. See Hurd, supra note 10 at 62-94; Heidi M. Hurd, Challenging Authority, 100 Yale L.J. 1011 (1991); see also Gregory Kavka, The Toxin Puzzle, 43 Analysis 33 (1983) and Gregory Kavka, Some Paradoxes of Deterrence, 75 J. Phil. 285 (1978) (explaining why it is impossible to form certain intentions). The rationality of following rules is a debated question; however, we are not persuaded that commitment, consent, or any other mental slight of hand can make it rational, at the time of application of a rule, to act in a way that one believes to be wrong, all things considered. See Alexander & Sherwin, supra note 1, at 75-77. For contrary suggestions, see e.g., Raz, The Morality of Freedom, supra note 5, at 88-99; David Gauthier, Commitment and Choice: An Essay on the Rationality of Plans, in Ethics, Rationality, and Economic Behavior 217 (Francesco Farina, Frank Hahn, & Stefano Vanncucci, eds., Oxford: Clarendon Press; New York: Oxford University Press 1996); Edward F. McClennon, Pragmatic Rationality and Rules, 26 Phil. and Pub. Aff. 210 (1997); Mark C. Murphy, Surrender of Judgment and the Consent Theory of Political Authority, 16 Law and Phil. 115 (1997); Scott J. Shapiro, The Difference That Rules Make, in Analyzing Law 33, 45-54 (Brian Bix, ed., Oxford: Clarendon Press; New York: Oxford University Press 1998).

21. See Larry Alexander, The Gap, 14 Harv. J. L. & Pub. Pol. 695 (1991). Because we believe this gap is unavoidable, we cannot accept Joseph Raz's suggestion that authoritative rules simply are, as an analytical matter, exclusionary in the sense that they preempts consideration of the reasons on which it depends. See Alexander & Sherwin, supra note 1, at 75-77; Raz, The Authority of Law, supra note 6, at 16-19, 22-23, 30-33; Raz, The Morality of Freedom, supra note 6, at 57-62.

22. See Schauer, supra note 5, at 94-100; Frederick Schauer, Rules and the Rule of Law, 14 Harv. J. L. & Pub. Pol. 645, 676 n.66 (1991)("Given that result *a* is indicated by rule *R,* you (the rule subject) shall reach result *a* unless there are reasons for not following rule *R* in this case that outweigh the sum of the reasons underlying rule *R* and the reasons for setting forth those underlying reasons in the form of a rule.")

23. See Schauer, supra note 5, at 196-206.

24. See Gerald J. Postema, Positivism, I Presume?... Comments on Schauer's Rules and the Rule of Law, 14 Harv. J. L. & Pub. Pol. 797, 815-16 (1991).

25. For a fuller explanation of our reasons for rejecting presumptive positivism, see Alexander & Sherwin, supra note 1, at 68-73. Briefly: on the most plausible interpretation of presumptive positivism, the presumptive positivist takes a "peek" at both reasons for following the rule (including rule value) and reasons for violating the rule, then violates the rule if the reasons for doing so greatly exceed the reasons for compliance. If the presumptive positivist understands that others actors will treat the rule in the same way, and that in doing so they will sometimes err in favor of violating the rule, the coordination value of the rule quickly erodes and the presumption loses force.

26. Possibly concern about harm to oneself from justifiable sanctions should not count as a moral reason for action; even so, grave harm to oneself or incidental harm to others may at some point take on a moral dimension. See Postema, supra note 24, at 819, 822 (sanctions work by "*corruption* of the decisionmaking process").

27. See Hurd, supra note 11, at 253-94; Heidi M. Hurd, Justifiably Punishing the Justified, 90 Mich. L. Rev. 2203, 2279-334 (1992); Rolf E. Sartorius, Individual Conduct and Social Norms 56-57 (1975).

28. See Alexander & Sherwin, supra note 1, at 77-86.

29. For arguments in support of the determinacy of rules, see Kent Greenawalt, Law and Objectivity 34-89 (New York: Oxford University Press 1992); Hart, supra note 14, at 132-44; Schauer, supra note 5, at 53-68; Jules L. Coleman & Brian Leiter, Determinacy, Objectivity, and Authority, 142 U. Pa. L. Rev. 549 (1992); Lawrence B Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. Chi. L. Rev. 462 (1987).

30. See, e.g., David Kairys, Law and Politics, 52 G.W. L. Rev. 243 (1984); Joseph Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1 (1984); Anthony D'Amato, Pragmatic Indeterminacy, 85 Northwestern U. L. Rev. 171-74 (1990). See also Hanoch Dagan, The Realist Conception of Law 8-12 (unpublished manuscript on file with the authors)(surveying indeterminacy arguments by American Legal Realists).

31. See, e.g., Steven J. Burton, An Introduction to Law and Legal Reasoning 18-20, 44, 52-57 (Boston: Little, Brown 1995); Karl Llewellyn, The Bramble Bush 72-75 (Dobbs Ferry, N.Y.: Oceana Publishing 1960); Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 11-12 178-235 (Boston; Toronto: Little, Brown 1960); Lloyd L. Weinreb, Legal Reason: The Use of Analogy in Legal Argument 88-91, 103-05 (New York: Cambridge University Press 2005).

32. Lochner v. New York, 198 U.S. 45, 76 (1905)(Holmes, J., dissenting) ("General propositions do not decided concrete cases); Burton, supra note 28, at 44 ("It may seem that rules can dictate the result in a case when this is not so."), 50 ("rules do not determine the scope of their own applications"), 57 ("the language of an enacted rule, announced before any case governed by the rule has materialized, describes an abstract class. The statement of conditions... points at the class of cases, not at the particular facts of any problem case"); Weinreb, supra note 30, at 89-90 "because words, as symbols with meaning, are general and phenomena, as such, are particular, and because words, however precise, do not fully distinguish phenomena in all their variety... there remains a gap between a rule and its application that no further statement of the rule or specification of the facts will close completely"), 91 ("no rule dictates a decision, in the manner of a deductive argument").

33. See Greenawalt, supra note 29, at 36-41; Hart, supra note 14, at 132-36.

34. See Saul A. Kripke, Wittgensten on Rules and Private Language (1982). Kripke is discussing Ludvig Wittgenstein, Philosophical Investigations § 203 (G.E.M. Abscombe trans., New

York: MacMillan 1958). See also Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U. L. Rev. 781, 797-811 (1989) (relying on Wittgenstein to refute traditional understandings of the rule of law). For discussion of Kripke's argument, see Schauer, supra note 5, at 64-68; Coleman & Leiter, supra note 29, at 568-72.

35. See, e.g., Peter Westen, The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct (Aldershot, Hants; Burlington, Vermont: Ashgate 2004); Alan Wertheimer, Consent to Sexual Relations (Cambridge: Cambridge University Press 2003).

36. See Schauer, supra note 5, at 55, 57.

37. Schauer suggests that rules may take on social meanings separate from their authors' intent. Id. at 218-21. We disagree, although we recognize that the question of authorship is sometimes complex. See Chapter 6, infra.

38. See e.g., Lon L. Fuller, Positivism & Fidelity to Law: A Reply to Professor Hart, 71 Harv. L. Rev. 630, 663-69 (1958).

39. See Schauer, supra note 5, at 59-61. Schauer points out that the same criticism applies to claim of legal indeterminacy made by some semantic realists. The claim is, roughly, that the meaning of words corresponds to the best current understanding of the things described, and the best understanding of law is a function of the values it serves. This argument relies implicitly on the contestable view that adjudication is best understood as entailing direct, rather than indirect, pursuit of values.

Our own understanding of rules includes the view interpretation of rules should refer to the intent of rulemakers. See Chapter Five, infra. This might be thought to introduce a source of indeterminacy. A crucial feature of rulemakers' intent, however, is the decision to employ a rule. In other words, the rulemaker intends the rule to possess a degree of semantic autonomy from the purposes the rulemaker intends it to implement.

40. See Burton, supra note 31, at 18-20, 44, 52-57; Weinreb, supra note 31, at 88-91, 103-05.

41. Burton, supra note 31, at 57.

42. On the effects of factfinding, see Greenawalt, supra note 29 at 45-48.

43. See Burton, supra note 31, at 97-102.

44. See Llewellyn, The Bramble Bush 72-75; Dagan, supra note 30, at 10-13.

45. See Schauer, supra note 5, at 194-95; Coleman & Leiter, supra note 29, at 572-578.

46. See Schauer, supra note 5, at 195-96. Schauer puts this in terms of judicial psychology: according to Schauer, it is an empirical question whether judges faced with conflicting rules choose the rule that best supports their all-things-considered (or political) conclusion or attempt instead to resolve the conflict.

47. See generally, Brian H. Bix, Natural Law: The Modern Tradition, in Oxford Handbook of Jurisprudence and Philosophy of Law 61 (Jules Coleman & Scott Shapiro, eds., New York: Oxford University Press 2002); John Finnis, Natural Law: The Classical Tradition, in Oxford Handbook of Jurisprudence and Philosophy of Law, supra, at 1; Kenneth Einar Himma, Inclusive Legal Positivism, in Oxford Handbook of Jurisprudence and Philosophy of Law, supra, at 125; Andrei Marmor, Exclusive Legal Positivism, in Oxford Handbook of Jurisprudence and Philosophy of Law, supra, at 104; Postcript to H.L.A. Hart's *The Concept of Law*, Parts I & II, 4 Legal Theory 249-547 (1998). Our own position can be found in Alexander & Sherwin, supra note 1, at 183-211.

48. See Hart, supra note 14, at 38-41, 79-88; Finnis, supra note 47, at 15-18; Jules Coleman, Methodology, in Oxford Handbook of Jurisprudence and Philosophy of Law, supra note 44, at 311, 314-42; Stephen R. Perry, Interpretation and Methodology, in Law and Interpretation: Essays in Legal Philosophy 97 (Andrei Marmor, ed., Oxford: Clarendon Press 1995).

Part II: Common Law Reasoning: Deciding Cases When Prior Judicial Decisions Determine the Law

We have assumed that even in an ideal community whose members share basic values and are disposed to act on them, settling controversies over specific applications of those values will be a high priority. Accordingly, the community will vest a power of settlement in chosen authorities. The community's primary lawmaking authorities, being unable to preside over every dispute that arises, will design and enforce general, serious rules.

In many cases, the primary authority's rules will prove sufficiently determinate to settle controversy without further official involvement. But this will not always be the case. Rules will require interpretation, a problem we take up in later chapters. Rules also will require enforcement: even if all actors within the community are disposed to act on the same values that animate the authorities' rules, some may be mistaken about what the rules require and others may believe that, in a given case, what the rule prescribes is wrong. Finally, the set of rules promulgated by lawmaking authorities will not provide answers to all questions that might arise in disputes. For all these reasons, the community, or the primary rulemaking authority, will need to create adjudicative authorities - judges with power to apply rules and settle particular disputes.

It is possible to conceive of a legal system in which judges performed a purely adjudicative function. Judicial decisions would not be publicized and, consequently, would have no prospective effect.[1] Actual legal systems, however, have not evolved this way, perhaps as a result of community demand for settlement.[2]

In the early period of English common law, for example, the role of courts was confined almost entirely to retrospective adjudication.[3] Judges announced their views orally, and the only written records of decisions were uninformative formal entries and scanty collections of observers' notes.[4] Precedents were invoked from memory and were cited, if at all, as evidence of law rather than embodiments of law.[5] The common law itself was conceived of as an amalgam of custom and reason taken up by judges.[6] Over time, however, judicial decisions became increasingly public, textualized, and authoritative, particularly in the United States.[7] Reports were regularized, secondary materials sorted precedents by legal type, and judges began to write opinions.[8] Lawyers focused increasingly on the texts representing judicial opinions, and judges as well as legal observers came to recognize a stronger connection between past and future decisions.[9]

This suggests that adjudication is unlikely to remain purely that in a working legal system. At the least, decisions in the

adjudication of controversies, as well as the reasoning on which they are based, will be known to the public. Once publicized, adjudicative decisions and their bases will serve not only as examples of legal reasoning but as subjects of legal reasoning by courts and private actors.[10] The following chapters address the nature of this reasoning.

Chapter Two: Ordinary Reason Applied to Law: Natural Reasoning and Deduction From Rules

In our view, there are two plausible models of common law reasoning, and only two.[11] One is the "natural" model, in which courts resolve disputes by deciding what outcome is best, all things considered. In the courts' balance of reasons for decision, prior judicial decisions are entitled to exactly the weight they naturally command.[12]

The second model of common law reasoning is the "rule" model, in which courts treat rules announced by prior courts as serious rules of decision, then revert to natural decisonmaking when rules provide no answers.[13] The difference between these two is that the natural model of common law reasoning treats judicial decisions as facts about the world; the rule model treats them as sources of law. In the next chapter, we shall explain why, contrary to many popular views of common-law decisionmaking, we believe that there are no other intelligible ways to reason from precedent.

The Natural Model of Common-Law Reasoning

The most obvious tools for courts to use in addressing controversies are moral and empirical reasoning. Moral reasoning typically follows the method of reflective equilibrium: the reasoner makes an initial judgment about how a particular case should be resolved, formulates a tentative moral principle to support her initial judgment, then tests the principle by picturing other actual and hypothetical examples of its application. If the principle yields results the reasoner judges to be wrong in test cases, the reasoner must then refine her analysis. She can either reject the supporting principle and reconsider her initial judgment, hold to her initial judgment and attempt to reformulate the principle, or, if she is convinced that the principle as she formulated it is sound, reconsider her judgments about its other applications. By moving between principles and particulars in this way, the reasoner can reach a better understanding of both moral values and their implications for the case at hand.[14]

For example: Heidi is a judge. In the case before her, Stephen has made plans to open a halfway house for released prisoners in a residential neighborhood.[15] Brian, who owns a home next to the proposed site for the halfway house, has sued to enjoin the project as a nuisance. He argues that a halfway house will increase traffic and bring to the neighborhood unsavory

characters who might have a bad influence on local children. Stephen's evidence shows that the halfway house will house only non-violent criminals such as minor drug offenders and that prisoners are more likely to make a successful transition back into society if they spend time in a halfway house. Stephen has not yet invested significant resources in the project. We assume, as we shall assume throughout this chapter, that there are no pertinent public regulations or private land use agreements in the legal background of the case.

Heidi's initial sense of the case is that the halfway house should be allowed to open. The burden on landowners like Brian is not too great, and Stephen will have difficulty finding a suitable location if residential landowners are given a veto. To support this judgment, she formulates a principle: uses of land that do not pose a significant threat to the health or safety of surrounding owners should be permitted.

To test her principle, Heidi considers examples of some other activities that might be challenged as nuisances if carried on in a residential neighborhood, examples drawn from actual cases or from her imagination. In her view: keeping a bear should not be allowed; a rifle range should not be allowed; a paintball arena should not be allowed; a mortuary should not be allowed (ick); a day care center is reasonable; and a sewage treatment plant is reasonable. Heidi's principle, allowing land

uses that pose no significant threat to health or safety, confirms her judgment about the bear (risky), the rifle range (risky), the day care center (low risk), and probably the sewage treatment plant (not much risk). However, it does not exclude paintball and mortuaries. At this point, Heidi might reformulate the principle: uses of land that pose no significant threat to health or safety and provide a needed service to the community should be permitted. The added requirement of public interest leaves open the possibility that homeowners could resist a paintball arena and is therefore more consistent with Heidi's judgments about particular cases. The mortuary remains a problem. Disposing of bodies might be deemed a needed service; if so, Heidi may need to reconsider her initial response to that case.

In any event, the issues posed by the halfway house dispute seem clearer now than when Heidi began. The method of reasoning she has used, however, is not uniquely legal. It is what any careful reasoner does in working through a moral problem.

Some controversies requiring settlement by courts will turn on the probable consequences of actions or the best means for implementing agreed ends, rather than on specification of moral principles. In such a case, courts must engage in empirical reasoning, gathering data and testing hypotheses. Empirical reasoning is probably more prominent when courts consciously

formulate general rules for future cases than when they focus on the resolution of a single dispute, but it can enter into particularized decisionmaking as well, for example, when the outcome fo a dispute depends on an assessment of risk. The case of the halfway house illustrates the point: to decide the question of nuisance, Heidi must determine whether non-violent ex-prisoners pose a substantial threat to the safety of neighbors.[16] Again, this type of assessment is not unique to law. There are legal procedures that may assist Heidi in assessing the risk of violence, and some that may limit her ability to do so, but there is nothing especially "legal" about the method of reasoning involved.

Within a natural model of common-law decisionmaking, moral and empirical reasoning are the only tools courts use to resolve disputes. This does not mean, however, that courts disregard past judicial decisions; past decisions enter into moral and empirical reasoning as facts about the world that can affect the outcome of a current case. Yet past decisions are not authoritative in the sense that they might dictate an outcome that is contrary to the court's best judgment of what should be done, all things considered.

The principal way in which prior decisions affect current decisionmaking within a natural model of precedent is as a source of expectations.[17] Expectations can form around judicial

decisions in several ways. First, parties to a dispute may rely on the finality of the court's disposition. For example: Claire plans to open a day care facility in Jules's neighborhood. Jules seeks an injunction on the ground that careless parents are likely to damage surrounding lawns as they drop off their children. Heidi concludes that the proposed facility is not a nuisance and denies the injunction. Claire and Jules will expect Heidi to reach the same result if Jules sues again, unless the facts have changed in some important way. As a consequence, Claire may go forward with her day care investment and Jules may pave over a section of grass.

Apart from the immediate parties, others may observe the outcome of a litigated dispute and form an expectation that courts will reach similar conclusions in the future. Leo, who is thinking of opening a day care facility in a neighborhood similar to Jules's, may calculate that future courts will not view day care as a nuisance. Accordingly, he is now more likely to go forward with his plans.

Without more, a third party expectation such as Leo's is not necessarily a justified expectation and therefore not a reason for decision within a natural model of the common law. Apart from the merits of the decision, which Leo is in no better position to predict now than he was before Heidi decided the case of Jules v. Claire, the reasonableness of Leo's prediction of

consistent treatment depends on the likelihood that courts will in fact take his expectations into account as a reason for decision. In other words, his expectations are not justified unless there is some independent reason, other than his having formed them, for courts to protect them.

There is, however, a general social interest in facilitating private expectations.[18] Another way to put this is that there is a social interest in coordination. Lack of coordination among individual actors is a common source of moral and practical error: the best course of action for one person often depends on the actions others take. Yet the actions of others are difficult to predict, especially when their choices too depend on others' unforeseeable acts.[19]

In a legal system in which judicial decisions are publicly accessible, courts can provide coordination by acting consistently over time. Individual actors can then predict with some degree of confidence that others will conform their conduct to the express or implied requirements of past decisions. Suppose that Sai is about to make a career decision that turns in part on the availability of local day care in Leo's suburb. If Heidi refuses to enjoin Claire's facility in the case of Jules v. Claire, and Sai knows that later courts are likely to give weight to expectations of judicial consistency because of their social importance, Sai has an additional reason to anticipate that he

will have easy access to day care and can make a better informed decision about his career. Moreover, because the value of coordination provides courts with an independent reason for consistency with past decisions, apart from avoiding harm to the specific individuals who formed expectations based on those decisions, Leo's and Sai's expectations about the course of future adjudication are now justified expectations. As such, they become moral reasons for judicial consistency in their own right.

Another reason sometimes given for consistency with past decisions under a natural model of common-law decisionmaking is equal treatment: as a moral matter, similarly situated parties should be treated alike; therefore, when two like cases arise over time, the later court should conform its decision to the decision of the earlier court. Suppose, for example, that *Jules v. Claire*, the day care case, is now pending before Heidi. Jules cites a prior case in which another judge, Rick, granted an injunction prohibiting Ben from opening a day care facility in a residential neighborhood. Many would say that Rick's prior decision gives Heidi a reason, if not a conclusive reason, to enjoin Claire: Ben and Claire should be treated alike.[20]

Equal treatment, on this view, is a moral value in its own right, independent from other moral principles. If protection of residents from traffic and noise were definitive moral reasons to

enjoin Ben, and Claire's facility will cause traffic and noise to the same or a greater extent, then Claire should be enjoined as well. The reason for doing so, however, is not equality but traffic and noise. Equal treatment enters in when other moral principles do not require Heidi to reach the same result in Claire's case that Rick reached in Ben's case. Equal treatment is also distinct from the parties' expectation: the argument from equal treatment applies even when there is no suggestion that Jules has changed his position in reliance on the outcome in Ben's case.

A related point is that equal treatment matters only when the prior decision appears to have been wrong. If Heidi believes that Rick was correct in his judgment that the noise and traffic generated by Ben's day care facility amounted to a nuisance, and if she also believes that Claire's case and Ben's case are alike, equal treatment need not enter into her reasoning because protection of residents against noise and traffic provide the grounds for a like result. Only if Heidi believes that Rick was correct about Ben, and that Claire should win against Jules, does equal treatment become a consideration.

Although the principle "treat like cases alike" is widely accepted as a cornerstone of fairness, we believe it has no place in common-law reasoning about the implications of past decisions.[21] One reason is that real cases are never truly

alike: Claire's day care facility is sure to differ in some ways from Ben's. Moreover, the only access Heidi has to the facts of Ben's case is the recital of facts in Rick's opinion. Rick's opinion, written with other purposes in mind, may filter out facts that differentiate the cases in important ways.

More important, even if we assume that the past and present parties are similarly situated in all relevant ways, we fail to see how equal treatment of this type can count as a moral good. For purposes of Heidi's reasoning, the current case can only be viewed from Heidi's perspective, and Heidi believes that Rick's prior decision enjoining a day care center was a moral error. *One moral error is not a reason for another*. Ben may have suffered an unjust loss in his case, but his loss is a consequence of the prior error, not of Heidi's decision for Claire, and a contrary decision - to enjoin Claire - will not make good the loss.

Let us elaborate on this point, for the argument that equal treatment is a moral imperative can be seductive. Equal treatment of a certain type *is* a moral imperative in particular situations. For example, when what justice requires is solely comparative, as some claim it to be in matters of retribution, and still more claim it to be in matters of distribution of resources or opportunities, then if A receives a certain punishment or a certain distribution of benefits, and B is

identical to A in terms of retributive or distributive desert, then it follows that B should receive what A received in equal measure. The general point is banal: under any moral principle that dictates that A and B should be treated the same, if A is given treatment *T*, morality demands that B be given treatment *T*.

In the cases we are considering, however, the present judge believes that in the prior case, the losing party was treated in a way that was morally wrong. The question before us is whether any moral notion of equality demands that if one party is treated wrongly, it is right to treat another party in the same way - a way that would be wrong in the absence of the prior case. Does killing half of an ethnic group as an act of genocide create any reason based on equality, however weak, to complete the task? We think the answer is obviously "no": equality furnishes absolutely no reason to extend past immoralities.

The same is true of judicial decisions: reliance aside, the fact that judges have strayed from the standard of morally correct treatment in the past does not alter the obligation of present judges to apply the correct moral principle to any and all litigants. If, to the contrary, equal treatment were a moral imperative requiring consistency with past decisions (including mistaken ones), morally incorrect decisions would corrupt morality itself. Moreover, if the set of past cases included both morally correct and morally incorrect decisions, the very

notion of equality would lose coherence, with correct and incorrect decisions pulling in different directions.

There are cases in which equal treatment may be a legitimate consideration for judges. If the current decision is likely to place a prior litigant at a competitive disadvantage, avoiding further harm may be a reason for like treatment. If, for example, Ben's business will suffer if Claire is allowed to locate in a residential neighborhood, the potential new harm to Ben may be a (nonconclusive) reason to enjoin Claire. But it is Ben's further harm, not the value of equality, that is doing the work here. Equal treatment may also be warranted, on grounds of distributive justice, when the moral merits of a case are in balance.[22] If Ben's case was essentially a coin flip on the merits, and the same is true of Claire's case, perhaps Ben and Claire, who run comparable businesses, should be treated alike. Courts, however, do not flip coins: they generally feel obliged to reach a conclusion as to which party has the superior right.[23] Once a court has determined that one party has a stronger claim, that party should prevail without regard to past mistakes.

In sum: within a natural model of common-law decisionmaking, courts engage in moral and empirical reasoning to determine what outcome is best, all things considered. Past decisions are relevant to the extent that they have generated justified expectations of consistency in the future. For those who reject

our views about equal treatment, past decisions are also relevant to the extent of the weight properly accorded to equality (a mystery we leave to believers). Past decisions are not, however, authoritative: the overall balance of reasons for a decision, including expectations and (if you will) equal treatment, determines the outcome of judicial reasoning.

The Rule Model of Common-Law Reasoning

An alternative model of common-law decisionmaking builds on the natural model but adds one important feature: courts treat rules announced by prior courts as authoritative in later cases that fall within the rules' terms. When no rule applies, courts continue to engage in moral and empirical reasoning to resolve disputes. If, however, the case is governed by a precedent rule, courts turn instead to interpretation and deductive reasoning.[24]

To make clear the full implications of the rule model of the common law, we must first return briefly to the natural model. Rules have a role in the process of natural reasoning. As we explained in Chapter One, rules capture the rulemaker's expertise, provide coordination for individual actors who need to predict what others will do, and simplify the process of decisionmaking. For a natural reasoner, preservation of these rule-based benefits may be a reason to conform to the rule: if disregarding the rule would result in a loss of rule-based

benefits, and that loss is likely to outweigh the moral costs of following the rule, then it is right, all things considered, to follow the rule.

For example: Heidi is presiding over a suit to enjoin Mike's Mortuary from opening for business in a residential neighborhood. Heidi discovers a prior opinion by her fellow judge, Rick, stating that mortuaries in residential neighborhoods are nuisances *per se*.[25] If Heidi endorses the natural model of decisionmaking, she will not accept the no-mortuary rule as authoritative: the result she reaches will be based on the balance of moral reasons for decision. Nevertheless, the rule may rule may affect her judgment insofar as it serves a source of coordination or may have engendered reliance.

