UNDERSTANDING JUDICIAL REASONING:
A CONCEPTION AND RATIONALE FOR LAW-RELATED EDUCATION

by

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Abstract

The topic of judicial reasoning has been largely excluded from high school law and social studies curricula despite widespread ignorance and misunderstanding among Canadians of the reasoning judges are expected to employ in applying the law. The two biggest obstacles to its inclusion are: (1) insufficient appreciation among educators of the importance of public understanding of judicial reasoning, and (2) a lack of consensus about the nature of judicial reasoning. Accordingly, the major thrusts of this dissertation are to justify why judicial reasoning ought to be part of basic civic education and to articulate a defensible conception of judicial reasoning for educators' use in law-related and public legal education programs.

Defensible criteria for theorizing about judicial reasoning are explained and justified by considering different types of theorizing about social practices. Three basic types of theories are identified - formal, causal and ethical theories. It is suggested that the relevant type of theory of judicial reasoning, what I call a formal theory, involves explication of what informed practitioners would accept as the standards operating within their system. This account of theorizing about social practices is defended against objections implied by a rival account of theorizing presented by Dworkin. Dworkin's explication is rejected on the grounds that it conflates a
distinction between theories that faithfully represent the standards of proper judicial practice and theories whose account of judicial standards is controlled by instrumental purposes.

Building on Hart's conception of law as a union of primary and secondary rules, an account of judicial reasoning is developed in terms of three types of second-order rules. These rules of application, which establish standards for applying the law in particular cases, include rules for determining the legal validity of arguments for a decision, for setting the relative weight of legal arguments, and for verifying the conclusions attributed to a legal argument. Rules of application are organized into three dominant modes or forms of reasoning: (1) reasoning from interpretive guidelines, which refers to a constellation of second-order rules that govern application of law by determining a law's meaning; (2) reasoning from prior cases, which deals with rules governing application of law in light of previous judicial decisions; and (3) reasoning from principle, which involves rules for assessing the implications of potential judicial decisions in light of other legal standards. Specific judicial decisions and general judicial practices are explicated in terms of these modes of reasoning. This account of judicial reasoning is defended against a number of objections, including challenges posed by the principal rival conception of reasoning about the law - an account of judicial reasoning offered by Dworkin.
Teaching high school students about the modes of judicial reasoning is justified because greater public understanding of judicial reasoning is required to combat widespread, potentially damaging, misperceptions of judicial practices. The key elements comprising an adequate lay understanding of judicial reasoning are outlined.
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Chapter One:

Introduction

The purpose of this study is to increase high school students' understanding of the reasoning judges are expected to employ in applying the law. The topic of judicial reasoning has been largely excluded from high school law and social studies curricula. Even groups focusing on law-related education have not recommended that judicial reasoning be addressed in public schools. Further, despite widespread ignorance about and misunderstanding of judicial reasoning among Canadians, this topic has received little attention in public legal education programs. While there may be others, the two strongest and

1 A review of senior law and social studies courses outlined in Canadian high school curriculum guides reveals no mention of legal/judicial reasoning, although the court system is often mentioned (Case, 1988, pp. 15-17).
2 Law-related education (LRE), also called law-focussed education or law studies, refers to the teaching about law and legal issues in elementary, secondary and post-secondary educational facilities where the primary intention is not to train legal professionals.
3 In a review of representative American and Canadian law-related education groups, only the Law-Related Education Project at the University of British Columbia, of which the author is a member, recommended understanding of legal reasoning as a goal of LRE (Case, 1985, pp. 116-128).
4 Public legal education (PLE) refers to non-formal educational programs which, typically, provide substantive information about particular laws and legal procedures, and which are directed to the lay public.
5 Some educators may be dissuaded by the complexity of the enterprise, believing, perhaps, that legal arguments put forth in judicial opinions are beyond the ken of untrained professionals. There are no good reasons to doubt that students are capable of and interested in learning about court decisions and judicial
most plausible explanations of why judicial reasoning is not taught in high school law and social studies courses are: (1) insufficient appreciation of the importance of public understanding of judicial reasoning, and (2) a lack of consensus about the nature of judicial reasoning. Accordingly, the major thrusts of this thesis are to show why judicial reasoning ought to be part of basic civic education and to provide a defensible conception of judicial reasoning for educators to use in law-related and public legal education.

1. The importance of the topic

A major obstacle to inclusion of judicial reasoning in law-related and social studies programs is educators' lack of appreciation for the importance of public understanding of judicial reasoning. Judicial reasoning is typically viewed as a narrow field which one need understand only if arguing cases before the courts. Since this task is seen as the exclusive purview of lawyers and judges, there is perceived to be little need for lay understanding of judicial reasoning. In other words, an understanding of judicial reasoning does not appear to be a necessary goal for civic or citizenship education. I contend that this conclusion is unwarranted. Despite its esoteric and recondite trappings, judicial reasoning warrants reasoning. While I do not have "hard" evidence, I know from personal experience and first-hand reports that high school students are surprisingly adept at understanding judicial opinions and are excited when given the opportunity to do so.
serious consideration by all who are involved in education for an informed, reflective citizenry.

It would not be controversial to suggest that civic educators should foster in students an understanding of and critical appreciation for the laws, the basic structure and functioning of our legal system, and the fundamental values upon which our laws and legal system rest. The typical rationale for these goals is the mutual advantage accruing to both citizen and society when persons appreciate the requirements of and justification for important social institutions. However, a general presumption that civic education should include course work on the workings of the major branches of the legal system does not go very far to justify teaching about judicial reasoning. Perhaps this presumption explains why social studies teachers discuss the hierarchy of the courts, the judicial appointment procedure, and the stages in civil and criminal suits. It does not obviously justify why citizens need a developed appreciation for the forms and standards of reasoning relied upon by judges.

This more ambitious justification stems from the fact that the judiciary is the Achilles of our legal system.

6 See Case (1985, pp. 21-26) for a discussion of constraints on the rights of educators to promote unqualified respect for the legal system.
7 I am assuming that the educational and social merits of a civic education, defensibly conceived, are generally recognized. A rationale for the law-related dimensions of civic education is presented in Case (1985, pp. 27-36).
8 These are the topics dealt with in the British Columbia Social Studies 11 curriculum, for example.
Paradoxically, the courts are an incredibly influential and yet vulnerable institution. When judges apply the law they are not involved in a mechanical procedure; they have the power to shape our constitutions and our common law in ways unavailable to elected legislators. It has been suggested that: "No department of state is more important than our courts, and none is so thoroughly misunderstood by the governed" (Dworkin, 1986, p. 11). On the other hand, a vigilant public possessing some appreciation of judicial reasoning plays a vital role in safeguarding the proper workings of the judicature. The judiciary is vulnerable: its integrity can be compromised by political interference, and the legitimacy of its rulings, particularly in controversial constitutional cases, can be undermined by public mystification and cynicism. The public's capacity for informed debate about issues of judicial adjudication has significant implications for the continued proper functioning of the judiciary.

1.1 The court's influence

While it is a commonplace that laws regulate nearly every reach of our lives, the magnitude of the courts' role in giving texture and substance to the law is a more recent revelation. The court's power to apply the law, especially general constitutional provisions, makes it an exceedingly influential agency. It has been said, for example, that "the Constitution is what the judges say it is."9 While this remark is potentially

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9 Attributed to former U.S. Chief Justice Evans Hughes (Fulford, 1986, p. 7). The famous English constitutional authority, A.V.
misleading, it is certainly true that all rights protected by the constitution are not expressly set out in the document. There is, for example, no explicit statement in either the United States or Canadian constitution giving women rights to abortion; yet the Supreme Court in each country has invalidated statutes curtailing access to abortion. Decisions such as these occur frequently, and their ramifications are often profound. As Justice Oliver Wendell Holmes remarked "the whole power of the state will be put forth, if necessary, to carry out their judgments" (Holmes, 1966, p. 176). Americans began to appreciate this power in the 1950s, with the controversial decisions about school segregation. Laurence Tribe, a prominent American constitutional expert, offered the following observation about the breadth of the Supreme Court’s influence:

the most basic ingredients of our day-to-day lives are sifted and measured out by the Supreme Court. When parents send their children to parochial schools, when men and women buy contraceptives, when workers organize a union, when friends share their intimate secrets in a telephone conversation without fear that others are listening, they enjoy rights and opportunities that would not exist if the Supreme Court had not secured them for us.

Dicey, offered a less ambiguous account: "Parliament is supreme legislator, but from the moment Parliament has uttered its will as law giver, that will becomes subject to the interpretation put upon it by the judges" (Bradley, 1985, p. 27).

12 Cited in Hutchinson (1987, p. 358). Hutchinson believes the popular view about constitutional decisions, that they have great impact on our lives, is exaggerated. He suggests that the U.S. abortion and school segregation decisions, touted as celebrated instances of constitutional social reform, changed very little. Ultimately, his arguments fail because his yardsticks for measuring impact are narrow. For example, Hutchinson would have us believe that the Roe decision had no impact because the total number of abortions were not altered significantly; the only
With promulgation of the Charter of Rights and Freedoms in 1982, Canadians are becoming increasingly aware of the courts' power:

the judicial branch will be the most important forum for the systematic application of Charter standards. Judicial opinions will be authoritative on the specific meanings to be given the Charter's general principles. (Russell, 1983, p. 47)

The public press (Bindman, 1986; Makin, 1987) and the professional literature (Russell, 1982; Morton & Withey, 1986) have documented the dramatically increased judicial powers resulting from promulgation of the Charter. In contrast with the courts' limited authority under the Canadian Bill of Rights to override federal legislation that interferred with basic rights and freedoms, since 1982 the courts have repeatedly used the Charter to strike down offending legislation and public agency practices. This significantly enhanced authority to review government decisions profoundly changes the balance of power in Canadian law - the courts now possess wide-ranging powers to override the decisions of elected and non-elected government institutions and officials. Since the courts have in some respects become a superior body to the legislatures, it is

change was in the percentage of abortions that were legal (p. 372). I doubt that Hutchinson's assessment is shared by the millions of American women who have avoided the additional trauma, humiliation, and financial costs of illegal abortions; by the doctors who are currently practicing only because they were not barred for performing illegal abortions; or by the countless women who are alive or unimpaired because of access to the significantly safer procedures provided by legal abortion facilities.
now more important than ever before that the public understand the nature and exercise of the court's powers.

Growing public recognition of judicial powers has often fuelled an incorrect and pernicious impression that judges have unbridled discretion. Many characterize the "activism" of American rulings on the constitution as a form of "judicial imperialism" and suggest that the Charter has made Canadians vulnerable to the risk of "government by judiciary" (Russell, 1983, p. 52). As another critic put it, the Charter created "a whole new class of potential dictators" (Fulford, 1986, p. 9). While we will return to the issue of judicial abuse of authority, it is important to recognize a popular misperception about judicial discretion. The fact that resolution of constitutional disputes often requires the exercise of judgment in balancing complex issues - in other words, decisions are not straightforward and may be controversial - causes many to conclude that judicial decision making is arbitrary and without standards. Certainly, judges will be influenced, consciously or unconsciously, by differing perceptions of their role, by social factors and by personal values. Like all human institutions, the judiciary is prone to error and prejudice - a biased or mistaken decision, unless overruled in some way, will carry with it the full force of law. However, judicial decision making, properly conducted, requires that judges conform to prescribed modes of reasoning. When they do otherwise they exceed their legitimate judicial authority.
It is important that citizens understand the court's intended role and proper functioning. Acquiring this understanding and, in particular, understanding that applying the law is neither mechanical nor (largely) discretionary, requires some familiarity with the canons and standards for good judicial reasoning. Not only is this important because of the magnitude of the court's impact on our lives, but also, as we will now see, because lack of public respect has profound implications for the court's proper functioning.

1.2 The court's vulnerability

The power of judicial review gives courts the authority to invalidate laws that exceed a legislature's jurisdiction or that fail to respect fundamental rights. While this balance of power is a necessary feature of a constitutional democracy, it creates an "adversarial relationship" between the judiciary and the legislature (Morton, 1984, p. 8). There is a danger, as in any power-sharing relationship, that one side will attempt to dominate the other. While I have alluded to the potential for the judiciary to exceed its authority, I have not discussed its areas of vulnerability. Two prominent ways in which governments can compromise the proper functioning of the judiciary are by

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13 Judges clearly are authorized to exercise some discretion in applying the law and in deciding on appropriate remedies or punishments. They are not entitled to exercise what Dworkin (1980, pp. 31-39) has referred to as "strong discretion" - that is, they may not decide a case on the basis of personal moral convictions or preferences.
exploiting their power to overrule court decisions and by exploiting their power to appoint judges.

To some extent in the United States14 but to a far greater extent in Canada, legislatures have authority to overrule judicial decisions on the constitution without following formal amendment procedures. The notwithstanding clause (Section 33) in the Canadian Charter gives federal and provincial governments considerable power to exclude legislation from Charter review. It was initially expected that exercise of this power would normally attract such political opposition that it would only be invoked in extreme situations (Hogg, 1982, p. 11). Legislators now appear significantly less reluctant to use this power than was first thought. In the seven-year history of the Charter, the clause has already been invoked three times.15 If the public comes to perceive judicial decisions as arbitrary fiats by non-elected officials, then public pressure - the intended antidote to excessive use of the notwithstanding clause - may trigger invocation of the clause. Should this power be exercised widely, the effect would be the destruction of the very notion of entrenched rights. Constitutions are intended to protect fundamental rights against the whims and insensitivities of the popular mood. It would be gravely unjust if public ignorance of judicial decision making created a political climate that

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14 The United States Congress has some power to overturn Supreme Court rulings on the Constitution and more extensive power to override decisions regarding federal statutes.

15 The notwithstanding clause has been invoked once by the province of Saskatchewan, and twice by the province of Quebec.
undermined the rights our Constitution and the courts were empowered to safeguard.

Partisan appointment of judges by government officials deals another potentially crippling blow to the proper functioning of the judiciary. Perhaps the most famous near instance of this form of tampering was President Roosevelt's threat in 1937 to pack the Supreme Court with fifteen judges to secure passage of his New Deal legislation (Hughes, 1981, p. 43). More recently, the nomination of Robert Bork as U.S. Supreme Court Justice was seen as a declaration of the Reagan Administration's intention to enforce its view of morality on law (Dworkin, 1984, p. 27). Significantly, the Senate's somewhat surprising rejection of Bork's nomination was attributed largely to widespread public support for judicial integrity.16

While Canadian Supreme Court appointments have not been reduced to political tug-of-wars between the "right" and the "left" as they have been in the United States,17 there is a history of political feuding between the "feds" and the provinces.18 The Charter may increase Canadian politicians'

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16 Dworkin (1987, pp. 36-39) surmises that: "the debate over Bork, like the debate over Roosevelt's plan left the public in no doubt that the issue was one of constitutional principles, and no senator could have justified his vote on any other grounds."

17 See, for example, Dworkin (1984; 1987). President Taft is reported to have written that the most significant domestic issue facing American electors in the Harding-Cox presidential race was whose Supreme Court appointments would be most desirable (Black, 1969, p. 41). Supreme Court appointments in Canada have been influenced to some extent by candidates' political and religious affiliations (Snell & Vaughan, 1985, pp. 82, 85, 129).

18 The federal government has repeatedly been accused of appointing judges with centrist leanings (Snell & Vaughan, 1985,
inclination to seek out candidates with "appropriate" political and personal convictions (Bindman, 1986).

While it is unlikely that Canadian politicians would denigrate judicial integrity by openly promoting candidates with pre-judged perspectives19 on controversial legal questions, it is a danger we should guard against. In many political circles in the United States there appears to be considerable expectation that judges will promote the interests of their sponsors. For example, in a *Time* article following a recent decision on the constitutionality of special prosecutors, it was suggested that the U.S. Supreme Court was acting in a "frustratingly independent" manner by failing to do the "President's bidding" (Lacayo, 1988, p. 21). The decision was viewed as a "sweeping repudiation of the White House position. . . . So much the worse that the ruling was written by Chief Justice William Rehnquist, the man Reagan had chosen for the court's top job." *Time* also reported that Administration officials would regard as ungrateful Reagan-appointed judges who failed to support the President's position.

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19 Simply having a particular political affiliation does not imply judicial prejudice. In applauding the appointment of Anthony Kennedy over Robert Bork, Dworkin (1987, p. 42) notes that while both are "conservative," Bork was rightly rejected because his views on judicial reasoning were inconsistent with acceptable practice. Although he disagrees with many of Kennedy's decisions, Dworkin admires his "intellectual discipline" and "lawyerlike, principled approach to judicial decision making."
Similar types of aspersions have been cast on the integrity of the Canadian judiciary, prompting former Chief Justice Laskin to issue a stirring rebuttal:

I have to be more sad than angry to read of an insinuation that we are "acting as spear carriers for the federal prime minister" or to read of a statement attributed to a highly respected member of the academic community that "the provinces must have a role in the appointment of members of the Supreme Court in order to ensure that they have confidence that it can fairly represent the interests of the provincial governments as well as any federal government." . . . I owe no allegiance, as a judge, to any person or to any interests; my duty, as I have already said, is only to the law and to the impartial and expeditious administration of justice under law. . . . Are there responsible persons in our society who see the judges of our courts as spokesmen for special interests, as representatives of some public or private authority or agency? Do they see us as partisan arbitrators rather than as independent judges? . . . I know of no better way to subvert our judicial system, no better way to destroy it than to give currency to the view that the judiciary must be a representative agency. (1978, pp. 120-121)

The point here, as earlier, is that the judiciary's ability to fulfill its vitally important, legitimate mandate is easily endangered. An informed public is a significant safeguard against those who would circumvent due process by interfering with or overriding judicial decisions. Ordinary citizens must acquire some understanding of judicial standards for applying the law if they are to make competent judgments about the proper role and functioning of the judiciary.

2. The need for a defensible conception

A second impediment to the inclusion of judicial reasoning in the schools' curricula is confusion about its nature. There is considerable uncertainty within the legal profession about the
limits and nature of judicial decision making. Intense debates have arisen in the jurisprudential literature over issues such as the proper role in judicial decision making of "extra-legal" standards, the breadth of judicial authority to review legislation, and the validity of interpretive approaches like "framers' intention." It is likely that at least some, if not considerable, uncertainty and confusion is a result of fundamental ambiguities in the law. Since many conventions and rules guiding judicial decision making have arisen through case law, it is to be expected that there will be inconclusive and often conflicting interpretations of what is required of judges. Another factor in the uncertainty is misconceptions of the basic structure and logic of judicial reasoning. This apparent misperception of fundamental elements is a primary focus of my effort to articulate and defend a conception of Anglo-American judicial reasoning. Obviously, the resolution of many

20 The recent spate of "grand theories" about the appropriate role of the judiciary within a constitutional democracy is a case in point (Tushnet, 1988, p. 1). At least one legal academic believes that the current state of affairs is sufficiently uncertain to warrant the claim that American jurisprudence is in the midst of a major "paradigm shift" (Richards, 1979, p. 1395).

21 The recent debate over the appointment of Robert Bork as United States Supreme Court justice raised these issues. See, for example, Dworkin (1984; 1985; 1987).

22 I am not implying that these are necessarily the sole or major sources of ambiguity. I believe there are fundamental discrepancies that go beyond conflicting interpretations of particular conventions.

23 Anyone even obliquely familiar with the literature in this area will be aware of the rival accounts of the essential "logic" of judicial reasoning. A major conclusion of this thesis is that Dworkin's influential account of judicial reasoning is incorrect.

24 American and British scholars have generally assumed commonality in the fundamental nature of law and in the structure of judicial reasoning in legal systems within the Anglo-American tradition. See, for example, Casswell (1982, p. 132), Dworkin
disputes about the nature of judicial reasoning is not prerequisite to the inclusion of judicial reasoning in school curricula. It is sufficient for educational purposes that there exists a reasonably perspicuous, by-and-large defensible account of judicial reasoning.