Within a natural model of reasoning, however, a rule announced in a past case has only the weight it commands in all-things-considered moral reasoning. In other words, judges approach previously announced judicial rules as rule-sensitive particularists,[26] taking into account the value of maintaining the rule as one of many reasons for decision. As we said in Chapter One, however, rule-sensitive particularism is always threatened with collapse into pure case-by-case particularism: if all judges are rule-sensitive particularists and all judges know this, then the value they accord to rules as rules in their reasoning will approach zero and they will end up reasoning like

pure particularists. Thus, if Heidi concludes through the process of reflective equilibrium that no plausible moral principle supports the exclusion of mortuaries from residential neighborhoods, and if she is not convinced that a no-mortuary rule has significant coordination benefits, she will ignore the rule and hold for Mike's.

The rule model of precedent entails a different attitude towards rules. In this model, prior judicial rules operate as serious rules, preempting the question whether the reasons for the rule justify the outcome it prescribes in a particular case.[27] If Heidi, presiding over the suit against Mike's Mortuary, discovers a no-mortuary rule in a prior opinion, her inquiry into the risks, aesthetics, and social benefits of mortuaries is finished. Subject to certain qualifications discussed below, she must grant an injunction.[28]

The rule model of common-law decisionmaking also entails a different role for judges. Under a rule model, rules announced in judicial opinions acquire authoritative status. Accordingly, judges now function as lawmakers as well as adjudicators. Traditionally, common-law judges were reluctant to assume lawmaking authority: their task, as they saw it, was not to make law but to find it embedded in social and legal practice and the dictates of reason.[29] Modern judges, however, are more forthright in their exercise of lawmaking power.[30] The rule

model assumes that judges have such a power.

Comparing the Models

In a world in which all judges were perfect reasoners, the natural model of the common law would undoubtably be superior to the rule model. The natural model seeks the best outcome in every case. The rule model, in contrast, guarantees that some outcomes will be wrong.

The errors of the rule model of common law have several sources. First, the rule model incorporates the basic problem of rules: rules must be stated in terms that are general and determinate enough to guide future conduct and decisions; therefore they do not perfectly capture the less determinate values they are designed to promote. It follows that in some of the cases they cover, they will prescribe the wrong result.[31]

A second source of error is bad rules. Rules prevent error by translating the expertise of the rulemaker into prescriptions for action, by facilitating coordination, and by reducing the costs of decisionmaking; but they also cause error by prescribing wrong outcomes, through bluntness or otherwise.[32] They are justified only when, judged by the values on which they are based, they will prevent more error than they cause.[33] Some rules fail to meet this standard, either because they were poorly conceived from the outset or because circumstances have changed

since they were issued.

For several reasons, judicial rules are particularly likely to lack justification or to lose their justification over time. Judges are not necessarily expert rulemakers, and, as we shall explain more fully in later sections, the task of resolving a particular dispute may further hinder their ability to craft sound rules.[34] Another problem is that once judicial rules are recognized as authoritative, they are hard to eliminate. Judges traditionally have been reluctant to overrule established rules of law, and in any event it is difficult to formulate a standard for overruling that does not jeopardize the benefits of authoritative rules.[35]

Despite the inescapable flaws of serious judicial rules, the rule model of common-law decisionmaking has advantages that we believe justify courts in adopting it. In the world as it exists, judges are not perfect reasoners: judges operating under the natural model of decisionmaking will seek to reach the best decision, all things considered, but they will not always succeed. The important comparison, in other words, is not between full implementation of values and flawed implementation of values, but between the flaws of unconstrained reasoning and the flaws of rules. The rule model is preferable if there is reason to think that a greater sum of moral errors will occur if judges always decide what is best all-things-considered than if

they treat previously announced judicial rules as serious rules of decision.

As we have said, the capacity of rules to prevent error depends primarily on the expertise of rulemakers and the coordination value of the rules. In the context of the common law, the maker of rules are judges in past cases. Comparing past judges to present judges, rulemaker expertise does not go far to make the case for a rule model of the common law. In the case of Mike's Mortuary, for example, we can assume that Rick, who announced the rule that mortuaries in residential neighborhoods are nuisances per se, has no greater capacity for moral and empirical reasoning about property rights than Heidi, the current judge. Moreover, the salient image in Rick's mind at the time of his decision probably was the mortuary at issue in his case, which may not have been representative of mortuaries generally.[36] Therefore, rather than representing special expertise, the no-mortuary rule may be myopic.

Some judicial rules stand on better epistemic ground than others. If the mortuary rule has been followed over time by a multitude of judges, it may be entitled to greater respect as a reflection of collective judgment.[37] A further consideration is that judicial rules have a wider audience than future judges. In comparison to private judgment, a judicial rule may sometimes have the advantage. In the mortuary case, Rick has studied

evidence and heard opposing arguments by advocates about the risks, burdens, and benefits associated with mortuaries in residential neighborhoods. Private decisionmakers, in contrast, may have less information at their command, and their judgment may be distorted by self-interest. On the other hand, in some settings private actors will have the best information about their own activities, so the argument from expertise remains weak.[38]

A much stronger argument is that judicial rules, when treated as serious rules, provide a new source of coordination. The coordination effect may be easier to see if we alter the mortuary example in the following way: in the precedent case, Rick announces a rule that mortuaries are permissible in residential neighborhoods as long as they pass municipal safety inspections. If this rule is authoritative for future judges, mortuary entrepreneurs can make plans to locate in suburbs without the worry that surrounding landowners will sue to prevent them from opening. If Heidi is free to decide in the next case what outcome is best, all things considered, these entrepreneurs are less able to predict how landowners will respond. Because lack of coordination results in decisional error, the community has reason to favor judicial creation of authoritative legal rules. Serious judicial rules also can simplify decisionmaking, both by future judges and by potential disputants, who must guess

the course of judicial decisionmaking and settle or litigate accordingly.[39]

Thus, the rule model of common law offers at least some of the benefits of rules generally. It creates a new set of rulemaking authorities (judges) who, while they may lack special expertise, can increase the level of coordination within the community. Mortuary owners will know where they can and cannot build. Homeowners will know whether mortuaries can build near their homes. Judges need not revisit the morality of mortuary nuisance.

We have noted that the natural model of common law decisionmaking also takes account of judicial rules. Within the natural model, judges can, and, as a matter of sound moral reasoning, must, take account of the value of consistently applied rules as a reason to follow rules announced in prior cases. But because natural reasoners approach rules as rule-sensitive particularists, most if not all of the benefits of rules will be lost under the natural model of decisionmaking.

To see why, suppose first that the no-mortuary rule appears to reflect collective wisdom (a form of expertise). Many judges have held over time that mortuaries in residential neighborhoods are nuisances *per se.* Heidi endorses the natural model of decisionmaking and acts as a rule-sensitive particularist. She recognizes that the rule bears indicia of expertise, but she also

understands general rules are by nature overinclusive, and she believes that Mike's Mortuary is a particularly well-run and tasteful establishment. She may reason that even if past judges were well-informed about mortuaries generally, the balance of reasons underlying the rule does not apply to Mike's. Accordingly, she may refuse to issue an injunction. This is all very well if Heidi is correct, but she may be wrong. And if judges in Heidi's situation (or private parties predicting what judges will do in Heidi's situation) are wrong more often than they are correct in second-guessing the rule, the community would be better off if all judges treated the rule as a serious rule.

More important for our purposes, rule-sensitive particularism runs into serious difficulties in accounting for the coordination benefits of rules. Suppose again that Heidi follows the natural model of decisionmaking. She understands that Rick's no-mortuary rule has the capacity to coordinate the conduct of landowners and prospective morticians. She also believes that the rule should not apply to Mike's Mortuary because Mikes is tasteful and well-run. The question she must ask in the course of all-things-considered reasoning is whether a decision for Mike's, contrary to the rule, will cause a reduction in the overall coordination benefits of the rule such that the loss of coordination outweighs the moral gain from (what she believes is) a correct understanding of liberty and property

rights as applied to Mike's.

One difficulty is that the loss of coordination from any single departure from the rule may seem negligible. But the problem is more serious. The coordination benefits of a judicial rule depend on its consistent application in the courts: only then can actors assume that future judges (and other actors) will follow the rule. In a legal system dominated by the natural model of judicial reasoning, Heidi will expect most other judges to approach judicial rules as rule-sensitive particularists. Rather than simply following the no-mortuary rule, they will ask whether all relevant considerations, including maintenance of the coordination benefits of the rule, recommend enjoining a particular mortuary from opening in a particular neighborhood. Some will conclude that they should not grant an injunction; and, given the inevitability of reasoning errors, some who reach this conclusion will be wrong. The prospect that other rule-sensitive particularists will not follow the rule reduces the rule's capacity to coordinate conduct, and therefore reduces the weight that Heidi, as well as other rule-sensitive particularist judges, will allocate to the coordination value of the rule in their calculations of what decision is best. In other words, if judges cannot predict confidently that the rule will be widely followed, no judge will calculate that his or her departure from the rule will damage an otherwise effective source of coordination. In

this way, rule-sensitive particularism as a universal practice unravels into pure particularism stripped of serious rules and their benefits.[40]

The situation changes if some judges treat precedent rules as serious rules. If some judges give preemptive effect to rules, but would cease to do so if they observed rule-sensitive particularist judges disregarding the rule, then the potential coordination value of the rule gives rule-sensitive particularists a reason to follow the rule. But even when judicial response is divided - some following the rule model and some acting as natural reasoners - the coordination value of rules is unstable at best. Only a widely accepted rule model of common-law decisionmaking preserves the full potential of precedent rules to provide coordination.

A further problem is that, to the extent that precedent rules retain some capacity to coordinate conduct, judges acting as natural reasoners may fail to give coordination its due weight in the balance of reasons for decision. The difficulty is cognitive: psychological research suggests that decisionmakers tend to focus on facts that are especially salient, and in doing so, tend to disregard or undervalue background probabilities. This bias, which Kahneman and Tversky have called the "availability heuristic," is one of a number of cognitive biases that facilitate decisionmaking but also distort human reasoning

in systematic ways.[41] Tangible facts move quickly to the front of one's mind, while statistical regularities remain obscure; as a result, the more readily available features of a problem claim disproportionate attention.

In legal disputes, the most salient facts are likely to be the circumstances of the litigants before the court. In the mortuary case, Heidi's attention will naturally be drawn to the character of the plaintiffs' neighborhood, the emotional impact a mortuary is likely to have on the plaintiffs,[42] and the specifics of Mike's proposed mortuary. Meanwhile, the availability heuristic predicts that Heidi's interest will not be similarly engaged by the possibility that departing from the rule might undermine potential coordination benefits for mortuaries and homeowners making plans in other neighborhoods.

Thus, even if the actual coordination value of a rule is not entirely eroded by the prospect that some judges will not follow the rule, judges may systematically underemphasize coordination value in their calculation of what is best all-things-considered. The rule model of judicial decisionmaking prevents this form of error by preempting all-things-considered analysis. I this way, it both preserves the actual coordination value of the rule and builds in protection against judicial miscalculation of that value.

A further point of comparison between the rule model of

judicial decisionmaking and the natural model is the complexity of the decisionmaking process. The rule model requires interpretation of rules, but once the court has determined that a precedent rule covers the case before it, all that remains is to follow the prescription of the rule. Under the natural model, in contrast, the existence of a precedent rule complicates rather than simplifies decisionmaking. A rule-sensitive particularist judge must make at least a quick assessment of the rule's meaning to determine whether it is likely to apply, and then must determine what weight the possible benefits of maintaining the rule should have in the balance of reasons for decision.

A definitive comparison of the two models of judicial decisionmaking we have discussed - the rule model and the natural model - would require empirical knowledge that we do not have. The critical question is whether the rule model ultimately results in less decisional error than the natural model. The answer depends on, among other things, the number and magnitude of likely reasoning errors by judges, the social value of various benefits of rules that might be lost under a natural model of reasoning, and the number and magnitude of errors that result from compliance with a contingent set of overinclusive rules - matters that are extremely difficult to quantify or compare. We are inclined to think that, given the frequency of human error and the demand for settlement we observe in society, the rule

model is the better choice. In any event, it is at least possible, as a matter of logic, that deduction from imperfect serious rules will produce better results overall than all-things-considered evaluation of what decision is best.

Although there are reasons to think that judges can do better by following precedent rules than by natural reasoning, there are difficulties with the rule model of decisionmaking. Most prominently, the rule model confers a broad rulemaking authority on judges; but judges. We have already noted that, because judges' first task is to resolve particular disputes, they are not ideally positioned to design sound rules. Later in this chapter, we discuss possible qualifications to the rule model that impose some restraint on judicial lawmaking and also provide judges with a means of escape from precedent rules that are seriously flawed.

Another set of difficulties is descriptive: judges purport to, and are widely believed to, act in ways that are not consistent with the rule model of decisionmaking. As rulemakers, they decline to exercise the full range of legislative power the rule model makes available to them. As rule appliers they "distinguish" seemingly applicable rules based on factual differences among cases. In Chapter Four, we shall return to the rule model and consider whether these features of judicial practice can be explained as strategies to counteract the

disadvantages of rulemaking in the context of adjudication.

This brings us back to the point with which we began the present chapter: despite appearances to the contrary, we believe that the two models of decisionmaking we have described - the natural model and the rule model - are the only plausible models judicial reasoning. Moreover, neither of these models entails special "legal" forms of reasoning. Both rely on methods of reasoning used by all decisionmakers: moral reasoning, empirical reasoning, and, in the case of the rule model, deduction from authoritative rules. In our view, these are all the tools that judges need, and all the tools they use in fact.

A Closer Look at The Rule Model: Implications and Puzzles

We have suggested that, at least under some conditions, judges can best implement the shared values of a community by treating rules announced by past judges as serious rules that determine the results of present cases. A central premise of the rule model of judicial decisionmaking is that judges act as rulemakers: judges have authority not only to resolve disputes but also to issue binding general rules to govern future disputes. The assumption that judges have power to establish legal rules leads to a number of further questions about the scope of judicial rulemaking authority and the nature of judicial rules. We do not claim to have a complete set of answers; our

objective in the following sections is simply to identify some of the puzzles judges might face in implementing a rule model of the common law.

Promulgation of Rules. The first question that arises under a rule model of the common law is, when should judges announce rules? Legislatures issue rules in response to social problems that come to their attention in a variety of ways. Their rules typically are prospective and designed to deal as comprehensively as possible with the problems they have taken up.[43] Judges traditionally have taken a different approach, issuing rules in response to particular disputes brought before them by litigants. Judicial rules typically provide an answer to the dispute before the court and do not stray far beyond what is necessary to resolve that dispute.[44]

Nothing in the rule model of judicial decisionmaking dictates that courts must adhere to this pattern of narrowly conceived, retrospective rules. The rule model treats precedent rules as serious rules. Yet, because rules are general in nature, precedent rules will always extend beyond the exigencies of the cases in which they are announced.[45] It follows that the rule model confers plenary legislative power on judges.[46] There may be constitutional limits on judicial lawmaking, as well as pragmatic reasons for judges to abstain from exercising plenary power,[47] but there are no inherent constraints on judicial

authority to make rules.

Suppose, for example, that Heidi is deciding the case of Edward, who is keeping a pet bear in his home. Neighboring homeowners claim the bear is a nuisance and have requested an injunction requiring Edward to remove it from the neighborhood. After moral reflection, Heidi reaches three conclusions. First, bears typically should not be permitted in residential neighborhoods. Second, the possibility of reasoning errors and the need for clarity, coordination, and decisionmaking simplicity justify a serious rule: "bears in residential neighborhoods are nuisances *per se.*" Third, Edward's bear, which is small, friendly, and declawed and has spent its life in captivity, poses no significant threat to neighbors; therefore Edward should be allowed to keep his pet.

In the circumstances, Heidi has at least three options. She can decide for Edward and decline to announce a rule. She can announce the optimal rule ("bears are nuisances *per se*") and apply it retrospectively to Edward. Or she can decide for Edward and announce the rule "bears are nuisances *per se*" as a rule to govern future cases.

The rational choice, and, if Heidi's reasoning is morally sound, the morally optimal choice, is the third of these: decide for Edward and announce a prospective rule. In this way, Heidi can secure both a correct outcome for Edward and maximum

settlement value for the future. If we assume, as the rule model assumes, that judges have authority to settle moral controversy by announcing serious rules, their authority appears to encompass this alternative. Those familiar with judicial practice in the United States, however, are likely to find this resolution of the case surprising and possibly unsettling.[48]

Now suppose we carry the example further. In the course of her deliberation in Edward's case, Heidi reflects on the problem of noise in residential neighborhoods. This reflection leads her to a fourth conclusion, that the community would be better off if all residential homeowners mowed their lawns between two and four o'clock on Saturday afternoons. The coordination benefits of such a rule, she concludes, outweigh possible inconveniences to owners who prefer a different time. We expect that most people would find it unseemly, as well as contrary to the ideals of due process and democratic representation, for Heidi to issue a rule, "homeowners must mow between two and four o'clock on Saturday afternoons."[49] Yet once we recognize that judges have rulemaking authority, the logic of authority places no limit on her power to issue the rule. To the extent that judges refrain from issuing rules of this kind, the disability is self-imposed.

Identification of Precedent Rules. Another question about the rule model of the common law arises from the perspective of later judges: what acts and statements by past courts count as

binding precedent rules? Legislative rules may require interpretation, but identifying the rule is not a problem. Because courts traditionally have been reluctant to legislate overtly, their rules can be harder to recognize. Judicial opinions typically focus on the immediate task before the court - resolution of a particular case. They are likely to contain a narrative description of the facts of the dispute, references to precedent cases, and a more or less complete explanation of the court's reasoning, but they may not explicitly announce a rule for future cases.[50]

Several necessary conditions for the existence of a serious precedent rule follow from our understanding of the function of authoritative rules. As we explained in Chapter One, communities recognize rulemaking authorities for the purpose of settling controversy and uncertainty about the application of shared moral values.[51] To perform the function of settlement, rules must be general enough to prescribe results in classes of future cases, determinate enough to provide answers without direct consideration of the values the rules are designed to serve, and "serious" in the sense that they preempt further reasoning and determine results.[52]

The settlement function of rules also dictates that precedent rules must be posited by a rulemaking authority - in this case a prior judge.[53] Authoritative rulemaking is an

intentional act. The task of the rulemaker is to determine the best prescription for future cases that can be captured in the form a rule. Rulemaking authorities, including judges, are expected to bring their powers of reason and expertise to bear on the choice of rules. It follows, for us, that authoritative rules take their meaning from their author's intent. We will have more to say about intent-based interpretation of rules in Chapter Five. For now, the important point is that precedent rules come into existence when they are posited by a past judge and mean what that judge intends them to mean.[54]

The requirement that precedent rules must be posited does not necessarily mean that they must appear in canonical form in a prior opinion. Often a rule is detectable in explanatory remarks and citations even if the precedent court did not state the rule explicitly and flag it as a prescription for future cases. As long as the judge had a rule in mind and the rule is capable of restatement in determinate, canonical form, positing can occur in an informal way.[55] Recognition of informal rules expands the capacity of the common law to settle future controversy: given prevailing patterns of judicial opinion-writing, insistence on explict rules would result in too few rules and too little settlement.

Thus, it is possible, and probably desirable, to include implicit precedent rules within the rule model of the common law.

At the same time, it is important to maintain a distinction between rules implicitly posited by prior courts and norms abduced by later courts from the data of past decisions. A precedent rule exists only when the precedent judge intended to adopt or endorse a rule and the rule can be stated in a form that is capable of governing future disputes. If these conditions are met, the precedent court can fairly be viewed as the author of the rule. If, however, the conditions we have described are not present, the current judge is not following a precedent rule. The current judge is either constructing a norm from the facts and outcomes of prior cases or simply positing a new rule. As we shall explain in our discussion of legal principles in Chapter Three, a norm constructed from past facts and outcomes is not posited (either by the past judge or by the current judge); nor does it constrain the current judge's decision in any meaningful way.[56]

For example: Heidi is presiding over the case of John, who is planning to open a music store in a residential neighborhood. Neighboring homeowners have asked Heidi to enjoin John from opening his store, arguing that the noise it will generate makes it a nuisance.[57] Heidi discovers a prior decision in which a court held an aerobics studio to be a nuisance in a residential neighborhood. The opinion in that case referred to the likelihood of noise and explained that an aerobics studio would

place too great a burden on surrounding owners. It also cited cases from other jurisdictions holding that a trumpet academy, an amusement park, and an ice cream truck were nuisances in residential neighborhoods but a chess tournament was not. Heidi can infer from this opinion that the precedent judge established applied a rule, "noisy activities are not permitted in residential neighborhoods."

Suppose, however, that instead of the opinion just described, Heidi finds an array of past cases holding that an aerobics studio, a trumpet academy, an amusement park, and an ice cream truck were nuisances in residential neighborhoods but a chess tournament was not. In each case, the court stated only that the activity in question placed an unreasonable burden on surrounding owners. In this version of the example, Heidi has no basis for inferring a rule against noisy activities in residential neighborhoods. She can posit a serious rule to this effect, or construct a principle that appears to fit the pattern of prior decisions, but there is no precedent rule in place to prescribe the decision she should reach in John's case.

Precedent rules must be posited, general, determinate, and preemptive: this much is implied by the concept of authoritative rules. The rule model of common law, in itself, places no further limits on what should count as a precedent rule. As we have noted, however, judges, as adjudicators, are not ideally

situated to make rules. To counteract the risk of flawed precedent rules, they might adopt additional preconditions for recognition of binding precedent rules.[58]

One possible way to protect against misconceived rules would be to deny precedential effect to rules that appear to have been posited without serious deliberation. The procedural history of a decision might reveal that the court announced a rule and intended it to operate as a rule in future cases, but that the parties never engaged in full debate about the future consequences of the rule.[59] If so, later courts could disregard the rule.

A requirement of adequate deliberation might not be practical, however, at least in the context of current legal practice. Evidence of deliberation, such as judicial notes and records of oral argument, tends to be scant and difficult to obtain. Further, regular inquiry into the deliberations leading up to adoption of rules might undermine the prescriptive effect of precedent rules. Following a rule against one's best judgment is not rational; therefore a legal system that relies on serious precedent rules to settle controversy necessarily depends a general disposition among judges to follow precedent rules without much reflection.[60] Intensive scrutiny of the deliberations of past judicial rulemakers could undermine the practice of unreflective rule-following.

A second possible check on undesirable judicial rules is a precondition of acceptance over time. According to this condition, precedent rules would become binding when, but only when, they had been "taken up" by a sufficient number of judges.[61] A condition of acceptance over time limits the precedential effect of judicial rules to rules that have been studied and approved by multiple judges working in a variety of contexts: rules come to represent a kind of collective wisdom.[62]

One difficulty with a precondition of acceptance over time is indeterminacy. There is no non-arbitrary point at which a rule has been sufficiently "taken up" by subsequent courts, and quantifying the extent of acceptance required would be impractical. The indeterminacy of acceptance, however, is like the indeterminacy of baldness and heaps: there comes a point at which one knows it has occurred.[63]

A more difficult question analytically is what exactly must be accepted. The intended meaning of a rule may change as judges apply the rule over time. For example: a prior opinion contains the rule "domestic household animals are permissible in residential neighborhoods." The judge who announced the rule intended the term "household animals" to include horses and chickens. Subsequent courts have continued to apply the rule. Recently, however, courts applying the rule have used the term "household animals" in a more restrictive way, to mean pets such

as dogs and cats. As we have explained, one implication of the settlement function of rules is that the meaning of rules is a function of their authors' intent. This raises the question, if precedent rules are not binding until taken up by later judges, who is the author whose intent governs the meaning of the rule?

The authority of the original judge is incomplete because that judge alone cannot establish a binding precede rule: the endorsement of subsequent judges is necessary to place the rule in force. This suggests that the subsequent judges who accept a precedent rule are its authors. However, the meaning intended by subsequent judges cannot be the meaning of the rule because that meaning has not yet been accepted over time. Nor, for that matter, can the original judge's intended meaning be the meaning of the rule, because that meaning has not met the test of acceptance. It appears, therefore, that no effective precedent rule exists until a further round of acceptance occurs, with all endorsers concurring in the meaning of the rule as posited by some prior judge. This further requirement, of course, adds greatly to the indeterminacy of the rule, and so is at odds with the objective of settlement that motivates the rule model of the common law.

The Persistence of Precedent Rules. A third question that arises under the rule model is whether and how later courts can overrule precedent rules. An initial point is that altering a

precedent in any way overrules the rule. Serious precedent rules are effective as a means of coordinating conduct and otherwise reducing error because, and to the extent that, later judges follow them automatically without looking behind the rules to see if their underlying reasons require a different result. It follows that when a current judge "narrows" a rule by carving out an exception for a particular case in which the rule's prescription appears to be a mistake, the judge is not applying a modified version of the rule but disregarding the rule and establishing a new rule in its place. As we shall explain more fully in Chapter Three, the original rule places no constraint at all on the current judge; in effect, the rule is overruled.[64]

Some power to overrule precedent rules is essential to the success of the rule model of judicial decisionmaking. The most persuasive criticism of the rule model is that serious rules entrench error.[65] Rules may be poorly designed or may become obsolete, and, as we have noted, judicial rules are especially susceptible to flaws. Without some qualification, the rule model appears to require that judges follow all rules according to their terms, and so to lock in past errors.

Perpetual entrenchment of flawed rules, however, is not a necessary implication of serious precedent rules. Under the rule model, precedent rules are preemptive in the sense that judges, in their role as adjudicators, must follow previously announced

rules even if the reasons behind the rules appear to require a different outcome in the case before the court. Yet the rule model also gives judges rulemaking authority, and in their role as rulemakers, judges can override rules they believe are flawed.[66]

Overruling of precedent rules is appropriate in two circumstances, and only two. First, a precedent rule may not be justified as a rule, either because it was misconceived or because it has become obsolete. Rules lack justification if they cause more error by prescribing erroneous outcomes than they prevent by coordinating conduct and averting the errors of natural reasoning. Second, a precedent rule may be justified in that it improves on unconstrained decisionmaking, but not optimal: a rule may prevent more error than it causes, but prevent less error, or cause more error, than an alternative rule. In that case, overruling is appropriate if but only if the benefits of the alternative rule are greater than the costs of disrupting the patterns of coordination that have formed around the existing rule. At least in theory, judges have the same power as legislatures to repeal rules when either of these conditions obtains. In contrast, overruling is not appropriate simply because the precedent rule prescribes erroneous outcomes in some cases. Errors of this kind are an inevitable feature of determinate general rules. If the rule is justified in the sense

that brings about a net reduction in error, and preferable to any alternative rule, the rule model requires judges to follow the rule even when it prescribes the wrong result.

Suppose for example, that Heidi is presiding over the case of Martha, who keeps a pet pit bull in her home. Heidi discovers a precedent case in which the judge announced a rule, "pit bulls in residential neighborhoods are nuisances per se." If this rule is sound as applied to most pit bulls and superior to any alternatives, Heidi must apply it to Martha's pit bull even if she is convinced that Martha's pet is gentle, well-behaved, and unlikely to do harm. If, however, Heidi believes that the rule "pit bulls are nuisances per se" is based on faulty empirical reasoning by a prior judge whose attention was focused on a rare case of mauling, she can overrule the rule by announcing a modified rule or simply declaring that no rule shall apply.

Logically, under a rule model of the common law, the powers of judges and legislators to make and then unmake rules are coextensive. Traditionally, however, judges have been reluctant to overrule precedent rules, at least overtly.[67] For several reasons, this may be a wise course. The first is that judges have more opportunities to overrule rules than legislatures: they are likely to revisit rules frequently as parties bring disputes one by one before multiple courts. Their assessment of rules will sometimes be incorrect, and even when their assessment is

correct, frequent overruling will undermine the settlement benefits of common law rules generally.

A second reason for caution in overruling precedent rules is that judges, unlike legislators, combine their oversight of rules with the task of adjudication. The separate standards we have outlined for applying sound rules and overruling unsound rules place judges in a difficult position psychologically. When a precedent rule is justified overall - when it will prevent more error than it produces if it is regularly applied - the rule model of decisionmaking calls for judges to follow the rule without consulting the reasons behind the rule. Yet, judges must consider the same set of reasons to determine whether to overrule. If, judged by those reasons, the rule will cause more error than it prevents, the rule is unjustified and should be overruled. If, judged by its underlying reasons, the precedent rule will cause more error or prevent less error than an alternative rule, and the benefits of a change outweigh the costs of disruption, the rule is suboptimal and again should be overruled. The problem is that, if the reasons underlying the rule are available to judges for the purpose of overruling, they will be hard to suppress for the purpose of application.

Assume, for example, that the rule that pit bulls are nuisances per se is based on a balance between the welfare that owners derive from their dogs and the risk of injury to others.

Heidi cannot decide for Martha on the ground that these reasons do not support an injunction in the case of Martha's dog; however, she is free to decide that they do not support a rule against pit bulls. Locally, these two conclusions are distinct: one concerns the outcome of the case and the other concerns the overall performance of the rule. In practice, however, it will be difficult for Heidi to compartmentalize in this way, particularly when she is convinced that an injunction is the wrong outcome for Martha.

Perhaps this dilemma could be avoided or at least minimized by a serious rule governing the occasions for overruling. For example, a court or legislature might posit a rule such as "overrule precedent rules that have not been followed for 30 years," or "overrule precedent rules that have been questioned by later judges in ten or more cases." A rule of this kind, however, suffers from several difficulties. It is uncomfortably blunt because the subject matter of legal rules and the frequency of litigation in different areas of law varies greatly. Moreover, the underlying assumption that judges have power to overrule rules creates a problem of regress. The overruling rule (and any higher order overruling rule for overruling rules) can be overruled. Ultimately, therefore, the question when to overrule can only be resolved through moral judgment.

Given the limitations and dilemmas we have described, the

best approach to overruling probably is a presumptive one. No overruling will lead to too much bad law. Overruling whenever a precedent rule fails to meet the test of moral justification (net reduction of error over the long run) will undermine the settlement value of rules. The middle ground is a practice of overruling precedent rules when and only when they are obviously and significantly flawed in their long term effects.[68]

This standard is not ideal. It does not eliminate the conflict between overruling unjustified rules and applying rules preemptively in particular cases; and in any event applying a presumption, like following a rule, is not rational when a judge believes the rule is moderately but not egregiously flawed. Presumptive overruling, however, appears to be the only practical alternative for judges operating within the rule model of precedent.

1. Bentham favored an arrangement along these lines. See Gerald J. Postema, Bentham and the Common Law Tradition 403-08, 453-64 (Oxford: Clarendon Press; New York: Oxford University Press 1989).

2. See Melvin Aron Eisenberg, The Nature of the Common Law 4-5 (Cambridge; London: Harvard University Press 1988) ("Our society has an enormous demand for legal rules that private actors can live, plan, and settle by.").

3. See Gerald J. Postema, Classical Common Law Jurisprudence, Part II, 3 Oxford U. Commonwealth L.J. 1, 11-17 (2003). For an account of the unwritten character of early common law and the increasing "textualization" of common law over time, Peter M. Tiersma, The Textualization of Precedent, available from Social Science Research Network, http://ssrn.com/abstract=680901 (2005).

4. See J.H. Baker, An Introduction to English Legal History 177-80, 196-98 (4th ed., London: Butterworth's Lexis-Nexis, 2002); J.W. Tubbs, The Common Law Mind: Medieval and Early Modern Conceptions 42-46 (Baltimore: Johns Hopkins University Press 2000.

5. See 1 William Blackstone, Commentaries on the Laws of England 71 (Oxford: Clarendon Press); Tubbs, supra note 4, at 182; Tiersma, supra note 4, at 17; Gerald J. Postema, Classical Common Law Jurisprudence, Part I, 2 Oxford U. Commonwealth L.J. 155, 160-62 (2002); Postema, supra note 3, at 11-17. One manifestation of this idea was a judicial practice of declining to rule when the judges disagreed among themselves: if judges disagreed, the opinion of the majority was only weak evidence of the law. See Baker, supra note 4, at 198.

6. See Postema, supra note 5, at 176-80; Postema, supra note 3, at 1-11. J.W. Tubbs suggests at least five possible understandings of the term *reason*, as used in the Yearbooks and

other English sources from the 13th to 17th centuries: equity in the Aristotelian sense of corrections of the errors of general rules; natural law; reason in distinction to the will of judges; internal coherence; "tried reason" tested by experience; and Coke's notion of "artificial" reason gained through training and refined by learned argument. J.W. Tubbs, The Common Law Mind: Medieval and Early Modern Conceptions 46-52; 68-73; 148-51; 161-68 (Baltimore: Johns Hopkins University Press 2000).

7. See Baker, supra note 4, at 181-86; Tiersma, supra note 3, at 25-51.

8. In the United States, statutes and state constitutions often require courts to issue written opinions. See Tiersma, supra note 3, at at 38. Opinions issued by "the court" have replaced seriatim statements by individual judges, and reports are official. Id. 39-42.

9. See David Lieberman, The Province of Legislation Determined 122-43 (Cambridge: Cambridge University Press 1989) (tracing the evolution of judicial attitudes toward lawmaking in the 18th century); Tiersma, supra note 3, at 52-69 (reporting findings on the frequency of explicit judicial statements and quotations of holdings).

10. See Eisenberg, supra note 2, at 5.

11. For earlier statements of our views on judicial treatment of precedent, see Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law 136-56 (Durham; London: Duke University Press 2001); Larry Alexander, Constrained By Precedent, 63 S. Cal. L. Rev. 1 (1989); Larry Alexander & Emily Sherwin, Precedent, in Common Law Theory (Douglas Edlin, ed., Cambridge: Cambridge University Press 2005).

12. Michael Moore can be read as endorsing this model of the common law. Michael S. Moore, Precedent, Induction, and Ethical Generalization, in Precedent in Law 183, 210 (Laurence Goldstein, ed.)(Oxford: Clarendon Press 1987) ("one sees the common law as being nothing else but what is morally correct, all things considered – with the hooker that among those things considered are some very important bits of institutional history which may divert the common law considerably from what would be morally ideal"). However, Moore also expresses sympathy, at least procedurally, with the notion of reasoning from legal principles - a notion we criticize in Chapter Three. See id. at 201.

13. See Alexander & Sherwin, supra note 11, at 145-48 (endorsing a rule model); Frederick Schauer, Playing By the Rules: A

Philosophical Examination of Rule-Based Decision-Making in Life and Law 185-187 (Oxford: Clarendon Press 1991) (endorsing a rule model); Alexander, supra note 11 (find a rule model superior to alternatives); see also Eisenberg, supra note 2, at 52-55, 62-76 (suggesting that courts generally accept a rule model of precedent, but coupling the rule model with a generous view of overruling powers).

14. See John Rawls, A Theory of Justice 14-21, 43-53, 578-82 (Cambridge: Belknap Press 1971); John Rawls, Outline of a Decision Procedure for Ethics, 60 Phil. Rev. 177 (1951); Norman Daniels, Wide Reflective Equilibrium and Theory Acceptance, 76 J. Phil. 256 (1979); Howard Klepper, Justification and Methodology in Practical Ethics, 26 Metaphilosophy 201, 205-06 (1995).

15. Cf. Nicholson v. Connecticut Half-way House, Inc., 218 A.2d 383 (Conn. 1966) (injunction against halfway house on ground of nuisance).

16. See id. at 385-86. Another common problem requiring empirical judgment is assessment of damages for harm extending into the future. See generally Douglas Laycock, Modern American Remedies 19-37, 201-231 (3d ed., New York: Aspen 2002).

17. See Eisenberg, supra note 2, at 10-12 (discussing "replicability" as a criterion for sound law); Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 55-58, 568-72 (William N. Eskridge, Jr. & Phillip P. Frickey, eds., New York: Foundation Press 1994); Schauer, supra note 13, at 137-45, 155-58; Stephen R. Perry, Judicial Obligation, Precedent, and the Common Law, 7 Oxford J. Legal Stud. 215, 248-49 (1987).

18. See Hart & Sacks, supra note 17, at 155; L.L. Fuller & William R. Perdue, Jr., The Reliance Interest in Contract Damages, 46 Yale L.J. 52, 62-63 (1946), Andrei Marmor, Should Like Cases Be Treated Alike?, 11 Legal Theory 33(2005).

19. For discussion of the value of coordination, see, e.g., Joseph Raz, The Morality of Freedom 49-50 (Oxford: Clarendon Press; New York: Oxford University Press 1986); Schauer, supra note 3, at 162-66; Gerald J. Postema, Coordination and Convention at the Foundation of Law, 11 Journal of Legal Studies 165, 172-86 (1982); Donald H. Regan, Authority and Value: Reflections on Raz's *Morality of Freedom*, 62 Southern California Law Review 995, 1006-10 (1989).

20. See, e.g., Kent Greenawalt, How Empty is the Idea of Equality?, 83 Columbia Law Review 1167, 1170-71 (1983); Michael

S. Moore, Precedent, Induction, and Ethical Generalization, in Precedent in Law 183 (Laurence Goldstein, ed.)(Oxford: Clarendon Press 1987).

21. See John E. Coons, Consistency, 75 California Law Review 59, 102-07 (1987). For more general critiques of equality as a moral ideal, see Peter Westen, Speaking of Equality: An Analysis of the Rhetorical Force of "Equality" in Moral and Legal Discourse 119-23 (Princeton: Princeton University Press 1990); Christopher J. Peters, Equality Revisited, 110 Harvard Law Review 1210 (1997). See also Marmor, supra note 18 (acknowledging that equal treatment has no role to play when there are reasons for decision, but offering a limited defense of the principle of equal treatment in the absence of determinative reasons for decision).

22. See Marmor, supra note 18.

23. One manifestation of this attitude is the reluctance of courts to adopt sharing remedies in close cases. Cf. R.H. Helmholtz, Equitable Division and the Law of Finders, 52 Fordham L. Rev. 313 (1983) (supporting equitable division but conceding that courts rarely grant remedies of this kind as a matter of common law).

24. We take up the problem of interpretation in Part III. In our view, all rules should be interpreted according to the intent of their authors (taking into account the authors' decision to employ a rule). Interpretation of common law rules follows the same fundamental principles as interpretation of statutes and other texts; it differs only in that both the rule and its "author" may be more difficult to identify.

25. See 8 A.L.R.4th 324 (2004) (collecting cases). See Dr. Martin M. Moore, Improving the Image and Legal Status of the Burial Services Industry, 24 Akron L. Rev. 565 (1991).

26. See Schauer, supra note 13, at 94-100; Frederick Schauer, Rules and the Rule of Law, 14 Harv. J. L. & Pub. Pol. 645, 676 n.66 (1991). Rule sensitive particularism is discussed in Chapter 1, supra, n.19 & accompanying text.

27. See Raz, supra note 19, at 17-62; Joseph Raz, The Authority of Law 16-19, 22-23, 30-33 (Oxford: Clarendon Press; New York: Oxford University Press 1979).

28. We discuss refinements of the rule model later in the chapter. See text at notes ?, infra.

29. See Sir Matthew Hale, The History of the Common Law of England 45 (1713) (Charles M. Gary ed., Chicago: University of Chicago Press 1971); 1 William Blackstone, Commentaries on the Laws of England 69-70 (Oxford: Clarendon Press 1765); Tubbs, supra note 4, at 182; Postema, supra note 5, at 166-67. But cf. Baker, supra note 4, at 200 (suggesting that the ranks of judges have always included both "timid souls" and "bold spirits").

For modern descriptions of legal decision-making that come close to the classic understanding, see Lloyd L. Weinrib, Legal Reason: The Use of Analogy in Legal Argument 147-52 (2005) (associating the rule of law with the idea that courts "are not to decide for themselves what the law is but are to seek it out, to discover and apply it as it is," but also maintaining that the process of declaring law entails judgment as well as reason). See also Ronald Dworkin, Taking Rights Seriously 82 (Cambridge: Harvard University Press 1977) ("Judges should apply the law that other institutions have made; they should not make new law"); A.W.B. Simpson, The Common Law and Legal Theory, in Osford Essays in Jurisprudence 77, 84-86 (Second Series, A.W.B. Simpson, ed., Oxford: Clarendon Press 1973) ("common law rules enjoy whatever status they possess not because of the circumstances of their origin, but because of their continued reception").

30. See Benjamin N. Cardozo, The Nature of the Judicial Process 124-25 (New Haven: Yale University Press 1921) ("Since the days fo Bentham and Austin, no one, it is believed, has accepted [the theory that judges do not legislate] without deduction or reserve"); Melvin A. Eisenberg, The Nature of the Common Law 4-7 (1988) (maintaining that courts inevitably make law, not only as a by-product of adjudication but also to enrich the body of legal rules).

31. See Schauer, supra note 4, at 31-34, 48-54; Chapter One, supra, text at note 17.

32. On the benefits of rules, see Chapter One, text at notes 10-11, supra.

33. See Raz, supra note 19, at 70-80 (discussing the "normal justification" of authority).

34. See Frederick Schauer, Do Cases Make Bad Law?, 73 U. Chi. L. Rev. ? [mss8-21] (forthcoming 2006); Alexander & Sherwin, supra note 11, at 132-33 (noting the possibility of cognitive bias); Emily Sherwin, A Defense of Analogical Reasoning in Law, 66 U. Chi. L. Rev. 1179, 1192 (same). But cf. Jeffrey J. Rachlinski, Bottom-Up and Top-Down Decisionmaking, forthcoming, 73 U. Chi. L. Rev. ? (2006) (suggesting that courts and legislatures have

different cognitive advantage and disadvantages for different purposes). We discuss this problem in greater length in Chapter Four, text at notes ?, infra.

35. We discuss the problem of overruling in text at notes ?, infra, and in Chapter Four, infra.

36. See text at notes ?, infra, and Chapter Four, text at notes ?, infra (discussing cognitive biases likely to affect rulemaking in the context of adjudication).

37. See Edmund Burke, Reflections on the Revolution in France, and on the proceedings in Certain Societies in London Relative to that Event (1790), in Edmund Burke, Selected Writings and Speeches 424, 469-70 (Peter J. Stanlis, ed., Washington: Regnery Gateway 1963); Sir Edward Coke, The First Part of the Institutes of the Law of England, §138, ¶ 97B (1628), reprinted in II The Selected Writings of Sir Edward Coke 577, 701 (Steve Sheppard, ed., Indianapolis: Liberty Fund 2003) (quoted in Chapter 1, n. 2); Simpson, supra note 29, at 94. But cf. Tubbs, supra note 6, at 161-63 (suggesting that Coke's views evolved over time, as he came to place more emphasis on "reason" and less on antiquity).

38. See generally Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes (Cambridge: Harvard University Press 1991).

39. This may not affect the volume of litigation. See George L. Priest, Private Litigants and the Court Congestion Problem, 69 B.U. L. Rev. 527, 534 (1989) (discussing the effects of docket congestion on the expected value of judgments). However, it should make decisionmaking easier for at least some parties.

40. For more examples, see Alexander & Sherwin, supra note 11, at 61-68.

41. See, e.g., Amos Tversky & Daniel Kahneman, Availability: A Heuristic for Judging Frequence and Probability, in Judgment under Uncertainty: Heuristics and Biases 163, (Daniel Kahneman, Paul Slovic, & Amos Tversky, eds.)(Cambridge and New York: Cambridge University Press 1982); Norbert Schwarz & Leigh Ann Vaughn, The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Source of Information, in Heuristics & Biases: The Psychology of Intuitive Judgment 103 (Thomas Gilovich, Dale Griffin, & Daniel Kahneman, eds: Cambridge U. Press 2002); Scott Plous, The Psychology of Judgment and Decision Making 121-130 (Philadelphia: Temple University Press 1993). Fred Schauer has made the connection between availability

and judicial decisionmaking. See Schauer, supra note 34, at [mss 11-13]; see also Timur Kuran & Cass R. Sunstein, Availability Cascades and Risk Regulation, 51 Stan. L. Rev. 683 (1999) (discussing the effect of availability on legislation); Cass R. Sunstein What's Available?: Social Influences and Behavioral Economics, 97 Nw. U. L. Rev. 1295 (2003) (same).

42. See Moore, supra note 25, at 570-71.

43. See, e.g., Rachlinski, supra note 34, at [mss 1-5] summarizing differences between legislative and adjudicative perspectives). Rachlinski states that "Courts *must* resolve the disputes before them and need not declare principles. Legislatures *must* declare general principles and cannot resolve single disputes.")

44. See, e.g., Cass R. Sunstein, One Case At a Time 4 (Cambridge: Harvard University Press 1999)(citing the principle that "courts should not decide issues unnecessary to the resolution of a case"); A.W.B. Simpson, The Ratio Decedendi of Case and the Doctrine of Binding Precedent, in Oxford Essays in Jurisprudence 148, 160-61, 167 (A.G. Guest, ed., London: Oxford University Press 1961). The idea that judicial rulemaking should not exceed the requirements of particular controversies is reflected in various justiciability doctrines adhered to by American courts. See, e.g., Schauer, supra note 34, at [mss 27-29].

45. See Schauer, supra note 34, at 4-7 (discussing judicial lawmaking); Frederick Schauer, Giving Reasons, 47 Stan. L. Rev. 633, 638-42 (1995) (pointing out that reasons judges give for their decisions are necessarily broader than the decisions themselves and thus operate in the manner of rules).

46. Cf. Raz, supra note 27, at 194-201. Raz acknowledges that judges make law, and that, in doing so, they should act "as one expects Parliament to act, i.e. by adopting the best rules they can find." Id. at 197. Yet he suggests that the lawmaking function of courts differs from that of legislatures, because judge-made law is revisable by later courts and therefore "less 'binding' than enacted law." Id. at 195. He also insists that judges act as "gap-fillers" and that "only the ratio" of judicial decisions is binding on future; as a consequence, "[t]here are no pure law-creating cases." Id. at 194-195. These limitations may be descriptive of actual practice, but Raz does not explain why they should be taken as logically necessary features of judicial rulemaking power.

47. For discussion of considerations bearing on the exercise of judicial power, see, e.g., Alexander M. Bickel, The Supreme Court, 1960 Term - Forward: The Passive Virtues, 75 Harv. L. Rev. 40 (1961); Helen Hershkoff, State Courts and the "Passive Virtues:" Rethinking the Judicial Function, 114 Harv. L. Rev. 1833 (2001).

48. For an arguable instance of prospective ruling, see Wilson v. Layne, 526 U.S. 603 (1999) (developing standards for qualified immunity). See also Hershkoff, supra note 47, at 1844-52, 1859-61 (discussing advisory opinions and moot decisions).

Prospective *overruling*, as a way to rid the legal system of undesirable rules while minimizing the harm to parties who have relied on precedent rules, has had some supporters. See Beryl Harold Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1 (1960); cf. Eisenberg, supra note 2, at 127-32 (favoring a very limited use of the technique). The United States Supreme Court, however has disapproved the practice. See Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991); Griffith v. Kennedy, 479 U.S. 314 (1987).

49. In traditional terms, this is a clear example of "dicta," which later courts are free to reject as outside the scope of binding precedent. See Steven J. Burton, An Introduction to Law and Legal Reasoning 37-38, 60 (Boston: Little, Brown 1995); Simpson, supra note 44, at 160-61.

50. Tiersma finds an increasing tendency on the part of judges to state their holdings explicitly, yet he also notes that many courts continue to avoid "textualized" holdings. See Tiersma, supra note 3, at 51-69; see also Frederick Schauer, Opinions as Rules, 62 U. Chi. L. Rev. 1455 (1995) (pointing out the advantages of increasingly explicit rulemaking in judicial opinions).

51. See Chapter One, supra, text at notes 1-2.

52. See Alexander & Sherwin, supra note 11, at 28-34; Schauer, supra note 13, at 17-111.

53. See Alexander & Sherwin, supra note 11, at 26-28 (distinguishing between rules and moral principles on the ground that rules are posited while moral principles are not).

54. If the rule is posited by a court composed of multiple judges, there is a problem of collective intent. We address this problem in Chapter Six, infra.

55. On canonicity of rules, see Schauer, supra note 13, at 68-72; Frederick Schauer, Prescriptions in Three Dimensions, 82 Iowa L. Rev. 911, 916-18 (1997). If canonicity entails that a rule be posited by a particular source as an intentional act at a particular time, we view canonicity as an essential feature of authoritative rules; we do not agree with Schauer's suggestion that a pattern of decisions can produce a rule. See Schauer, Prescriptions in Three Dimensions, supra, at 917-18. If canonicity entails that the rule must be posited *in the form of a rule*, we do not view it as essential; we require only that a rulemaking authority has done something from which a rule capable of statement in determinate form can be inferred.

56. See Chapter 3, infra, text at notes ?.

57. Schauer uses a similar example to illustrate his argument that prescriptions can be inferred from a pattern of prior particularistic decisions. See Schauer, supra note 54, at 916-17. In our example, however, the prescription is inferrable, not from the pattern of prior decisions, but from the pattern of citations offered by a precedent judge. The pattern of citations, unlike the pattern of decisions itself, is evidence of rulemaker intent.

58. We return to the problem of judicial rulemaking in Chapter Four, infra, where we raise the possibility that various judicial practices may serve as indirect strategies for improving the quality of precedent rules.

59. See, e.g., Conley v. Gibson, 355 U.S. 41 (1957) (announcing a pleading rule not debated by the parties); State v. Shack, 277 A.2d 369 (1971) (announcing a trespass rule although no active party defended the position of the owner).

60. On the rationality of rule-following, see Heidi M. Hurd, Moral Combat 62-94 (Cambridge: Cambridge University Press 1999); Heidi M. Hurd, Challenging Authority, 100 Yale L.J. 1011 (1991). See also Alexander & Sherwin, supra note 11, at 53-96 (explaining why it may be rational to endorse rules but not to follow them); Schauer, supra note 13, at 128-134 (explaining the "asymmetry of authority"). On the importance of a practice of unreflective rule-following and the difficulties of maintaining such a practice, see Alexander & Sherwin, supra, at 87-88; Alexander & Sherwin, The Deceptive Nature of Rules, 142 U. Pa. L. Rev. 1191, 1201 (1994).

61. This position has support in judicial practice, particularly in earlier periods of the common law. See Postema, supra note 5,

at 167 (explaining the classical view that common law was not posited by judges but found in "*reasonable usage* - usage observed and confirmed in a public process of reasoning"); see also Simpson, supra note 29, at 85-86 (taking the view that common law exists by virtue of is "reception" over time); Tubbs, supra note 6, at 149-51 (discussing the notion of "tried reason").

62. See sources cited at note 37, supra.

63. See Hyde, Dominic, "Sorites Paradox", in Stanford Encyclopedia of Philosophy (Edward N. Zalta, ed. fall 2005), <http://plato.stanford.edu/archives/fall2005/entries/sorites-paradox/>: "The name 'sorites' derives from the Greek word *soros* (meaning 'heap') and originally referred, not to a paradox, but rather to a puzzle known as *The Heap*: Would you describe a single grain of wheat as a heap? No. Would you describe two grains of wheat as a heap? No. … You must admit the presence of a heap sooner or later, so where do you draw the line?

64. See Chapter Three, infra, text at notes 44-51.

65. See Edward H. Levi, An Introduction to Legal Reasoning (Chicago: Chicago University Press 1948) ("change in the rules is the indispensable dynamic quality of law"); Frederick Schauer, Formalism, 97 Yale L.J. 509, 542 (1988) (acknowledging the inherent conservatism of rules, but defending rule-based decisionmaking).