The educational consequence of confusion about the nature of judicial reasoning is seemingly that either the topic is not considered or its treatment is inadequate and misleading. An example of virtual lack of treatment is a thirty-eight page government educational publication about the Canadian justice system. The only comment remotely related to judicial application of the law is the remark that the courts have been established "to administer justice and to interpret and apply federal and provincial laws" (Department of Justice, [undated], p. 20). Where they have been made, attempts to deal with judicial reasoning have been cursory and vague. Consider two examples.

(1986, pp. 1-44) and MacCormick (1978, p. 11-12). While this thesis and the majority of cases cited focus on the Canadian judicature, I shall follow the seemingly common assumption and presume to portray Anglo-American judicial reasoning. This not to deny that there are important differences between the Anglo and the American jurisdictions. For example, Honore (1983, pp. 48-49) suggests that American and British judges' authority to overrule longstanding precedents may differ because of different constitutional arrangements.

25 Needless to say, a clearer understanding of the nature of judicial reasoning might benefit legal practice and legal training. Without question, it important that judges and lawyers understand, as clearly as is possible, the standards for proper legal argument and decision making. Raz (1983b, p. 180) suggests that theorizing about adjudication is the area in philosophy of law that has had the greatest impact on judicial practice.
A recent American educational publication on the workings of the United States Supreme Court identifies the need for greater public understanding in this area.

Few understand the Court’s mandate; fewer appreciate the procedures by which its business is conducted and its decisions rendered. For most of us, the Supreme Court is an institution shrouded in mystery, a collection of nine distinguished jurists whose decisions—whether they address prominent social issues or matters of seemingly minor importance—are rendered with much fanfare, but little public explication. (Green, 1987, p. 6)

In this publication’s attempt to demystify the Court, less than one-half page (one per cent of its space) is devoted to the standards of judicial reasoning. Two modes of reasoning employed by judges—interpretive guidelines and precedent—are mentioned in passing. A third mode of reasoning—reasoning from principle—to which judges resort when the meaning of the words and prior decisions fail to resolve a case, is not mentioned at all. Not surprisingly, the author suggests that "there is at times little to guide the Justices in determining the meaning of these phrases [due process, liberty, and equal protection] with respect to situations that could not have been anticipated when the words were written" (Green, 1987, p. 11). While court decisions will often be controversial, the standards for judicial application of the constitutions are significantly more extensive than this account suggests. In a particularly misleading manner, the discussion concludes with the ambiguous remark by Charles Evans Hughes (later Chief Justice) that: "We are under a Constitution, but the Constitution is what the judges say it is." While judges are charged with declaring what the law requires in a particular
case, this does not imply that judges are authorized to exercise considerable discretion in determining what the law requires. I will later argue that the common impression that judges have wide discretionary powers is a misperception of proper judicial practice.

A recent Canadian high school textbook contributes to a similar, misleading impression. The authors appear to recognize the importance of learning about the considerations judges entertain when applying the Charter in particular cases (Bartlett, Craig, & Sass, 1989, p. 161). While the authors stress the need for judges to interpret constitutional provisions and weigh competing interests, they provide no explication of the standards that judges must follow in carrying out these tasks. Is the reader to assume, for example, that judges are free to follow their personal intuitions about what would be the "fair" decision? Similarly, in discussing several cases, no mention is made of the grounds for the courts' conclusions or the appropriateness of basing their decisions on those considerations (Bartlett et al., 1989, pp. 162-163). The impression is created that judges determine, on mysterious or idiosyncratic grounds, that controversial cases will be settled in a particular way. Understanding of the proper nature of the judicial mandate has not been advanced.

The discussion thus far has stressed the need for public understanding of the workings of the judiciary and has indicated
the inadequate and misleading treatment of judicial reasoning in educational materials. Thus the challenges for the thesis are: (1) to explicate a defensible conception of judicial reasoning and (2) to justify why proper understanding of judicial reasoning is an important, perhaps indispensable, component of informed public attitudes towards the judiciary. As we will see, the former task, that of explicating the nature of judicial reasoning, requires considerably more extensive treatment than the latter task. Before previewing the strategy for carrying out these tasks, it will be useful to clarify briefly the focus of the thesis. This clarification involves delineating the notion of judicial reasoning and identifying the jurisprudential roots of the present work.

3. Key contextual issues

In this thesis, the term "judicial reasoning" refers to reasoning about what the law requires in a particular case. Following Coombs (1985), this phrase refers to one aspect of the reasoning included in the broader term "legal reasoning," and is distinct from what he coins "jury reasoning." Although some writers treat legal reasoning as synonymous with judicial reasoning, it is misleading to do so. Most people would agree that legislators and ordinary citizens reason about the law in ways significantly different from the ways judges do. Even those who believe judges have a clear law-making role recognize a difference in the standards to which legislators and judges
appeal (Raz, 1983b, pp. 195-196). The term judicial reasoning is itself misleading, since it might be expected to include the reasoning followed when establishing the facts of a case. While trial judges often determine the facts, it is characteristic of the jury's responsibility to do so. In this thesis, judicial reasoning will be understood to exclude considerations involved in fact finding. My account of judicial reasoning focuses on the considerations that govern judicial application of the law in a given situation.

A theory of judicial reasoning must be articulated in the context of a theory of the judicial system, which in turn relies on a theory of (Anglo-American) law. In fact, it has been recognized that there is a reciprocal relation - any account of judicial reasoning "makes presuppositions about the nature of law; equally, theories about the nature of law can be tested out in terms of their implications in relation to legal reasoning" (MacCormick, 1978, p. 229). The theory of judicial reasoning I propose to defend comes out of the legal positivist tradition.27

26 For a similar point see Dworkin (1986, p. 90) and Raz (1983a, p. 209).
27 Like Dworkin (1983, p. 247), I do not propose to debate labels. Whether or not my theory of legal reasoning qualifies as a legal positivist theory depends on one's conception of legal positivism. The notion is difficult to pin down (Hart, 1958; Hart, 1982, p. 253; Lyons, 1984a, p. 50; Raz, 1983b, p. 37). For that matter, the label "legal positivism" may indicate very little about a theory (Hart, 1967a, p. 418; MacCormick, 1978, p. 240). The theory of judicial reasoning I propose meets Hart's "minimal" condition of legal positivism, which requires proponents to assert that "unless the law itself provides to the contrary, the fact that a legal rule is iniquitous or unjust does not entail that it is invalid or not law" (Hart, 1967a, p. 419). This does not imply, as Lyons (1984a, pp. 58-59) suggests, that
More specifically, it relies heavily on a theory of law espoused by Hart in *The Concept of Law* and in a subsequent article "Problems of Philosophy of Law" (hereafter referred to as CL and PPL, respectively). While I am not wed to the entirety of Hart's account of law, I propose to build a theory of judicial

the only "moral" standards appropriately appealed to by judges in deciding a case must be explicitly stated in law. Hart appears explicitly to deny this assertion (1982, pp. 200-201). Regardless of the moral considerations to which judges are legally expected to appeal in reaching their decisions, their judgments once offered become law. In the absence of an explicit provision that legal rules inconsistent with morality are invalid, those judgments stand, regardless of their moral pedigree. Even if a legal system encouraged judges to decide indeterminate cases entirely on the basis of moral principles, any particular judgment need not be moral. Immoral conclusions may result from judges deciding indeterminate cases incorrectly or deciding determinate cases correctly. Hence, Hart (1967a, p. 419) suggests legal positivism claims that "no reference to justice or other moral values enters into the definition of law," although judges and legislators often entertain moral considerations. Lyons (1984a, p. 49) finds this interpretation of legal positivism implausible because he believes that almost no one, including a "natural law" theorist, would deny Hart's minimal condition. While it would be hard to find contemporary opponents, this minimal condition apparently was denied by notable jurists such as Lord Blackstone (Hart, 1958, p. 594), and Dworkin (1980, p. 342) identifies it as an extreme form of natural law theory. Raz (1983b, pp. 27-52) explicates legal positivism in terms of what he calls "the strong source thesis" - that tests for identification of the existence and content of laws depend exclusively on social facts and can be applied without resort to moral argument. This account of legal positivism implies that cases involving almost any discretion in applying law are law-making, not law-identifying situations. For example, Raz (1983b, p. 181) holds the counterintuitive view that application of statutes containing value-laden terms such as "unreasonable" require law-making discretion. Lyons (1984a, pp. 54-57) discounts positivism, as Raz understands it, as an implausible theory of law.

In fact, my account of judicial reasoning differs from Hart's regrettably brief explication, although I regard my account as a complement to his basic conception of law as a system of valid rules. It is beyond the scope of this work to raise the extent to which I disagree with his account of law in areas not related to judicial reasoning. I do not think, for example, that Hart provides an adequate, nor necessarily a correct, explication of
reasoning upon the basic tenets of his explication of law as a union of primary and secondary rules. I shall borrow Dworkin's early label of Hart's conception and refer to it as the "model of rules" account.29

Hart proposes that legal systems be understood to comprise two levels of rules. Primary rules consist of an elaborate constellation of rules specifying citizens' obligations within the legal system. These are typically what lay people refer to as "laws" (CL, p. 111) and include rules that, for example, prohibit the use of violence, require that motorists drive on the right-hand side of the road, and so on. Secondary rules, directed primarily at officials,30 establish criteria by which primary rules within a system are identified and changed, and legal obligation. See, for example, Beehler (1978) and MacCormick (1978, pp. 275-292). A justification for citizens' obligation to obey law is not a problem for the present thesis since my concern is with judicial obligation to the law and this appears to be unproblematic, as suggested by the following remarks of former Chief Justice Laskin (1978, p. 120): "my duty [as a judge], as I have already said, is only to the law and to the impartial and expeditious administration of justice under the law."

29 In Taking Rights Seriously, Dworkin used this phrase to emphasize a difference between Hart's account and his own conception of law, which relies heavily on principles as well as on rules. Many who sympathize with Hart's theory reject Dworkin's distinction between principles and rules (in the strict sense). Subsequently, in Law's Empire, Dworkin (1986, pp. 114ff.) refers to Hart's theory as "conventionalism" - a view that determination of propositions of law are matters of pre-accepted, noncontroversial historical fact. This change of label (and the failure to revive the earlier distinction) suggests that Dworkin has conceded the limited force of the "principle-rule" criticism. More will be said about this criticism in chapter four.

30 Some secondary rules, such as those conferring the power to make legally binding contracts and wills, are directed at citizens as well as at officials.
establish mechanisms for making authoritative determinations regarding breaches of primary rules and appropriate sanctions (CL, pp. 92-95). For example, secondary rules of recognition specify the requirements for duly enacted legislation - that is, rules of recognition specify the criteria by which persons within the legal community can identify bona fide laws. At the foundation of any legal system is a complex and often unformulated secondary rule establishing the validity of all other (primary and secondary) rules of that legal system. According to Hart, a rule is a valid legal rule - i.e., it is a rule of a given legal system - if it meets the criteria provided by the rule of recognition for that system (CL, p. 100). This ultimate rule of recognition is part of a legal system not by virtue of more fundamental formal criteria but by virtue of its acceptance by the community of legal officials (CL, pp. 111-114). This rule might stipulate the official (or body) that has final authority in the event of a constitutional dilemma and the principle(s) that are to be given paramount importance within the legal system.

Somewhat surprisingly, given the extent of his treatment of the various dimensions of law, Hart's account of judicial reasoning is incomplete (Hughes, 1968, pp. 413ff.). Hart's discussion of what he calls secondary rules of adjudication does not deal with judicial standards for applying rules in particular cases. Rather, he attends almost exclusively to rules establishing institutional adjudicative mechanisms such as courts
and other tribunals (CL, p. 94). In fact, he explicitly states that treatment of the various forms of judicial reasoning is beyond the scope of his book (CL, p. 144). His positive account of judicial reasoning amounts to the claim that in situations where application of the rule is not "clear," judges will attempt to weigh, in an impartial and reasoned manner, competing legal and "moral" principles and aims (CL, p. 200; PPL, p. 271).

This present study is an attempt to complement Hart’s work by constructing a theory of judicial reasoning in terms of what will be called secondary rules of application. Throughout, the term "rule" will refer to a wide range of legal norms or "normative standards," including canons, conventions, doctrines, maxims, precepts, presumptions, and principles. Essentially, the theory holds that in applying the law judges are governed by secondary rules which meet criteria of validity similar to those required of primary rules, and which constitute standards for identifying and adjudicating among acceptable reasons for a decision. In other words, judicial judgments must be justified by reasons whose legal validity and

31 A "clear" case is a situation where conventions about the ordinary and legal meanings of words determine the case or, when the agreed meanings of words do not resolve the issue, where the legislative aim is sufficiently directive to settle what is to be done (PPL, p. 271).
32 Waluchow (1980, p. 191) offers the phrase "normative standard" as an equivalent to Hart’s notion of rules.
33 Gottlieb (1968, p. 40) suggests that any normative utterances that can be expressed in the form "in circumstances X, Y is required/permitted" function as a rule.
34 Hart’s criteria of validity, specified in what he refers to as rules of recognition, include passage by authorized legislators, citation in an authoritative text or judicial opinion, and recognized customary practice (CL, p. 97).
weight can be established by criteria set out in rules of application. It should be pointed out that because of the inevitable indeterminacy of rules, especially general rules, the existence of rules of application does not imply that judicial decision making can be reduced to a mechanical procedure or that it leads to uniquely correct answers in every case. In fact, if rules of application are vague, ambiguous or conflicting, as they often appear to be in Anglo-American legal systems, judicial decisions will often be inconsistent and unpredictable.

The question of the proper role of the judiciary in applying the law has become the principal focus of considerable academic, professional and public attention. This is due in large measure to Dworkin's criticisms of Hart's account of law. Dworkin's considerable contributions to this debate are found in three books - Taking Rights Seriously, A Matter of Principle and Law's Empire (hereafter referred to as TRS, MP and LE, respectively). Unquestionably, his strongest criticisms of Hart's position focus on legal reasoning (MacCormick, 1978, p. 229; Cotterrell, 1987, pp. 509-510). As Dworkin is regarded as the most formidable critic of a model of rules approach (Waluchow, 1980, p. 3), many of the potential objections to the proposed theory of judicial reasoning issue from Dworkin's work.

4. Overview of the thesis

The thesis has three parts: (1) explication and defence of the criteria for justifying theories of judicial reasoning
(chapters two and three); (2) articulation and justification of the positive account of judicial reasoning (chapters four through eight); and (3) an educational rationale for teaching about judicial reasoning (chapter nine).

Because of historical and contemporary confusion over the purposes of theorizing about law, explication of three basic types of theorizing about social practices is presented in chapter two. It is suggested that the relevant type of theory building about judicial reasoning, called a "formal theory," requires justification in light of what informed practitioners would accept as the standards operating within their system. In chapter three, this criterion for justifying theories of judicial reasoning is defended against objections implied by an account of theorizing presented by Dworkin. Dworkin argues that theory building in law is a deeply interpretive enterprise and that as a result, several conceptions of judicial reasoning are likely to account for - to "fit" - the phenomena of a legal system. Dworkin's explication of theory building is rejected on the grounds that it conflates a distinction between theories that faithfully represent the standards of proper judicial practice and theories whose account of judicial standards is controlled by an instrumental purpose - say, by a desire to reform judicial practice.

Chapter four begins the development of a conception of judicial reasoning as a rule-guided practice. The basic form of
judicial reasoning is explored, and a conception of judicial reasoning in terms of various second-order rules is outlined. These rules establish the standards judges rely upon when they decide how to apply a law in a particular case. The standards of judicial argument are reflected in three types of secondary rules of application: rules of argument validity, rules of argument verification and rules of weight. The rules establish which arguments are legally valid for a decision, the relative weight of those arguments, and criteria for verifying the conclusions attributed to the arguments. Chapters five, six, and seven contain positive accounts of the three dominant modes or forms of reasoning relied upon by judges. These modes of reasoning - reasoning from interpretive guidelines, reasoning from prior cases, and reasoning from principle - depend on constellations of secondary rules which guide judicial decision making. Reasoning from interpretive guidelines involves second-order rules that govern application of law by determining a law's meaning; reasoning from prior cases involves second-order rules governing application of law in light of previous judicial decisions; and reasoning from principle involves second-order rules for assessing the implications of potential judicial decisions in light of other legal standards. In addition to defending the basic logic of each of these modes against rival interpretations, I address challenges to the adequacy of these modes as rule-guided accounts of legal practice. Chapter eight considers several of Dworkin's key objections to this conception of
judicial reasoning. These include Dworkin's explicit criticisms of Hart's account of law and legal reasoning, and implicit challenges posed by Dworkin's rival account of judicial reasoning.

The closing chapter provides a rationale for teaching about judicial reasoning in public and school-based educational programs, and an account of the key understandings that ought to be promoted. Several example are offered as to how public ignorance or misunderstanding about judicial decision making unfairly threatens public respect for the judiciary and increases support for undesirable changes in the judicial system. It is argued that greater understanding of the modes of judicial reasoning could be expected to decrease unfounded and potentially damaging perceptions of judicial practices. The dissertation concludes with an outline of the key elements of an adequate understanding of judicial reasoning.

As indicated above, before it can be shown why judicial reasoning ought to be part of basic civic education, a defensible theory of judicial reasoning must be articulated, and, prior to that, the nature of theorizing about judicial practice must be clarified. It is to this latter task that I now turn.
Chapter Two:

Theorizing about Judicial Reasoning

The interrelation between judicial reasoning and broader theories of law raises an important caution. The past two centuries have witnessed extensive and seemingly sterile speculation about the nature of law. Philosophical and legal literature abounds with differing accounts of law and, by implication, of legal reasoning. These accounts are variously referred to as descriptions of the nature, or the concept, or a theory, or a model, or the science of law. This diversity of labels reflects differences in the perceived nature of the inquiry as much as substantive differences in the content of the accounts. This confusion about the nature of the question being asked might explain Kant's reported remark that the inability adequately to answer the question "What is law?" may embarrass jurists as much as the question "What is truth?" embarrasses logicians (Golding, 1966, p. v). Clarifying the nature of law has been called "one of the most insistent and yet elusive problems in the entire range of thought" (Williams, 1956, p. 134). More recently it has been ventured that the problems of definition of law have been "endlessly debated" (PPL, pp. 264-265).1

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1 Hart suggests that the major disputes underlying the recurrent question "What is law?" cannot profitably be resolved by
If we are to avoid arguing at cross purposes, we had better be clear about the nature of the question lurking beneath our inquiry. Two educational theorists recently suggested that without clear, defensible standards, we are unable to distinguish intellectual fantasizing from rigorous theorizing.

In virtue of what criteria do we dismiss Nazi philosophy, for instance, as valueless and accept Marx and Freud as valuable? Are we not simply warmed by some world-pictures and chilled or horrified by others? Are we not simply acting out our own fantasies in intellectualized or rationalized forms, when we write or criticize them? Are we (to put it severely) behaving responsibly in spending our time thus? The position is uncomfortably like that of medieval pseudo-science in which, without a proper methodology, scientists were reduced to picking among the fantasies about the origin and nature of the world on the basis of what happened to appeal to them. To finalize the point less theatrically: reason cannot get a grip on any form of discourse unless we have some idea about the criteria which we are to apply to it, or the standards of reason which it is supposed to satisfy. (Wilson & Cowell, 1988, p. 5)

A clear understanding of the standards for appraising theories of judicial reasoning is essential if we are to cut through the historical confusion about the nature of legal theorizing. For example, Dworkin's theory of judicial reasoning appears to be offered as a rival to the "model of rules" account. However, as we will see, his account of the criteria for justifying theories of judicial reasoning does not require that theorists faithfully account for accepted Anglo-American practices. Perhaps, in the final analysis, Dworkin does not concisely defining the term or by distinguishing instances and non-instances of law (CL, pp. 13-17).