66. Melvin Eisenberg appears to share this view. See Eisenberg, supra note 2, at 104-05 (maintaining that overruling is governed by the same principles as development of law; thus, "[a]s an event in the history of a doctrine, overruling often involves no sharp changes of course.)

67. See, e.g., Raz, supra note 27, at 189 (noting that courts overrule "more sparingly" than they distinguish); Robert S. Summers, Precedent in the United States (New York), in Interpreting Precedents: A Comparative Study 355, 394-97 (D. Neil MacCormick & Robert S. Summers, eds.)(Dartmouth: Ashgate 1997) (describing limited categories of "justified overruling); Grant Lamond, Do Precedents Create Rules?, 11 Legal Theory 1, 12 (2005 (stating that courts distinguish much more freely than they overrule).

68. This approach to precedent would ask judges to "peek" at the justification of the rule, in the manner Frederick Schauer recommends in his discussion of "presumptive positivism." See Schauer, supra note 26, at 677. Although we reject presumptive positivism as a solution to the general dilemma of rules, it

appears to provide best available answer to the question when a rule should be jettisoned altogether. See Alexander & Sherwin, supra note 11, at 68-73.

Chapter Three: The Mystification of Common-Law Reasoning

We argued in Chapter Two that there are two and only two plausible models of judicial reasoning: the natural model and the rule model. The natural model incorporates two forms of reasoning: moral reasoning through the method of reflective equilibrium and empirical reasoning. The rule model adds a third form of reasoning, deduction from authoritative rules. These forms of reasoning are not unique to law, but are common to all subjects of human deliberation. In our view, they are the only tools judges need to decide cases and the only tools they use in fact.

This is not the prevailing view. Texts on judicial reasoning, as well as judges themselves, often maintain that the primary decisionmaking method of the common law is reasoning by *analogy*.[1] Analogical reasoning is the special art of lawyers and judges and the means by which the common law has successfully adapted to changing social conditions.[2] Commentators also maintain that courts reason from *legal principles*, a method closely linked to the method of analogy.[3]

In this chapter, we intend to demonstrate that judges cannot be doing what they claim. One cannot "reason" by analogy, and legal principles are chimerical. We shall argue as well that if analogies and legal principles could in fact affect the course of judicial reasoning, the results would be pernicious.

Our position raises several questions. One is descriptive: what are judges doing when they claim to reason by analogy or to apply legal principles? We suggest in Chapter Four that searching for analogies and common principles that link past and present cases is a professional habit that can play a useful role in the development of common law. It is, however, only a habit: analogies and legal principles do not decide cases.

A second question is why judges, teachers, and textwriters find the idea of judicial reliance on analogies and legal principles so appealing. One explanation for the popularity of this account of judicial decisionmaking is that it appears to provide a way out of the stark choice presented by the natural and rule models of decisionmaking. If all judicial reasoning is natural reasoning, there is no meaningful "common law" that can curb the errors and biases of individual judges. The rule of law is imperiled, at least in the absence of legislation. If, on the other hand, precedent rules are serious rules, then judges must set aside their best moral judgment and decide as the rules require. Analogies and legal principles seem to offer a middle course: they constrain judicial judgment without displacing it. Our analysis, however, suggests that the compromise is illusory. Natural decisionmaking and rule-governed decisionmaking are the only courses open to judges.

Analogical Reasoning from Case to Case

In the purest sense, analogical reasoning in law means reasoning directly from one case to another.[4] The judge observes the facts and outcome of a past case, compares the facts of the past case to those of a pending case, then reaches a decision in the pending case based on similarities and differences between the cases. This form of reasoning has popular appeal for several reasons. As we have just noted, it promises a happy medium between constraint and flexibility. Judges must conform their decisions to the course of prior adjudication, but they are not precluded from assessing the merits of cases before them and they have considerable leeway to expand on or distinguish the past conclusions of their colleagues.[5] Analogical reasoning also conforms to a supposed principle of justice: treat like alike.[6] Another possible reason for the broad appeal of analogical reasoning is that findings of similarity and difference among cases may be acceptable to parties who disagree at the more abstract level of moral principle.[7]

Judges use, or claim to use, case-to-case analogies in three ways. First, the outcome of a precedent case may dictate a like outcome in the new case if the cases are factually similar.[8] Second, the outcome of a precedent case may dictate the outcome of new case *a fortiori*, because the new case presents at least as strong a case for the same result.[9] These two versions of the

analogical method are thought to be sources of constraint: the analogy between precedent case and new case is a reason, and possibly a conclusive reason, for the court in the new case to reach a result that parallels the result of the precedent case, even if the court believes, all things considered, that the result is wrong. In effect, the precedent court exercises authority by describing a set of facts and determining an outcome that can control the outcome of later cases.

The third way in which courts purport to reason by analogy is to "distinguish" precedent rules based on factual dissimilarities between the cases in which the rules were announced and new cases that appear to fall within the rules' terms.[10] Distinguishing is the flip side of *a fortiori* decisionmaking, in that disanalogy provides an escape from authority. The precedent court exercises lawmaking authority by announcing a general rule, but the court in a new case can avoid the rule and return to natural reasoning.

Constraint by Similarity. The simplest and most common way in which courts use analogies is by finding that the case before them is similar to a precedent case and then proceeding to reach a parallel result. For example: Heidi is called on to decide a nuisance action against Karl, who is keeping an ocelot in his house. Surrounding homeowners point to a past case in which the court enjoined Edward to remove his pet bear from a residential

neighborhood. An ocelot, they say, is like a bear, so Heidi should likewise order Karl to remove it.

The homeowners in this case presumably are invoking the maxim that like cases should be treated alike. We have already explained why, in our view, like treatment has no moral value in sequential decisionmaking.[11] But suppose we assume, for the purpose of argument, that the principle of like treatment is sound. The difficulty with the analogy between Karl's ocelot and Edward's bear - and with any analogy of this kind - is that, without more, it is impossible to say that the two cases are either alike or different.

As a factual matter, there are an infinite number of similarities and differences between the ocelot and the bear.[12] Both are predators that might harm a small child, both are difficult to domesticate, and both are furry mammals. On the other hand, Karl's ocelot is (we can assume) smaller than Edward's bear, it is a type of feline indigenous to Belize, and it has spots. Nothing in the outcome of Edward's case - Edward was made to give up his bear - picks out which of these similarities and differences are important for purposes of comparison. Karl can just as easily point to another past case in which Herman was allowed to keep a Dalmatian in a residential neighborhood. Herman's Dalmatian, he might say, was about that same size as his ocelot and, like his ocelot, it had spots.

Where are we now?

Our point is that Heidi cannot *reason* that Karl's case and Edward's case should be decided alike because they are similar. To reason that they should be decided alike, she must determine that they are *importantly* similar, and to reason that they are importantly similar, she must refer to some general proposition that links ocelots to bears. Without this additional link, the facts and outcome of Edward's case have nothing to say about Karl's case.[13]

In a recent book defending analogical reasoning in law, Lloyd Weinreb rejects the conclusion that analogies depend on supporting generalizations.[14] Weinreb cites as an example an opinion in which the New York Court of Appeals held the owner of a steamboat strictly liable for losses suffered by a passenger whose money was stolen from a stateroom.[15] The court cited two possible lines of precedent: a series of cases holding that innkeepers were strictly liable for thefts from guest rooms, and another series of cases holding that railroads were not strictly liable for thefts from sleeping cars. Ultimately, the Court of Appeals found steamboats to be more like inns than like railroads and held for the passenger.[16] In Weinreb's view, this demonstrates that courts can and do decide cases on the basis of factual similarity, without reference to general propositions that make certain similarities relevant to the outcome.[17]

We observe, first, that the court's failure to refer explicitly to a general rule linking steamboats to inns does not establish that it decided the case without the aid of a generalization. Judicial opinions, particularly opinions from the days of steamboats when courts were reticent about rulemaking, may not spell out every step of the courts' reasoning. In any event, our point is not that courts must engage in formal rulemaking in order to draw analogies, but only that the reasoning they engage in to reach decisions must refer to some general proposition that supports the analogy. The Court of Appeals may well have had in mind that businesses providing lodging are strictly liable for thefts from rooms if the accommodation is of such a type that guests are likely to expect protection, or that providers of lodging are in a better position than guests to furnish protection.[18]

If, on the other hand, Weinreb is correct that the court detected a similarity between steamboats and inns without relying on a supporting generalization, the analogy has no power of constraint. Suppose the Court of Appeals had reached the opposite conclusion, that steamboats are like railroads, and therefore that they are not strictly liable for thefts. As a matter of similarity, this is fair enough: steamboats and railroads are both mobile. Thus, if nothing more than brute similarity were involved, the steamboat-railroad analogy would be

equally as valid as the steamboat-inn analogy and, consequently, equally incapable of determining the outcome of the case.

We can press our point further by examining more closely what might be involved in drawing an analogy. There are several ways in which Heidi might *reason* to the conclusion that ocelots and bears are importantly alike for the purpose of an action of nuisance. She might formulate a moral principle and test her initial judgment through the method of reflective equilibrium: the liberty of property owners to use their property as they wish is subject to a duty to not to inflict an unreasonable risk of harm on others, and both ocelots and bears pose unreasonable risks of harm.[19] More likely, Heidi will refer to a rule that captures applicable moral principles in more concrete terms: dangerous wild animals should not be kept in residential neighborhoods, and both ocelots and bears are dangerous wild animals.[20] Once Heidi has arrived at a morally sound principle or rule, she can deduce from it that ocelots and bears are importantly similar, and enjoin Karl.

Notice that when Heidi reasons in either of these ways - by reference to a moral principle or by reference to a less abstract rule - the outcome of the prior case against Edward plays no effective role in her decision. The reason for granting an injunction against Karl is not that his ocelot is similar to Edward's bear, but that his ocelot falls within a general

principle or rule that Heidi has now determined is sound and should apply. The principle or rule is both necessary and sufficient to decide Karl's case, and the fact that the same principle or rule applies to Edward's case as well has no effect on the outcome. Another way to put this is that the lawmaker who settles Karl's case is not the judge in Edward's case, but the new judge, Heidi, who exercises authority by formulating a principle or rule. The reasoning Heidi uses to arrive at her decision is not a special "analogical" form of reasoning, but ordinary moral reasoning and deductive reasoning.

A third way in which Heidi might be said to reason to the conclusion that Karl's ocelot should be treated in like manner as Edward's bear is by referring to a *legal principle* that establishes similarity between the cases. A legal principle is a general proposition that is consistent with existing legal materials, including the outcomes of past cases.[21] For example: past cases include the decision enjoining Edward to remove his bear and another decision permitting Jerome to keep his pet crocodile. The combination of precedents might support the legal principle that dangerous furry wild animals are not permissible in residential neighborhoods. Heidi can then deduce from this principle that Karl's ocelot must be removed. This method of decision-making, unlike the methods just described, accords a role to past outcomes. The legal principle (no dangerous furry

wild animals) decides the case against Karl, but the prior decision in favor of Jerome limits the principle's content.

If in fact legal principles are viable entities, then analogical decisionmaking on the basis of legal principles is a form of reasoning that is, arguably, unique to law. We take up the subject of reasoning from legal principles in the second half of this chapter.[22] For now, it is enough to say that we reject the notion of legal principles as both incoherent and undesirable. It follows that for us, decisions that appear to treat past outcomes as grounds for decision in current cases are in fact either instances of ordinary moral reasoning or instances of deduction from rules.

A fourth possibility is that Heidi might rely directly on a perception of similarity: ocelots and bears are alike when placed in residential neighborhoods. At this point, we must distinguish between reasoning and intuition. A lifetime of experience may allow Heidi to identify and apply a supporting general rule so rapidly that she herself is unaware of all the steps involved. If so, she has reasoned to a conclusion, in an abbreviated way. Alternatively, Heidi may simply perceive an important likeness between ocelots and bears, perhaps because they evoke a similar emotional response (fear) or because Heidi's mind is wired to respond to problems by through pattern recognition and metaphor.[23]

As a psychological matter, we cannot say which of these descriptions is most likely to be correct. We can say, however, that if Heidi's response is purely intuitive it is not a form of reasoning.[24] Reasoning entails, at a minimum, a process of thought that one can articulate to oneself and to others. A coin toss is not a form of reasoning; nor is a perceived analogy. Whatever psychological mechanism allows judges to class ocelots and bears together for purposes of residential land use, the classification is not a reasoned one unless it refers to some more general proposition that links common properties of ocelots and bears to problem the judge is trying to solve.

At this point, the proponent of analogical decisionmaking may say fine, what Heidi is doing is not reasoning as you define it. But it is what judges do. They manage to decide cases in this way. This is, in effect, Weinreb's argument for analogical reasoning in law.[25]

To answer this argument, we first point out that the subject under discussion is analogical reasoning as a form of constraint. Precedent outcomes are supposed to dictate, or at least to provide reasons for, parallel outcomes in cases judged to be similar. With this assumption in place, we can return to Heidi's decision and consider more closely how she might reach it.

Suppose first that Heidi looks at the precedent case involving Edward's bear and has an intuition of important

similarity between Edward's bear and Karl's ocelot. She then hypothesizes a general proposition that supports her intuition: dangerous wild animals should not be kept in residential neighborhoods. If she is satisfied with this proposition as a reason for decision, and if she confirms that both ocelots and bears are dangerous wild animals, she will enter an injunction against Karl.[26] We have no difficulty with this method of decisionmaking, but it is not truly an analogical method. Assuming our description of Heidi's mental process is correct, the intuition of important similarity plays only a minor role, as the inspiration for a more complete process of reasoning. Nor does the outcome of Edward's case constrain Heidi's decision. The lawmaker is not the precedent judge, but Heidi, who engages in ordinary moral and deductive reasoning, with the help of intuition, to formulate a rule of decision.

Now suppose that Heidi first reasons to a tentative conclusion about Karl's case: she determines that, based on an appropriate balance of liberty and protection against harm, she should permit Karl to keep his ocelot. She then studies Edward's case and has an intuition of important similarity between Edward's case and Karl's. Next, she hypothesizes a general proposition that supports her intuition of similarity: dangerous wild animals should not be kept in residential neighborhoods. She tests this proposition with further examples (crocodiles,

lions), finds that it fits her intuitions about these cases and also seems to fit her beliefs about liberty and harm. Ultimately, she abandons her initial conclusion, applies the proposition that dangerous wild animals should not be kept in residential neighborhoods, and enters an injunction against Karl. Again, Heidi's decision is not truly analogical; her method is ordinary reasoning and Edward's case does not constrain the outcome. Heidi's intuition of important similarity between Karl's ocelot and Edward's bear simply triggered a reasoned reexamination of her original position.

Another possibility is that Heidi begins by reasoning to a conclusion in favor of Karl, based on the comparative moral value of liberty and protection against harm. She then studies Edward's case and has an intuition of important similarity between Karl's ocelot and Edward's bear. Without more, she decides to treat the two cases alike and order Karl to remove his ocelot from the neighborhood. This reconstruction supports the possibility of a purely analogical approach to judicial decisionmaking, but it strikes us as implausible. There is nothing in Heidi's unconscious and inaccessible intuition of similarity between ocelots and bears that provides a reason capable of overriding the conclusions she has reached through a process of moral reasoning. Only if she can construct a justification for the intuition, as in the prior example, will

she abandon her reasoned moral judgment.

The possibility that poses the greatest difficulty for our position is this: Heidi begins with an intuition of important similarity between ocelots and bears. She then decides to reason no further and decide Karl's case as the precedent judge decided Edward's case: remove the ocelot. Assuming that it is in fact psychologically possible for Heidi to intuit important similarity without referring to a supporting generalization, this is a genuinely analogical decision. Given Heidi's intuition, the precedent outcome controls the outcome of Karl's case. The lawmaker is the precedent judge, who has exercised authority by describing facts and reaching a decision that dictates a like decision in Karl's case. This is, however, a very impoverished view of judicial decisionmaking, which we are reluctant to attribute to judges adjudicating in good faith. The intuition of important similarity on which it relies is completely opaque: it provides no warrant - no accessible justifying reason - for Heidi's decision. We emphasize again that the two cases are not identical; they are only felt to be similar (why?). There is no way even to think about whether Heidi's judgment of important similarity is right or wrong.[27]

At this point, our argument is partly a normative one. As an analytical matter, we can say that purely intuitive analogical decisionmaking is not a form of reasoning. We can also say that

what appears to be analogical decisionmaking may in fact be ordinary reasoning. Finally, we can return to one of the basic assumptions we made in our initial discussion of settlement as a social end and a justification for authority: the assumption that settlement, as a social end, means reasoned settlement.[28] Members of a community choose an authority to translate values they recognize as reasons for action into particular decisions or rules when their own judgments conflict. Whether the authority's conclusion is right or wrong, it is expected that the process of translation will be capable, at least in principle, of articulation and justification. Otherwise, the choice of an authority is no different from the flip of a coin. This leads to the normative point: judicial decisionmaking, as an exercise of authority, ought to meet this minimal requirement, and therefore ought to entail more than blind, untested, and untestable intuition.

A Fortiori Constraint. We have argued that factual similarities between cases cannot constrain judicial decisionmaking. Similarities are infinite; therefore some rule or principle is necessary to identify important similarities. Once a court has identified such a rule or principle, the rule or principle, rather than the factual similarities themselves, determines the outcome of the pending case. Analogy alone, therefore, does not enable courts to extend the "law" of past

cases into new domains.

It might be argued, however, that analogies can play a more limited role in judicial decisionmaking by dictating outcomes "*a fortiori*."[29] In this version of analogical reasoning, the court compares the relative strength of two sets of facts - the facts of the precedent case and the facts of a new case now under consideration. If the facts of the new case provide support for the outcome reached in the precedent case that is stronger than the support provided by the facts of the precedent case itself, then it follows, *a fortiori*, that the new court should reach a parallel result.

For example: Heidi is considering a nuisance claim against Felix, who has established a private zoo in a residential neighborhood. On display at the zoo are a bear, a lion, and a python. Heidi discovers a prior case in which a court ordered Edward to remove his pet bear from a residential neighborhood. *A fortiori*, Heidi should order Felix to close his zoo. This conclusion follows even if Heidi believes Edward's case was wrongly decided, and, accordingly, would have held for Felix in the absence of Edward's case.

The *a fortiori* method of decisionmaking appears more promising as a form of case-to-case reasoning than a method that relies solely on the court's sense of similarity. Here, the court compares cases and draws what appears to be a necessary

conclusion about the outcome of one from the facts and outcome of another. As we shall demonstrate, however, *a fortiori* reasoning suffers from a number of problems that diminish the effect of the precedent case to the vanishing point. Moreover, to the extent that *a fortiori* comparisons do in fact dictate outcomes, the possibility of erroneous precedents grossly distorts their operation. Given the presence of even a few past mistakes, *a fortiori* analogies can wreak havoc with the overall body of law.

The first hurdle in *a fortiori* reasoning is determining what facts are in play. The present judge, Heidi, does not have access to all the facts of precedent case (the case of Edward's bear). The parties' lawyers will have selected a subset of all the facts pertaining to Edward and his bear for presentation to the court, and the judge (or an appellate court) is likely to have culled the evidence further in composing an opinion. One possibility for Heidi is to assume that the comparison must be between the classes of facts named by the prior court and the facts of her new case. If the court in Edward's case mentioned only that Edward was keeping a "bear," then the presence of any type of bear can support a claim of nuisance.[30] This approach could result in significant constraint: a precedent court could, by design or by mistake, exert a very strong influence on future cases by casting its description of facts in general terms. At the same time, it could produce unwanted results. An opinion in

Edward's case stating that Edward was keeping an *animal* would result in a great many *a fortiori* nuisances, not all sensible.

As a result, courts are more likely to take the view that the appropriate comparison is between particulars actually described in the prior opinion and the facts of the new case.[31] If the court in Edward's case stated without further elaboration that Edward was keeping a "bear," then details about the bear in Felix's zoo might serve to distinguish the case against Felix. Once judges take this more creative approach to factual comparison of cases, however, an *a fortiori* effect is very easy to avoid. No two cases are perfectly identical in their facts, and the current judge need only pick out some feature of his or her case that was not mentioned in the precedent opinion and that, *if* it was not in fact present in the precedent case, tip the scales in favor of a new result. Assume that Heidi is sympathetic to Felix's zoo. If Felix's bear is declawed and kept in a sturdy cage, and if the opinion in Edward's case does not specify that Edward's bear was likewise declawed and kept in a sturdy cage, Heidi can treat these as distinguishing facts. Morever, in any case in which the *a fortiori* effect of a precedent case makes a difference to the current judge's decision - that is, in any case in which the judge would otherwise reach a different result - we can assume that the judge will be tempted to manipulate factual assumptions in this way to avoid a result

the judge thinks is wrong.

In theory, factual comparisons between cases are not infinitely manipulable. The judge must identify facts that tip the scales, or in other words, facts about the new case that, if not also present in the precedent case, make the new case a weaker case for the precedent outcome. This leads to another problem, which is how a judge can "weigh" facts in favor of one outcome or another.

To weigh the facts of two cases, the judge must first determine what outcome particular facts tend to favor, and then assign a weight to that tendency.[32] The tendency of a fact may seem obvious: the large size of a bear favors an order to remove the bear from a residential neighborhood. But this is not as simple a matter as it first appears. The size of a bear does not *in itself* recommend an injunction. Bear size must be linked to bear removal either by an inaccessible intuition or by a process of reasoning that relies on general propositions: owners must not impose unreasonable risks on the safety of those around them, and large bears pose a greater safety risk than small bears.[33] In other words, *a fortiori* reasoning runs aground for the same reasons that simple similarity-based analogies run aground: facts alone have no implications for future decisionmaking.

A further problem is that if the new case involves facts that tend both in favor of and against the outcome of the

precedent case, the court must assign weight to the facts in order to determine whether the *a fortiori* effect of the precedent case is dispelled. This may not be possible if the tendencies of different facts depend on wholly different values. For example: Felix's zoo contains not only a bear but other animals as well, a fact that presumably favors an injunction. Suppose, however, that Felix's zoo also doubles as a breeding facility for endangered species, a fact that favors a decision for Felix. If human safety and preservation of species are incommensurable values, neither of which has lexical priority, there is no way to weigh them in the manner an *a fortiori* comparison calls for. Calculation of the relative strength of additional animals (in favor of an injunction) and a breeding program (against an injunction) requires either a ranking of values or a common metric for measurement.[34]

Some moral systems, such as utilitarianism, provide a universal metric that allows, in principle, for quantitative comparison of the facts of past and present cases. Within a system of this kind, *a fortiori* comparisons may be logically, if not practically, possible. The consequences, however, are nonsensical. We must assume that, in any legal system, some precedent cases have been erroneously decided: if judges always decided correctly, there would be no need for precedential constraint. We must also assume that, but for precedent case,

the judge in the new case would decide the new case differently; otherwise the precedent would have no effect. In these circumstances, a process of quantitative comparison yields results that are perverse and ultimately self-contradictory.[35]

To illustrate: homeowners have asked Heidi to enjoin Max from opening a gas station in their neighborhood.[36] After calculating potential decreases in human happiness from traffic, fumes, and aesthetic offense, as well as potential increases in happiness from financial profit, convenience, and employment, Heidi finds that the gas station is likely cause a net loss of three utils. Accordingly, she is inclined to grant an injunction. Max, however, points to a prior case in which Jerome was allowed to keep a crocodile in a residential neighborhood. These cases may not appear to have much in common. But assume Heidi believes the prior decision was wrong: by her calculation, Jerome's crocodile was likely (ex ante) to cause a net loss of 6 utils. Max can now argue that in any case in which a use of land will cause a net loss of six or fewer utils, Jerome's case is an *a fortiori* precedent for denying an injunction. In fact, if utils are the denominator for comparison, Max might be able to cite a wholly unrelated precedent - say, an erroneous decision in the field of contract law - as a reason to decide in his favor.

Alternatively, Heidi might compare potential gains and losses of utility.[37] Assume that the court in Jerome's case

concluded, erroneously, that the happiness Jerome would gain from his crocodile exceeded the loss of happiness his neighbors would suffer from contemplating the risks posed by a crocodile residing nearby. Heidi believes that in Max's case, the neighbors' potential loss of happiness due to traffic, fumes, and aesthetic offense will exceed Max's and others' gains in happiness due to profits, convenience, and employment. But if she also concludes that fumes, traffic and aesthetic loss from Max's gas station will cause a lesser loss of happiness than the proximity of Jerome's crocodile was likely to cause, and that profit, convenience, and employment from the gas station will produce more gains in happiness than Jerome's enjoyment of his crocodile, then she is again constrained, *a fortiori*, to deny the injunction against Max. (Heidi believes that in Max's case, fact set *x* outweighs fact set *y*; but in the precedent case, fact set *b* was found to outweigh fact set *a*; if *a* outweighs *x* and *y* outweighs *b*, then the precedent case demands that Heidi treat *y* as if it outweighs *x*.) This cannot be a sensible way to resolve the dispute.

The problem is compounded by the presence of both correct and incorrect precedents. Assume that Heidi discovers two precedents. One is Jerome's case, in which the court denied an injunction, resulting in a net loss, ex ante, of six utils. The other is Edward's case, in which the court ordered Edward to

remove his bear. Heidi determines that Edward's case was correct and that it resulted in a net gain, ex ante, of one util. These two cases stand as precedents both for granting and for denying an injunction in Max's case (and in all other cases in which the sum of expected utils if an injunction is granted is between one and six).

Perhaps *a fortiori* decisionmaking can be redescribed in a way that gives guidance to courts in comparing the facts of past and present cases. Grant Lamond suggests that precedent requires later courts to assume that precedent cases were correctly decided on their facts.[38] According to Lamond's "reason-based" account of precedent, a later court must accept the "*ratio*" of a precedent case - - the proposition supporting its outcome - as a sufficient reason for the outcome in the factual context of the precedent case.[39] Then, if the facts entailed by the *ratio* of the precedent case are present in a later case, the later court must reach a parallel result *unless* additional facts create a reason for a different outcome that is strong enough to defeat the reason given by the precedent *ratio*. If no such facts appear, the prior case is an *a fortiori* precedent. Lamond refers to this a "reason-based" account of precedent because it compares the reasons that justify outcomes in the context of particular facts.[40]

For example: homeowners have asked Heidi to enjoin Max from

opening a gas station. Heidi finds a precedent case in which the presiding judge stated that "businesses that significantly increase traffic in residential neighborhoods are nuisances" and enjoined construction of a Pizza Hut.[41] Heidi must grant the injunction against Max unless she concludes that the convenience of a local gas station defeats the burden of significant new traffic.

Assuming that Heidi must accept the precedent judge's statement of the ratio of its decision,[42] the precedent opinion appears to constrain Heidi by providing a reason that must be overcome: protection of homeowners against business traffic. Suppose, however, that Heidi believes that the precedent judge's reasoning was wrong; in her view, traffic is unavoidable if the neighborhood is to have normal amenities. If so the reason generated by the new fact (local gas is convenient) will always be "stronger" than the reason for the precedent outcome, from Heidi's point of view. Again, there is no real limit on what Heidi can decide.

A fortiori decisionmaking has one virtue: it taps the ability of reasoners to make comparative judgments. Comparing the degree to which a certain property is present in two objects - light A is brighter than light B - is an easier task for the human mind to manage than determining an absolute value - how bright is light A?[43] Thus, judges can make *a fortiori* judgments

about past and present cases with greater confidence than they can assess present cases in isolation. Yet this does not mean that judges can reason from case to case without more. A comparison of cases is possible only by reference to a general proposition that identifies which features the cases should be compared. To know that lights A and B should be judged on the scale of brightness, one first must have in mind a rule, "choose the brightest light."

Distinguishing Precedents. A third form of analogical decisionmaking, very popular among courts, is the use of *dissimilarities* to avoid the implications of precedent rules. If a new case falls within the terms of a precedent rule, but includes facts that are not specifically mentioned in the rule and were not present in the precedent case in which the rule was announced, the court can "distinguish" the new case and reach a result contrary to what the rule prescribes.[44]

Distinguishing precedents can be seen as the reverse of expansion of precedents on the basis of similarity: here, the court limits the effect of precedents on the basis of dissimilarity. The process of distinguishing precedents can also be conceived of as a reverse *a fortiori* calculation. The new court is free to reach a new result if the facts of the new case provide weaker support for the precedent outcome than the facts of the precedent case.[45]

For example: Andrei is considering a nuisance claim against Herman, who is keeping a large dog in a residential neighborhood. He discovers a prior case in which Heidi ordered Karl to give up his ocelot and stated that "large animals in residential neighborhoods are nuisances per se." By the general terms of Heidi's rule, Herman's dog must go. According to conventional understanding, however, Andrei can distinguish the precedent rule on the ground that Herman's dog, unlike Karl's ocelot, is a domestic animal, and the rule does not say in so many words that large domestic animals are nuisances per se. As a consequence, the precedent rule is modified to provide that "large wild animals in residential neighborhoods are nuisances per se."

The first point we wish to make about the practice of distinguishing is that it is not, as is sometimes suggested, a qualified version of the rule model of precedent.[46] Andrei appears to consult a precedent rule (no large animals), identify a fact about Herman's case that is not named in the predicate of the rule, restate the rule in a modified form (no large wild animals), and apply it to the case before him. But in fact, the precedent rule plays no rule in Andrei's decision.

To see this, suppose that the new case before Andrei is the case of Jerome, who is keeping a pet crocodile in his home. Andrei is sympathetic to Jerome. Suppose further that in the precedent case, Heidi ordered Karl to remove his ocelot from a

residential neighborhood and stated a rule, "wild animals in residential neighborhoods are nuisances per se." To distinguish this precedent, Andrei can point to the fact that Jerome's crocodile, unlike Karl's ocelot, has no fur. The precedent rule does not specifically mention animals without fur, therefore Andrei is free to decide in favor of Jerome. Moreover, this type of distinction will always be possible, because no precedent rule can be specific enough to cover all the particulars of all future cases. No matter what the rule, Andrei will be able to find some fact about Jerome's case that the rule does not particularly name. It follows that the rule has no constraining effect on the outcome of the case.

Joseph Raz has suggested that the practice of distinguishing precedents, as conventionally understood, constrains judges by limiting the manner in which they can modify precedent rules.[47] According to Raz, a judge seeking to distinguish a precedent rule must restate the rule in a way that meets two conditions: the modified rule must be the precedent rule with some further condition added, and the modified rule must support the outcome of the precedent case. He illustrates with an example in which the precedent case involved facts *a*, *b*, *c*, *d*, and *e*, the result was *X*, and the opinion announced a rule "if *A*, *B* and *C*, then *X*." The new case involves facts *a*, *b*, *c*, *d*, and *f*, but not *e*. The court can distinguish the new case and announce a modified rule

"if *A*, *B*, *C*, and *E*, then *X*," or a modified rule, "if *A*, *B*, *C*, and not *F*, then *X*." But it cannot announce a modified rule "if *A*, *B*, *C*, and not *D*, then *X*, because this rule does not support the outcome of the precedent case.[48]

In our view, this constraint is illusory. Assume again that in Karl's case, Heidi announced the rule "wild animals in residential neighborhoods are nuisances per se." Andrei distinguishes Jerome's case on the ground that Jerome's crocodile has no fur. He then announces a rule, "furry wild animals in residential neighborhoods are nuisances per se." This may not be an ideal rule, and it authorizes a result that seems contrary to the values the precedent rule was designed to protect; but it meets Raz's two conditions: it is the precedent rule with a condition added, and it justifies the outcome of the precedent case. Nor do Raz's conditions guarantee that the modified rule will be similar in effect to the precedent rule. Andrei could announce a rule, "wild animals that are three year-old ocelots with one lame foot are nuisances per se" without running afoul of the supposedly constraining conditions. But the pattern of future nuisance decisions under the rule will be radically different from the pattern one would have expected under Heidi's rule, "wild animals are nuisances *per se*."

Raz alludes to a third possible condition, that the court should adopt "only that modification which will best improve the

rule."[49] From the standpoint of a judge who thinks the precedent rule is misconceived, however, any narrowing of the rule is an improvement, and the narrowest version may be the best, however ungainly. A condition requiring that any modification of the precedent rule must serve the purposes of the rule, or that any modification must conform to common sense, might help to solve the problem.[50] But these conditions are too indeterminate to provide effective constraint.

Thus, when judges distinguish precedent rules, the precedent rules have no constraining effect, either on the outcomes of new cases or on the content of the rules announced by new judges. When the new court announces a "modified" rule, it is not following precedent but acting as a lawmaking authority in its own right. The new court, not the precedent court, is the author of the rule.

Beyond this, many of the observations we have already made about analogical decisionmaking apply equally to the dis-analogies used to distinguish precedents. The possibilities for factual distinction between any two cases, like the possibilities for findings of factual similarity, are infinite. Further, as in the case of *a fortiori* decisionmaking, the factual descriptions provided by precedent judges place no meaningful limit on judges' ability to distinguish new cases because current judges are likely to assume that facts not actually mentioned in precedent

opinions were not present.[51] The outcome of the prior case does not in itself illuminate which dissimilarities are important. Therefore, the practice of distinguishing is most plausibly and appealingly understood as a process of ordinary reasoning that refers to moral principles or rules to identify important differences among cases, rather than a decisionmaking method in which the outcome of one case bears directly on the outcome of another. So understood, findings of dissimilarity, like findings or similarity, do not entail a form of "legal" reasoning that differs from the reasoning used in any other field.

Summary: Why Purely Analogical Decisionmaking Does Not Exist. Analogical reasoning is supposed to act as a constraint on judicial decisionmaking, either dictating parallel results *a fortiori*, dictating parallel results in similar cases, or determining when judges may avoid precedent rules. We hope we have shown that it does none of these things.

Analogical decisionmaking based on factual similarity between cases is either intuitive or deductive. If the process of identifying important similarities is intuitive, the precedent case does not constrain the outcome of the new case in any predictable or even detectable way. If the process is deductive, the rules or principles that govern similarity, rather than the outcome of the precedent case, determine the result of the new case.

A precedent case cannot determine the result of a new case *a fortiori* because some fact about the new case can always be cited as weighing in favor of a different result and therefore dispelling the *a fortiori* effect of the precedent. Moreover, the notion of weighing sets of facts is problematic. To "weigh" two different sets of facts, a judge identify a common metric for comparison. If such a metric exists at all, its application to a body of precedent that includes incorrect decisions will result in legal chaos.

Finally, distinguishing precedent rules is an open-ended process in which the precedent rules themselves have no constraining effect. Rather than applying modified precedent rules, judges in new cases exercise rulemaking authority, constrained only by such limits as there may be on findings of dissimilarity. Findings of dissimilarity, however, can only be limited by independent principles or rules that establish the importance of particular facts. The prior decisions themselves ultimately are inert.

There is one possible qualification to what we have just said. We noted in our discussion of constraint by similarity that a court might base a determination of similarity, not on an independent moral principle or rule, but on a "legal" principle that explains precedent cases. If so, precedent cases might constrain current outcomes by restricting the content of the

legal principle on which the analogy is based. We take up, and reject, this possibility in the next section.

Reasoning from Legal Principles

We have argued that analogical reasoning does not exist, apart from supportin[52]g general rules. To the extent that the analogies are supported by moral principles, morally justified rules, or serious precedent rules, analogical reasoning is not a special form of reasoning known to lawyers, but an exercise in ordinary moral, empirical, and deductive reasoning. There remains, however, one alternative possibility, which has played a leading part in the mystification of legal reasoning: the possibility of reasoning from legal principles.

The idea that judges decide cases by reasoning from legal principles has a venerable history and a strong resonance for most lawyers and judges. According to this view of legal reasoning, a judge presiding over a dispute surveys the body of legal precedents, formulates a principle that explains them, then applies the principle to determine the rights of the parties in the pending case.[53] Law students are taught to reason in this way, judicial opinions follow this pattern, and traditional academic commentary employs a similar method to explain the law and propose reform.

The Nature of Legal Principles. The best known and most

rigorous account of the process of reasoning from legal principles comes from Ronald Dworkin.[54] Dworkin describes legal principles as the morally best principles capable of explaining a substantial proportion of past legal decisions. More precisely, two criteria govern the formulation of legal principles: legal principles must satisfy a threshold requirement of "fit" with existing legal materials, and they must come as close as they can, given the requirement of fit, to being morally ideal.[55]

Legal principles do not dictate outcomes in the manner of rules; rather, they are "starting points" for decisionmaking,[56] which "weigh" in favor of outcomes.[57] At the same time, legal principles are authoritative in the sense that the combination of legal principles applicable to any case determines the judge's decision. Other legal materials do not directly govern judicial decisionmaking, but serve only as data points for construction of legal principles.[58] Effectively, therefore, legal principles make up the content of the common law.

For example: Heidi must decide the case of Roscoe, who is planning to open a paintball arena a residential neighborhood. Surrounding owners argue that a paintball arena will increase traffic and noise and should be enjoined as a nuisance. The parties refer to a number of prior nuisance cases: in one line of cases, courts enjoined defendants from keeping a bear, an ocelot, and a crocodile, respectively, in residential neighborhoods,

citing danger to the safety of homeowners. In another line of cases, courts declined to enjoin a tennis club, a bowling alley, a golf course, and a rifle range. An archery range, however, was enjoined. Courts have also permitted a day care center, a halfway house serving non-violent offenders, and a carefully managed sewage treatment plant to operate in residential neighborhoods. From these precedents, Heidi abduces a legal principle: landowners in residential neighborhoods are at liberty to pursue activities that pose no significant risk to human safety or health. If Roscoe can show that the safety risks of paintball are minimal, and if no other principles are in play, Heidi will then deny the injunction and enter a judgment for Roscoe.

One use (or purported use) of legal principles is to derive solutions to new cases from past decisions. Heidi's decision in favor of Roscoe, for example, can be viewed as an extension of the line of cases permitting non-dangerous recreational activities in residential neighborhoods by means of a principle that ties those cases together and explains their relation to other cases. Legal principles can also be used to avoid rules announced in past cases. Suppose, for example, that in the prior case involving an archery range, the court announced a rule, "sports involving mechanically enhanced projectiles are nuisances per se in a residential neighborhood." In the sport of

paintball, players use guns to shoot paint at one another; therefore, the precedent rule, treated as a serious rule, calls for an injunction. In a regime governed by legal principles, however, rules do not operate as serious rules, but only as evidence of legal principles. It follows that legal principles override announced rules. Heidi can conclude that the principle that best supports both the pattern of past outcomes and the precedent rule is the principle that owners are at liberty to pursue activities that pose no significant risk to health or safety. This principle explains the outcome of the archery case and is arguably consistent with the purposes of the no-mechanically-enhanced-projectile rule; at the same time, it permits a decision for Roscoe, contrary to the terms of the rule.

Descriptions of legal principles vary as to the sources from which such principles are drawn and with which they must "fit." Some accounts suggest that, as far as the common law is concerned, only the facts and outcomes of past decisions are relevant; the current judge is free to disregard rules and other statements found in past opinions.[59] This description of legal principles connects them to analogical reasoning: legal principles are the generalizations drawn from past results, which judges can then use to identify relevant similarities among cases.

In other accounts, rules and principles set forth in prior

opinions, as well as facts and outcomes, are pertinent to the content of legal principles.[60] But here a distinction must be drawn: a judge reasoning from legal principles treats past statements as data from which to derive a principle; disposition of the case is then governed not by the past statements but by the principle they are found to support. If the judge treats past statements as direct constraints on his or her decision, the judge is not applying a legal principle in the Dworkinian sense, but deducing an outcome from posited precedent rules.

Legal principles, therefore, are fundamentally different from legal rules. The difference is not a function of the form of the prior judge's statement but of the role it plays in the current judge's decision. If Heidi decides for Roscoe because prior judges have stated that activities that pose no significant risk to human health or safety are permissible in residential neighborhoods, she is treating past statements as rules. If she decides for Roscoe because she believes past judicial statements about safety support a principle that activities that pose no significant risk to human health or safety are permissible, she is following the method that Dworkin recommends.

Another way to put this is that a judicial rule is a norm posited by a prior judge.[61] The precedent judge acts as lawmaker, exercising authority by announcing a rule.[62] A principle is not posited, but organic. Due to the dimension of

fit, it changes as the body of legal decisions changes over time.[63] The lawmaker is the current judge, who defines and applies a principle that appears consistent with the decisions and statements of past judges. Future judges, however, will remake the principle as they decide the cases that come before them against the background of precedent cases as those stand at the time of their decisions. Thus, legal principles are not posited by past judges; nor are they posited by the current judge who constructs them for the purpose of deciding a case.

Rules also differ from legal principles in that they determine the results of future cases that fall within their terms. Legal principles, in contrast, are not determinative of outcomes. Instead, they are reasons for decision that have "weight" when they come in conflict with other legal principles. The outcome of any given case depends on the balance of applicable principles.[64] For example, the legal principle in Roscoe's case (landowners in residential neighborhoods are at liberty to pursue activities that pose no significant risk to human safety or health) might be restated as two principles: a principle that owners should be allowed the maximum use of their property and a competing principle that owners must not use their property in ways that pose significant health or safety risks on neighbors. If the latter of which proves to be of greater weight, Roscoe is enjoined.

At the same time, legal principles are not moral principles; they are principles internal to law. The dimension of fit requires that legal principles must conform to the pattern of past decisions, even if, as a consequence, the principles that result are morally flawed.[65] Legal principles need only be the morally best principles that pass the threshold of fit.

Thus, Heidi may believe that paintball has no redeeming social value that justifies the burdens of traffic and noise it imposes on surrounding owners. More generally, she may believe that the correct moral principle for nuisance cases holds that landowners may not engage in activities that pose significant burdens of any kind on surrounding owners unless those burdens are justified by the importance of the activity as a service to the community. In Roscoe's case, however, prior decisional history appears to rule out Heidi's ideal principle. Recall that in prior cases, courts enjoined several owners from keeping wild animals and enjoined an owner from opening an archery range, but permitted other owners to maintain a tennis club, a bowling alley, a golf course, a rifle range, a day care center, a halfway house, and sewage treatment plant. A perfect fit with these decision is not required: for example, Heidi probably can disregard the rifle range case as a mistake. But three of ten other precedents permitted recreational uses that were likely to increase traffic and noise. Therefore the threshold of fit seems

to require that Heidi modify her ideal principle to allow uses that do not fill an important social need, unless those uses pose a threat to health or safety. In other words, given the inevitable fact of erroneous outcomes in the past, legal principles are the most morally attractive morally *incorrect* principles that fit the background of prior decisions.[66]

A further observation, related to the last, is that the process of formulating legal principles is not a process of reflective equilibrium.[67] The structure of reasoning is similar - the judge refers to particular judgments and formulates a principle to support them; but the effect is radically different. Legal principles must be consistent with a certain (undefined) percentage of the judgments with which the reasoner begins. Not all past decisions can be rejected. In the case of reflective equilibrium, the reasoner can reject any and all judgments that cannot be explained by what the reasoner holds confidently to be a morally correct principle.

A second, closely related difference between judicial formulation of legal principles and the method of reflective equilibrium is that the judgments from which the reasoner (the current judge) draws a legal principle are not moral judgments, but authoritative acts by past judges. They may be morally correct or incorrect, but this does not matter; until the threshold of fit has been passed, the fact that past decisions

were wrong does not alter their effect on the content of the principle. In contrast, the judgments from which a moral principle is drawn in the process of reflective equilibrium are moral judgments, whose effect on outcome of reasoning depends on their ability to survive reflection.

As with analogical reasoning, much of the appeal of legal principles lies in the compromise they appear to allow between unconstrained natural reasoning and serious rules that preempt reasoning.[68] Judges reasoning from legal principles are constrained by the limits that institutional history (in the form of past decisions) places on the principles' content. At the same time, judges need not set aside moral values or abstain from exercising their powers of reason when deciding cases. They must formulate and apply the most morally attractive principles that fit with institutional history, and in doing so they can discard at least some past mistakes.

Another part of the allure of legal principles is the promise of a body of law shaped by internal coherence.[69] Legal principles maintain consistency among past, present, and future decisions and across doctrinal boundaries. A regime of legal principles, in which coherence provides a standard for development of law, has the added advantage of providing an answer (although not necessarily a unique answer) to every dispute, which is grounded in preexisting law.[70] The right

outcome in any new case is the outcome that, in the judge's view, best fits what has come before.

Or so it may seem. We do not accept the claims made for this form of decisionmaking. As a matter of logic, we do not believe legal principles are viable as constraints on judicial reasoning. If they do constrain, we believe they are a vice, not a virtue, of legal decisionmaking.

Faulty Logic. Working from Dworkin's description of legal principles, we can demonstrate in two ways that legal principles are incapable of constraining judicial decisions. Our first argument is based on the notion of weight: the effect of a legal principle on the outcome of any dispute is a function of its weight in competition with other principles.[71] The process by which a judge is to calculate a principle's weight, however, is mysterious.[72]

Recall that, by hypothesis, legal principles differ from morally correct principles because they must be made to fit a body of decisions that is sure to contain some mistakes. It is possible that in a given area of law, so few decisions will be mistaken that the legal principle suggested by past cases will correspond to a correct moral principle. But it is equally possible, and probably more likely, that the legal principle suggested by past decisions in an area of law will not pass the threshold of fit unless it conforms to a significant number of

past errors. The best legal principle will then be morally incorrect. Further, assuming that there are both morally correct and morally incorrect legal principles immanent in existing legal materials, it must be the case that morally incorrect legal principles will sometimes outweigh morally correct legal principles: otherwise, all outcomes would follow from morally correct principles and past outcomes would have no practical effect on present decisions. Given these assumptions, the question for the judge becomes, what weight should a morally incorrect legal principle have in competition with other correct and incorrect principles?

There is nothing in the past decisions themselves that can determine the weight of the legal principle they support. The judge might count the number of decisions that support a particular legal principle, but the number of supporting decisions does not tell her what weight the erroneous legal principle has as a reason for decision in the current case. Nor can a judge refer to correct moral principles to assign weight to an incorrect legal principle, because correct moral principles will always dictate that incorrect principles should have no weight at all. In other words, there is no possible standard for determining the weight of incorrect legal principles: their weight must be a matter of unregulated intuition or discretion. Therefore, legal principles cannot control what the judge

ultimately decides.[73]

Our second argument to show that legal principles cannot constrain judicial decisionmaking is based on the requirement of fit with past decisions. An initial difficulty is that the necessary degree of fit cannot be specified in a non-arbitrary way. We know only that a legal principle must fit well enough with past decisions to meet the objective of coherence, and that it must fit some number of mistaken decisions if it is to be distinguished from natural reasoning. Beyond this, nothing in the idea of a legal principle tells where the threshold of fit lies and how many recalcitrant decisions the judge can ignore.[74]

But suppose we assume that judges can interpret the threshold of fit in a reasonably determinate way. This brings us to our main point, which is that the requirement of fit is not a real constraint: a judge can always devise a legal principle that fits perfectly with past cases and also applies a correct moral principle to present and future cases. To do this, the judge simply states the applicable moral principle and adds an exception describing past outcomes.[75]

For example, assume that the correct moral principle governing land use in residential neighborhoods is that landowners may not engage in activities that pose significant burdens on surrounding owners unless those burdens are justified by the activity's importance as a service to the community.

Heidi believes that, based on this principle, she should enjoin Roscoe from opening his paintball arena; however, she also believes that the correct moral principle is at odds with past decisions allowing a tennis club, a bowling alley, and a golf course to operate in residential neighborhoods (decisions *X*, *Y*, and *Z*). To escape this bind, she can formulate a legal principle, "landowners may not engage in activities that impose significant burdens on surrounding owners unless those burdens are justified by the activity's importance as a service to the community; *except* that they may operate the specific tennis clubs, bowling alleys, or golf courses permitted in past cases *X*, *Y*, and *Z*." This principle supports all past decisions but favors an injunction against Roscoe. Given that the past cases are past, and that *X*, *Y*, and *Z* can never recur, the principle also favors morally correct outcomes in all future cases. In its prospective effect, Heidi's legal principle is indistinguishable from the correct moral principle. In practice, therefore, the "legal" component of the principle is inert.

If judicial maneuvering of this kind seems implausible, recall that the only cases in which legal principles constrain natural reasoning are cases in which the judge believes the outcome indicated by the legal principle is morally wrong. The moral superiority of a principle that applies correct moral principles with an exception for past mistakes may well

counteract its ungainly ad hoc formulation. In fact, if we take Dworkin's criteria for legal principles literally, it appears that Heidi must formulate her legal principle this way, in order to achieve the maximum of both fit and moral attractiveness.

We have addressed our arguments so far to Ronald Dworkin's account of legal principles, in which a judge constructs a legal principle from the data of past decisions to resolve a current dispute. Suppose instead that we take a conventional view of legal principles: legal principles are the decisional principles generally agreed upon within the legal profession.[76] Could such a principle constrain judicial decisionmaking? We do not think so.

We note, first, that to count as legal principles, conventional legal principles must operate as legal principles, not as rules. They must be organic rather than posited, changing as the body of professional opinion changes. Their content must be governed at least in part by coherence with past decisions. They must influence future decisions by exerting weight, rather than determine future decisions by prescribing results.[77]

The weight of a conventional legal principle, as well as its content, is established by professional agreement. There are two ways to conceive of legal principles as products of convention. First, legal professionals might agree on the principles themselves: legal principles, and their weights, are constituted

by professional agreement. We can reject this understanding quickly. If legal principles are *posited* by the profession - for example, in judicial opinions or legal texts - they do not count as legal principles, but as posited rules. If, on the other hand, they arise out of agreement alone, they are self-referential. Professional agreement cannot create a preexisting principle, and if the principle does not predate professional agreement, the profession cannot be *agreeing upon* the principle but rather, must be generating it. If the profession generates the principle, it is, once again, a posited rule, not something distinct.

Alternatively, legal professionals might agree, not directly about the content of legal principles, but about how particular cases should be decided. In that case, legal principles might be conceived of as the best principles that conform to particularized professional judgments. The main difficulty with this account of legal principles is that it depends on the unlikely event of broad professional consensus. To the extent that professionals disagree about outcomes, there are no legal principles. A further problem is that when professionals do agree on particular outcomes, it is not at all clear that their agreement on outcomes reflects an agreement on legal principles and their comparative weights. Consensus about outcomes might just as well follow from agreement on an unstated moral rule. In

other words, professional judgment about outcomes might be shaped, not by institutional history (in the manner of a legal principle) but by moral principles, including principles that give moral weight to past decisions.

Pernicious Effects. We have argued that judges cannot reason from legal principles: legal principles are logically incapable of imposing constraint. At this point, we shall suspend logic and assume both that past decisions shape legal principles and legal principles affect the outcome of current decisions. Our argument here is that legal principles, if in fact they are effective, can seriously impair the quality of decisionmaking.