2 Shiner (1986, p. 515) compliments Dworkin for raising important theoretical issues regarding legal reasoning but chides him for abandoning rigorous and disciplined argument in favour of "noble day-dreaming."
purport to offer a theory about the standards that our legal system currently expects judges to rely upon in reasoning about the law. However, before coming to any conclusions about the defensibility of rival theories, clearer explication and justification of the grounds for a theorizing about judicial reasoning are required.

In this chapter, three types of theories of judicial decision making and the criteria for justifying each theory are identified. In the course of exploring ways in which the theories are sometimes conflated, an account of the criteria for formal theorizing - the type of theorizing appropriate for the present project - will be presented and defended. In the next chapter, we will look in some detail at Dworkin’s challenge to this account of the criteria for legal theorizing.

1. Three kinds of theorizing

Let us begin by noting that judicial decision making is a social practice - that is, it is a public, relatively organized activity undertaken to pursue a set of shared goals. When speculating about, say, the workings or the point of this practice, one engages in theory building of at least a limited kind. If we are to assess the adequacy of such a theory we must have some idea about the purpose of the speculation; criteria for assessing a theory’s merit depend on the purposes for developing theories of that type. To explain the different purposes and the criteria each implies, I offer a rough account of three types of
theories about judicial decision making - ethical theories, causal theories and formal theories. These encompass the different kinds of theories that have been offered about law. While these ways of theorizing will be discussed separately to clarify the differences between them, in practice, theorists may intertwine them. 3

One type, which I will call ethical theorizing, seeks to describe and to justify how laws, legal agents and legal institutions ought to be arranged so as to maximize the ethical desirability of the legal system. It is a theory about how the existing system should be arranged if we had the opportunity to reform it. Such a theory may be radical and propose, for example, as does Wolff, that in the interests of liberty we dismantle our legal system and allow individual moral convictions to rule (Mazor, 1972, pp. 1037-1038). Alternatively, the theory could amount largely to a defense of current procedures, on the grounds that they are the best we can reasonably expect. These theories are ethical theories because they appeal to standards which reflect their proponents' conception of "the good" - a conception of the interests, aims and rights of the immediate and ultimate clients of the system and how they ought to be served.

3 In discussing the types of theorizing he is engaged in, Dworkin distinguishes between the "external" perspective of the sociologist or the historian and the "internal" perspective of the participant (LE, pp. 13-14). The "internal" perspective spills over into two types of theories that I distinguish - theories about proper practice (formal theories) and theories about desirable practice (ethical theories).
A defense of this type of theory, as with the justification of value claims, rests largely on two criteria: (1) the acceptability of the ethical standards or ideals the proponent seeks to promote, and (2) the likelihood of the recommended configuration promoting these ends more effectively than would available alternatives. For example, Wolff's theory, which proposes abolition of all organized forums for the administration of justice in order to maximize individual freedom, has been criticized on both justificatory grounds. The near-paramount importance Wolff attaches to individual liberty is regarded as unacceptable, because it undervalues other equally important ideals such as equality and justice, and his assumptions about the likely results of such a state of affairs are considered unrealistic – anarchy would succeed only if "men were angels" (Mazor, 1972, p. 1038).

Ethical theories about judicial decision making can be contrasted with a second type, which I will call causal theories. These seek to describe and to explain the behaviour of judicial agents and the operation of legal institutions in terms of underlying economic, political, psychological or sociological causes and influences. In other words, they endeavour to account for the system in terms of latent causes, de facto functions, historical forces, and so on. For example, as the title of his book, The Politics of the Judiciary, suggests, Griffith argues that the British judiciary exercises an important "political" role. One of Griffith's conclusions is that the homogeneous
social background of British superior court judges explains what he sees as the relatively uniform "conservative" stance of many appellate decisions (Griffith, 1985, p. 234).

Justification of this type of theorizing, as of other forms of empirical explanations, appeals to two basic criteria. One is the credibility of the putative facts; that is, whether there is good evidence to warrant belief that an event occurred or that a characteristic appeared as depicted. For example, it might be shown that Griffith's selection of cases for analysis was atypical and that there was no discernible "conservative" trend when all appellate decisions were considered. A second justificatory criterion is the credibility of the explanation for the phenomena. Does the theory provide the most plausible explanation of the causes for the phenomena? For example, it is conceivable that although British superior court judges tend to be drawn from the same social class they might have different political views. If this were the case, Griffith's explanation of the judges' conservative tendency in terms of common social background could not be sustained. Alternatively, the phenomena might be (partially) explained by the hypothesis that, regardless of their personal political views, judges perceive their professional judicial duty as requiring that they apply law in a conservative manner.

Neither type of theorizing we have considered thus far provides us with an account of judicial decision making that addresses the purposes identified briefly in the opening remarks
of the thesis - namely, to explicate the standards to which judges are expected to conform in fulfilling their adjudicative responsibilities. Griffith’s causal theory about British judges’ social background leaves open the question of whether judges overstep their authority in deciding as they do. Arguments for and against Wolff’s ethical theory may offer little explication of the standards governing current practices. If educators are to explain how the judicial function is supposed to be carried out, they require an account of the standards that judges follow when they apply the law properly.

This third type of theorizing, which I will call formal theorizing, seeks to construct a model of correct judicial decision making within a given legal system or legal tradition. Formal theories attempt to explicate the essential features of a practice - its structure, governing norms, and basic "logic."

Theorizing of this sort is descriptive in that it must faithfully portray the sanctioned standards and recognized practices of a given system. However, formal theorizing also has a normative dimension. Unlike causal theories, which generally have a strong interest in predicting and explaining likely behaviour, formal theories focus on identifying and explaining expected behaviour - on what would occur if practitioners operated in accordance with the norms prescribed by their system. In other words, formal

4 This statement is meant to refer only to the conclusion cited above. Griffith (1985, pp. 193-235) concludes that British judges are authorized to act in a law-making role and that, by and large, they act in a judicially proper manner.

5 Kovesi (1971, pp. 1ff.) uses the term "formal" in a similar way.
theories account for "proper" rather than "typical" behaviour. This distinction underlies the following remarks about reasoning from precedent:

My observations are meant to be faithful to the accepted theory of practice rather than to the practice itself. Their aim is to explain the way judges and legal scholars regard the working of the doctrine of precedent. Only an empirical study going beyond the examination of the law reports could record to what extent the actual practice conforms to these theories. (Raz, 1983b, p. 181)

A formal theory explicates what counts as "acceptable" or "correct" practice, and gives rise to normative conceptions of judicial duty and justified decision. As MacCormick (1978, pp. 12-13) suggests, formal theorizing about judicial reasoning is essentially "an attempt to explicate and explain the criteria as to what constitutes a good or a bad, an acceptable or an unacceptable type of argument in law." However, unlike ethical theories, formal theories do not defend the standards embedded in a given system in light of more fundamental ethical values. For example, the most plausible formal theory about acceptable norms of legal practice in South Africa need not presume that apartheid is ethically defensible.6 In some systems at least, legally proper practice may be morally unfair or discriminatory.7 In the introduction to his (formal) theory of judicial reasoning, MacCormick offers a compatible observation: "My conclusions

6 See, for example, Manning's (1987) observations on the legalized inequity in South Africa's legal system.
7 For example, in Canada it would generally be accepted that the orders-in-council authorizing deportation of Japanese Canadians after World War II were unfairly discriminatory and yet legally sanctioned - at least, their legality was upheld by the Supreme Court of Canada in Cooperative Committee on Japanese Canadians v. A.G. of Canada [1947] 1 D.L.R. 577.
therefore present a double face: they are both in their own right normative and yet I believe them to describe norms actually operative within the systems under study" (MacCormick, 1978, p. 13).

In some respects, defending a formal theory of judicial reasoning is analogous to ordinary language analysis of concepts. The justification of ordinary language claims builds upon the ways in which words are (and have been) used by competent speakers of the language. The range of uses are explored, and central or paradigmatic features of usage are contrasted with derivative and atypical features. The usual upshot of such an analysis is a set of essential conditions constituting a concept "properly understood." These standard conditions are the criteria upon which are based assessments of the correctness or appropriateness of particular applications of the concept. While formal theorizing about the judicial system is not, at heart, an analysis of the concepts used by practitioners - it is an analysis of a practice - it shares a parallel methodology. Formal theorizing about either a concept

8 Ordinary language analysis provides a theory of correct usage of a concept; a formal theory of judicial reasoning is an account of standards for correct practice.
9 Some have suggested that Hart's project was essentially a conceptual analysis of "law" (Samek, 1974, pp. 271ff.). This is not a surprising assessment given Hart's choice of title, The Concept of Law, and his extensive analysis of numerous concepts. However, I think this assessment is inaccurate; Hart's account is predominantly a formal theory of legal practice. Notice that Hart suggests that his project will be regarded as "analytical jurisprudence" because "it is concerned with the clarification of the general framework of legal thought, rather than with the criticism of law or legal policy" (CL, p. v). All that he is admitting is that his work is not what I call an ethical theory.
or a practice presupposes a relatively uncontroversial set of "facts" - what competent practitioners would recognize as features of accepted behaviour in a given community10 - and proceeds to identify constitutive principles and structures which explain, rationalize and, if appropriate, assess particular aspects of the practice. In passing, it is important to note that accepting practitioners as authoritative sources of information about acceptable standards within a practice should not be confused with asserting practitioners' competence to theorize about the underlying logic and structure of those standards. For example, the Swiss children that Piaget (1965) interviewed for his study of rule-guided behaviour were experts on the rules of the game of marbles even though they may never have considered the second-order principles that explained their behaviour. Similarly, while judges are authorities on the secondary rules of application in a given system, they may not be

Furthermore, Hart characterizes his work as "descriptive sociology" and, citing Austin, provides a rationale for his instrumental concern with conceptual analysis: "a sharpened awareness of words to sharpen our perceptions of the phenomena" (CL, p. v). Finally, in concluding his introductory chapter, Hart explicitly states that resolution of doubts about application of the concepts "law" and "legal system" is only a secondary concern of his book (CL, p. 16). As he says, "its purpose is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested; it is rather to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system" (CL, p. 17).

10 As Waluchow (1983, p. 336) states, "The best way to determine the rules of the game is to ask its participants." See also Bell (1985, pp. 23-24).
in a position to explain the underlying logic of judicial reasoning.11

I suggest that defense of a formal theory depends on the extent to which the descriptions and explanations of the practice can be sustained in light of the norms, requirements, procedures, and purposes which fully informed, competent practitioners would recognize as characterizing their system. As we will see, the phrase "what fully informed, competent practitioners would recognize" is used figuratively, as a "legal fiction." It denotes a test or criterion to be met, namely that it is reasonable to expect that open-minded persons sufficiently informed about the relevant facts would recognize a given theory as a faithful account of the norms of a given legal system. For example, Raz believes that judges are applying the law in a given situation only if their decision can be deduced from the meaning of the words used or from previous cases (Lyons 1984a, pp. 56-57). According to Raz's theory, because of the vagueness of the meaning of the due process clause in the U.S. Constitution, judges who first interpreted the clause were most likely involved in making law - they could not, on Raz's account, be said to have applied the due process clause. However, most practitioners

11 Dworkin supports this distinction when he suggests that disputes between rival theories of law will not be resolved "by framing more intelligent questionnaires for judges" (TRS, p. 352). As he says, the fundamental dispute is over "which philosophical account of the practice is superior." In commenting on practitioners' competence to theorize about legal practice Dworkin suggests: "popular opinion about judges and judging is a sad affair of empty slogans, and I include the opinions of many working lawyers and judges when they are writing or talking about what they do" (LE, p. 11).
would agree that there are other legal grounds besides interpretation and precedent for deciding whether or not a law applies in a particular case. Thus, Raz's account of judicial reasoning is at best an incomplete formal theory since it fails to account for all of the norms that practitioners recognize as appropriate legal standards. We can get a clearer understanding of how to identify the criteria for assessing rival formal theories - that is, identifying what practitioners would recognize as appropriate legal standards - by considering the ways in which the three types of theories are sometimes conflated.

2. Conflation of theories

The conflation of types of theorizing occurs for several reasons. One reason, which has already been discussed, is confusion over the purposes for the inquiry. For example, the American legal realists' theory of judicial reasoning, which denied that "rules" reliably accounted for judicial decisions, was often taken to be a rival theory to legal positivism. According to one reading of legal realism,12 they are not rival theories since the realists' claim that judges do not always apply the rules impartially is not incompatible with the positivists' claim that judges are remiss when they fail to apply

12 Legal realism is a loose collection of diverse views on the actual workings of law. One version of realists' position - the unqualified claim that legal rules are myths - cannot plausibly be taken to be a formal theory (CL, p. 133). Hart identifies several versions of what he calls rule-skepticism that may qualify as formal theories (CL, pp. 132ff.).
the rules impartially. Legal realists were, for the most part, concerned with a causal explication of legal practice and not an explication of how law was supposed to be practiced. A second reason for conflation of theories stems from difficulties in identifying bona fide standards within a practice. These difficulties arise in two ways. Because of the normative dimension of formal theorizing, two forms of "ought" are sometimes conflated: it is often difficult to distinguish what should occur, given accepted legal standards, from what would otherwise be desirable to occur. Because of the descriptive dimension of formal theorizing, two forms of "is" are also sometimes conflated: it is often difficult to distinguish existing standards from pseudo-standards. Let us consider these two sources of difficulty in turn.

2.1 Normative confusions

It was suggested earlier that, unlike ethical theories, formal theories do not attempt to justify standards embedded in practice in light of more fundamental ethical values. Stated this way, the claim is very misleading. After all, in the official conduct of their duties, judges continually defend their judgments in light of more fundamental values. In fact, the Canadian Charter of Rights and Freedoms (hereafter the Charter) requires judges to justify any limits on constitutional rights in light of the principles sanctioned by a "free and democratic society." Thus it appears that legal standards often require judges to justify their decisions in light of fundamental "moral"
principles, and yet fundamental moral principles do not play a role in justifying what legal standards judges should apply. To explain this apparent contradiction, it is useful to envisage a legal system as a kind of value system - that is, a complex set of standards and rules ordered in a loose hierarchy (Samek, 1974, p. 44). A verdict in a particular case will be justified in light of a rule of law. The legality of that rule of law might in turn be justified in light of higher, constitutional standards, which in turn might appeal to more fundamental ideals within the system.

The fact that we refer to our law as a system suggests that at some point we can distinguish the standards and rules that belong to it from those that are outside the system. Speaking of a person, we might say that the standards explicitly or implicitly held by that person comprise the standards of his value system. We may have great difficulty in clearly identifying those standards, but, in principle, we can distinguish values that are part of an individual's value system from those that are not. The same applies to legal systems - the values of a given legal system will be the values that can be attributed to the institutions and practices within that system.13 For example, a fundamental issue in the traditional debate between natural law and legal positivism can be understood as a dispute over demarcation of the values of a legal system. A

13 The analogy with ordinary language analysis is that the range of uses of a concept will be those recognized within a given language community.
traditional version of natural law holds that a necessary condition for attributing a standard to any legal system is that the standard is consistent with principles of "natural" justice. Classical legal positivism holds that that condition is not a necessary element of a legal standard. Classical natural law theory insists that there is no distinction between the norms of a legal system and moral norms. Legal positivism holds that although there will inevitably be grey areas, in principle it is possible to distinguish legal from moral standards. If natural law and legal positivism are rival formal theories of law, then resolution of this dispute hinges on what informed practitioners would accept as the limits of their legal system. The natural law requirement that all judicial decisions be consistent with moral principles is a bona fide requirement of our legal system only if officials in our system accept it as a standard binding on them.

14 As was discussed earlier, this way of expressing the "separation of law and morality" thesis implies only that the attribution of any given standard to a legal system does not require that the standard be a morally defensible one. Hart acknowledges what has been called the "minimum moral content" of a legal system - that degree of justice and fairness required for any system to function (CL, p. 202).

15 Positivists disagree about the sharpness with which the distinction between legal and extra-legal standards can be drawn and about what is expected in the "penumbra" cases. For example, "legal formalism" or "mechanical jurisprudence" - the view that application of law is largely a technical task circumscribed by relatively unambiguous rules - asserts a clear division between legal and extra-legal standards. This "letter of the law" version of positivism is to be contrasted with Hart's version, which recognizes that application of the law is often uncertain and creative, as it requires appeal to ambiguous or general standards (CL, p. 200).
Regardless of where a given formal theory divides those standards attributable to the legal system from those outside the system, any system will allow for ethical theorizing in light of external standards. As was suggested above, an obvious area of contention in distinguishing formal and ethical theories involves determining whether or not the standards being appealed to are "acceptable" standards within the legal system. A further way in which formal and ethical theories are sometimes conflated stems from the fact that appeals to values external to the system do not exhaust the ways of ethical theory building. An ethical theory with recommendations as to how legal practice should be improved may be justified in light of standards within the system. For example, assume that an established legal custom permits judges to dispose of a case without being required to provide written opinions explaining their reasons for judgment. Assume, further, that the absence of these reasons impairs judges' ability to decide subsequent cases in a consistent manner. A theorist would be engaging in ethical theory building if he recommended changing the custom because mandatory written

16 It is worth noting that the distinction between formal and ethical theorizing does not prejudice the case against theorists who deny a clear separation between legal norms and political morality. A formal theory which claims that judges are authorized to appeal to community standards of morality does not collapse into an ethical theory of law. For example, an external ethical justification of legal practice might conclude that a given community's political morality is fundamentally unjust. However, formal theorists who believe that judges are authorized to appeal to moral considerations cannot defend their theory merely by showing that it would be morally desirable that practitioners act in a particular way. Formal theorists must show that the "moral" standards to which judges supposedly appeal are actually the norms accepted by fully informed, competent practitioners.
opinions would be more compatible with the fundamental principles underlying the doctrine of precedent (Sartorius, 1968, pp. 180-181). The mere fact that a legal rule is inconsistent with other more fundamental principles does not mean that the rule is not an acceptable legal rule. In explicating a formal theory we must be careful not to confuse inconsistent and, perhaps, undesirable \textit{bona fide} practices with mistaken accounts of judicial duty. It must be remembered that the primary objective in formal theorizing about legal reasoning is to describe what is regarded as acceptable judicial practice. The dilemma will be, as Hart suggests, how to distinguish "efforts to correct conventional misdescriptions of the judicial process" from "efforts to correct the process itself" (PPL, p. 270). A danger in theorizing about judicial reasoning is that certain \textit{bona fide} practices will be dismissed because it would be better - it would promote desirable legal values - if they were not recognized as \textit{bona fide} practices.\footnote{Mackie (1984, pp. 163ff.) suggests that Dworkin is guilty of this conflation. Dworkin wants his theory to be a "truer description" of practice than it actually is because, in Dworkin's eyes, it would be a better system if his theory were more widely followed by judges.}

17 Although, as I will now explain, it may often be difficult to determine whether or not a given legal practice is a \textit{bona fide} legal practice.

2.2 Descriptive confusions

Difficulties in identifying \textit{bona fide} standards within a practice arise because of confusions between existing and pseudo-standards. For example, the fact that a particular judicial
behaviour frequently occurs within a practice will sometimes be mistaken as an indication that it is acceptable behaviour. Because of the importance in formal theorizing of identifying bona fide standards, we will consider three pitfalls in some detail. These pitfalls deal with difficulties in distinguishing (1) "merely accepted" from "acceptable" practice, (2) "nominally acceptable" from "actually acceptable" practice, and (3) "mistakes" from "divisions" in practice.

(1) "Merely accepted" v. "acceptable" practice. Patterns of behaviour may be accepted by many persons involved with the system and still be unacceptable behaviour. To say that certain behaviour is accepted may merely signify that it is tolerated - it may be far below what is recognized as proper. For example, the use of anabolic steroids by Olympic athletes is accepted in many quarters but is unacceptable under existing rules. This suggests that dismissing an accepted way of behaving on the grounds that it is not acceptable practice would still be regarded as describing proper practice. It may be, for example, that Griffith and the American legal realist tradition are correct in their claim that judges decide cases on the basis of their political ideology. It may be that this pattern is widely acknowledged and accepted. It remains an open question - one addressed by formal theorizing - whether this sort of appeal to political values is authorized. Many causal theories are mistaken for formal theories because the difference between merely accepted and acceptable practice is overlooked. The fact
that certain behaviour frequently occurs and is known to occur does not, on its own, make that behaviour proper within the practice. The analogue in language is, for example, that the fact that many people misuse, misspell or mispronounce particular words does not make those practices acceptable. However, as we will see, widespread use may cause what was once unacceptable to become acceptable practice.

One way to begin to resolve the accepted/acceptable division is suggested by a distinction between descriptive and prescriptive generalizations (Green, 1966, pp. 115-117). A descriptive generalization about behaviour implies merely that a particular behaviour is a normal occurrence - that is, the generalization is recognized to be an accurate statement of behaviour within a group or practice. For example, it might be said that judges often rely on personal political values in deciding cases. It would be an open question whether or not this common practice was consistent with the standards of proper judicial practice. A prescriptive generalization, on the other hand, implies that behaviour is "rule following" or "norm obeying" - that is, the generalization is recognized to be a statement of the way persons within the group or practice should behave. For example, a high incidence of judicial appeal to personal political values would be a prescriptive generalization if judges were authorized to do so. In other words, a prescriptive generalization indicates whether or not a given behaviour is proper behaviour.
Hart argues that accepting a rule as a standard for behaviour means that the rule provides the reason for one's behaviour (CL, pp. 50-60; PPL, p. 266). A norm or pattern of behaviour qualifies as a justifying reason for behaviour only if it is proper to do the sorts of things identified by the norm. This explains why the reasons practitioners offer to justify their behaviour are, generally speaking, good indications of the sorts of norms they consider acceptable. One sign of an acceptable standard for judicial decision making is, therefore, judicial willingness to cite the standard as a reason for the decision. To offer an absurd example, consider the theory of sentencing known as "gastronomic jurisprudence" (Cardozo, 1964, p. 332). It holds that the degree of judicial satisfaction with breakfast determines the severity of sanctions judges are likely to hand out that day. This may be an accepted generalization about judicial behaviour but it is an unlikely candidate for an acceptable standard for judicial decision making, as judges are unlikely officially to cite it as a reason for determining severity of sentences and would be hard put to offer any authorization for it as a legally valid consideration.

Written judicial opinions are good indications of what informed practitioners would accept since the reasons for judgment in a case imply the standards of judicial reasoning held by the judge offering those reasons.18 It goes without saying

18 As Postema (1982, pp. 193-194) notes, judges need not have the standards consciously in mind when they reach their decisions. It is sufficient that the standards be implicit in judges' justifications. For the moment, I am ignoring the more
that official statements (e.g., interpretive acts, pronouncements from the highest courts, authoritative treatises) about the standards that judges are expected to follow in justifying their decisions are also good indications of acceptable norms. Unfortunately, judicial opinions and other official declarations are reliable only to a point, as we shall see when we look at two other pitfalls in identifying acceptable standards within a practice.

(2) "Nominally acceptable" v. "actually acceptable" practice. Often norms will be officially sanctioned but not considered to be bona fide. For instance, although official Olympic Games Committee rules prohibit use of steroids by Olympic athletes, the fact that officials may know about widespread use and still fail to take corrective steps suggests that this form of drug use may be only nominally unacceptable. In other words, public declarations of the rules may not be accurate statements of the de facto rules. This discrepancy between the nominally and the actually acceptable can be problematic in judicial reasoning. There are basically two objections to the use of judicial opinions and official legal documents as evidence of judicial standards: judges may be deceitful, and judicial standards may no longer be acceptable.

It has frequently been suggested that judges fail to disclose the real reasons for their decisions. According to this pedestrian but nonetheless troubling semantic obstacles to explication of acceptable standards arising from ambiguity in judicial statements.
view, legal opinions may be little more than rationalizations framed in textbook language. The most cynical version of this theory is that there is a significant and widespread gap between the so-called "rules" of judicial reasoning and the criteria that judges actually employ (Hughes, 1981, pp. 41-43). It is suggested that judicial reluctance to admit this fact publicly stems more from fear of embarrassing the administration of justice than from the lack of acceptance of this behaviour within judicial circles. A less cynical version of this theory is that particular justifications offered in judicial opinions, such as the "true" intent of the legislators, are tacitly understood by the legal community as euphemisms for judicial discretion. For this reason, despite repeated references in U.S. Constitutional opinions to the framers' original intentions, for example, it would be a mistake to regard consistency with framers' intentions as an actual judicial standard.

Whether judges merely pretend to apply law according to the norms implied by the reasons they offer, or are by and large sincere, even if mistaken, in their proffered justifications, is largely an empirical question. I find the more cynical view of judicial reasoning - that the practice as a whole is a deception - highly improbable. I am less certain to what extent particular standards are deliberately cited as a convenient disguise for judicial law making. No doubt some judges rationalize decisions on particular grounds; it is not clear that judges generally do
so and believe it acceptable to do so.\footnote{For example, Williams (1982, pp. 76-77) suggests that it is "simply human nature" that some judges will find any excuse to distinguish a prior case from the case before them if they are gravely dissatisfied with the prior case's ruling. Significantly, Williams expresses doubts about this being a common occurrence.} In cases where the actual reason differs from the publicly stated reason, unless the judicial community admits (even if only within its own circle) that the actual reason is an acceptable standard, then the publicly stated reason is arguably the legally correct standard.

Another possible source of discrepancy between nominally and actually accepted practice is what Dworkin calls "unrecognized anachronisms" \footnote{Certainly this rule was rejected in interpretation of Canadian constitutional provisions in the famous Persons case - Edwards et al. v. Attorney General of Canada [1930] A.C. 124.} (LE, p. 72). This refers to the fact that some standards which at one time were acceptable are no longer so because they have been superseded. It might be suggested that the "frozen concept" rule - that the meaning of a word is limited (or frozen in time) to its meaning at the time the law was passed - is no longer a rule of Canadian statutory interpretation.\footnote{Certainly this rule was rejected in interpretation of Canadian constitutional provisions in the famous Persons case - Edwards et al. v. Attorney General of Canada [1930] A.C. 124.} While this hypothesis explains why norms appearing in legal treatises that have not been relied upon recently in judicial opinions may no longer be acceptable standards, it fails to justify ignoring norms implied by reasons which are offered in current judicial opinions since recent judicial affirmations of a traditional rule mean that the implied norm is currently acceptable to at least some judges.
It appears that neither the deception nor the anachronism hypothesis plausibly challenges acceptance of reasons in judicial opinions as generally reliable indicators of correct standards. The remaining and most troubling challenge is the identification of judicial mistakes.

(3) "Mistakes" v. "divisions." I have been arguing that the opinions judges offer in support of their judgments are prime indicators of acceptable standards in judicial reasoning. But what happens when judges get it wrong? We cannot presume that every reason judges offer implies norms that are acceptable in the practice generally. We must distinguish between a judge being moved by arguments that were merely "psychologically persuasive" and by those that were "worthy of persuasion" (Stone, 1964, p. 331). Given the volume of cases decided each year, it is to be expected that an immense number of errors in judicial reasoning will be made. We may be justified in characterizing a judge's reason as erroneous if her reasoning was rejected by a superior court21 or if her reasoning obviously conflicts with clearly acceptable standards that were offered by judges in relevantly similar situations. However, even if judges are not authorized to invent new standards for applying laws, Anglo-American reliance on precedent means that once decided (correctly

21 A particularly candid repudiation of a judge for ignoring the rules of judicial reasoning occurred in Davis v. Johnson [1978] 1 All E.R. 1132 at p. 1137. Lord Diplock suggested that Lord Denning's reinterpretation of the doctrine of precedent amounted to "what may be described, I hope without offence, as a one-man crusade with the object of freeing the Court of Appeal from the shackles which the doctrine of stare decisis imposed on its liberty of decision."
or otherwise), judicial arguments become part of the law.22 In other words, judicial behaviour that was once merely accepted becomes acceptable. Goldstein (1984, p. 101) refers to this as the "self-verifying quality" of legal decisions.

Recent accounts of the evolution in American constitutional interpretation suggest that standards of judicial reasoning have changed dramatically over the last two centuries (Brubaker, 1987, p. 263). The fact that the standards of judicial reasoning may change does not in itself pose a problem for formal theorists; the problems arise when it is unclear whether or not a change has occurred. Often there will be significant doubt about whether a given standard is still acceptable within a system (Goldstein, 1984, p. 99). If divergent practices are widespread, it may not be possible to distinguish "mistaken" positions from the "correct" position.23 Certainly there are ample indications in judicial opinions of underlying jurisprudential disputes about the proper standards for adjudicating competing claims. For

22 The role of precedent in setting standards for judicial decision making was implicitly affirmed in a recent Supreme Court of Canada decision. In arguing the proper interpretation to be given a provision in the Charter, lawyers presented numerous "extrinsic materials" such as transcripts of House of Commons' debates. Justice Estey explained that while the Court had received these materials it had not needed them to reach its conclusion. Accordingly, the Court did "not wish to be taken in this appeal as determining, one way or the other, the propriety in the constitutional interpretive process of the admission of such material in the records" (Law Society of Upper Canada v. Skapinker [1984] 9 D.L.R. (4th) 161 at p. 181).

23 It is important to remember that this is not a dispute about the decision reached in a given case. As will be discussed in chapter five, judges may accept the same general set of standards for deciding a case and still reach opposing conclusions about the correct disposition in light of those standards.
example, Canadian Supreme Court Justice Dickson opened his majority opinion in Rathwell v. Rathwell24 with observations about the uncertain state of matrimonial property law. In his view, judicial resolution of disputes in this area had been "bedevilled" in part by a continuing struggle between rival schools of jurisprudence - between those who would dispense "palm tree justice" and those who would search for a "phantom intent."25

The possibility of divisions of this sort makes articulation of (some) judicial standards problematic - practitioners may have different perceptions of what is acceptable. A lack of homogeneity in judicial decision-making practices cannot be resolved merely by claiming that one set of standards would be more desirable than another. In situations where significant divisions in practice exist, Hart's observations about the consequences of disagreements over the fundamental rule of recognition are instructive. He explains that rules establishing the validity of primary legal rules must be regarded by the legal community as shared standards. A failure in this respect not merely threatens the efficacy of a legal system but challenges a logically necessary condition of our ability to speak of the

25 "Palm tree justice" refers to a manner of deciding cases that ignores the established rules and attempts to reach a just resolution on the basis of the perceived merit of the competing positions. "Phantom intent" refers to a view that cases should be decided on the basis of the historical intentions of the law's framers. It is often a "phantom" intention because the legislators can not have anticipated all cases that would eventually come to be decided by the law.
existence of a single legal system (CL, pp. 112-113). It may be
that sufficient divisions among practitioners preclude
descriptions of a practice in terms of a unitary set of standards
for judicial reasoning.

To summarize the discussion, I have suggested that a formal
theory of judicial reasoning attempts to explain what competent,
informed practitioners within a system would regard as the
standards for correct practice. While judges may be unable to
conceptualize this constellation of standards, judicial opinions
are authoritative sources of the standards for which a formal
theory must account. Further, we cannot assume that acceptable
practices will necessarily be consistent or desirable, or that
all practitioners within a system will share the same standards.
Before articulating a positive account of the nature of Anglo-
American judicial reasoning consistent with these criteria, I
will consider a challenge to this explication of formal
theorizing.
Chapter Three:

A Rival Account of Legal Theorizing

The previous chapter presented an account of formal theorizing about judicial reasoning. I claimed that formal theories must account for the "acceptable" norms and standards as recognized by competent Anglo-American practitioners. A rival account of legal theorizing, offered by Dworkin, discusses legal theory building in terms of interpretation of social practices. For Dworkin, all legal theorists must adopt an "interpretive attitude" - they must make sense of judicial behaviour by offering an interpretation that portrays judicial practices in their most favourable light (LE, p. 226). The most defensible theory of judicial reasoning is that theory which offers both a plausible interpretation of the "realities" of judicial practice and a better justification for the practice generally than do other plausible interpretations. Dworkin calls the first criterion the "fit" requirement and the second criterion the "best light" requirement.

In this chapter I defend my account of formal theorizing against objections implied by Dworkin's account of legal theorizing. I begin by clarifying Dworkin's understanding of interpretation, particularly in the context of theorizing about legal practice. Next, Dworkin's two criteria for legal theory
building are explicated. The inadequacy of these criteria is shown by exploring why theories that purport to represent practice faithfully need not collapse into theories that serve some other desired end. I argue that Dworkin's "fit" requirement - the extent to which a theory must account for the recognized standards within a practice - is not sufficiently stringent to distinguish formal theorizing from ethical theorizing.

1. Dworkin's account of theory building

Dworkin emphasizes that legal theorizing is essentially a matter of interpreting judicial practices. Before considering his criteria for assessing rival theories we must get clearer about Dworkin's understanding of the notion of interpretation.

1.1 Types of interpretation

Dworkin employs the term "interpretation" in at least three different senses. In its most general sense - used almost interchangeably with the terms "conception" and "theory"1 - Dworkin uses it to refer to a general explanation or exposition of something.2 This sense, which I will call "interpretation as

1 Dworkin's use of the three terms in apparently synonymous ways is reflected in the following passages: "theories that challenge rather than elaborate the connection it [a previously mentioned "characterization of the concept of law"] assumes between law and the justification of coercion;" "Conceptions of law refine the initial, uncontroversial interpretation I just suggested provides our concept of law;" and "In the next several chapters we shall study three rival conceptions of law, three abstract interpretations of our legal practice that I have deliberately constructed" (LE, p. 94).
2 The roughly synonymous meanings of interpretation, conception and theory are reflected in The Oxford English Dictionary (Hereafter referred to as OED), 1986, pp. 500-501, 1467, 3284.
explaining," would not discriminate between what I have termed a causal theory and a formal theory of law. Each would qualify as an interpretation serving a different purpose or providing a differing perspective.3

Dworkin uses "interpretation" in two other and more specific senses. He uses it to refer to the identification of meaning4 and the creation of meaning.5 Identification of meaning is defined as an act of expounding the meaning of something abstruse; rendering words or authors clearer or explicit (OED, p. 1467). This sense, which I will call "interpretation as deciphering," presumes that utterances are communications with intended meanings. Joint acceptance of a semantic theory, or participation within a particular language game, to use Wittgenstein's metaphor, enables the interpreter to glean the author's message. While this sense is ordinarily at play when we speak of judges interpreting statutes, it does not describe interpretation in the context of articulating a formal theory of judicial reasoning. As I have indicated, theory building of this

3 This observation is compatible with Dworkin's distinction between theories that adopt an external or an internal point of view - the former look to explain why certain patterns of legal arguments develop, while the latter seek to account for good and bad legal argument (LE, pp. 13-14). As I suggested earlier, ambiguity about what counts as a "good" legal argument leaves unclear whether Dworkin's "internal perspective" discriminates between ethical and formal theories of judicial reasoning.
4 Dworkin's discussions of "conversational interpretation" (LE, pp. 50-52) and the "speaker's meaning" view of legislative intention (LE, pp. 314-315) demonstrate this sense.
5 Dworkin's discussion of "constructive interpretation" (and therefore his view of what is involved in "artistic interpretation") uses the term in this sense (LE, pp. 52-65).
sort is not essentially an explication of speakers' meaning of words like "law."

Dworkin also uses "interpretation" to refer to the creation of meaning - i.e., a construction put upon actions and purposes; a representation according to one's conception of the author's idea (QED, p. 1467). This sense, which I will call "interpretation as attributing," presumes that phenomena acquire significance or meaning for an interpreter by virtue of the values, purposes, which the interpreter attributes to the object of the inquiry. This sense is in evidence in Dworkin's remark: "Once this interpretive attitude takes hold . . . people now try to impose meaning [his emphasis] on the institution - to see it in its best light - and then to restructure it in light of that meaning" (LE, p. 47).

For Dworkin and for our present work, a key issue is which sense(s) of interpretation applies in the context of legal theory building and what criteria distinguish acceptable from unacceptable interpretations.6 It is important to keep in mind that legal theory building refers to second-order considerations in identifying and justifying a theory of judicial reasoning. It is not to be confused with any particular theory of judicial reasoning.7

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6 Dworkin clearly recognizes the importance of these concerns: "the analysis of interpretation I construct and defend in this chapter is the foundation of the rest of the book" (LE, p. 50).
7 Dworkin argues that legal theory building and judicial reasoning in Anglo-American legal systems are similar types of interpretive enterprises (LE, p. 54). In this chapter I argue
As indicated above, Dworkin claims that all interpretations must meet two criteria: they must fit the phenomena and they must show the object of the interpretation in its best light. That is, an interpretation must account, to some degree or another, for the uncontested features of the object of interpretation and, in the event of competing plausible accounts, best serve the purposes for objects of that sort. Further explication of these criteria depends on the context — on the sense of interpretation being used and the nature of the object of interpretation. As Dworkin says, "all interpretation strives to make an object the best that it can be, as an instance of some assumed enterprise, and that interpretation takes different forms in different contexts only because different enterprises engage different standards of value or success" (LE, p. 53). Dworkin offers "conversational," "scientific" and "artistic" interpretations (LE, pp. 49ff.) as three examples of different contexts and, therefore, different implicit criteria for assessing interpretations. In conversational interpretation, "the so-called principle of charity" requires that, when faced with several equally plausible interpretations of a speaker's utterance, an interpreter should assume the most generous meaning that can be attributed to the speaker (LE, p. 53). In science, the best account of a body of data among rival, plausible accounts will be the one exhibiting "standards of theory construction" such as simplicity, elegance and verifiability (LE, that his account of theory building is incorrect and, in chapter eight, that his account of judicial reasoning is incorrect.
p. 53). Artistic interpretation strives to maximize the value of the piece being interpreted by showing the piece in its best light (LE, pp. 52-53).

Dworkin suggests that interpretation of artistic works is the most appropriate model for legal theory building. Conversational interpretation (what I called "interpretation as deciphering") is rejected for the reason I suggested earlier - i.e., formal legal theorizing is not at heart an inquiry into what people mean when they speak (LE, p. 50). Dworkin dismisses scientific interpretation because unlike law, whose focus is human actions, science focuses on "events not created by people" (LE, p. 50). Or, as he later says, science is concerned with "mere causes" and not with purposes (LE, p. 51). Since the other two types of interpretation are dismissed by Dworkin as inappropriate, he offers artistic interpretation as the most plausible candidate for interpretation of social practices like law (LE, pp. 54-55, 62-65). 8

Dworkin relies heavily on similarities between interpretation of two social practices - courtesy and literary criticism - for his explication of the standards and nature of legal theory building (LE, p. 87). Courtesy and social practices in general have rules which guide behaviour and promote identifiable interests or serve recognized purposes (LE, p. 47). 8 This a very weak argument. Showing that his interpretive approach is preferable to two other approaches that, by his own admission, are obviously inappropriate for interpretation of social practices does not establish the merits of Dworkin's approach in light of more credible alternative approaches.
For Dworkin, law and, presumably, courtesy, but not all types of social phenomena, are "argumentative" - legal practice is centrally concerned with arguments about the truth of propositions of law and what implications follow from these propositions (LE, p. 13). Judges and legal theorists talk meaningfully about both what is true about the law and what should be taken to be the law. Dworkin suggests that these descriptive and normative features of legal discourse are profitably explained in the "aesthetic hypothesis" (MP, p. 148). Any credible interpretation of an artistic work is inextricably linked with standards for good art (MP, pp. 150, 152). In literary criticism, when faced with competing interpretations, a critic will employ his aesthetic standards in the interpretation which shows the literary piece in its best light. By analogy, "what is law" is inextricably linked with "what is good law." Dworkin invites us to accept parallels between the judge and the literary critic and between the judge and the chain novelist (MP, pp. 146-148; LE, pp. 53-55). For the moment, let us accept

9 It is difficult to decipher exactly what Dworkin means when employing coined terms such as "argumentative." The term perhaps acknowledges that legal practice is a normative activity. As Dworkin explains, persons theorizing from the internal point of view do not want predictions of the legal claims they will make but arguments about which of these claims is sound and why; they want theories not about how history and economics have shaped their consciousness but about the place of these disciplines in argument about what the law requires them to do or have. (LE, p. 13)

10 The chain novelist is Dworkin’s fanciful literary metaphor for the role of judges in judicial reasoning. Judges are like novelists who are involved in a collaborative effort to develop a work. Both inherit an unfinished product and are required to add to its evolution by making sense of and extending previous efforts (MP, pp. 158-166).
Dworkin's parallel between interpreting judicial practice and interpreting a literary work, and examine Dworkin's criteria for assessing rival theories of judicial reasoning.