Our basic argument is simple. Legal principles incorporate moral error into law without the compensating benefits of serious rules. We have already explained that legal principles are imperfect from a moral point of view because they must conform to past decisions, some of which will be moral mistakes. As a result, they are inferior to ideal natural reasoning, which perfectly reflects moral ideals.[78]

Rules too are morally imperfect. They are based on moral principles, but to guide decisions, they must generalize in ways that lead to morally mistaken outcomes in some cases. They may also fall short of moral standards due to obsolescence or faulty design. Rules, however, compensate in several ways for the moral

mistakes they produce. They settle moral controversy, preempt errors by individual decisionmakers, provide coordination, and make decisionmaking more efficient.[79]

Legal principles provide none of these benefits. Principles whose content is determined by a standard of coherence with past decisions may yield answers to legal questions, but they will not yield unique answers because more than one principle may satisfy the requirement of coherence. Further, even if we assume that morally incorrect legal principles can have weight and that judges will not circumvent the requirement of fit through creative use of exceptions, judges have considerable freedom in reasoning from legal principles. To formulate and apply a legal principle, a judge must draw tentative principles from past cases, determine which among eligible principles is morally best, and assign weight to competing principles. The risk that judges will err as they proceed through these steps is at least a great as the risk of error in natural reasoning. The process of decisionmaking under legal principles is just as complex as natural reasoning, if not more so. Because judges may vary in the legal principles they extrapolate from precedents and the moral values that guide them in selecting principles and assigning them weight,[80] legal principles cannot provide the benefits of coordination and will thus lead to further moral costs beyond their incorporation of past errors.

Not only do legal principles fail to provide the benefits of serious rules, they override rules. According to some descriptions at least, rules announced in prior opinions are among the legal materials with which legal principles must be made to fit.[81] Once the threshold of fit has been passed, however, rules can be discarded; and in any event precedent rules do not prescribe results: they can only help to shape legal principles. In a regime of legal principles, therefore, there can be no serious rules.

The Failure of Proposed Justifications for Legal Principles. Various normative arguments have been made on behalf of legal principles; in our view, none succeed. One such argument is that reasoning from legal principles promotes equality or "integrity." The requirement of fit with past decisions means that past and present litigants who are similarly situated (as defined by the legal principle itself) will be treated alike.[82] More generally, legal principles drawn from past decisions provide judges with a comprehensive set of decisional standards that unite the body of law and reflect a "coherent conception of justice and fairness" applicable to all parties in all cases.[83]

We have already explained why we reject like treatment of litigants over time as a moral ideal.[84] Legal cases are never identical, and past opinions offer limited factual descriptions that can filter out important differences. More substantively,

aside from the effects of justified reliance, morally incorrect decisions in the past do not justify morally incorrect decisions in the present and future. Equality is theory-dependent: it requires, if anything, that any given moral principle be applied equally to all. A lapse in the past is a cause for regret but not for additional moral wrongs.

For those who are convinced that equal treatment among litigants is a moral good even when governing moral principles are misapplied, we suggest that legal principles are not a reliable source of consistency in judicial decisionmaking. Given the variability of legal principles among judges and the changeability of legal principles over time, past and present litigants may not in fact be treated alike. Serious rules at least guarantee like treatment of all cases that fall within the classes defined by a rule; legal principles are too unstable to guarantee a similar level of consistency. And, as we have noted, legal principles makes serious rules impossible.

A second, related claim on behalf of legal principles is that they avoid retroactivity.[85] Natural and rule-based models of law allow judges to make retroactive decisions, in the manner of legislatures. Natural reasoning does not rely on predefined standards of decision and legal rules apply only to the classes of cases that fall within their terms; in any other case, the judge must decide what is best, all things considered, or

formulate a new rule and apply it to events that occurred before the announcement of the rule. Legal principles, in contrast, "exist" prior to their application to particular cases, as the morally best principles that explain the body of decisions to date. They are capable of resolving all possible disputes, because coherence with the past supplies a decisional standard for new cases. It follows, according to this claim, that when judges decide cases on the basis of legal principles, they are enforcing preexisting rights of the parties.

This argument for legal principle fails on several grounds. First, natural decisionmaking, including natural decisionmaking in the interstices of legal rules, takes account of the moral concerns that make retroactivity a problem. Judges reasoning naturally can and must consider the effects of their decisions on justified expectations of the parties and other actors.[86] Second, it is not so clear that legal principles preexist particular decisions in a way that matters morally. As we explained in comparing legal principles with rules, legal principles are indeterminate in several ways.[87] Indeterminacy means, in turn, that the prior "existence" of legal principles is no guaranty against unfair surprise.

Moreover, as Ken Kress has shown, the content of legal principles changes over time.[88] Legal principles, at least as defined by Dworkin, are the morally best principles that pass a

threshold of fit with prior decisions. Assuming that judges do not simply combine correct moral principles with exceptions for past cases, and assuming that the set of past decisions includes some mistakes, the best available legal principle will always be a principle that fits the minimum allowable number of past decisions. Beyond this threshold, judges will discard mistaken precedents in order to formulate morally preferable principles. Meanwhile, new decisions, are constantly entering the body of law. As this occurs, judges will discard more past mistakes, new mistakes will need to be accounted for, and legal principles will change accordingly. Legal principles, in other words, are organic rather than fixed, and it is impossible to predict with confidence their content at any time. As Kress demonstrates, they may even change between the time of the disputed transaction and the time the dispute is adjudicated, thus resulting in retroactivity. In other words, reasoning from legal principles may be less rather than more capable of avoiding pernicious retroactivity than natural reasoning on the rule model.

Summary: Why Legal Principles Do Not and Should Not Have a Role in Judicial Decisionmaking. For many lawyers, the idea of legal principles seems to capture an important part of legal reasoning. As a matter of logic, however, legal principles cannot operate in the way their proponents suggest, as a medium by which past decisions constrain the outcome of natural

reasoning in current cases. The notion of weight is too elusive, and the criterion of fit with prior decisions is too malleable, to sustain the argument that legal principles guide judges in reaching decisions.

Perhaps if judges took the requirement of fit very seriously - legal principles must explain all prior decisions without resort to awkward exceptions - past decisions would exert some (vague) power over current outcomes. The effect, however, would be pernicious: legal principles would entrench past errors without securing the benefits associated with legal rules. In any event, coherence would eventually break down under a strict standard of fit. Not surprisingly therefore, proponents of legal principles do not support a standard of this kind.

Accordingly, we eliminate from our account of legal reasoning the entire apparatus of legal principles. To the extent that analogical reasoning rests on similarities identified by reference to legal principles, we also exclude analogical reasoning from our account. In the next chapter, we suggest that the process of drawing analogies and searching past decisions for evidence of principles may have a practical function for judges. But legal principles, and analogies based on legal principles, do not determine the outcomes of cases. Judges who purport to reason on this basis are either reasoning naturally under the guise of legal principles or reasoning deductively from

informally posited rules.

1. See, e.g., Edward H. Levi, An Introduction to Legal Reasoning 1-6 (Chicago: Chicago University Press 1948); Lloyd L. Weinreb, Legal Reason: The Use of Analogy in Legal Argument (New York: Cambridge University Press 2005). For explanations and defenses of analogical reasoning in various forms, see Steven J. Burton, An Introduction to Law and Legal Reasoning 25-41 (Boston: Little, Brown 1995); Joseph Raz, The Authority of Law 183-89, 201-06 (Oxford: Clarendon Press; New York: Oxford University Press 1979); Cass R. Sunstein, Legal Reasoning and Political Conflict 62-100 (New York: Oxford University Press 1996); Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 Harvard Law Review 925, 925-29, 962-63 (1996); John F. Horty, The Result Model of Precedent, 10 Legal Theory 19 (2004); Grant Lamond, Do Precedents Create Rules?, 11 Legal Theory 1 (2005). See also Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 77-87 (Boston; Toronto: Little, Brown 1960) (discussing "the leeways of precedent"); Karl Llewellyn, The Bramble Bush: On Our Law and Its Study 66-69 (Dobbs Ferry: Oceana Publishing 1960) (same).

2. See, e.g., Anthony Kronman, The Lost Lawyer 109-62, 170-85, 209-25 (Cambridge: Belknap Press of Harvard University Press 1995); Levi, supra note 1, at 4; Charles Fried, The Artificial Reason of the Law or: What Lawyers Know, 60 Tex. L. Rev. 35, 57 (1981).

3. Ronald Dworkin, Law's Empire 228-32, 240-50, 254-58 (Cambridge: Harvard University Press 1986); Ronald Dworkin, Taking Rights Seriously 22-31 (Cambridge: Harvard University Press 1978); see also Burton, supra note 1, at 105-11 (discussing "purposes" embedded in the common law); Steven Burton, Judging in Good Faith 35-68 (Cambridge; New York: Cambridge University Press 1992); Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law lxxix-lxxx, 545-96 (William N. Eskridge, Jr. & Phillip P. Frickey, eds., New York: Foundation Press 1994)(discussing "reasoned elaboration" of law); Roscoe Pound, An Introduction to Legal Philosophy 56 (New Haven: Yale University Press 1922); Sunstein, supra note 1, at 30-31; Kenneth Henley, Abstract, Principles, Mid-Level Principles, and the Rule of Law, 12 L. & Phil. 121 (1993); Roscoe Pound, Survey of the Conference Problems, in Conference: The Status of the Rule of Judicial Precedent, 14 University of Cincinnati Law Review 324, 328-31 (1940).

4. See Burton, supra note 1, at 27-41; Levi, supra note 1, at 1-2; Weinreb, supra note 1, at 8, 78-90. Weinreb states, for example, that "the arguments of lawyers and judges resemble a Tinker-toy construction, one case being linked to another by

factual similarities." Weinreb, supra, at 8.

5. See Burton, supra note 1, at 31-41 (asserting that in drawing analogies, judges must make an unconstrained "judgment of importance"); Levi, supra note 1, at 2-3 ("It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification"); Weinreb, supra note 1, at 160-62 (arguing that analogical reasoning is central to the "rule of law," properly understood as combination of justice and certainty).

6. See, e.g., Burton, supra note 1, at 26.

7. See Sunstein, supra note 1, at 65-69.

8. See, e.g., Goddard v. Winchell, 52 N.W. 1124 (1892) (determining ownership of a fallen meteor: meteors are like rocks). This us of analogy is discussed in Levi, supra note 1, at 1-2; Raz, supra note 1, at 201-06.

9. See, e.g., Edwards v. Sims, 24 S.W.2d 619 (1929) (finding caves to be indistinguishable from underground minerals for purposes of trespass). This type of analogy is discussed in Rorty, supra note 1; Lamond, supra note 1.

10. See Hannah v. Peel, [1945] K.B. 509 (1945) (drawing distinctions among finders of lost property). This practice is discussed in Raz, supra note 1, at 183-89; Lamond, supra note 1, at 9-15.

11. See Chapter Two, supra, text at notes 20-21.

12. See Melvin Aron Eisenberg, The Nature of the Common Law 84 (Cambridge; London: Harvard University Press 1988); Weinreb concedes this point but insists that courts can determine relevant similarity without the aid of rules. See Weinreb, supra note 1, at 109-15.

13. See Eisenberg, supra note 12, at 87; Peter Westen, On "Confusing Ideas:" Reply, 91 Yale L.J. 1153, 1163 (1982). Schauer suggests that it is possible to induce a rule from the facts stated in a prior opinion, based on natural kinds and cultural and linguistic conventions; however, the rule, rather than the facts, governs the later decision. See Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Life and Law 183-87 (Oxford: Clarendon Press 1991) Similarly, Scott Brewer argues that judges can "abduce" an

analogy-warranting rule from the facts of prior cases. From that point on, however, the analogy-warranting rule (confirmed by more abstract analogy-warranting rationales) determines the outcome of the present case. See Brewer, supra note 1, at 962-65; see also Weinreb supra note 1, at 19-39 (arguing that Brewer's account underestimates the force of pure analogy in decisionmaking).

14. See Weinreb, supra note 1, at 12-13; 77-103, 107-16.

15. Adams v. New Jersey Steamboat Co., 151 N.Y. 163 (1896).

16. Id. at 166-70.

17. See Weinreb, supra note 1, at 44-45.

18. The court referred to "considerations of public policy" common to steamboats and inns, and also to passenger expectations in locked rooms, and the opportunity for theft. Id. at 166-69. Brewer provides an "interpretive reconstruction" of the case as relying on an analogy-warranting rule turning on the passenger's confidence in the proprietor and the proprietor's opportunity for theft. See Brewer, supra note 1, at 1003-06.

19. On reflective equilibrium, see John Rawls, A Theory of Justice 14-21, 43-53, 578-82 (Cambridge: Belknap Press 1971); Chapter Two, supra, at note 14 and accompanying text.

20. It may be that the "craft" often attributed to judges and lawyers is simply familiarity with many such low-level rules. See Kronman, supra note 2, at 109-62, 295; Llewellyn, The Common Law Tradition, supra note 1, at 213-32; Fried, supra note 2, at 57.

21. See Dworkin, Law's Empire, supra note 3, at 230-32, 254-58; Dworkin, Taking Rights Seriously, supra note 3, at 115-18.

22. See text at notes ?, infra.

23. See, e.g., George Lakoff & Mark Johnson, Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought (New York: Basic Books 1999); George Lakoff & Mark Johnson, Metaphors We Live By (Chicago: University of Chicago Press 1981); Howard Margolis, Patterns, Thinking, and Cognition: A Theory of Judgment 1-6, 42-86 (1987).

24. At least, it is not reasoning as we have defined it in reference to authoritative decisionmaking. We stated in Chapter One that reasoning means "conscious, language-based deliberation about reasons for the choice ultimately made." Chapter One,

supra, text at note 3; see Jonathan Haidt, The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment, 4 Psychological Review 814, 818 (2001). The goal of settlement that is the foundation of law as we understand it requires that authoritative decisions be reached through reasoning in this sense. Id.

Others may, of course, define reasoning more broadly for different purposes. See e.g., Lakoff & Johnson, Philosophy in the Flesh, supra note 23, at 4-5; Steven A. Sloman, Two Systems of Reasoning, in Heuristics & Biases: The Psychology of Intuitive Judgment 379 (Thomas Gilovick, Dale Griffin, & Daniel Kahneman, eds: Cambridge U. Press 2002).

An important current debate in the field of psychology concerns the respective roles of reason and intuition in moral judgment. See e.g., Haidt, supra (taking the position that the primary cause of moral judgment is intuition; reason enters in as a source of supporting arguments to justify the initial judgment to others); Sloman, supra, at 380-84 (discussing associative and rule-based reasoning).

25. See Weinreb, supra note 1, at 91-92. Levi offers the following insight:

> "If this is really reasoning, then by common standards, thought of in terms of closed systems, it is imperfect unless some overall rule has announced that this common and ascertainable similarity is to be decisive. But no such fixed prior rule exists. It could be suggested that reasoning is not involved at all; that is, that no new insight is arrived at through a comparison of cases. Bur reasoning appears to be involved; the conclusion is arrived at through a process and was not immediately apparent. It seems better to say there is reasoning, but it is imperfect."

Levi, supra note 1, at 3. See also Roscoe Pound, Law Finding Through Experience and Reason 45-65 (cautioning against confusion of analogical reasoning with "reason").

26. This is structurally similar to the form of analogical reasoning described by Scott Brewer. According to Brewer, the analogical reasoner abduces a potential rule of decision from the common facts of the precedent case and the new case (the "target"), tests the rule against a broader rationale, then, if the rule proves satisfactory, deduces an outcome. See Brewer, supra note 1, at 962-65. Brewer assumes, however, that the reasoner is bound to apply a rule abduced from existing precedents. In other words, the decisional rule generated by Brewer's reasoner is a *legal* principle of the kind we reject in the next section of this chapter.

In contrast, the judge in our description searches for a morally sound rule that supports her intuition of similarity. If she cannot formulate a satisfactory rule, the intuition of similarity is unsupported and will not justify a decision.

27. Brian Leiter finds support for judgments of this kind in Heidegger. See Brian Leiter, Heidegger and the Theory of Adjudication, 106 Yale L.J. 253, 259-61, 277-78 (1996) (criteria of relevant similarity, on which analogical decisionmaking depends, "can never be made fully explicit;" therefore judicial decisionmaking resists theorization or critical evaluation and is best understood as practical wisdom).

28. See Chapter One, supra, text at note 3.

29. See Larry Alexander, Constrained By Precedent, 63 S. Cal. L. Rev. 1, 29-30 (1989); Horty, supra note 1; see also Lamond, supra note 1 (defending what appears to be a from of *a fortiori* decisionmaking).

30. At this point, a fortiori decisionmaking may appear to collapse into rule-bound decisionmaking: all bears are nuisances. See Alexander, supra note 29, at 43. John Horty points out, however, that an important difference remains, in that the later court could find that an additional fact, present in the later case but not in the precedent case, favors the opposite fact. In the later case, for example, the cage may be stronger or the neighborhood differently configured. See Horty, supra note 1, at 28-29.

31. See Raz, supra note 1, at 187; Lamond, supra note 1, at 16.

32. See Horty, supra note 1, at 23-27 (using a set of equations based on the "polarities" of different facts to explain *a fortiori* reasoning); Lamond, supra note 1, at 15 (acknowledging that, because "cases come before courts with all of their multitudinous facts," courts must determine the relevance of certain facts). See also Burton, supra note 1, at 31-41 (discussing, somewhat mysteriously, the need for a "judgment of importance).

33. See Lamond, supra note 1, at 16 (appearing to rely on the precedent court's explanation of why particular facts justified a conclusion as establishing the relevance of those facts).

34. Horty argues that it is possible for precedents to have an *a fortiori* effect in the absence of a metric for comparing the weight of different facts. If a precedent case is decided for

the plaintiff, and if all the facts that supported the plaintiff in the precedent case are present in a later case, *and* all the facts that support the defendant in the later case were present in the precedent case; then the later case follows *a fortiori* from the precedent case. Horty, supra note 22, at 23-24. This seems correct, but the constraint provided by the precedent is minimal. All that is needed to free the later court to decide as it believes best is a single new fact in support of the defendant.

Horty also gives the example of a case involving two precedents. In the first precedent case, a certain plaintiff-favoring fact (*f1*π) outweighed a certain defendant-favoring fact (*f1*δ). In the second precedent case, a different plaintiff-favoring fact (*f2*π) was outweighed by a different defendant-favoring fact (*f2*δ). If the later case involves the plaintiff-favoring facts present in both of the precedent cases and also the defendant-favoring fact that was outweighed in the first precedent case (*f1*π, *f2*π, and *f1*δ), the later case is governed *a fortiori* by the precedent cases. Id. at 25. But again, a single new fact is enough to dispel the *a fortiori* effect.

35. See Alexander, supra note 29, at 34-37.

36. See Bortz v. Troth, 59 A.2d 93 (Pa. 1948) (holding a gas station to be a nuisance *per se*).

37. Cf. Russell Hardin, Rational Choice, in II Encyclopedia of Ethics 1062, 1063-64 (Lawrence C. Becker & Charlotte B. Becker, eds., New York; London: Garland Publishing 1992) (discussing cardinal and ordinal utility measurement).

38. See Lamond, supra note 1, at 2-4, 16-20.

39. See id. The notion of "ratio decedendi" is discusseded in W.A.B. Simpson, The Ratio Decidendi of a Case and the Doctrine of Binding Precedent, in Oxford Essays in Jurisprudence 148, 160-63 (A.G. Guest, ed., Oxford: Oxford University Press 1961).

40. Lamond, supra note 1, at 2.

41. See Diehl v. Lockard, 385 A.2d 550 (1978)(holding a Pizza Hut to be a nuisance *per se*).

42. Lamond does not make clear whether the "reason" for the precedent outcome is the reason stated or implied by the precedent court, or a reason constructed by the later court. He says at one point that "What the precedent court decided [and therefore what the later court must accept] was that in the

context of [the precedent facts, certain facts] justified the conclusion C." Id. at 16. At another point he says that "the later court... must consider how strong the reason provided by [the facts entailed by the ratio of the precedent case] for C really is and whether it is defeated by any reason[s] based on [different facts of the later case]. Id. At yet another point, he states that "the ratio sets out the factors that ground the reason(s) in favor of the result: the later court must determine the strength of th reason in favor of the result in the precedent on the basis of those factors." Id. at 18.

43. See, e.g., William N. Dember & Joel S. Warm, The Psychology of Perception 113, 116-17 (2d ed., New York: Holt 1979); Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decison Under Risk, 47 Econometrica 263, 277 (1979); Anne Treisman, Properties, Parts, and Objects, in II Handbook of Perception and Human Performance 35-4 (Kenneth R. Boff, Lloyd Kaufman, & James P. Thomas, eds., New York; Chichester; Brisbane; Toronto; Singapore: John Wiley & Sons 1986).

44. See, e.g., Raz, supra note 1, at 185-87; Lamond, supra note 1, at 16-17. See also Robert S. Summers, Precedent in the United States (New York), in Interpreting Precedents: A Comparative Study 355, 390-92 (D. Neil MacCormick & Robert S. Summers, eds.)(Dartmouth: Ashgate 1997) (describing the practice of distinguishing as "arguing either that the material facts were different or that the substantive rationale for the ruling does not apply to the facts of the case under consideration).

45. See Lamond, supra note 1, at 17.

46. We agree with Lamond on this point. See id. at 17-18, 19-20; see also Levi, supra note 1, at 3 ("rules are discovered in the process of determining similarities and differences) . For the common view that distinguishing creates exceptions to rules, see, e.g., Eisenberg, supra note 1, at 66-68; Raz, supra note 1, 183-89; A.W.B. Simpson, The Ratio Decedendi of Case and the Doctrine of Binding Precedent, in Osford Essays in Jurisprudence 158-59 (A.G. Guest, ed., London: Oxford University Press 1961); Summers, supra note 44, at 391.

47. See Raz, supra note 1, at 1886-87.

48. Id. Raz assumes that any fact that *might* not have been present in the precedent case - that is, any fact not mentioned in the precedent opinion - can be a ground of distinction. If no mention was made of fact *f* in the precedent opinion, the court in the new case can assume that *f* is a new fact, and can announce a

modified rule "if *A*, *B*, *C*, and not *F*, then *X*." Id. at 187.

49. Raz at 187.

50. Lamond, in developing his "reason-based" account of precedent, suggests that a later court's choice of distinguishing facts is limited by a requirement that "if the difference provides an argument of the same kind as a fact that has already been rejected [as a ground of distinction by a precedent court], then the argument must be a compelling one." Lamond, supra note 1, at 21. He adds however, that when a court distinguishes on the basis of a fact that "is not of the same kind," this limit does not apply. Id.; see Simpson, supra note 46, at 174-75 (maintaining that not all factual distinctions suffice to distinguish precedents, but only those that "justify" refusal to follow the precedent).

51. See note 47 and accompanying text, supra.

52. See Pound, An Introduction to Legal Philosophy, supra note 3, at 56; Pound, Survey of the Conference Problems, supra note 3, at 328-31; Hart & Sacks, supra note 3, lxxix-lxxx, 545-96. Pound also embraced the idea that judges should acts as "social engineers." See Pound, supra note 25, at 42-43; Pound, An Introduction to Legal Philosophy, supra, at 47.

53. Zenon Bankowski, Neil MacCormick, and Geoffrey Marshall aptly refer to this as a "determinative" theory of precedent. Zenon Bankowski, D. Neil MacCormick, & Geoffrey Marshall, Precedent in the United Kingdom, in Interpreting Precedents, in Interpreting Precedents, supra note 44, at 315, 332. They explain that a theory of this kind views law as

> "Grounded in principles partly emergent from practice and custom, partly constructed our of moral or ideological elements that bring together practice and contemporary values in a coherent order... Legal rules and judicial rulings on points of law are then to be understood as 'determinations' (in the Thomist sense) of background principles - neither deductions from them nor arbitrarily discretionary decisions about them, but partly discretionary decisions as to the best way of making the law determinate for a given (type of) case... Precedent is authoritative because each decision is a determination of law, but no decision is absolutely defeasible."

Id.

54. See Dworkin, Law's Empire, supra note 3, at 230-32, 254-58; Dworkin, Taking Rights Seriously, supra note 3, at 22-31, 115-18.

55. See Dworkin, Law's Empire, supra note 3, at 228-32, 240-50, 254-58; Dworkin, Taking Rights Seriously, supra note 3, at 115-18.

56. Pound, Survey of the Conference Problems, supra note 3, at 331.

57. Dworkin, Taking Rights Seriously, supra note 3, at 26-27 ("Principles have a dimension that rules do not - the dimension of weight").

58. See Dworkin, Taking Rights Seriously, supra note 3, at 37.

59. Dworkin can be read in this way. He states, for example, that "[f]itting what judges did is more important than fitting what they said;" that "an interpretation [of precedent] need not be consistent with past judicial attitudes or opinions, with how past judges saw what they were doing, in order to count as an eligible interpretation of what they in fact did;" and that the ideal judge assigns "only an initial or prima facie place in his scheme of justification" to rationales offered by prior judges. Dworkin, Law's Empire, supra note 3, at 284; Dworkin Taking Rights Seriously, supra note 3, at 118. He adds, however, that fit with judicial opinions is "one desideratum that might be outweighed by others." Dworkin, Law's Empire, supra note 3, at 285. Cf. Dworkin, Taking Rights Seriously, supra note 3, at 110-115 (referring to the "enactment force" and gravitational force" of precedents).

60. See Hart and Sacks, supra note 3, at 369; Pound, supra note 3, at 330-31 (indicating that principles are formulated gradually as series of judges explain their reasoning y in opinions); Stephen R. Perry, Two Models of Legal Principles, 82 Iowa L. Rev. 787, 807-08 1997)(understanding Dworkinian "fit" to refer to fit with rules as well as decisions).

61. See Chapter Two, supra, text at note 52.

62. See Chapter Two, supra, text at notes 29-32.

63. See Dworkin, Law's Empire, supra note 3, at 254-58.

64. See note 57 and accompanying text, supra.

65. See Dworkin, Law's Empire, supra note 3, at 230-31, 255; Dworkin, Taking Rights Seriously, supra note 3, at 116-17.

66. See Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law 147 (Durham; London:

Duke University Press 2001); Joseph Raz, Ethics in the Public Domain 296 (Oxford: Clarendon Press; New York: Oxford University Press 1996; Larry Alexander, Precedent, in A Companion to Philosophy of Law and Legal Theory 503, 509 (Dennis Patterson, ed., Cambridge, Massachusetts: Blackwell Publishers 1996).