1.2 The "fit" requirement

What standards of "fit" does artistic interpretation imply for a theory of judicial reasoning? We can begin answering this question by considering Dworkin's distinction between the "preinterpretive" raw data of a social practice or a work of art, and the data that any given interpretation of a practice or work will encompass (LE, pp. 65-66). The raw data of a literary work are the words of the text. The analogue in social practices are "the rules and standards taken to provide the tentative content of the practice" (LE, pp. 65-66). Dworkin recognizes that interpreters must agree about the raw data - in the absence of general agreement as to what constitutes the "text" of a given literary work, interpreters can not presume to offer rival interpretations of the same work (LE, p 66). Similarly, a precondition of saying that one interpretation of a practice is better than an other interpretation of that practice is a shared understanding of the basic components of the practice. As Dworkin says, there must be sufficient "agreement about what practices are legal practices so that lawyers argue about the best interpretation of the same data" (LE, p. 91).

While every interpretation of a particular practice or work must begin at this common starting point, any given
interpretation need not account for all the raw data of the practice or work. For example, consider Dworkin's suggestion that there is considerable support for interpreting Raymond Chandler's novels as more than simple thrillers (MP, p. 151). Dworkin recognizes that all segments of the texts (i.e., the preinterpretive raw data) can not be accommodated in such an interpretation and some elements of the novels may be incompatible with a philosophical reading. Despite these unexplained and inconsistent segments of the text, the more ambitious interpretation is plausible— in Dworkin's view there is sufficient fit between the text and the interpretive account. The "fit" criterion merely "constrains the available interpretations" (LE, p. 52) and "will sometimes check" options (LE, p. 255). For example, Agatha Christie's mystery novels would not sustain an interpretation that they were treatises, say, on the meaning of death because all but one or two sentences in each novel would be irrelevant to the supposed theme (MP, p. 150). In the context of social practices, Dworkin claims that an interpretation "need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one" (LE, p. 66). For example, an interpretation could not qualify as an interpretation of Anglo-American legal practice if it required denying major, universally recognized features of our legal system, such as the traffic code (LE, p. 88) or the principles of legislative competence and supremacy (LE, p. 255). Presumably, an interpretation would meet Dworkin's
"fit" requirement even though it dismissed a considerable number of less fundamental features which were generally regarded by practitioners to be bona fide aspects of our legal system.

The implications of Dworkin's account of fit go beyond the claim that an interpretation would "fit" legal practice even if it was incompatible with numerous "lesser" legal standards. Also implied is the possibility that an interpretation may account for major features or "paradigms" of a practice in significantly different ways than practitioners would recognize and accept (LE, pp. 88, 91-92). We can see how extensive "reinterpretation" of major events is possible by considering a literary example, say, a play where the characters' major focus is the destruction of the forest. It might be suggested that, while the topic of the characters' discourse is trees, the play's real topic is human beings. An interpreter could claim arguably that this play is really about the clash between technology and nature, or that it is really a warning about the impending destruction of humanity. Thus, while an interpretation of the play could not ignore the extensive discussion about the forests and still fit the play, it could involve radical reinterpretation of those discussions and still fit the play. Analogously, an interpretation of legal practice which denied outright that, say, the principle of legislative supremacy was a bona fide legal standard would not fit Anglo-American practice. However, an interpretation could characterize that principle in ways significantly at odds with generally accepted views and still meet the fit criterion (LE, p.
Similarly, an interpretation would not fail Dworkin's fit requirement merely because it characterized judicial opinions in ways that "would have amazed the judges whose decisions it proposes to interpret (LE, p. 285). These possibilities arise because interpretations of social practices are not neutral reports of what practitioners think their practice requires, but often competing accounts of what that practice requires (LE, pp. 64-65).

Thus, Dworkin's "fit" criterion admits interpretations of legal practice that (1) are inconsistent with acceptable "lesser" standards and (2) imply substantial reworking of fundamental norms and recognized ways of behaving. Given the laxity of this "rough threshold requirement" that merely the "brute facts of legal history" be accounted for (LE, p. 255), it is to be expected that several (if not many) interpretations of a particular practice are possible.

1.3 The "best light" requirement

Dworkin offers the "justification" or "best light" requirement to adjudicate among those rival interpretations which "fit" legal practice (LE, pp. 52-53). Each interpretation of a social practice will impute different values (or at least ascribe differing priorities to values). Every social practice serves

11 In the terminology I suggest, an ethical theory of law would qualify as an interpretation of current legal practice by Dworkin's standards as long as the recommendations contained in that ethical theory could be seen to be amendments or reforms to recognized practices and ideals (as opposed to a call for a new legal order).
some purpose (or set of purposes). Therefore the "best" from among rival interpretations will be the one which posits the most flattering account of that practice in light of the broader point or values of the enterprise, as understood by the interpreter of that particular practice (LE, pp. 87-88). As Dworkin suggests, "constructive interpretation is a matter of imposing purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong" (LE, p. 52). That is, among theories of law each with their own imputed purposes, the best theory is that which best serves the purpose(s) of law (LE, pp. 93-94).

Dworkin extends the parallel between interpretation of an artistic work and the artistic values within a community to law. Interpretations of law, which is undeniably a political institution, are inextricably linked with views of political morality - with the moral standards of the political community within which the legal system operates. As he says: "the most general point of law, if it has one at all, is to establish a justifying connection between past political decisions and present coercion" (LE, p. 98). Rival conceptions of law must be adjudicated on political grounds: the "model of rules" account is a better interpretation than other accounts of judicial reasoning only if the purposes it imputes to legal practice provide stronger justification within Anglo-American political morality for law's coercive force (LE, pp. 98-99). The "best" legal theory is that theory which shows our legal system in the most
flattering light—that is, provides the strongest justification, given the community's political ideals, for the legal system's continued existence (LE, p. 256).

2. Inadequacies in Dworkin's account

There is nothing necessarily problematic about Dworkin's identification of theory building about social practice as a form of "constructive" interpretation (LE, p. 52), or what I have called "interpretation as attributing." Formal theorizing is constructive because it requires abstraction or model building wherein sense is imputed or attributed, and in a fundamental way the sense or significance that emerges depends on the purposes for interpreting. For example, the account of judicial reasoning I propose explains Anglo-American practice in terms of a model of rules and in particular in terms of secondary rules creating three (largely) discrete modes of reasoning (i.e., reasoning from interpretive guidelines, prior cases and principle). The point of my inquiry, as I have suggested, is to faithfully represent the standards judges employ when applying the law properly. A different type of theory, say a causal theory, might explain judicial practice in terms of professional, community and personal influences. Its purpose might be to represent the psychological determinants of judicial behaviour.

According to Dworkin's account of legal theory building, interpreters' purposes shape interpretations of artistic works and social practices in a fundamental way (LE, p. 52). It is not
merely that theorists determine whether a formal theory is to be preferred over a causal theory: for Dworkin, the interpreter’s convictions of good art and, by analogy, good law determine what the object of the interpretation "really" signifies. Different interpreters’ conceptions of what would make practice more justifiable will determine what comes to be accepted as proper practice. As we have seen, Dworkin draws heavily on the ways in which interpretations of literary works are inextricably linked with interpreters’ conceptions of good literature. While there are noteworthy parallels between interpretation of literary works and social practices, there are important differences which Dworkin apparently fails to appreciate. This overextended analogy leads Dworkin to exaggerate the degree to which formal theorists impute value to legal practice "in order to make it the best example of the form or genre to which it is taken to belong" (LE, p. 52). The limits of Dworkin’s analogy between artistic interpretation and theorizing about judicial reasoning can be seen if we distinguish two basic types of interpretive purposes: "fidelity" and "instrumental use."

2.1 Faithful v. instrumental representations

In some situations, interpretations are motivated by a desire for fidelity - that is, the interpreter’s primary purpose is to provide a perspicuous, faithful representation of, say, the basic features or operations of a particular phenomenon or state of affairs. A city map, for example, purports accurately to portray the network of streets within a given municipality. This
type of interpretation can be contrasted with interpretations having instrumental motives - that is, interpretations whose primary purpose is to serve some practical end or to promote an ideal. For example, the typical, hand-drawn "directions" map does not faithfully represent the typography of the area between the place of departure and the destination. Rather, only features likely to assist in guiding the traveller are depicted. I am not suggesting that city maps do not serve this purpose, simply that the primary criterion for selection of features on them is to provide a complete, faithful representation of some aspect of the reported area.

Dworkin implicitly acknowledges the distinction between fidelity and instrumentality in interpretation in his discussion of rival interpretations of The Merchant of Venice. Dworkin suggests that a director might interpret Shylock either by portraying what, most plausibly, were Shakespeare's conscious impressions of the character or by portraying the character in a way that advances what, most plausibly, were Shakespeare's overall intentions regarding the play (LE, pp. 55-56). In considering the merits of these alternative interpretations Dworkin suggests: "(f)idelity to Shakespeare's more discrete and concrete opinions about Shylock, ignoring the effect his vision of that character would have on contemporary audiences, might be treachery to his [Shakespeare's] more abstract artistic purpose" (LE, p. 56). For example, it may be that Shakespeare's views about Shylock were bigoted. Representing Shylock from an anti-
Semitic perspective might prevent modern audiences from appreciating Shakespeare's more fundamental theme of the folly of greed. In other words, a director might deviate from the playwright's actual views on a character in order to make the production more appealing to contemporary audiences, and instead, might offer an interpretation consistent with the playwright's more general artistic intentions in writing the play. Thus, the director's artistic values determine which of the playwright's intentions to represent in the production. While Dworkin recognizes the notion of faithful representations, he leaves the dimensions or features of the object that an interpretation will represent to be determined by the interpreter.

As Dworkin's example suggests, the difference between the two basic types of interpretive purposes may be mainly a matter of focus. They need not be mutually exclusive - any particular interpretation may aspire faithfully to represent some phenomenon and to have instrumental use in another context. In fact, we could not call an account of a phenomenon an interpretation unless it attempted (even if unsuccessfully) to represent some feature, aspect or dimension of the phenomenon. For example, tourist maps of a particular region often indicate routes to, and locations of, the major points of interest only. If the object of the interpretation - the phenomenon under study - is the geographical region, the interpretation is most plausibly seen as having primarily an instrumental purpose because it depicts only
those features likely to enhance tourism.12 If the map depicts all the major tourists spots (or at least aspires to that goal), it could be regarded as a representative interpretation of major tourist spots in the area. Notice that a shift in the focus of the interpretation (e.g., from the geographical region as a whole to tourist attractions in the region) alters the most likely ascription of purpose. A map that is, say, a good faithful representation of a single dimension of a region may also serve as a good instrumental interpretation of the region as a whole.13

It may be that representing Shakespeare's more general artistic intentions in *The Merchant of Venice* makes the play a better (contemporary) piece, but it would be a mistake to claim that this production attempts faithfully to represent all dimensions of Shakespeare's intentions. The contingent fact that Shakespeare's broader artistic intentions cannot be represented in the same production as his conscious impressions of Shylock does not mean that only one of these intentions are what Shakespeare "really" intended. If the director's mandate is to represent Shakespeare's intentions faithfully then some way must be found to portray these apparently conflicting intentions—perhaps by mounting two productions of the play. Merely because

12 It could of course be seen as a self-consciously incomplete representation of the region.
13 Caricatures of political personalities, for example, deliberately exaggerate specific aspects of the figure to serve some end (e.g., to amuse or to persuade the reader) and in this respect they have instrumental motives. They succeed, however, only because the physical exaggeration of an individual's features represents a recognizable dimension of his personal or political nature or predicament.
a single production can not portray certain dimensions of the phenomenon it is expected faithfully to represent, does not mean that what constitutes a faithful representation is determined by what the interpreter regards as the more flattering or desirable representation.

The fact that incompatible dimensions of authors' intentions are rarely portrayed suggests that in literary circles there is little perceived value in representing all features of an author's intentions. Typically, one dimension of an author's intentions is chosen because that dimension advances values that the interpreter considers worth promoting. However, if an interpreter purports faithfully to represent all significant dimensions of some object, then he cannot select one aspect because it would be more flattering or because to portray all facets would require multiple representations. The significance of this point can be appreciated if we consider the way in which maps of the world represent certain dimensions of the world's features and not others.

The Mercator and Peters projections of the world are good illustrations of rival interpretations. In the sixteenth century, Gerhard Kremer created the Mercator projection (mercator means merchant) to assist explorers and merchants in plotting their navigational courses. Accordingly, the Mercator projection, with its "fidelity of axis" (The New Internationalist, March 1989), locates countries in their proper
directional relationships with other countries. However, it achieves this result at the expense of exaggerating the size of countries nearer the poles. A more recent projection by Dr. Peters depicts countries in proportion to their actual land masses, but distorts the countries' shapes. Dr. Peters' purpose was to combat what he considered to be the Eurocentric view of the world arising from Mercator's under representation of the size of developing countries (The New Internationalist, March 1989). Depending upon our purposes, we might rightly adopt one projection over the other. However, we could not claim to do so because one projection was the more faithful representation of the world: the world is not really like either of the projections, although aspects of the world are faithfully represented by each projection. We would be wise to resort to instrumental considerations when deciding which of the two imperfect representations best serves our current need for a world map. (If we require a faithful representation of the world we should use a globe.) Thus an interpreter's (or user's) instrumental purposes determine which interpretation is adopted only if the interpreter ceases to be concerned about faithfully representing the (entire) phenomenon.

Before considering Dworkin's counter-arguments to my claim that interpreters' purposes do not determine what counts as

14 Fidelity of axis implies that a country that would be reached by heading, say, northeast from the person's physical location would be shown on the Mercator projection to be to the northeast of the person's location of the map.
15 For example, although South America is twice the area of Europe, on the map it is shown as slightly smaller than Europe.
correct practice, it may be useful to clarify the relation between the educational motivation for theorizing about judicial reasoning and the fidelity/instrumentality distinction. In the previous chapter I claimed that a formal theory of judicial reasoning has fidelity as its primary purpose - the point of the enterprise is to represent as accurately as possible the norms and standards which govern Anglo-American judges in their adjudicative role. It might be suggested that the educational purposes for developing a theory of judicial reasoning would be better served if "accuracy" were sacrificed for some other value. For example, if we want to foster greater respect for the administration of justice, perhaps we ought to provide as flattering an account of judicial practice as can be plausibly attributed to our legal system. If this were the case, we would no longer be committed to providing a faithful account and would shift to offering an instrumental representation. For several reasons, I believe that a faithful account better serves our educational purposes than an instrumental account. These reasons include the need for students to understand what constitutes current proper practice\(^{16}\) and students' right to make up their own minds as to the extent to which current practices are worthy of their respect.\(^{17}\) Thus, while an interpreter's purpose determines which type of theory is most appropriate, if that

16 This rationale is explored in the concluding chapter.
17 See Case (1985, pp. 21-26) for reasons why students should be allowed to come to their own conclusions about contentious legal issues.
purpose requires a faithful representation an interpreter's purpose does not determine what counts as the practice.

While Dworkin accepts, implicitly at least, the distinction between fidelity and instrumentality, he would claim that the interpreter's sense of purpose determines the practice in a different way. The interpreter's perception of the purpose of the practice, not the interpreter's purpose for the inquiry, determines what is to be taken as the practice properly understood.18 Social practices, unlike the physical world, do not have an independent reality. The "raw data" of a social practice depend on what practitioners accept as requirements of their practice in a way that the physical world does not depend individuals' beliefs. For example, the fact that explorers thought that the world was round did not make it round, whereas the fact that judges believe that judicial practice requires a certain conclusion may mean that that conclusion is required. Furthermore, practitioners are often mistaken about what their practice requires, and rival interpretations of what is required are possible. For these reasons, Dworkin suggests that determination of the requirements of a practice - what the practice "really" requires - involves deciding which plausible

18 Dworkin believes that the interpreter’s sense of the best overall purpose of the practice determines what counts as the practice. For example, Dworkin argues that "conventionalism" fits legal practice badly, but he goes on to consider whether or not conventionalism provides "an attractive picture of law’s point" (LE, p. 150). Since Dworkin believes that the point of law underlying conventionalism is not attractive, he concludes "we have no reason to strain to make it [conventionalism] fit" (LE p. 150).
interpretation of the practice best serves the most defensible conception of the point of the practice (LE, p. 65).

Before I explain how Dworkin's account exaggerates the importance of interpreters' perceptions of the point of a practice and distorts the role of practitioners' intentions in determining what a practice amounts to, let us consider Dworkin's explanation why each interpreter's sense of the best overall purpose of a social practice determines what the practice really requires.

A participant interpreting a social practice, according to that view [constructive interpretation], proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or exemplify. Very often, perhaps even typically, the raw behavioural data of the practice - what people do in what circumstances - will underdetermine the ascription of value: those data will be consistent, that is, with different competing ascriptions. One person might see in the practices of courtesy a device for ensuring that respect is paid to those who merit it because of social rank or other status. Another might see, equally vividly, a device for making social exchange more conventional and therefore less indicative of differential judgments of respect. If the raw data do not discriminate between these competing interpretations, each interpreter's choice must reflect his view of which interpretation proposes the most value for the practice - which one shows it in the better light, all things considered. (LE, pp. 52-53)

As this passage indicates, Dworkin believes that the accepted facts of a practice will typically underdetermine any interpretation of a practice. This implies that it will generally be the case that either (1) two or more different theories will account equally well for virtually all accepted facts of a practice; or (2) different theories will account for some, or much, of the accepted facts of a practice, but no theory
will account for virtually all accepted facts. As I will explain, the first option - that of equally plausible, complete accounts of judicial reasoning - is not particularly likely. When we understand why Dworkin believes that this option is typical, we will see why his explication of what counts as equally representative interpretations is unacceptable. The second option - that of equally plausible, incomplete accounts of judicial reasoning - is a more likely possibility. However, as I will argue, it does not justify the conclusion that Dworkin asserts, namely that each interpreter determines what the practice requires by adopting the more flattering account of the practice as a whole.

2.2 Equally plausible, complete accounts

Dworkin suggests that several interpretations may provide equally plausible, complete accounts of a practice. The possibility of multiple accounts of a phenomenon is easily seen in the context of artistic interpretations. For example, a character in a play might say "I feel fine." In interpreting what this comment means, it may be plausibly suggested that the character is sincerely reporting his physical or emotional state, or that he is actually hiding his pain in order to avoid causing others to worry about him. The greater the variety of interpretations that any particular comment or behaviour can sustain, the more likely it will be that the literary piece as a whole can be interpreted in several ways at least. The interpretation that is eventually attributed to a particular
comment will depend upon its plausibility given the larger
context of the play and the interpreter’s convictions about the
artistic merit of rival interpretations.

Does the multiplicity of interpretations of the "real"
meaning of a literary character’s comments or behaviour provide
good reason for believing that multiple interpretations of
participants’ comments and behaviour in a social practice are
likely? Dworkin believes that there is a parallel because the
most defensible interpretation of what a social practice "really"
requires may be significantly different from what participants
think the practice requires. As he says, a theorist’s claims
about the demands of courtesy are "not neutral reports about what
the citizens of courtesy think but claims about courtesy
competitive with theirs" (LE, p. 64). This remark is ambiguous
since it fails to distinguish between speculative and
authoritative accounts of a practice. In the previous chapter,
it was noted that participants may not be competent to offer
second-order judgments about the nature of their practice.

19 We can distinguish between practitioners offering
authoritative and speculative accounts of the requirements of
their practice. For example, judges or other observers will
sometimes conjecture about a particular set of legal practices.
These explanations are not authoritative if the individuals are
not speaking in an official capacity. On the other hand, in the
course of justifying a decision, if the Supreme Court accepts an
hypothesis about the point of a body of precedent, that
explanation would be authoritative. Since the explanation is
offered by the court acting within its authorized capacity, the
judicial pronouncement establishes (or confirms) the validity of
the explanation. It was suggested in the previous chapter that
the reasons judge offer in their opinions constitute the
standards within the practice, whereas speculations about useful
ways to conceptualize their practices do not.
However, unless we believe that practitioners are engaged in deception, the standards implied by practitioners' reasons for their behaviour as they conform to the practice, constitute the requirements of the practice. Consider the example of a man who, out of courtesy, tips his hat as a woman passes by. Dworkin would have us believe that the mere behaviour - the tipping of the hat - comprises the "raw data" that an interpretation of the practice of courtesy must explain. This is an inadequate

20 Justifications for judicial behaviour may be offered at a "micro" or a "macro" level. Reasons offered at a micro level are explanations of individual norms and particular features of a legal practice - accounts of a narrow point of law, a specific legal principle, or a single judicial decision. Explanations at a macro level refer to general descriptions of numerous features or broad aspects of legal practice - an account of a body of law, purposes of the practice as a whole, or fundamental principles such as the rule of law. Thus, an account of the purpose of a particular rule would be a micro-level explanation and an account of the purpose of a constellation of rules, perhaps the practice as a whole, would be a macro-level explanation. Some macro-level accounts are authoritative, others are not; the same applies to micro-level accounts. For example, the oath that judges swear when taking office is an authoritative macro-level account of their role's general purposes and guiding principles. Levinson (1978, p. 1088) reports a case where two judges felt compelled to concede the constitutionality of fugitive slave laws despite the moral bankruptcy of those laws. The judges explained that their obligation was "to do what they had agreed to do when they were made judges, or quit the bench."

21 There are several reasons for suspecting that Dworkin does not consider the reasons judges and other legal officials offer for their actions as an essential part of the phenomena to be accounted for. Dworkin describes phenomena as "raw behaviour data" - referring to "what people do in what circumstances" (LE, p. 42). In exploring the plausibility of Posner's "economic" theory of law, Dworkin suggests that an interpretation need not be consistent with past judicial attitudes or opinions, with how judges saw what they were in fact doing. ... [I]t seems more reasonable to regard that kind of fit as one desideratum that might be outweighed by others in deciding whether an interpretation fits well enough. So we cannot reject the economic interpretation on the sole grounds that it would have amazed the judges whose decisions it proposes to interpret. (LE, pp. 284-285)
account of the action required by the practice since it fails to include the reason why the man tipped his hat. Understanding the requirement that courtesy places on this man depends on our learning why he tipped his hat—whether it was because she was a female or, perhaps, because she was his social superior or his boss. In other words, the reason for the behaviour constitutes the standard of behaviour required by the practice. It is not, as Dworkin suggests, the prerogative of the interpreter to impute a reason which would show the practice in its "best" light.

A major reason for Dworkin’s claim that practitioners’ reasons are not constitutive of the standards for proper practice is that practitioners often disagree about the standards. If an interpreter is not free to select the most meritorious account of the standards of a practice, how are disputes among practitioners to be resolved? Before answering this question we must remind ourselves that the issue is with practitioners’ authoritative, not speculative, accounts of practice. Furthermore, at this stage we are concerned with practitioners’ disagreements over the acceptable standards within a practice, and not with disputes about the application of those standards in particular situations. (Understanding the standards required of judges when they apply the law aids in understanding what the law requires in particular situations, but a formal theory of judicial reasoning is concerned with explication of the standards themselves.)

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22 In chapter eight, Dworkin’s conflation of legal standards with the application of those standards in particular situations will be discussed.
Dworkin is correct that there will not be unanimity among practitioners about the requirements of a practice. We can determine how these disputes should be dealt with once we understand the different explanations for practitioners' disagreements. Disagreements about standards arise because some individuals are mistaken, because of divisions in the practice, and because of unsettled areas of practice.

As indicated in the previous chapter, individual practitioners may be mistaken about proper standards. Individual practitioners are mistaken when the reasons they offer for their behaviour in a particular situation are at odds with the reasons provided by the general community of competent practitioners or by an authorized regulatory body (e.g., the Supreme Court). Perhaps these individuals have not correctly learnt the rules of the practice or perhaps they do not claim to adhere to all the recognized rules operating within a given social practice. Only when isolated practitioners' authoritative accounts of the standards are inconsistent with a widely shared consensus or a superior authority can their comments be legitimately dismissed as mistaken.

Disputes about proper standards also arise because of widespread differences of opinion regarding internal divisions about the requirements of a practice. In other words, apparently

23 For example, in chapter two it was suggested that Lord Denning's account of the doctrine of stare decisis was mistaken. Superior judges have disapproved of Lord Denning's "heterodox views" (Davis, at p. 1139) and commentators have referred to him as a "strong-minded maverick" (MacCormick, 1978, p. 242).
equally authoritative factions within the practice will accept rival norms. For example, in a given situation, one body of judges may consistently apply a set of standards different from those applied by another body of judges. When opinions are divided in this way, if the theory is to be faithful to the practice as currently conducted, it must accommodate each faction's account of proper standards. It may be that practitioners will eventually resolve these inconsistencies within their practice, but a theorist cannot justifiably dismiss standards recognized by a large group of practitioners merely because these standards do not fit with the theorist's conception of the overall point of the practice.

At times the distinction between mistakes and divisions will not be obvious. For example, perhaps the Supreme Court has yet to consider the propriety of a particular judicial standard or has provided an inconclusive answer, and there are no obvious patterns among the community of judges. In these situations, it would be appropriate to conclude that the requirements are unsettled - that is, there is no convincing indication of which standards regulating a particular area of practice are acceptable to competent practitioners. While a theory purporting faithfully to represent practice will often imply a particular resolution to unsettled areas of a practice, this anomaly-resolving tendency is not tantamount to Dworkin's claim that the interpreter determines what counts as good practice. A formal theory must faithfully account for the settled requirements of a practice. There is no
slippage to instrumental representation by suggesting, once the most plausible theory of settled practice is established, that disputes over unsettled practice be resolved in a manner consistent with that theory of proper practice.

Another reason why Dworkin resists accepting practitioners' intentions as authoritative indications of the requirements of a practice is that practitioners' accounts of their conscious reasons for behaviour do not exhaust what can plausibly be characterized as the reasons for their behaviour. Dworkin uses the example of an imagined conversation with Fellini, about his film *La Strada*, to draw a distinction between what an author consciously intends and "finding a purposeful account of his behaviour he is comfortable in ascribing to himself" (LE, pp. 56-58). In the fictional conversation Fellini admits that a classical legend, which he had not previously considered, captures feelings he had about a particular character while filming. Dworkin suggests that Fellini now recognizes this feeling "as part of the film he made" (LE, p. 56). In other words, "(a)n insight belongs to an artist's intention, on this view, when it fits and illuminates his artistic purposes in a way he would recognize and endorse even though he has not already done so" (LE, p. 57). Presumably, this example confirms that what comes to be legitimately accepted as the "real" intention is not what an author (or judge) actually intended by a literary piece (or a decision), but what that individual should have
intended according to the interpreter's best reading of the outcome. As Dworkin says:

This brings the interpreter's sense of artistic value into his reconstruction of the artist's intentions in at least an evidential way, for the interpreter's judgment of what an author would have accepted will be guided by his [the interpreter's] sense of what the author should have accepted, that is, his sense of which reading would make the work better and which would make it worse. (LE, p. 57)

In short, Dworkin would have us believe that the most defensible interpretation of an author's intention amounts to what the interpreter considers to be the most desirable interpretation of that author's intention. This conclusion glosses over the difference between asserting that an author "should accept" an explanatory account of his intentions and that an author "should accept" an evaluative account of his intention. An explanatory account addresses the accepted facts of the phenomenon, and provides the most plausible theory about the causes of, or interrelations among, those facts.24 We should accept an explanatory account of Fellini's intentions only if the account explains his actual feelings in a more perspicuous way than any other account. On the other hand, we should accept an evaluative account of Fellini's intentions if accepting that way of construing the author's intentions serves some instrumental value.25 Of course, the more fundamental question - whether we

24 In deciding that we should adopt an interpretation attributed to Fellini as an explanatory account of his intentions, we must determine that the suggested interpretation is more consistent than plausible alternatives with what is known about Fellini's views on art generally, on the film itself, and so on.
25 This type of interpretation might characterize the film in a way that is not particularly faithful to Fellini's original
should seek an explanatory or an evaluative account - depends upon the purposes for inquiring into Fellini's intentions in the first place. It is significant that in the fictional conversation Fellini acknowledges that the legend insightfully explained feelings he actually had. It would be a different matter - an evaluative account of his intentions - if Fellini acknowledged that the legend, while not depicting his actual feelings, represented what he should have intended in creating the film. An analogous distinction is the difference between a judge accepting that a commentary explained his reasoning in a more insightful way than what he was able to articulate at the time of his decision, and the judge admitting that he should have decided the case for the reasons specified in the commentary. The Fellini example does not establish, as Dworkin implies it does, that deciding upon practitioners' intentions and purposes is largely determined by the interpreters' sense of merit. As suggested earlier, it may not matter to directors or critics whether there is slippage from faithfully accounting for an author's intentions to improving upon them. However, if we are serious about a formal theory of judicial reasoning, we must avoid that slippage.

To summarize the discussion thus far, I have agreed that there will be ambiguities in practitioners' reasons, that individual practitioners can be wrong about the correct standards, that factions may legitimately disagree about what intentions. Its value may be in making the film more compelling to North American audiences.
their practice requires, and that at times standards will be unsettled. Accepting the likelihood of these disputes does not imply the view that Dworkin appears to hold - namely, that practitioners' intentions are radically underdetermined in the way that fictional characters' intentions are, and that accounts of practitioner's intentions are largely determined by interpreters' senses of value. While it is possible that rival formal theories will account equally well for virtually all the recognized features of a practice, it is unlikely that this will typically be the case with theories of judicial reasoning. Therefore, the challenge facing theorists is not inevitably, or even likely to be, a choice between equally representative, complete accounts of judicial practice. In fact, as we will see, Dworkin readily admits that the theory he proposes, and the other theories of judicial reasoning he discusses, fail to account for significant dimensions of what practitioners generally recognize to be acceptable practice. The challenge will then be to determine what theorists should do when there are discrepancies between what their theory indicates is correct behaviour and what practitioners claim the practice requires.

2.3 Equally representative, incomplete accounts

Dworkin suggests that an interpretation of a given practice may require treating paradigms of that practice - clear, dominant examples of acceptable practice - as "unrecognized anachronisms" (LE, p. 72). This claim is ambiguous. Characterizing practitioners' opinion on some feature as an anachronism may
simply mean that a conception of judicial reasoning explains what practitioners were actually doing even though practitioners had not fully appreciated that they were reasoning in that way. Consider a situation where a number of judges refer to the "legislative intention" in enacting a statute in a way that seems to imply that there was literally a single meaning collectively held by the body of legislators. In these situations, we could expect that, when these judges were apprised of the inappropriateness of this characterization, they would acknowledge, when reconsidering the interpretive guidelines they had been using all along, that they had been treating "legislative intention" as a legal fiction without appreciating that fact. These insightful, but nevertheless faithful, representations of practitioners' perceptions are to be expected. One might wonder whether developing a theory of judicial reasoning was worth the effort if it did not raise new insights about the practice. However, Dworkin does not limit the notion of unrecognized anachronisms to this type of explanation. He insists that acceptance of a particular theory may require that practitioners abandon an established practice because the theory shows the practice to be inconsistent with the theory's construct of good practice. As Dworkin says:

No paradigm [a nearly universally accepted requirement of the practice] is secure from challenge by a new interpretation that accounts for other paradigms better and leaves that one isolated as a mistake. (LE, p. 72)

26 The inappropriateness of regarding "legislative intention" in this way is discussed in chapter five.
No conception need justify every feature of the political practices it offers to interpret; like any interpretation, it can condemn some of its data as a mistake, as inconsistent with the justification it offers for the rest, and perhaps propose that this mistake be abandoned. (LE, p. 99)

Dworkin uses the notion of "a mistake" in a different way than I have used it. Dworkin believes that a standard the community of practitioners or a superior regulatory body regards as acceptable may be a mistake if it is seen to be inconsistent with what a theory of the practice holds to be the point of the practice. Dworkin offers the example of men standing up in the presence of a woman as a longstanding paradigm of an imaginary community standard. Presumably this behaviour would be required by the practice of courtesy until "one day women would object to men standing for them; they might call this the deepest possible discourtesy. Yesterday's paradigm would become today's chauvinism" (LE, pp. 72-73). The crucial issue overlooked in this example is the grounds for deciding whether or not the norm that men should stand when women enter a room continues to be a bona fide norm. If, after the chauvinism is drawn to their attention, practitioners continue to manifest what Hart calls the "internal aspect" towards this norm - that is, continue to expect adherence to the prescribed behaviour and to reprimand those within the community who fail so to adhere (CL, p. 56) - then the norm remains a requirement of that practice. The norm's status within the practice does not directly depend on the norm retaining its historical justification. Even if many practitioners cease to accept the norm, its continued acceptance
by many others cannot be dismissed as mistaken merely because the norm is inconsistent with what is taken to be a justification for that community's practice of courtesy.

While unsettled areas of a practice will typically be decided in light of what the most plausible (i.e., the most faithful) formal theory suggests, the criterion for acceptance of established requirements of a practice is not consistency with the purposes that a theorist imputes to the practice as a whole. It may be desirable that all norms within each social practice be consistent with the most defensible justification for the practice, however this type of consistency can not be presumed to be a basic criterion for any theory. If a formal theory is sought, the justificatory ideals that a theorist imputes to a particular practice do not warrant dismissing as mistaken what competent practitioners recognize as acceptable standards. For example, in chapter six I identify a constellation of rules of application - including the doctrine of stare decisis - as constituting a mode of judicial reasoning called "reasoning from prior cases." I suggest that the general point of this mode of reasoning is to decide current cases in a manner consistent with relevantly similar prior decisions. While this justification captures the overall point, it does not represent every particular judicial norm within this mode of reasoning. It is widely recognized, for example, that judges are not bound by decisions reached in inferior courts or in courts of other jurisdictions. Whether or not there are good reasons for these
exceptions to the general point of this dimension of judicial practice is irrelevant. Until practitioners abandon these rules about the authority of various levels of courts, any formal theory must recognize them for what they are - bona fide standards of judicial practice.

Practitioners may recognize particular rules as anachronisms and abandon them, but a theorist cannot modify or dismiss practitioners' intentions merely because these intentions are inconsistent with the imputed point of the practice. Judges have authority to overrule an existing rule if it would be required by law; a theorist cannot ignore or dismiss an established practice merely because this practice is inconsistent with his theory of judicial reasoning. In this connection, we must be careful not to confuse two questions. There is an important difference between asking "What are the grounds judges use to justify abandoning anomalous practices?" and "What are the grounds theorists use to justify dismissing practices as anomalies?" The answer to the former question is contingent upon the standards existing within the practice for dealing with anomalies. A formal theory of judicial reasoning would endeavour to explain what standards judges employ when making these determinations. As I argue in chapter seven, judges resort to a mode of reasoning called "reasoning from principle" when justifying exceptions to seemingly established rules. It is true that attention to the overall point of the area of a law (or some aspect of the practice) is a fundamental consideration in resolving these
anomalies; however, it is not the only consideration that judges entertain. It is a separate matter - a concern raised by the second question - whether a theory can continue to claim fidelity to a practice if bona fide standards are dismissed because they do not fit with the interpreter's sense of the most defensible overall purpose of a practice. It is also worth noting that the interpreter's sense of the overall purpose of a practice may be at odds with practitioners' conceptions.27 As Dworkin asks:

Can the best justification of the practices of courtesy, which almost everyone else takes to be mainly about showing deference to social superiors, really be one that would require, at the reforming [my emphasis] stage, no distinctions of social rank? Would this be too radical a reform, too ill-fitting a justification to count as an interpretation at all? (LE, p. 67)

The effect of Dworkin's view of theory building is to reform social practices by dismissing all requirements that are inconsistent with an imputed overall purpose.28 As I have said, this presupposes that all bona fide practices are consistent with these goals and that there are no conflicting tensions and arbitrary or anomalous requirements. If we remember that

27 Dworkin suggests that interpreters of legal practice propose value or purpose (LE, p. 42) and offer justifications why the interpreter believes the practice is worth pursuing (LE, p. 66).
28 For example, Dworkin offers a somewhat stereotypical account of legal positivism - he refers to it as "conventionalism." Dworkin suggests that this theory does not fit judicial practices very well - numerous aspects of practice cannot be accounted for by this theory. He then inquires "whether that conception [conventionalism] would justify these practices, by providing an attractive picture of law's point, if it fit well" (LE, p. 150). Apparently, conventionalism attributes two basis purposes to law - certainty and flexibility. Since conventionalism promotes flexibility less efficiently than another theory of law which Dworkin considers, he concludes that there is "no reason to strain to make it [conventionalism] fit" legal practice (LE, p. 150).
judicial practices have evolved over centuries, it is not obvious that theorists should expect, let alone require, complete integrity among standards.29

It is possible that more than one formal theory could faithfully account for Anglo-American judicial practice. More likely, no theory will completely and adequately address all dimensions. In the event of discrepancies between the theoretical account and what informed practitioners recognize as acceptable legal practice, theorists must modify their theories.30 Any lingering discrepancies with settled practices

29 In speaking about the implications of Dworkin's requirement of overall coherence, Mackie (1984, p. 169) suggests that Dworkin's theory would cause large areas of law, that practitioners regard as settled, to be reconsidered. Dworkin's response to this criticism is that it is questionable whether his theory allows more "settled" law to be challenged. He says "(m)uch depends on the details of doctrine and practice in particular jurisdictions - for example, whether these allow overruling of undesirable precedents" (TRS, p. 362). This is an unsatisfying response, since Dworkin holds that should a theory show law in a better light were judges to overrule undesirable precedents, a theorist could legitimately dismiss judges who felt compelled to adhere to undesirable precedents.