67. See note 19, supra.

68. See Dworkin, Law's Empire, supra note 3, at 254-58.

69. See Dworkin, Law's Empire, supra note 3, at 225, 228-32 ("The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness."); Kenneth J. Kress, Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions, 72 California Law Review 369, 370 (1984) (associating Dworkin with coherence theory); Barbara Baum Levenbook, The Meaning of a Precedent, 6 Legal Theory 185, 233-34 (2000) (interpreting Dworkin's theory of precedent as a coherence theory).

70. See Dworkin, Law's Empire, supra note 3, at 258; Dworkin, Taking Rights Seriously, supra note 3, at 81-84 (elaborating the "rights thesis"). See also Hart & Sacks, supra note 3, at 369 (referring to the common law as "a process of settlement which tries to relate the grounds of present determination in some reasoned fashion to previously established principles and policies and rules and standards).`

71. See note 57 and accompanying text, supra.

72. The following paragraphs track the argument set out in Alexander & Kress, supra note 69, at 301-06.

73. For an effort to systematize the process of weighing principles, see S.L. Hurley, Coherence, Hypothetical Cases, and Precedent, 10 Oxford Journal of Legal Studies 221 (1990) (suggesting that settled cases, actual and hypothetical, provide guidance about the relative weight of principles in particular factual settings).

74. See Dworkin, Law's Empire, supra note 3, at 255 ("different judges will set [the threshold of fit] differently").

75. See Alexander & Kress, supra note 69, at 304-06. Thus, if P_C is the correct moral principle, and P_L is the best legal

principle in terms of fit and moral attractiveness, and there are *N* incorrect past cases, C_N, then P_L is P_C - C_N. Id.

76. See Owen Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739, 744-50 (1982).

77. See text at notes 55-58, 61-63, supra.

78. See text at note 65, supra.

79. See Chapter Two, supra, text at notes 31-39.

80. See Dworkin, Law's Empire, supra note 3, at 255-57.

81. See note 60 and accompanying text, supra.

82. See Dworkin, Taking Rights Seriously, supra note 3, at 112-15; Michael S. Moore, Legal Principles Revisited, 82 Iowa L. Rev. 867, 872-89 (1997).

83. Dworkin, Law's Empire, supra note 3, at 225. This is the ideal Dworkin refers to as "integrity" in law. Id. For a detailed refutation of Dworkin's claim that reasoning from legal principles leads to "integrity," see Larry Alexander & Ken Kress, Against Legal Principles, in Law and Interpretation: Essays in Legal Philosophy 279 of Dworkin's argument from "integrity," see Alexander & Kress, supra note 82, at 310-26 (Andrei Marmor, ed., Oxford: Clarendon Press 1995)..

84. See Chapter Two, supra, text at notes 21-23.

85. See Dworkin, Taking Rights Seriously, supra note 3, at 30, 85-86, 110-15, 335-38.

86. See Chapter Two, supra, text at notes 17-19.

87. See text at notes 71-74, supra.

88. See Kress, supra note 69, at 377-88; Alexander & Kress, supra note 83, at 296-97.

Chapter Four: Common Law Practice

In our analysis of the common law, we have taken argued that judges resolving legal disputes reason in the ways that all decisionmakers reason. They reason naturally, drawing moral and empirical conclusions through induction and the method of reflective equilibrium, and they reason deductively from authoritative rules. Natural reasoning is unconstrained by law; deductive reasoning is constrained by legal rules that preempt natural reasoning. Other methods of decisionmaking popularly attributed to judges, including analogical reasoning from case to case and reasoning from legal principles, are illusory. Judges may appear to do these things, but analogies and legal principles impose no actual constraint on judicial reasoning. The outcome of purportedly analogical processes rests in fact on natural or deductive reasoning.

We have also suggested that the common law will be most effective, both in correctly resolving particular disputes and in settling future controversies, if current judges treat rules established by prior judges as binding in a preemptive sense. This model of judicial decisionmaking, which we have called the rule model, entails that judges have rulemaking authority. In Chapter Two, we addressed some of the theoretical questions that arise when judges act as rulemakers, including the scope of their

rulemaking authority, preconditions for establishment of binding precedent rules, and overruling of precedent rules.[1] In the present chapter, we consider some practical objections to the rule model, both as a prescription for judicial decisionmaking and as a description of judicial practice.

The most significant difficulty facing the rule model as a prescription for decisionmaking is that judges may not be good rulemakers. Our argument for the superiority of the rule model of judicial decisionmaking over unconstrained natural reasoning depends on the quality of judicial rules. Deduction from precedent rules can improve on natural reasoning only if rules prevent more error by preempting faulty reasoning, coordinating conduct, and simplifying decisionmaking, than they cause by prescribing the wrong result in particular cases.

Precedent rules can be faulty in several ways. Most obviously, rules may be substantively misconceived: they may serve inappropriate ends, or the means they select may be inapt. Alternatively, rules may be formally defective. Rules may be so blunt that errors of overinclusiveness exceed the errors that would result from unconstrained reasoning and lack of coordination. Overinclusiveness is an unavoidable byproduct of the qualities of generality and determinateness that make rules effective; at some point, however, it goes too far.[2] Precedent rules may also be overly complex: if rules are too confusing,

judges and actors may err so frequently in applying them that actual outcomes will not be superior to the outcomes of natural reasoning.[3] Another possibility is that rules may be too vague and indeterminate to preempt natural reasoning, or may generate interpretive controversies that are just as costly as the moral controversies the rules were designed to settle.[4]

Whether any given judicial rule meets the standard of net error reduction is, ultimately, an empirical question. Certain features of the environment in which judges announce rules, however, give cause for concern about the quality of judicial rules. Under the rule model of judicial decisionmaking, judges are not only rulemakers but also adjudicators. For reasons we outline below, the demands and distractions of adjudication create a special risk of suboptimal rules.

Our argument for the rule model of judicial decisionmaking can also be challenged on descriptive grounds: judges and lawyers behave in ways that appear to contradict both the rule model of decisionmaking and our more general conclusion that judicial reasoning consists of nothing more than ordinary moral, inductive, and deductive reasoning. The rule model assumes that judicial decisions are constrained only by posited rules; yet judges claim to be guided by factual analogies to prior cases, and lawyers regularly present analogies to judges as a source of persuasion.[5] The rule model assumes that judges have plenary

authority to make rules; yet, to the extent judges announce rules at all, they typically confine themselves to narrow rules tailored to the dispute before them.[6] When precedent judges do issue rules that go beyond the needs of adjudication, future judges may disregard the rules as *dicta*.[7] The rule model permits overruling but does not recognize the practice of distinguishing rules; in contrast, judges typically are reluctant to overrule precedents but frequently claim to distinguish precedent rules.[8]

In the sections that follow, we raise the possibility that various conventions traditionally associated with the common law may help to counteract the disadvantages judges face as rulemakers. The conventions we consider do not ensure that judges will adopt sound precedent rules, but they serve, indirectly, to neutralize some predictable sources of error. If in fact conventional practices can improve the quality of judicial rules, they place the rule model on a sounder practical footing. Further, the possibility that conventional practices assist judges in designing sound rules helps to explain the descriptive gaps between the rule model and actual judicial behavior. Practices that appear to contradict the rule model of decisionmaking may have developed in response to the special problems that arise when a single authority must both resolve a particular dispute and also announce rules for a broader class of future cases.

The picture of common law in action we present in this chapter is far from ideal. The practices we describe are not direct, rational responses to the deficiencies of judicial rulemaking, but rather are customary practices that counteract those deficiencies in a rough and indirect way. Because they depend on professional custom, they are also potentially unstable. Yet the capacity of these practices to improve the quality of judicial rules may explain why seemingly illogical methods of decision and argumentation occupy a central place in legal training and convention and also why the common law appears to have evolved more sensibly over time than its circumstances might predict.

Judges as Rulemakers

The rule model of the common law, in which precedent rules are binding on later judges, is defensible only if precedent rules prevent more error than they cause. Judicial rules need not perfectly translate moral principles into concrete prescriptions, but they must be sufficiently well designed that judges will do a better job of implementing moral principles by following precedent rules than by reasoning without constraint.[9] All rules - judicial or legislative - must meet this standard to be justified as rules. Judges, however, must combine the task of rulemaking with the task of adjudication. As a result, they face

special difficulties in designing rules that will bring about a net reduction in error.

Inattention. The first impediment to sound judicial rulemaking is that judges tend to treat rulemaking as incidental to adjudication. For much of the history of English and American common law, judges were reluctant to acknowledge their role as lawmakers. Creating law was the province of legislatures; the role of judges was to resolve disputes according to previously established law.[10] In the absence of positive (legislated) law, judicial decisions were governed by the common law, but the common law was viewed as an independent body of norms located in custom and "reason" rather than judicial opinions.[11] Because judges were both learned in both legal custom and experienced in the application of reason, their statements and decisions served as evidence of law. But they had no personal authority to make law by announcing rules: they merely discovered and applied the law.[12]

This view of the matter did not deter early courts from developing a comprehensive body of law, but it prevented them from acknowledging lawmaking as an equal part of their work.[13] Modern judges, recognizing that their opinions affect conduct, are quicker to admit that they can and do create law, and some are quite explicit about announcing rules to govern future cases.[14] Yet for most courts, rulemaking continues to be a

secondary concern: the immediate need is to resolve a dispute.

As a result, judges are likely to announce rules more casually than legislatures, with less attention to the full range of the rules' consequences. Heidi, drafting an opinion in the case of Edward's bear, might state that "wild animals in residential neighborhoods are nuisances *per se*;" therefore, the bear must go. Because her attention is focused on explaining why she has decided against Edward, she may not pause to consider the breadth of the rule, which by its terms bans not only bears but also field mice and other odd but harmless pets.

Of course, Heidi's statement may not in fact amount to a rule. As we understand the nature of authoritative rules, if Heidi did not intend to announce a rule, no precedent rule exists.[15] In that case, no harm is done. Yet it is also possible that Heidi meant to state a rule justifying her decision but formulated the rule in haste without thinking systematically about future cases. If so, the result is an authoritative, but suboptimal, rule.

This is not to suggest that legislatures are impeccable rulemakers. For a variety of reasons, they too are capable of enacting poor rules. Legislatures, however, are at least more likely to view future governance as a central part of their project.

Cognitive Bias. A second difficulty is that even when

judges turn their full attention to rulemaking, the facts of the dispute before them may distort their reasoning about rules. In the developing field of behavioral decision theory, cognitive psychologists have demonstrated that human decisionmakers rely on a variety of "heuristics" - cognitive shortcuts - to reach empirical conclusions.[16] These heuristics are useful because they allow people to form judgments with confidence under conditions of complexity and uncertainty. Yet because cognitive heuristics replace full unbiased reasoning with simpler indirect decisional strategies, they can also lead the reasoner into error.[17]

Judges, like all human reasoners, are subject to errors of this kind. Cognitive heuristics can affect the accuracy of judicial factfinding. For example, well-documented biases can lead judges (and juries) to err in calculating probabilities,[18] determining causation and responsibility,[19] judging the foreseeability of past events,[20] fixing damage awards,[21] evaluating settlements,[22] estimating the chance of reversal on appeal,[23] and assessing the merits of appeals.[24]

More important for our purposes, cognitive biases can affect the design of judicial rules. When the facts of a particular dispute are prominent in a rulemaker's mind, certain certain heuristics are especially likely to come into play and to cause the rulemaker to miscalculate the future effects of rules.

Accordingly, as Frederick Schauer has observed, there is reason to doubt the common assumption that judicial rules benefit from the concrete factual settings in which judges work.[25] Concrete facts may give judges a sense of rules in action, but they also can distort judicial analysis of the consequences of rules across the range of cases to which they apply.

The cognitive heuristic that bears most directly on the rulemaking in the context of adjudication is "availability."[26] In judging the frequency or probability of events, decisionmakers tend to assume that the events that come most easily to mind are also the most likely to occur. This assumption can work fairly well as a time-saving rule of thumb, but it can also lead the reasoner to overlook statistical probabilities.

When a judge formulates a rule for future cases, the facts of the case currently pending are easy to recall, while other potential applications of the rule are distant and possibly unknown to the judge. As a result, the current case may appear more representative than it is of the class of cases covered by the rule, and the court may announce a faulty rule. For example: Heidi is considering the case of Martha, whose mean-tempered pit bull recently attacked a neighbor. With Martha's pit bull in mind, Heidi formulates a rule, "pit bulls in residential neighborhoods are nuisances *per se*." Martha's dog, however, may not be typical. If, in fact, most pit bulls are docile, this

rule may cause more errors that it prevents.

Another heuristic likely to affect judges in their dual capacity as rulemakers and adjudicators is "affect."[27] Particular images may evoke positive or negative emotions in reasoners, based on the reasoner's experience. As a cognitive heuristic, affect manifests itself in a number of ways. The most pertinent for our purposes is that decisionmakers give more weight to information that translates easily into emotionally charged images than to information that does not produce a ready affective response. Thus, people take risks more seriously when the risk is presented as a frequency (1 in 10) than when it is presented as a probability (10%). The reason for this, presumably, is that frequency information refers to instances and is therefore more likely to raise specific images in the decisionmakers's mind. When risk information is presented in narrative form, the response is stronger still.[28]

Like the availability heuristic, the affect heuristic suggests that in formulating rules, judges may give greater weight to the facts of the cases they are currently adjudicating than to other cases that might fall within the terms of the rule. The case at hand provides a ready-made set of images, often presented in a manner calculated to invoke the adjudicator's emotions. As a result, it may command the judge's attention in a way that statistical information about the class of cases

governed by the rule does not. The picture of Martha's pit bull mauling a child may lead Heidi to adopt the wrong nuisance rule. Legislators can be influenced by affect and availability as well, as when they act in response to events that have engaged public emotions. In the case of judges, however, vivid images that are likely to provoke an affective response are a regular feature of the rulemaking environment.

Another possibly relevant heuristic is "anchoring."[29] In assessing value or probability, decisionmakers may be influenced by particular numbers or instances that have been brought to their attention, even if those numbers or instances are not typical. For example: Heidi is considering whether to announce a rule that pits bulls in residential neighborhoods are nuisances *per se*. A pertinent question is what percentage of pit bulls are dangerously aggressive. The plaintiffs in Martha's case have shown that Martha owns four pet pit bulls, two of which have attacked children or dogs in the neighborhood (50%). Heidi knows that Martha trained her dogs to act as watch dogs and that she should, accordingly, adjust her estimate of the general aggressiveness of pit bulls downward from 50%. Yet, in the absence of further evidence (which neither party has much reason to present), the anchoring heuristic suggests that Heidi will not adjust sufficiently from the initial figure suggested by the facts.

There are other possibilities. Research suggests that decisionmakers handle statistical calculations more accurately when they understand that they are assessing a series of cases (how often do pit bulls bite?) than when they focus on a single event (how likely was it that Martha's pit bull would bite?).[30] Perceptions may be distorted by a sense of contrast when decisonmakers begin with a single observation (compared to Martha's pit bull, airedales may appear safer than they are).[31] Decisionmakers who observe the actions of others, as judges do in deciding cases, tend to attribute causal responsibility to personal traits of the actor rather than background conditions because the actor is more salient (a pit bull may appear aggressive when in fact it is suffering from indigestion).[32]

Adjudication may have some positive effects on judicial cognition as well. Affect and examples appear to facilitate and clarify decisionmaking in some situations.[33] Focusing on a specific set of facts may also lead judges to announce narrower rules, which, while not necessarily optimal, will at least cause less damage if they turn out to have been misconceived.[34] Overall, however, the special salience of a pending dispute in the mind of the judge seems likely to interfere with, rather than enhance, the reasoning needed to design sound rules for future cases.[35]

Overruling Problems. The rule model of judicial

decisionmaking assumes that judges have authority not only to make precedent rules but also to overrule them.[36] At the same time, the rule model does not and cannot distinguish between overruling precedent rules and modifying or "distinguishing" them.[37] When a judge makes an exception to a rule to accommodate a particular case, the judge is effectively eliminating the precedent rule and announcing a new rule in its place.

As we explained in Chapter Two, judges ideally should overrule precedent rules only when they are unjustified or suboptimal *as rules*. More precisely, judges should overrule *either* when, due to obsolescence or poor design, a precedent rule is likely to cause more erroneous results than it prevents over the range of cases to which it applies, *or* when an alternative rule would prevent more error or cause less error than the precedent rule, *and* the likely benefits from error reduction exceed the costs of the disruption likely to follow from overruling the precedent. At the same time, judges must bear in mind that rules can be both justified and optimal *as rules* - likely to reduce the sum of error over the range of their application and preferable to any alternative - and yet prescribe the wrong result in certain cases. When a generally sound rule appears to require an erroneous result, courts should not overrule; they should treat the rule as a serious rule and follow it without second-guessing what it prescribes.[38]

As Schauer points out, judges may not succeed in overruling precedent rules when and only when they should.[39] One problem is the overruling standard itself. The rule model requires that, as adjudicators, judges must follow precedent rules without regard to the moral justification of the results those rules prescribe in particular cases. As makers and abrogators of rules, however, judges can and should evaluate the overall moral justification of rules before determining whether to retain them or to overrule them. This is a fine line for judges to walk. If they fail to make the distinction between erroneous outcomes and unjustified or suboptimal rules, they may either upset settlements by overruling sound rules to accommodate the supposed "equities" of particular cases or entrench error by retaining defective rules.

The first problem - precipitous overruling - is aggravated by the same cognitive heuristics that affect the design of precedent rules, particularly the tendency to assume that readily recalled facts or affectively charged images are representative of the larger classes to which they belong.[40] For example: Heidi is considering the case of Sally, who keeps a well-trained, amiable pit pull in her home. In a previous nuisance case, a judge announced the rule that "pit bulls in residential neighborhoods are nuisances *per se*." Assume this rule is sound: a rule excluding all pit bulls will produce more correct decisions overall, and greater coordination benefits, than case-

by-case prediction of the probable behavior of particular pit bulls. When Heidi assesses this rule, however, the picture most likely to come to mind is Sally's well-mannered dog. Particularly if the image of Sally and her pet evokes a positive emotional response, the facts of the case are likely to have a greater effect on Heidi's deliberations than more abstract information such as the statistical likelihood of pit bull attacks and the coordination value of an unqualified no-pit-bull rule.[41] As a result, Heidi may be tempted to overrule the precedent rule or modify it to allow owners of well-trained pit bulls to keep their pets. If the rule in its existing form is the best rule for future pit bull disputes, this will be an error: cognitive bias triggered by the adjudicatory setting will have led Heidi to mistake a single regrettable outcome for lack of overall justification for the rule.

As Schauer has noted, the second problem - failure to overrule rules that are suboptimal or unjustified as rules - is exacerbated by case selection effects.[42] Judges address precedent rules only when the rules are challenged by parties to a dispute. When the law governing a dispute is clear, however, parties are likely to settle rather than bring their case to court.[43] It follows that judges may not often preside over cases that involve core applications of a precedent rule. Trials and appeals become more likely when the rule's application to

particular facts is indeterminate.[44] In cases of indeterminacy, however, the judge can avoid allegedly infelicitous applications of the rule by interpreting the rule narrowly so as to avoid those applications, leaving the rule as so interpreted full in effect. Thus, judges may have few opportunities to assess the everyday application of rules that are obsolete or misconceived. A particularly harsh application may give the party opposing the rule hope for an exception, but, as we have noted, a harsh application does not necessarily indicate that the rule itself is unsound.

Summary: Why Judges Are Poor Rulemakers. The rule model of judicial decisionmaking casts judges as both rulemakers and adjudicators. The dual role that judges perform in the legal process is likely to affect the quality of judicial rules in several ways. The demands of adjudication, together with traditions and political pressures that relegate rulemaking to a secondary position, can lead judges to pay less attention than they should to the potential consequences of their rules. Cognitive heuristics, triggered by attention to particular facts, can lead to miscalculation or disregard of the consequences of rules. Adjudication may also have adverse effects on judicial oversight of precedent rules.

This is not to say that legislation is clearly superior to common law as a source of settlement. Moral and empirical

deliberation by elected representatives is notoriously subject to interest group politics and collective action problems, in addition to cognitive biases and ordinary reasoning errors.[45] We are not equipped to undertake a full comparison of judicial and legislative rulemaking; we note only that there is reason to believe Schauer is correct in his observation that the need to resolve a particular dispute hinders rather than helps judges in producing sound precedent rules. "Cases make bad rules."[46]

Correctives to Judicial Rulemaking

Because judges announce rules in the course of resolving particular disputes, they face impediments in designing sound rules. The risk of poor quality rules challenges the key assumption of the rule model of judicial decisionmaking - the assumption that following precedent rules will reduce the sum of error. The prospects for effective common law, however, may not be as bleak as our analysis so far suggests. In the sections that follow, we suggest that some aspects of traditional common-law decisionmaking - practices and norms that we find difficult to explain on any other ground - may work to improve the quality of judicial rules. We make this suggestion cautiously: the practices we have in mind do not address the problems of judicial rulemaking directly, and the correctives they provide are partial at best.

The Method of Analogy. We have argued that so-called analogical reasoning does not contribute in a meaningful way to judicial decisionmaking.[47] The outcome of one case, without more, carries no logical implications for the outcome of another case. Nor do past decisions constrain decisionmaking through the device of "legal principles."[48] Our analysis of the notion of legal principles (in its best-known and most attractive form) suggests that past decisions do not generate legal principles, and that if they could, legal principles would in any event have no real impact on current decisions. Further, if past decisions could constrain the content of legal principles, and legal principles could constrain the outcome of current cases, they would do so only at the cost of entrenching error. If we are correct that analogical reasoning and reasoning from legal principles are spurious constraints, it follows that the only viable forms of legal reasoning are natural moral and empirical reasoning and deduction from rules.

The analogical methods practiced by judges and lawyers may nevertheless have a positive influence on legal rules. The most serious impediment to sound judicial rulemaking is the possibility that a particular set of facts will have inordinate influence on the judge's deliberations about rules.[49] Reacting to evidence that Martha's pit bull recently attacked a child, Heidi may respond too quickly with a rule: "pit bulls in

residential neighborhoods are nuisances *per se.*"

Seeking analogies in prior cases widens the judge's perspective by bringing alternative sets of fact to mind. This in turn reduces the risk of bias in rulemaking. If the judge proceeds to formulate a rule, exposure to additional facts makes it less likely that the judge will assume the pending case is representative of the larger class of cases covered by the rule.[50]

Thus: in the case of Martha's pit bull, Heidi, aided by lawyers, will pause to review past nuisance cases involving dogs. Assume she finds two cases in which courts allowed owners to keep docile pit bulls, one in which a court ordered an owner to give up a German shepherd that bit a landscaper, and another in which the court allowed an owner to keep a very large sheepdog with no history of aggressive behavior. After consulting these cases, Heidi may adjust her position and conclude that breeds are not the most accurate criteria for judging when dogs are nuisances. She may choose instead to issue a narrower rule ("attack-trained pit bulls are nuisances"), a different rule ("dogs that have previously engaged in aggressive behavior are nuisances"), or no rule at all.

The benefits of analogical methodology are indirect. Analogies to past decisions do not constrain the content of judicial rules, any more than they constrain the outcome of

adjudication. Instead, the process of searching for analogies and comparing cases dilutes the impact of the pending dispute and places the judges in a better position to seek reflective equilibrium before announcing a rule. After scanning an array of factual settings, the judge is in a better position to test the application of possible rules. Actual evidence in the pending case may be more vivid than descriptions of facts in past opinions, but the images it presents are no longer unopposed.

Ideally, the notion of analogy would not be necessary. Judges would test potential rules against examples drawn from past cases and from other legal and extra-legal sources as well in the course of natural reasoning about rules.[51] Analogy enters in because, in practice, time pressure and preoccupation with the task of adjudication are likely to cut the process of deliberation short. The widely accepted belief that analogies can and should guide judicial decisionmaking leads judges to study a broader array of factual possibilities than they otherwise likely would.

To some extent, the rule model of decisionmaking itself may enlarge the perspective of judges. Judges operating under the rule model will come into contact with past decisions as they search for precedent rules. Analogical methods, however, are likely to be more effective because they require the judge to engage with the facts of prior cases, make comparisons, and

formulate rules that explain the importance or unimportance of common facts. Analogical techniques are also broader in scope. All cases are potentially "governed" by analogy, while precedent rules cover only those cases that fall within their stated terms. Accordingly, the search for analogies continues even if the court is satisfied that no rule applies.

Analogical methods are not without risks. A judges who believes that analogies in themselves provide a ground for decision may decide on the basis of an unexplained intuition of similarity.[52] Thus, Heidi might conclude that Martha's pit bull is "like" a German shepherd. Alternatively, the judge may construct a "legal principle" based largely on fit with prior cases, and in doing so entrench past mistakes.[53] If Martha's pit bull, unlike the pit bulls in prior cases, is a French pit bull, Heidi might decide according to the principle that "European guard dogs are nuisances in residential neighborhoods.")

Restrictions on the Scope of Precedent Rules. If judges are not good rulemakers, it follows that they should be cautious in announcing rules. Ideally, they should avoid rulemaking only when bias affects their judgment; but cognitive bias, by its nature, is difficult for the reasoner to detect and cure. As a fallback, the safest course for judges may be to minimize the impact of unsound precedent rules by limiting the scope of all precedent rules.

Established conventions restrict judicial rulemaking in several ways. We noted in Chapter Two that, in announcing precedent rules, judges typically confine themselves to rules that provide an answer to the dispute before the court.[54] In a dispute over Edward's bear, Heidi will stop short of announcing a rule about lawnmowing in residential neighborhoods, even if her research on the subject of nuisances has convinced her that a lawnmowing rule would be beneficial. Judicial restraint in promulgating rules is reinforced by prevailing methods of interpreting prior opinions. Later judges typically characterize statements that are not necessary to explain the result of the prior case as non-binding "dicta," even if they take the form of rules.[55] Thus, if Heidi states in her opinion in Edward's case that residential landowners must mow their lawns on Saturday, future judges will feel free to regard her statement as a stray remark or at best a suggestion.

These limits on judicial rulemaking are not entailed by the rule model, which confers rulemaking authority on judges without qualification.[56] Limits of this kinds, however, may be sensible responses to the problems judicial rulemaking encounters. A self-imposed restraint against rulemaking on subjects that are unrelated to the dispute at hand tends to result in narrow rules and cautious development of common law.

Analogical methods can have a similar conservative effect on

judicial rules. We have argued that *reasoning* by analogy (as opposed to purely intuitive analogical decisionmaking) amounts to formulating and applying rules that support like treatment of cases.[57] Connections between the facts of past and present cases are easiest to see and articulate at a low level of generality; therefore, analogy-warranting rules tend to be modest and concrete.[58] For example: Heidi determines that Karl's ocelot is importantly similar to Edward's bear, which a prior judge held to be a nuisance. She explains the likeness of the cases by reference to a rule: "dangerous wild animals in residential neighborhoods are nuisances." The same moral principles that justify this rule might also justify a broader rule: "potentially dangerous agents that are difficult to control are nuisances when maintained in an area where they might cause serious personal injury." This rule, however, does not capture the link between Karl's ocelot and Edward's bear as effectively as the narrower dangerous-wild-animal rule. The broader rules also calls for a much wider search of prior cases to test the rule against outcomes within its range.[59] Therefore, Heidi is likely to choose the narrower form. If the resulting rule is unsound, the harm it causes will be correspondingly small.

Distinguishing and Overruling. The rule model of judicial decisionmaking has no conceptual room for the practice of distinguishing rules. Precedent rules are serious rules, meaning

that judges must either follow them according to their terms, without reference to the underlying moral principles they are designed to implement, or overrule them. At the same time, the rule model itself does not limit the power to overrule: judges have authority to make rules, and therefore judges have authority to replace or eliminate rules. Ideally, judges will overrule precedent rules only when the existing rule is either unjustified or suboptimal *as a rule* - that is, when it causes more error than it prevents or performs less well than an alternative rule - and only when the harm to expectations and coordination from overruling or the prospect of overruling does not militate in favor of retaining a suboptimal rule.[60] When sound rules appear to prescribe mistaken results, judges should leave them in place and decide as they require.

As we have noted, however, the ideal standard for overruling, as just described, is difficult if not impossible for judges to apply. Unjustified rules are logically distinct from justified rules that produce erroneous outcomes; psychologically, however, it is hard to separate the two. Cognitive heuristics exacerbate the problem: the availability and affective power of live parties and narrative facts will illuminate an unappealing outcome in the case before the court and obscure the more abstract benefits of upholding a sound rule.[61] An artificial presumption in favor of rule-following might counteract the

effects of compelling facts, but applying such a presumption is not rational. Why should a judge follow a precedent rule when the judge believes the balance favors overruling?

The stance that judges traditionally have taken toward precedent rules is rather different from what the rule model recommends. Judges tend to be cautious in overruling precedent rules; at least, they do not repeal rules at will in the manner of a legislature. On the other hand, they commonly distinguish precedent rules, carving out exceptions based on factual differences between the current case and past cases in which the rule was applied.[62]

As we have said, distinguishing is not a form of partial rule-following. For the reasons outlined in Chapter Three, when a judge distinguishes a precedent rule, that rule has no impact on the outcome of the pending case or the content of the "modified" rule. Nor do the facts of prior cases applying the rule constrain the outcome of the pending case. Distinguishing is based on factual disanalogies that, like analogies, have no independent rational force. Either disanalogies are purely intuitive, or they stem from a rule that identifies important differences among cases. Ultimately, therefore, there is no constraint on the ability of judges to distinguish rules if distinguishing is permitted: distinguishing rules is logically equivalent to repealing rules at will.[63]

As a practice, however, distinguishing differs in one important way from simple overruling of precedent rules. Before distinguishing a rule, the judge studies and compares the facts of past cases applying the rule. In the process, the judge is likely to encounter at least one and probably more than one concrete example in which the rule performed well. Just as seeking analogies helps judges assess the consequences of rules beyond a single case, the practice of distinguishing may enable judges to perceive more easily the benefits of adhering to precedent rules.

For example: Heidi is considering the case of Edward's bear. A prior opinion, in a nuisance suit against Walter, announced the rule that "bears in residential neighborhoods are nuisances *per se*." Heidi believes that the purposes of this rule do not apply to Edward's bear, a gentle retired circus animal that has lived uneventfully in Edward's home for years. So she sets about distinguishing Edward's case. To do this, she reads descriptions of facts provided by the judge in Walter's case: Walter's pet bear escaped and wandered into a school cafeteria, frightening children and teachers. She also consults the description of facts in a later case that applied the no-bear rule in a nuisance action against Charles: Charles's bear, which had previously been well-behaved, clawed a representative of a charitable organization canvassing door-to door. At this point, Heidi is

still free to distinguish Edward's case: Edward may keep his bear in an especially sturdy cage, and Walter's and Charles's bears may never have worked in the circus. But the facts of the prior cases provide competing narratives that demonstrate the value of an unqualified no-bear rule in a manner that is more likely to influence Heidi's deliberations than abstract arguments about error prevention and coordination. As a result, Heidi may be less tempted to distinguish (and thereby overrule) the rule.

The practice of distinguishing precedent rules is dangerous to the stability of rules because it creates an illusion of modesty. Judges may intervene more often when they believe they are merely modifying, rather than overruling, established rules. Yet, if judges cannot reliably separate faulty rules from regrettable outcomes, a set of conventions by which judges hesitate to "overrule" but are willing to "distinguish" may be the next-best solution. Erroneous rules are not permanently entrenched, but judges normally will not overrule rules without first consulting examples that counteract the tendency to overrule in response to engaging facts.

Summary: Corrective Practices. Judges traditionally have engaged in a number of practices that are not required by the rule model of the common law and in some cases appear to contradict either the rule model itself or the related assumption that judicial reasoning is nothing other than ordinary moral and

empirical reasoning and deduction from rules. Judges seek analogies; they avoid rules that are not necessary to the outcome of a pending case and dismiss unnecessary rules as dicta; they purport to distinguish precedent rules based on factual differences among cases. In our view, these practices do not embody a special form of legal reasoning: apart from their effect in narrowing the pool of eligible precedent rules, they do not determine the outcomes of judicial decisionmaking. They become more understandable, however, when viewed as indirect strategies that counteract the disadvantages of judges as rulemakers. The task of adjudication can lead judges to formulate rules infelicitously; the practices we have described may serve, partially and imperfectly, to correct the effects of adjudication on rulemaking.

We offer this suggestion cautiously. The potential benefits we have attributed to otherwise mysterious judicial practices are possibilities, not empirically verified and not without accompanying risks to the stability of precedent rules. If our speculations are correct, however, the relationship between these practices and judicial rulemaking helps to reconcile the rule model of decisionmaking with the conventional behavior of lawyers and judges.

Rationality and Sustainability of Judicial Practice

Certain conventional judicial practices - seeking analogies with past decisions, avoiding or disregarding rules that are not necessary to the outcome of a pending case, and distinguishing precedent rules - may help to improve the quality of judicial rules or limit the damage done by rules that are infelicitous. We have already noted several concerns about these practices. Analogical methods invite intuitive judgment and, to the extent they constrain judicial decisionmaking, can entrench error. Restrictions on the scope of precedent rules limit the opportunity for settlement. Distinguishing precedent rules, which is really overruling precedent rules, can undermine the settlement value of existing rules.

Apart from these potential adverse consequences, the conventional practices we have mentioned suffer from two problems of a deeper kind. First, although their most plausible virtues lie in their capacity to prevent or contain the errors of judicial rulemaking, this is not why judges pursue them. Judges engage in these practices because they believe they are the best way to decide cases. In other words, judges have, in a sense, tricked themselves into adopting what might well be good rulemaking habits. This state of affairs is hard to reconcile with the ideal of legal decisionmaking as a publicly accessible process based on reason.

The element of unreason is most evident in the case of

analogical decisionmaking: judges deciding by analogy purport to resolve disputes on grounds that are logically unavailable. Conventions that restrict judicial rulemaking to rules that explain the outcome of adjudication are more straightforward, but they treat a cautionary strategy as a limit on judicial power. The practice of distinguishing precedent rules disguises overruling as something more modest. In each case, the practice in question is justifiable, if at all, for reasons of which practioners are unaware.

Indirection and self-deception are common enough in law.[64] Rules themselves illustrate this point. As we noted in Chapter One, legal rules serve moral values indirectly. Rules reduce the errors of natural reasoning by prescribing answers in a form that will sometimes yield the wrong results. As a consequence, following rules means acting against the balance of reasons in some cases. Acting against the balance of reasons is not rational. Therefore, to accept the authority of rules, one must convince oneself that following the rule is the right thing to do in every case, even though it is not.[65] Self-deception of this kind allows rules to perform the morally valuable function of settling controversy, but it is nevertheless disturbing. Any departure from reasoned decisionmaking, even if justifiable on reasoned grounds, is a cause for regret.

More practically, because the conventional judicial

practices we have described involve self-deception and irrationality, they are also unstable. If lawyers and judges come to understand that conventional practices are not rationally defensible on their own terms, they may cease to accept those practices, and whatever benefits conventional practices hold for rulemaking will be lost. Analogical reasoning appears to be firmly established at present: our critical analysis of analogical methods is not likely to prevail over pervasive legal training and professional acceptance. Careful factual comparisons, however, may eventually give way to quicker work-based searches for applicable rules.[66] Judicial diffidence in rulemaking may be more vulnerable, as judges come to accept that they possess a full complement of rulemaking power. There are also indications that courts have become more comfortable with direct overruling of precedent rules, and therefore may be less likely to search past cases for distinguishing facts.[67]

The common law, therefore, stands on movable ground. The rule model of judicial decisionmaking, which allows the common law to function as law and settle controversy, is defensible only when judicial rules are justified as rules, and only when judicial rules are generally followed. Rule-following depends on the willingness of judges and actors to apply rules even when the results the rules prescribe conflict with their own best judgment. To the extent that practices we have discussed in this

chapter are important to the quality of judicial rules, the justification of precedent rules also depends in part on conventional attitudes and practices of judges. It follows that perfect rationality can subvert the conditions for sound and effective common law.

1. See Chapter Two, supra, text at notes 43-66.

2. On the possibility of optimal but over- and under- inclusive rules, see Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Life and Law 47-52 (Oxford: Clarendon Press 1991). An overinclusive rule may be justified in the sense that it prevents more errors than it causes, but suboptimal because another rule would do a better job of reducing error. Conversely, precedent rules may be suboptimal because they are underinclusive. An underinclusive rule may be justified in terms of error reduction, but suboptimal because a broader rule would provide greater settlement value.

3. See Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law 31 (Durham; London: Duke University Press 2001)

4. See Id. at 30-31.

5. See Lloyd L. Weinreb, Legal Reason: The Use of Analogy in Legal Argument 44-45 (New York: Cambridge University Press 2005).

6. See, e.g., Cass R. Sunstein, One Case At a Time 4 (Cambridge: Harvard University Press 1999); (A.W.B. Simpson, The Ratio Decedendi of Case and the Doctrine of Binding Precedent, in Oxford Essays in Jurisprudence 148, 160-61, 167 (A.G. Guest, ed., London: Oxford University Press 1961).

7. See Steven J. Burton, An Introduction to Law and Legal Reasoning 37-38, 60 (Boston: Little, Brown 1995); Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 86 (Boston; Toronto: Little, Brown 1960); Simpson, supra note 6, at 160-61.

8. See, e.g., Joseph Raz, The Authority of Law 183-91 (Oxford: Clarendon Press; New York: Oxford University Press 1979); Robert S. Summers, Precedent in the United States (New York), in Interpreting Precedents: A Comparative Study 355, 390-92, 394-97 (D. Neil MacCormick & Robert S. Summers, eds.)(Dartmouth: Ashgate 1997); Grant Lamond, Do Precedents Create Rules?, 11 Legal Theory 1, 12 (2005)

9. See Chapter Two, supra, text following note 35.

10. See Sir Matthew Hale, The History of the Common Law of England 45 (1713) (Charles M. Gary ed., Chicago: University of Chicago Press 1971); 1 William Blackstone, Commentaries on the

Laws of England 69-70 (Oxford: Clarendon Press 1765); J.W. Tubbs, The Common Law Mind: Medieval and Early Modern Conceptions 182 (Baltimore: Johns Hopkins University Press 2000; Gerald J. Postema, Classical Common Law Jurisprudence, Part I, 2 Oxford U. Commonwealth L.J. 155, 166-67 (2002) A.W.B. Simpson, The Common Law and Legal Theory, in Osford Essays in Jurisprudence 77, 84-86 (Second Series, A.W.B. Simpson, ed., Oxford: Clarendon Press 1973).

11. On the role of "reason" in early common law, see Sir Edward Coke, The First Part of the Institutes of the Law of England, §138, ¶ 97B (1628), reprinted in II The Selected Writings of Sir Edward Coke 577, 701 (Steve Sheppard, ed., Indianapolis: Liberty Fund 2003); Tubbs, supra note 10, at 45-52, 148-68; Postema, supra note 10, at 176-80; Gerald J. Postema, Classical Common Law Tradition, Part II, 3 Oxford U. Commonwealth L.J. 1, 1-11 (2003); Introduction, supra, note 2; Chapter Two, supra, note 6.

12. This view continues to be influential. See Lloyd L. Weinrib, Legal Reason: The Use of Analogy in Legal Argument 147-52 (2005); Ronald Dworkin, Taking Rights Seriously 82 (Cambridge: Harvard University Press 1977).

13. See David Lieberman, The Province of Legislation Determined 86-87, 122-43 (Cambridge: Cambridge University Press 1989); Postema, supra note 10, at 162.

14. See Peter M. Tiersma, The Textualization of Precedent, 52-69 available from Social Science Research Network, http://ssrn.com/abstract=680901 (2005) (citing explicit holdings and "tests," especially in Supreme Court opinions, as evidence of the "textualization" of the common law).

15. On the requirement that precedent rules must be posited, see Chapter Two, supra, text at notes 52-53.

16. See generally Judgment under Uncertainty: Heuristics and Biases 163, (Daniel Kahneman, Paul Slovic, & Amos Tversky, eds.)(Cambridge and New York: Cambridge University Press 1982) [hereinafter Judgment Under Uncertainty]; Heuristics & Biases: The Psychology of Intuitive Judgment (Thomas Gilovich, Dale Griffin, & Daniel Kahneman, eds: Cambridge U. Press 2002)[hereinafter Heuristics and Biases]; Scott Plous, The Psychology of Judgment and Decision Making (Philadelphia: Temple University Press 1993); Symposium: The Behavioral Analysis of Legal Institutions: Possibilities, Limitations, and New Directions, 32 Fla. St. L. Rev. 315 (2005).

17. See Plous, supra note 16, at 109; Amos Tversky & Daniel Kahneman, Availability: A Heuristic for Judging Frequence and Probability, in Judgment Under Uncertainty, supra note 16, at 3, 4-14;; Thomas Gilovich & Dale Griffin, Introduction - Heuristics and Biases: Then and Now, in Heuristics and Biases, supra note 16, at 1; Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, Inside the Judicial Mind, 86 Cornell L. Rev. 777, 780 (2001).

18. See Guthrie, Rachlinski, and Wistrich, supra note 17, at 807 (discussing representativeness biases in assessment of forensic evidence); Jeffrey J. Rachlinski, Heuristics and Biases in the Courts: Ignorance and Adaptation, 79 Ore. L. Rev. 61, 85-86 (2000) (same).

19. See Jeffrey J. Rachlinski, Bottom-Up and Top-Down Decisionmaking, forthcoming, 73 U. Chi. L. Rev. ?, [mss 14-17] (2006) (discussing attribution biases); Guthrie, Rachlinski, and Wistrich, supra note 17, at 808-11 (studying the effects of representativeness bias on findings of negligence).

20. See Jeffrey J. Rachlinski, A Positive Psychological Theory of Judging in Hindsight, 65 U. Chi. L. Rev. 571 (1998) (discussing hindsight biases and legal mechanisms developed in response); Guthrie, Rachlinski, and Wistrich, supra note 17, at 799-805 (studying the effects of hindsight on judicial assessment of the likelihood of appeal).

21. See Guthrie, Rachlinski, and Wistrich, supra note 17, at 790-94 (studying the effects of anchoring on damages); Keith Sharfman, Judicial Valuation Behavior: Some Evidence From Bankruptcy, 32 Fla. St. L. Rev. 387 (2005) (studying the effects of loss aversion bias on valuations in bankruptcy). See also Cass R. Sunstein, Daniel Kahneman, David Schkade, & Ilana Ritov, Predictably Incoherent Judgments, 54 Stan. L. Rev. 1153 (2002) (studying contrast effects on punitive damages assessment).

22. See Guthrie, Rachlinski, and Wistrich, supra note 17, at 796-94 (studying the effects of framing on settlement supervision).

23. See id. at 814-16 (studying the effects of egocentric bias on trial court assessments of appeal prospects).

24. See Chris Guthrie & Tracey E. George, The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on The United States Courts of Appeals, 32 Fla. St. L. Rev. 357 (2005) (studying affirmance effects).

25. See Frederick Schauer, Do Cases Make Bad Law?, 73 U. Chi. L. Rev. ? [mss 8-21] (forthcoming 2006); Alexander & Sherwin, supra note 3, at 132-33 (noting the possibility of cognitive bias in judicial rulemaking); Emily Sherwin, A Defense of Analogical Reasoning in Law, 66 U. Chi. L. Rev. 1179, 1192 (same); Emily Sherwin, Rules and Judicial Review, 6 Legal Theory 299, 315 (same).

26. See, e.g., Amos Tversky & Daniel Kahneman, Availability: A Heuristic for Judging Frequence and Probability, in Judgment under Uncertainty, supra note 16, at 163; Plous, supra note 16, at 121-30; Schauer, supra note 25, at [mss 11-13]; Rachlinski, supra note 19, at [mss 10]; Norbert Schwarz & Leigh Ann Vaughn, The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Source of Information, in Heuristics & Biases, supra note 16, at 103 ; see also Timur Kuran & Cass R. Sunstein, Availability Cascades and Risk Regulation, 51 Stan. L. Rev. 683 (1999) (discussing legislation); Cass R. Sunstein What's Available?: Social Influences and Behavioral Economics, 97 Nw. U. L. Rev. 1295 (2003) (same).

27. See, e.g., Paul Slovic, Melissa Finucane, Ellen Peters, & Donald G. MacGregor, The Affect Heuristic, Heuristics and Biases, supra note 16, at 397; Rachlinski, supra note 19, at [mss 9].

28. See id. at 413-14. When the affective association is very strong, people may ignore probability altogether. See id. at 409.

29. See, e.g., Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 Science 1124, 1128030 (1974); Gretchen B. Chapman & Eric J. Johnson, Incorporating the Irrevevant: Anchors in Judgments of Belief and Value, in Heuristics and Biases, supra note 16, at 120, 121-23; Guthrie, Rachlinski, and Wistrich, supra note 17, at 787-94.

30. See Rachlinski, supra note 19, at [mss 13]. In the example we give in the text, bias hindsight is a problem as well. If Heidi focuses on Martha's pit bull rather than pit bulls generally, her reasoning about ex ante probability will be affected by her knowledge that, in fact, the dog did bite. See materials cited in note 20, supra.

31. For discussion of "contrast effects," see Plous, supra note 16, at 38-41; Rachlinski, supra note 19, at [mss 12-13]; Sunstein, Kahneman, Schkade, & Ritov, supra note 21.

32. For discussion of the "fundamental attribution error," see Plous, supra note 16, at 180-82; Rachlinski, supra note 19, at [mss 14-15]; Lee D. Ross, The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process, in 10 Advances in Experimental Social Psychology 174 (Leonard Berkowitz, ed., New York: Academic Press, 1977).

33. See Rachlinski, supra note 19, at [mss 21-22] (noting that the "multiple frames" courts encounter in developing common law may improve the quality of judicial rules); Slovic, Finucane, Peters, &. MacGregor, supra note 27, at 406, 413-14 (noting instances in which affective associations increase the accuracy of prediction).

34. Cf. Rachlinski, supra note 19, at [mss 19-20] (suggesting that the decentralization of courts provides opportunities for "experimentation and error correction").

Narrow judicial rulings may be connected to the "representativeness" heuristic, in the following way. Representativeness comes into play when decisionmakers rely on resemblance rather than probability to determine causal connections or membership in a class. See Plous, supra note 16, at 109-12, 115-16; Tversky & Kahneman, supra note 17 , at 4-9; Maya Bar-Hillel, Studies of Representativeness, in Judgement Under Uncertainty, supra note 16, at 69; Amos Tversky & Daniel Kahnman, Judgments of and by Representativeness, in Judgement Under Uncertainty, supra note 16, at , 84 ; Guthrie, Rachlinski, and Wistrich, supra note 17, at 805-06; Rachlinski, supra note 18, at 82-83. One manifestation of this heuristic is the conjunction fallacy, in which the decisionmaker perceives a specific factual description (pit bull bites child) to be more probable than a more general description (dog bites child). See Amos Tversky & Daniel Kahneman, Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment, in Heuristics and Biases, supra note 16, at 19, 26-32. The detailed description more closely resembles the decisionmaker's expectations, although the general description is more probable. This suggests that judges who have in mind a particular instance of a problem may deem that instance to be particularly likely, and therefore tailor their rules to address the instance rather than the general problem. Thus, Heidi, having in mind the case of Martha's pit bull, might be more likely to announce the rule "pit bulls are nuisances per se" than the rule "dogs are nuisances per se," because she views pit bull bites as more likely than dog bites.

35. Cf. Rachlinski, supra note 19, at [mss 17-28] (confirming that courts may be misled by the context of adjudication, but

reaching a mixed conclusion about the comparative rulemaking aptitude of courts and legislatures).

36. See Chapter Two, supra, text at note 66.

37. See Chapter Two, supra, text at note 64; Chapter Three, supra, text at note 46.

38. See Chapter Two, supra, text following note 66.

39. See Schauer, supra note 25, at [mss 21-26]. Schauer refers to this as the "dynamic" aspect of judicial rulemaking.

40. See id. at [mss 22-23].

41. See notes 26-28 and accompanying text, supra.

42. See Schauer, supra note 25, at 24-26

43. See George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1, 9-15 (1984) (explaining the selection effect).

44. The rule model requires judges to treat rules as serious rules, but parties may calculate that they will not always do so, either because it is not rational for the judge to follow the rule when the judge believes the result it describes is wrong or because the judge mistakenly believes the rule itself, as opposed to the result, is unjustified.

45. See Rachlinski, supra note 19, at (noting cognitive biases affecting legislation); Schauer, supra note 19, at 26-27 (noting legislative pathologies and avoiding speculation about the comparative virtues of courts and legislatures as rulemakers); see also Kuran & Sunstein, supra note 26 (discussing availability biases in legislation); Sunstein, supra note 26 (same).

46. Schauer, supra note 25.

47. See Chapter Three, supra, text at notes 4-51.

48. See id., text at notes 52-88.

49. See text at notes 26-32, supra.

50. See Emily Sherwin, Judges as Rulemakers, 73 U. Chi. ,[mss8-10] (forthcoming 2006); Sherwin, supra note 25.

51. See Chapter Two, supra, text at notes 14-15.

52. See Chapter Three, supra, text at notes 23, 27-28.

53. See id., text at notes 78-81.

54. See sources cited in note 6, supra.

55. See sources cited in note 7, supra.

56. We defend this view in Chapter Two, supra, text at notes 45-47.

57. See Chapter Three, supra, text at notes 12-28.

58. See Cass R. Sunstein, Legal Reasoning and Political Conflict 63, 68-69 (New York: Oxford University Press 1996).

59. Past outcomes, in our view, do not determine either current outcomes or the content of newly announced rules. Judges practicing the method of analogy, however, must at least consider decisions that are inconsistent with the analogy-warranting rules on which they rely and, if the inconsistency cannot be resolved, discard either the rule or the inconsistent decisions.

60. See Chapter Two, supra, text following note 66.

61. See text at notes 26-28, supra.

62. See sources cited in note 8, supra.

63. See Chapter Three, supra, text at notes 46-49.

64. See Larry Alexander, Pursuing the Good - Indirectly, 95 Ethics 315 (1985). On the ethical and practical problems of indirection and deception, including self-deception, see, e.g., Alexander & Sherwin, supra note 3, at 89-91; Thomas Schelling, The Strategy of Conflict (Cambridge: Harvard University Press 1980); Larry Alexander & Emily Sherwin, The Deceptive Nature of Rules, 142 U. Pa. L. Rev. 1191, 1211-25; Gregory Kavka, The Toxin Puzzle, 43 Analysis 33 (1983); Gregory Kavka, Some Paradoxes of Deterrence, 75 J. Phil. 285 (1978).

65. See Chapter One, supra, text at notes 18-25; Alexander & Sherwin, supra note 3, at 553-95; Schauer, supra note 2, at 128-34.

66. See Helen Hershkoff, State Courts and the "Passive Virtues:" Rethinking the Judicial Function, 114 Harv. L. Rev. 1833, 1844-52 (2001) (discussing advisory opinions in state courts); Tiersma, supra note 14, at 56-61, 66-68 (tracing an increase in explicit

judicial "holdings).

67. See Zenon Bankowski, D. Neil MacCormick, & Geoffrey Marshall, Precedent in the United Kingdom, in Interpreting Precedent, supra note 8, at 315, 342 (discussing English practice) ; Tiersma, supra note 14, at 61-62 (noting an increase in explicit overruling by American courts).