30 It might be suggested that a contingent fact of Anglo-American legal systems is that the practice of judicial reasoning is neither homogeneous nor well understood by practitioners. Therefore, no interpretation can account for all practitioners' behaviour and many practitioners' explanations for their behaviour will be inconsistent with what they really do. The claim that there is considerable confusion among practitioners about many aspects of judicial practice has considerable merit. Despite the apparent widespread confusion about particular matters in judicial reasoning, it is not obvious that these differences preclude assessing rival theories for their fidelity to judicial practices. Certainly, lawyers and judges disagree about the correct application of the law. In fact, it is universally agreed by practitioners that it is not always clear what the law requires in a particular case. Yet this admission does not imply that there is no general agreement about the grounds upon which most cases should be resolved; as we will see, it implies only that application of the law is not a mechanical process, and that there are conflicting understandings about the
are to be recognized as flaws in the theory, in the same way that the Mercator and Peters projections are each seen as presenting unrepresentative accounts of some dimensions of the world.31

In conclusion, we have seen that Dworkin's view is that legal theory building is determined largely by interpreters' conceptions of desirable practice.32 This position is predicated on the questionable legitimacy of modifying, ignoring or dismissing judges' accounts of the requirements of their practice. Dworkin's objections to the claim that the reasons judges offer for their decisions determine the standards of judicial reasoning have been shown to be unconvincing. Having articulated the criteria for (formal) theory building about judicial reasoning in chapter two and, in this chapter, having defended these criteria against Dworkin's rival account, we are now ready to begin explication of the nature of judicial reasoning in Anglo-American jurisdictions.

correct standards to apply in a some areas. In other words, recognition of widespread consensus about basic norms and standards, and considerable uncertainty about the law are not mutually exclusive.
31 Discrepancies does not refer to features recognized by practitioners to be contentious or in a state of transition; rather, it refers exclusively to differences between the theory and widely recognized tenets of legal practice.
32 This does not imply that Dworkin believes that an interpreter is free to impute any purpose the interpreter desires (CL, p. 52). Rather, Dworkin believes that several purposes "typically" can be imputed to a practice and the interpreter must ultimately decide which of these show the practice in its best light.
This chapter has two parts. The first part, which is an introduction to a rule-guided account of judicial reasoning, has four sections: (1) an examination of Hart’s treatment of judicial reasoning, (2) an outline of the basic elements of a rule-guided account of judicial reasoning, (3) an overview of the types of rules constituting the proposed model of rules, and (4) a discussion of several points of potential confusion about rule-guided decision making. The second part – an excursus to the first part – consists of an extended account of the judges’ reasoning in Riggs v. Palmer.

In the first section of this chapter Hart’s limited treatment of judicial reasoning is explored. Explanations for his inattention to this dimension of legal practice are suggested, and reasons are offered for regarding an account of judicial reasoning in terms of secondary rules of application as an important supplement to Hart’s conception of law as a union of primary and secondary rules. Also, it is suggested why positing a rule-guided account of judicial reasoning is central to explaining fundamental features of our legal system.

The rule-guided nature of judicial reasoning is explicated in terms of three elements: the basic structure of legal
arguments, the modes of reasoning used to argue for the
disposition of a given case, and the criteria for assessing the
conclusions from these modes of reasoning. More specifically, it
is suggested that the structure of judicial argumentation is what
has been termed "conductive argument" - that is, judges and
lawyers offer independent arguments for and against a conclusion.
These arguments are constructed in the context of three general
modes or forms of reasoning - reasoning from interpretive
guidelines, reasoning from prior cases and reasoning from
principle. The specific standards for assessing arguments are
established by the constellation of rules comprising each of
these forms of reasoning.

The third section, which builds directly upon the prior
section, explicates the three general types of rules that
establish the standards which determine proper judicial
reasoning. These rules establish criteria for: (1) justifying
what counts as a legally valid argument, (2) verifying an
argument's conclusions, and (3) determining the relative weight
or force of arguments.

In the final section of part one, an important confusion
about the relation between controversial decisions and rule-
guided decisions is discussed. It is a truism that judges
frequently disagree in difficult cases and that there often
appear to be no obvious, preexisting rules stipulating the
standards judges rely upon. These types of disputes are thought
to challenge the adequacy of a rule-guided account of judicial
reasoning. I argue that a rule-guided conception of judicial reasoning is consistent with contentious judicial decisions for two reasons: (1) there are rule-guided standards by which judges resolve disputes over contested primary and secondary rules, and (2) while the need to exercise judgment in applying rules is inevitable given the complexity of the issues judges face, this fact is not inconsistent with the claim that rules control judicial decisions. This latter claim, that controversial decisions may still be rule-guided, is supported by drawing a distinction between exercising judgment and exercising discretion.

Part two of the chapter details a rule-guided reconstruction of the majority and dissenting judges' reasoning in a celebrated case - *Riggs v. Palmer*. The issue facing the Court was whether or not application of statutory provisions on succession precluded persons convicted of murdering the testator from inheriting under the will. The excursus illustrates the capacity of the model of rules outlined in the first part of the chapter to account for judges' reasoning in an actual case. Also, a rival rule-guided account of judges' reasoning in this case, offered by Coval and Smith (1986), is discussed and criticized.

1. Hart and judicial reasoning

The account of judicial reasoning I propose builds upon Hart's conception of law as the union of primary and secondary rules. That is, the (formal) nature of our legal system can be
explained faithfully in terms of rules specifying citizens' obligations (primary rules) and rules as to how these primary rules are to be established, changed and enforced (secondary rules). As I indicated in the opening chapter, Hart offered what, at best, could be called a limited account of the rules regulating judicial reasoning. What he does say on the matter can be succinctly outlined. According to Hart, in easy or "core" cases, judicial application of the law is governed by the settled meaning of a determinate rule (CL, pp. 140-141). The settled meaning of a rule is essentially a function of the legal and ordinary meaning of the language used in the rule and the obvious purpose of the rule (PPL, p. 271). In controversial or "penumbra" cases, judges are expected to impartially balance competing considerations - e.g., "individual and social interests, social and political aims, and standards of morality and justice" (PPL, p. 271). Or, as he says elsewhere, it may only be possible to expect that the decision be a "reasoned product of impartial choice" (CL, p. 200). Hart's vague articulation of standards in penumbra situations leaves a significant gap in the ability of his model of rules to explain judicial decision making. For that matter, Hart recognizes that his explication of judicial reasoning does not concur, in at least one respect, with what practitioners appear to accept as proper practice - he characterizes much of judicial application of law in difficult cases as rule-making (CL, p. 201) despite admitting that "the courts often disclaim any such creative function" (CL, p. 132).
It is somewhat surprising that Hart would pay such scant attention to judicial reasoning especially since he builds (secondary) rules of adjudication into his conception of law. However, an examination of Hart's account of these rules reveals that they deal exclusively with procedures for adjudication (CL, pp. 94-96). They focus on establishing a mechanism - courts, jurisdictions and judges - through which disputes about the validity and scope of laws are resolved (CL, p. 90). In discussing these adjudicative rules Hart makes passing mention of what he calls "standards for correct judicial decision" - criteria for determining correct application of the law in a particular case (CL, pp. 141-142). It is these standards that are the focus of any formal account of judicial reasoning.

Hart's inattention to secondary rules regulating judicial decision making can be explained by examining his rationale for postulating secondary rules. Hart justified the need for three types of secondary rules by considering defects inherent in mythical, "pre-legal" communities regulated by primary rules alone. According to Hart, a lack of rules of recognition creates uncertainty in a legal system, a lack of rules of change leads to a (near) static set of laws, and a lack of rules of adjudication leads to inefficient maintenance and enforcement of laws (CL, pp. 90-91). Each of these deficiencies in "immature" legal systems

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1 Hart describes two other types of secondary rules - rules of recognition dealing with the standards for identifying rules as valid rules of a legal system, and rules of change dealing with mechanisms for altering laws to keep pace with changing circumstances (CL, pp. 89ff.).
is corrected by establishing appropriate second-order rules. As indicated above, the defect that gives rise to Hart’s rules of adjudication is inefficiency in a legal system where there is no centralized voice establishing violations and authorizing sanctions. Hart’s remedy is to establish a mechanism for resolving what might otherwise be unending disagreements about breaches of law. In short, the inefficiency arising from inconclusive determination of violations of the law is remediated by creating final arbiters of law. However, in establishing this dispute resolution mechanism, Hart neglects to articulate in any depth the standards that arbiters must follow in performing their role. In other words, Hart’s account of secondary rules is incomplete because he overlooks an important defect in legal systems where there are no clear standards controlling the application of primary rules in particular cases.

1.1 Complementing Hart

Hart’s inattention to judicial reasoning is an important omission, although it need not undermine a model of rules conception of law. The need for rules of application indicates a further possible defect in immature legal systems. Unlike the three defects inherent in a primitive legal order consisting exclusively of primary rules, this defect is a derivative problem occasioned by the delegation of adjudicative powers to bodies other than the principal legislative agency. If the offices authorized to adjudicate disputes were also authorized to legislate, it would be less important that a legal system
establish clear criteria for application of laws. Hart, himself, refers to heightened concern over the indeterminacy of legal rules "in jurisdictions in which the separation of powers is respected" (PPL, p. 270). This potential defect has been referred to as the danger of judicial tyranny. It arises in legal systems where final authority to apply law is vested with officials other than the principal legislators and when constraints on this power are inadequate to curb unbridled discretion (Tushnet, 1988, pp. 16-17). A somewhat exaggerated concern over the potential tyranny of judicial power was voiced by Bishop Hoadly in speaking before the English king in 1717:

Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them. (Gray, 1966, p. 195)

Hart recognizes that in Anglo-American law judges do not have absolute authority to interpret the law and, in a later work, seems to have understood that secondary rules guiding judicial reasoning constrain judges. However, in The Concept of Law, there is no recognition of this type of secondary rule — what I will call "rules of application."2 Hart talks as if the

2 Occasionally, Hart appears to recognize that rules do not provide for their own application (CL, p. 123). For example, Hart seems to imply the need for secondary rules regulating the ambit of a primary rule when he states that, even in the "plain case," laws "seem to need no interpretation" and their application in specific instances "seems unproblematic or automatic" (CL, p. 123). It is not clear if this means that even in clear cases, there is need for secondary rules governing the extension of a general term to a fact situation. It is more likely, given what we have said about his account of rules of adjudication, that the potential for uncertainty over the precise scope of a rule, requires an official voice to establish definitively whether or not a rule applies. As he says, "the
constraints on judicial application of the law reside entirely in the primary rules themselves. Primary rules come with a "core of certainty" - a settled range of application (CL, p. 119). When discussing the duty of an official scorer in a game to apply the scoring rule as best he could, Hart envisions constraints emerging from mere acceptance of the scoring rule as valid. Similarly in law, if judges sincerely accept the primary rules identified by the rule of recognition, they inherit constraints on their ability to interpret - rules "are determinate enough at the centre to supply standards of correct judicial decisions" (CL, pp. 141-142). In fact, this last remark is offered as Hart's defense against the argument reflected in the Hoadly quote. In other words, in the Concept of Law, Hart appears to deny the need for distinct secondary rules of application on the grounds that any potential defect presented by the danger of judicial tyranny is avoided by the inherent meaning of the primary rules.

Waluchow (1980, pp. 48-52; 1985, pp. 68-70) argues that Hart introduces in "Problems in Philosophy of Law" an important dimension into his model of rules account. Not only does Hart recognize that the scope of a rule is not limited to the "shared conventions of language" but also that "the meaning of words may be clearly controlled by reference to the purpose of a statutory enactment which itself may either be explicitly stated or rule itself [cannot] step forward to claim its own instances" (CL, p. 123).

3 According to Moles (1987, pp. 116-119), Hart creates the impression that primary rules settle the judges' work.
generally agreed" (PPL, p. 271). In other words, the application of law in particular instances is not controlled exclusively by each rule's inherent meaning. In addition, Hart makes the following observation:

It is of crucial importance that cases for decision do not arise in a vacuum but in the course of the operation of a working body of rules, an operation in which a multiplicity of diverse considerations are continuously recognized as good reasons for a decision. These include a wide variety of individual and social interests, social and political aims, standards of morality and justice; and they may be formulated in general terms as principles, policies, and standards (PPL, p. 271; emphasis added).

This statement strongly suggests Hart's emerging recognition of the need for second-order rules controlling judicial decision making.4

Whether or not Hart actually acknowledges their need is, to a large extent, immaterial. The more relevant issue is whether rules of application warrant acceptance as an additional, necessary element of a mature legal system. I contend that, if Hart's model of rules account of law is to redress the defects resulting from judicial tyranny, the model must incorporate secondary rules that provide standards regulating judicial application of primary rules in particular cases.

Full consideration of the ability of secondary rules of application to control judicial decision making awaits a more extended discussion of the nature and basic modes of judicial

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4 It is unclear whether or not Hart intended that these rules be understood as legal rules - i.e., that they meet the criteria for validity required by rules of recognition.
reasoning. However, several preliminary points will be made about the ability of secondary rules of application to explain important features of Anglo-American legal systems.

1.2 The need for secondary rules of application

Positing the notion of secondary rules of application explains important features of judicial reasoning both in easy or core cases, and in difficult or penumbra cases. First, I will justify the claim that secondary rules control application of the law in easy cases. This will be done in the context of an actual case whose conclusion, at least according to one legal philosopher, can be explained without recourse to secondary rules. I will then consider the role of secondary rules in explaining key features dealing with the application of law in difficult cases.

In his book on judicial reasoning, MacCormick (1978, pp. 19-37) offers a case which he believes establishes that the syllogism is the basic structure of judicial decision making in easy cases. In other words, the application of the law in an easy case can be deduced directly from the primary rule and the facts, without recourse to secondary rules of application. The example involves the Sale of Goods Act (1893) which holds vendors liable to purchasers for damages resulting from the sale of goods that are not of "merchantable quality." (This is the primary rule.) In the case at issue, a pub owner sold a bottle of

5 Daniels and Daniels v. White & Sons and Tarbard [1938] 4 All E.R. 258.
contaminated lemonade to Mr. Daniels. (These are the facts.) The pub owner was found guilty of selling goods of non-merchantable quality. (This is the verdict and the conclusion of the syllogism.) MacCormick (1978, p. 24) argues that the justification for application of the primary rule to the facts of the case can be reduced to the form: "In any case, if p then q; in the instant case p; therefore, in the instant case, q." Let us examine the adequacy of this account of the reasoning in the case.

In order to complete the syllogism, MacCormick builds into his major premise an interpretation of "goods of non-merchantable quality" that corresponds to descriptions of the agreed facts. In other words, although the primary rule stipulates simply that vendors are liable if the goods are "non-merchantable," MacCormick interprets that term to mean goods that are not fit for proper use, which would obviously include contaminated drinks. MacCormick (1978, p. 22) cites a prior case establishing this interpretation as justification for accepting this translation of the primary rule as an "equivalent proposition." But this is precisely the crux of judicial reasoning - in justifying whether or not a party is guilty of breach of law, a judge must demonstrate that the accepted facts meet the conditions established by the relevant legal rule. Characterizing contaminated lemonade as a good of non-merchantable quality must be justified, and this requires accepting further assumptions. Relying on a decision in a prior
case as his reason for this characterization presupposes that an interpretation of the Sale of Goods Act arrived at in a prior case is binding on subsequent applications of the Act. This inference is warranted only if we accept a further rule authorizing (perhaps requiring) use of prior interpretations of primary rules in subsequent applications of those rules.6 (A legal system that did not rely on precedent could not accept the earlier decision as sufficient justification for the characterization.) In short, a secondary rule is required to justify the interpretation ascribed to non-merchantable goods.

While I have focused on justifying the legal denotation of "non-merchantable goods," other secondary rules are required to justify subsumption of the other material facts of the case within the primary rule. For example, applicability of the rule might require justifying that Mr. Daniels was a "purchaser" under the legal meaning of the term. While there is a recognized rule to the effect that words are to be presumed to carry their ordinary language meaning, it is possible that prior cases or an interpretive provision in the Act had determined a specific legal meaning for the term "purchaser." For example, there could be an interpretive rule distinguishing personal and commercial buyers and, if Mr. Daniels had been acting on behalf of a company, he might not have qualified as a "purchaser." Alternatively, "goods" under the meaning of the Act may refer solely to nonedible products. In short, disguised in MacCormick's

6 The exact formulation of the rule is immaterial. Clearly, it is an implication of the doctrine of stare decisis.
reduction of rule application to a syllogism are assumptions about the defensibility of subsuming the specific facts of the case within each of the categories contained in the rule. Postulating rules of application explains why these extensions are warranted. Gottlieb (1968, p. 17) concurs with this view: "the heart of the question in legal reasoning is the classification of particulars. If one gives a term a certain interpretation, then a conclusion follows but logic cannot help classify particulars." And later on, remarking on the irreducibility of rule application to a syllogism, Gottlieb (1968, p. 166) explains:

It is possible to formulate a major premise (rule) and a minor premise (facts) of a judicial syllogism so that it entails a necessary conclusion but this conceals the heart of the legal decision which consists in the adoption and formulation of such premises.\(^7\)

As Hart recognized: "[a]ll rules involve recognizing or classifying particular cases as instances of general terms" (CL, p. 119). Admitting that a legal rule is recognized as correctly covering a set of particular situations - i.e., has a settled meaning - is implicit acceptance of second-order rules regulating the denotation of the primary rule.

The failure to appreciate the inevitable role of secondary rules in deciding whether or not a given case falls within the authorized meaning of law encourages a naive belief about the

7 In defending his example, MacCormick (1978, pp. 34-36) discusses an objection that Gottlieb raises, namely that an act - the verdict - cannot be the logically entailed conclusion of a syllogism. Clearly, this objection is neither the thrust of Gottlieb's remarks cited above nor the objection I raise.
inherent denotation of a rule. Any number of actions can be subsumed under, or excluded from, a rule depending on the understandings ascribed to the categories created by the rule. For example, in one case a telephone was considered to be a telegraph and a telephone message was considered a telegram because the law regulating telegraphs was intended to "include all apparatus for transmitting messages or other communications by means of electric signals." Raz's (1985a, p. 321) example of the implications of introducing a statutory rule stipulating that a foetus will thereafter be understood to be a "person" offers further evidence of how secondary rules control the application of primary rules. Although the formulations of all primary rules referring to persons remain unchanged, the range of their application is significantly altered to include foetuses. These examples suggest why one writer remarked that "[t]he meaning of the terms of a legislative provision does not inhere in the provision itself. Judges do not discover meaning for the words; they assign meaning to the words" (Peck, 1987, p. 12). The assignation of meaning, if it is not to be arbitrary, must be regulated by further standards, conventions, principles, and so on. Thus, the fact that we are clear about the application of rules in easy cases is not a repudiation, but an affirmation, of the existence of rules of application that control the denotation of the rule (Gottlieb, 1968, pp. 99-101).

8 The fact that the meaning does not inhere in a rule admits the potential for what Wittgenstein called the "anarchy of interpretation" (Postema, 1982, p. 188).
The discussion of MacCormick's example suggests two central features of judicial reasoning: (1) the principal task in judicial decision making is rule application - determining whether or not the accepted facts of a case fall within the categories created by a primary rule; and (2) secondary rules of application provide the grounds for justifying the subsumption of particular facts under a rule. A third feature which MacCormick's example does not reflect, since he has raised an "easy" case, is the possibility of rules of application justifying conflicting conclusions about the applicability of a rule to a given set of facts.

Rules of application are not merely implicit features of agreed understandings about the content of laws, these rules play an essential role in controlling judicial reasoning in difficult cases. A common tendency is to regard the denotation of rules as clear and uncontroversial, and to view uncertainties over the application of law as evidence of a breakdown in a rule-guided explication of the application of law. Dworkin characterizes the positivist's conception of judicial decision making as comprising "mechanical jurisprudence" and interpretation according to actual intentions. As he says, positivistic judges are not "licensed" to conclude that a case is decided by a rule unless the rule is explicit - i.e., "competent lawyers and judges will all agree" about what it covers (LE, p. 114). No doubt, the perception of rules as rigid norms is fuelled by the importance that positivism places on the need for certainty in law. However, a model of
rules account of law is not incompatible with variable standards and legal responsiveness to social change. In fact, as I shall briefly illustrate, secondary rules help to explain how this flexibility is possible.

One reason for resisting the inclination to reduce the content of legal rules to a pre-established range of application is the inability of this view to explain why many laws are deliberately cast in vague or general terms. If the only situations that are controlled by a rule are situations that are expressly identified by the rule, then why would legislators deliberately enact vague laws? Yet, it is generally understood that constitutions, especially constitutional bills of rights, are deliberately left general to avoid the consequences of a narrow reading. Freund's famous quip that the courts should not "read the provisions of the Constitution like a last will and testament lest it become one" captures the dangers of excessive specificity and interpretations restricted to explicit denotation.

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10 Positivism has stereotypically been accused of exaggerated emphasis on predictability and certainty in law (Waluchow, 1986, p. 199).

11 Cited in Hunter v. Southam [1984] 2 S.C.R. 145 at p. 158. The Fifth Amendment of the U.S. Constitution illustrates the disadvantages of excess specificity. It states, in part, that: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." In 1791, when the amendment was ratified, twenty dollars represented a significant amount of money; clearly, it now is a trivial sum. The need for flexibility is not limited to constitutional documents. It has frequently been noted that the strength of the common law, where the explicit wording of its rules are not binding, lies in its ability to adapt to changing situations.
threshold - an equilibrium where the advantages of further specification of what would fall within the ambit of the rule is offset by the disadvantages of rigidity. Legislative drafters must balance the benefits of precise rules (e.g., predictability, uniformity, certainty, consistent application) against the counterproductive consequences of restrictive rules (e.g., becoming dated, applying rigidly in situations that are undesirable or self-defeating, increased volume of rules needed). In point of fact, many laws are left vague because, contrary to what Dworkin and others allege, vague rules can regulate unanticipated or novel situations.

The Supreme Court’s ruling in Hunter v. Southam12 is a good example of the way in which secondary rules control application of primary rules beyond the explicit denotation of a rule. In this case, as authorized by statute, a director at the Combines Investigation Branch had authorized a search at one of Southam’s offices. The question confronting the Court was whether or not the director’s actions violated Charter protections against "unreasonable search and seizure." The resolution of this question hinged on the meaning of the admittedly vague term "unreasonable" (at pp. 154-155). In an opinion that Gibson (1986, p. 49) characterizes as an "excellent illustration" of this interpretive approach, Justice Dickson (as he then was) articulated three criteria, not explicitly mentioned in the Charter, for determining whether or not searches were

unreasonable. The three criteria - "objective standards" regarding the timing of an authorization, the degree of impartiality of the authorizing official, and the degree of proof required to warrant issuing an authorization (at pp. 160ff.) - were explicated and justified by resorting to an accepted interpretive guideline. This interpretive rule permitted appeals to the recognized purposes of the law - in this case, to the reasons for protecting individuals against government searches - in applying constitutional provisions. Thus, the secondary rule of application, and not the explicit denotation of the primary rule, provided the Court with the justification for concluding that the Charter prohibited searches of the kind authorized by the director of the Combines Investigation Branch.

This case is illustrative of an apparent paradox in judicial decision making - in Anglo-American law, where we recognize a division of powers between the judicial and legislative branches (Zander, 1980, p. 49), judges are expected to decide cases in accordance with the law and yet our laws cannot be inflexible. In other words, there is a tension between avoiding the problem of judicial tyranny and reaping the benefits of open-ended provisions. In discussing this problem, Tushnet (1983, p. 784) concludes that the solution lies with second-order standards that control judicial decision making:

Our system, however, provides no way to enforce constitutional theory coercively; and if it did, the problem of how to constrain the constrainers would merely shift up one level. In consequence, constitutional theory can constrain judges only by creating standards for criticism
and, to the extent that the standards are internalized by the judges, for self-criticism.

Implicit in this reference to the need for accepted standards of criticism is recognition of Hart’s notion of the internal aspect of rules—rules whose existence and force depends on their acceptance as grounds for justification and criticism by the community of judges (CL, pp. 111-113). It is suggested that therein lies the key to understanding the nature of the balance struck between judicial tyranny and mechanical jurisprudence. The perception that either judicial reasoning is a matter of mechanical jurisprudence (i.e., a straightforward matter of deciding whether or not a case falls within the explicit ambit of an established primary rule) or it is not, in which case it is extra-regulatory (i.e., resolution of the situation cannot be decided in light of established rules), is a false one. This view fails to appreciate the guidance and flexibility possible within a legal system where secondary rules establish grounds for justifying the subsumption of a particular situation under a primary rule. Thus, in a fundamental way, application of law is a union of primary and secondary rules. The more complete account of the nature of these secondary rules is the focus of the next sections and the following three chapters.

2. The basic elements of a rule-guided model

It has variously been suggested that judicial reasoning consists in one or more of the following forms of logic:
deduction, induction, analogous reasoning, or "holistic" reasoning. While more will be said about the appropriateness of particular suggestions, there is a general problem with sorting through which form(s) of reasoning best account for judicial decision making. These forms of reasoning overlap, and it is not clear whether these accounts describe how legal practitioners typically construct arguments or whether they offer a reconstruction of the logic of practitioners' arguments.

It may be useful, in sorting through these conflicting recommendations, to draw three interrelated distinctions - to distinguish between (1) the general structure of judicial argumentation, (2) the mode(s) of reasoning employed in constructing individual arguments, and (3) the standards for assessing an argument's acceptability. For example, imagine an Oxford style debate where the basic structure consists in presentation and rebuttal of arguments for and against a given resolution. Competing arguments may be offered in the form of analogies or syllogisms, and the acceptability or soundness of

13 MacCormick (1978, pp. 19-52) argues that this is the basic form of rule application in easy cases.
14 Hart suggests that a number of writers including, presumably, G.W. Patton characterize some elements of judicial reasoning in terms of this form (PPL, p. 269).
15 Levi (1964, p. 267) emphasizes this form of reasoning.
16 Weschler (1959) is the most prominent, early advocate of this form of reasoning in hard cases.
17 This is the term Mackie (1984, p. 169) uses to describe Dworkin's conception of judicial decision making.
18 For example, in assessing the soundness of a deductive argument whose major premise is a value principle it would be appropriate to test the acceptability of the major premise by applying considerations involved in reasoning from principle.
these arguments may be challenged by competing analogies or by attacks on the validity of the conclusions or the truth of the premises. Notice the standards for assessing credibility may depend on the internal logic of the particular form of argument used or they may be drawn from other forms of argument. Viewing judicial reasoning through this loose typology allows us, for example, to accept the appropriateness of standards of deductive logic in assessing the soundness of judicial decision making without accepting that it is a mode of reasoning lawyers and judges use in constructing their arguments (i.e., in justifying their decisions) or, for that matter, that it exhausts the appropriate standards for appraising judicial decisions. Distinguishing between the structure, modes and standards of judicial reasoning also helps identify and organize different elements in suggested accounts of judicial reasoning. For example, Dworkin (1986) offers an account of judicial reasoning where the general structure of judicial argumentation involves justification of propositions of law in light of an overall coherence theory of law, the principal mode of reasoning employed is characterized as "artistic" interpretation, and the dominant standards of assessment are "fit" and "best light."19

As I have indicated, the conception of judicial reasoning that I propose builds on Hart's conception of law as the union of primary and secondary rules. Let us now examine each of the elements of this account of judicial reasoning.

19 Dworkin's account of judicial reasoning will be considered in chapter eight.
2.1 The structure of judicial arguments

In a particularly illuminating manner, Quebec Chief Justice Deschenes' opinion in Quebec Association of Protestant School Boards v. Attorney-General of Quebec (No. 2)20 captures the basic structure of judicial reasoning. The case involved the constitutionality of statutory restrictions on the rights of parents to send their children to English-speaking public schools. In that portion of the opinion dealing with the reasonable limits provision of the Charter, the Chief Justice summarized the plaintiffs' nine arguments against and the respondent’s eleven arguments for the constitutionality of the restriction (at pp. 79-88). These arguments were based on a variety of grounds including the nature of constitutional documents, Parliamentary intentions, basic rights of citizenship, the legitimacy of the statutory purpose, and the likely consequences if the restrictions were rescinded. While most arguments presented independent reasons for a conclusion, others were interrelated arguments and some were offered to counter opposing arguments. In weighing the arguments, the Chief Justice raised two considerations: whether the arguments warranted the conclusions they purported to establish and whether the collective force of one set of arguments justified deciding the case in favour of one of the parties (at pp. 88-90). The Chief Justice concluded that the respondent’s arguments were both inadequate to sustain the contention that the restriction was

necessary and of insufficient force to meet the burden of proof required of them by the Charter provision.

This case is characteristic of the structure of judicial reasoning. Numerous writers have portrayed this structure as the assessment of independent reasons for and against application of a rule. As Hart suggests, in difficult cases:

judges marshal in support of their decisions a plurality of such considerations [policies, principles, standards] which they regard as jointly sufficient to support their decision, although each separately would not be. Frequently these considerations conflict, and courts are forced to balance or weigh them and determine priorities among them. (PPL, p. 271)

This type of justification has been referred to as "conductive arguments." Its name derives from the fact that arguments provide relevant, and often distinct, reasons for a conclusion - they are conducive to a conclusion - but do not deductively entail it (Govier, 1985, p. 260). This structure is not limited to contentious cases. In fact, it suggests a basic similarity of reasoning in difficult and relatively straightforward cases. An easy case would simply be one where either there are no legally valid reasons to support a decision in favour of one of the sides, or the valid reason(s) are clearly outweighed by arguments for the opposing side. Of course, judges

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21 See, for example, Bodenheimer (1969, pp. 378ff); Farrar (1984, pp. 52-53); Gottlieb (1968, p. 71); Holmes (1966, p. 184); Levenbook (1984, p. 16); Lloyd (1981, pp. 268-269); Lyons (1985, pp. 327-328); MacCormick (1978, pp. 11-12); Sartorius (1968, p. 178); and Stone (1964, p. 327).
22 The cumulative effect of discrete reasons justifying a legal decision have been characterized as "the legs of a chair not the links of a chain" (Farrar, 1984, p. 52).
are rarely asked to consider cases when one side has no reasons, or relatively weak reasons, for contesting a case. It is also interesting to note that counsel for each side has primary responsibility for providing the arguments that judges must assess and weigh (MacCormick, 1978, pp. 122-123). In fact, judges are generally reluctant to address an issue that has not been argued before them (MacCormick 1978, p. 123; Weiler, 1968, p. 416) and they are expected to adjudicate disputes by resolving only that which is required to reach a conclusion given the arguments presented (Read, 1986, p. 163).

2.2 The modes of judicial reasoning

A second element of judicial reasoning is the form in which arguments are constructed. I suggest that three modes of reasoning or general types of arguments are used by lawyers and judges. Reasons for a given disposition of a case will be: (1) based on interpretations of the meaning of the relevant primary rule, (2) derived from precedents established in previous decisions, and (3) based on evaluations in the light of broader legal standards of the principles implied by the suggested alternative resolutions of the case. These modes will be referred to as reasoning from interpretive guidelines, reasoning

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23 For example, in Hunter v. Southam Inc. [1984] 2 S.C.R. 145 at p. 169, the Supreme Court of Canada refused to consider whether the provisions of the Combines Investigation Act could be salvaged under the reasonable limits section of the Charter because the Crown had not argued the point.

24 All modes of reasoning rely on preexisting principles in deciding cases; reasoning from principle receives its name from the fact that it provides standards by which the consequences of adopting a new principle are assessed.
from prior cases, and reasoning from principle. While there is general agreement that the courts entertain the first two forms of reasoning, there is disagreement about what each involves and little recognition that they are rule-guided. The third mode of reasoning is less widely recognized although it has been identified in various forms by many writers including Gottlieb (1968), MacCormick (1978), Weiler (1974), and Weschler (1959). These modes of reasoning are discussed in detail in the following three chapters.

2.3 The standards for assessing arguments

The modes of reasoning comprise constellations of secondary rules that control the application of laws by regulating the grounds upon which decisions are justified. While the criteria for assessing, say, interpretive arguments will differ in detail from those used to assess reasons based on precedent, there are three general categories of criteria common to all three modes of reasoning.

First, judges must know what counts as a good argument for applying the law in a particular situation. This implies that the modes of reasoning must provide criteria that differentiate those reasons that are legally acceptable reasons from among the universe of possible reasons for a decision. If application of rules is not to be arbitrary or simply discretionary, judges must not be at liberty to choose any reason as a reason for a decision - the reason must be a legally sanctioned reason. This set of
standards establishes the validity of a legal argument. In addition to establishing the validity of a particular kind of argument, there must be standards for verifying the claims that are attributed to the argument. For example, while it is legally permissible in applying the law for judges to appeal to the statute's purpose - i.e., it is a valid reason for a legal decision - not any manner of speculation about that purpose will be accepted. Judges must establish what defensibly can be taken to be the purpose of the statute - that is, what would constitute evidence of that purpose. This set of standards establishes criteria for verifying the claims of a legal argument. A further set of standards is implied by characterizing the structure of judicial reasoning in terms of conductive arguments. Since judges will be confronted with arguments for and against a particular decision, criteria for weighing the relative force of opposing sets of arguments must be provided. This set of standards establishes the weight of legal arguments. I will now consider the nature of these three sets of standards and their relation to secondary rules of application.

25 Validity is used to refer to the legitimacy of offering a particular kind of argument as a legal argument. This sense of validity is the same as what is meant when a rule is identified as a legally valid rule. Validity does not refer to claims about the formal logic of an argument (e.g., that a conclusion is necessarily implied by the premises of a deductive argument).

26 For example, in Britain and to a lesser extent in Canada, politicians' statements about what they were attempting to achieve by a particular piece of legislation are not accepted as reliable indicators of a statute's purpose.
3. Secondary rules of application

While I suggested that a rule-guided account of judicial reasoning need not imply that application of law is limited to the explicitly designated extension of preexisting rules, there is an important sense in which judicial decisions must be grounded in preexisting, generally accepted rules. If legal standards fail to control judicial decision making, then judges are free to make up arguments for applying a law as they go along or, at least, they have wide discretion in their decisions. However, there is a widely shared view that judges are authorized only to resolve cases according to the law. As Weiler (1968, p. 420) suggests, the adversarial model of adjudication "is meaningless unless the parties can know before their preparation and presentation of the case the principles and standards which the arbiter is likely to find relevant to his disposition of the dispute." And as Bell (1985, p. 230) clearly recognizes: "it is a central feature of a legal system that the decisions made by a judge have to be justified in terms of standards and reasons accepted within that system." This requirement is analogous to the need for public criteria by which to recognize primary rules as valid legal rules. If a theory of judicial reasoning is unable to explain how legal standards control judicial decisions then the theory has inadequately accounted for a crucial dimension of acceptable judicial practice. The account of judicial reasoning I propose accounts for the standards that
control judicial decision making in terms of a class of secondary rules which I call rules of application.

Secondary rules of application, like others of Hart's classes of rules, depend for their validity on secondary rules of recognition and ultimately on a master rule of recognition. In other words, rules of recognition stipulate criteria that other rules must meet if these other rules are to be legitimately recognized as valid rules of the legal system. Paraphrasing Hart, to say that a secondary rule of application "is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system" (CL, p. 100). The forms of these "tests" include "reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specific persons, or to past judicial decisions in particular cases" (CL, p. 97). Therefore, we should expect to find secondary rules of application in classic legal works such as Maxwell on the Interpretation of Statutes, in the statutes themselves, in conventions of judicial practice, and in judicial opinions. In the balance of this section, I offer a sampling of the rules of application that establish standards for argument validity, verification and weight; in the following three chapters these rules are discussed in the context of particular modes of reasoning.
3.1 Rules of argument validation

If judicial reasoning is rule-guided, judges and lawyers require secondary rules providing criteria for recognizing reasons as valid legal reasons for deciding a case. I will refer to these rules as argument validating rules. Several Continental writers, most notably Perelman, have recognized this feature of judicial reasoning (Stone, 1964, pp. 327-331; Bodenheimer, 1969, pp. 381-384). Following Aristotle’s account of "topoi" and Cicero’s notion of "loci," they characterize legal reasons as proceeding from accepted "seats of argument" - agreed starting points from which valid arguments are developed. In other words, an accepted rule provides the legal anchor for, or establishes the legal validity of, an argument. Unless grounded in law, judges cannot entertain an argument - cannot consider it as a reason for deciding a case one way or another (Bell, 1985, pp. 23, 27, 35; Levenbook, 1984, pp. 4-5; MacCormick, 1978, pp. 11-12). For example, as was suggested when discussing the case cited by MacCormick, the interpretation given "non-merchantable goods" in the prior case is a reason for accepting the pub owner’s culpability only because it is agreed that interpretations reached in prior cases are appropriate grounds for resolving disputes in subsequent cases.27 This rule of argument validity is part of the doctrine of stare decisis.

27 As I will explain later in this chapter and in subsequent chapters, the need for rules of argument validity does not preclude the possibility of new secondary rules of application being introduced into a legal system in the course of deciding a case.
Another rule, also related to the doctrine of precedent, recognizes the validity of appeals to prior decisions in other jurisdictions. For example, in Clarkson v. Canadian Indemnity Co.28 it was accepted that "[I]n the absence of binding authority in one's own jurisdiction, assistance should be sought where it can be found, whether from the Courts of other provinces of Canada or from the Courts of other countries."

As has been suggested, there are three general types of valid arguments: arguments based on interpretive guidelines, prior cases and principle. Each of these modes of reasoning identifies a wide range of potential arguments that can be marshaled in support of a judicial decision. For example, in interpretation, judges are authorized to appeal to the statute's purpose as a reason for deciding the meaning of the rule in a given situation (Frankfurter, 1947, p. 538). One of Dworkin's important contributions to our understanding of judicial reasoning is his emphasis on the role of legal principles in providing reasons for and against application of a rule in a given situation (TRS, p. 26). While Dworkin rejects the existence of explicit criteria that sharply distinguish legal and moral principles, even he recognizes the notion of valid legal argument.29 I will consider the extent to which these rules of

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29 In criticizing U.S. Supreme Court Justice candidate Robert Bork, Dworkin (1985, p. 39) insists that judges "should use the normal style of legal analysis" and accuses Bork of exhibiting "blatant distaste for ordinary legal argument" (1984, p. 27) and of "judging by fiat because he made no serious legal argument at all" (1985, p. 40).
argument validity establish the necessary pedigree for all acceptable legal arguments throughout the three succeeding chapters and in chapter eight.

3.2 Rules of argument verification

A second type of criterion for rule-guided adjudication deals with verifying the claims implied by a legal argument. The secondary rules of application providing these standards will be called argument verification rules. In the example involving the sale of contaminated lemonade, MacCormick's account of the judges' reasoning implied two rules: (1) a rule (of argument validity) establishing the validity of arguing from interpretations decided in prior cases, and (2) a rule (of argument verification) establishing criteria for verifying that the specifically mentioned prior case established the definition that MacCormick attributes to it. The latter rule derives from the doctrine of precedent: the ratio decedendi - the rule established by a prior case - is restricted to what is considered necessary for reaching the decision. If the prior case cited by MacCormick had been decided on grounds that did not require acceptance of the definition ascribed to non-merchantable goods, then that definition would not have been necessary to the prior decision and appeal to the prior case would not establish the definition for the present case.
The admissibility in appellate courts of Brandeis briefs to establish claims about social and economic conditions is another example of rules of argument verification. So too is the authority to take "judicial notice" - to recognize certain propositions as true because they are assumed to be generally accepted facts (e.g., the laws of the state, international law, historical events, geographical features). The reluctance in Britain and in Canada to accept statements made by politicians as evidence of the legislative purpose is not that these jurisdictions consider arguments from legislative purpose as invalid. Rather, particularly in Britain and to a lesser extent in Canada, politicians' statements are considered unreliable indicators of the purpose.

It should be noted, that while judges rely upon and are bound by these rules, the rules are not always posited or expressly mentioned. That is, in any given case judges will not cite all the rules that their arguments rely upon and all the implied rules need not have been expressly formulated prior to their usage in judicial argument. Certainly many ordinary language conventions and definitions are implied in determining the "plain meaning" of words and yet they are often not explicitly cited. If pressed, judges would likely cite specific linguistic conventions as evidence for their claim, or they might

30 This type of brief, named after Justice Louis Brandeis, contains economic and social surveys and studies.
31 This point is discussed in chapter five.
refer to their authority to take judicial notice of noncontroversial facts.32

3.3 Rules of argument weight

A third dimension of a rule-guided account of judicial reasoning are rules establishing standards for weighing the strength of competing positions. This weighting involves assessing the cumulative force of individual arguments on each side and deciding whether the required onus of support for a decision has been meet. By and large, a verdict in favour of a position is warranted if that position is more strongly supported than any other. Therefore, most rules of argument weight specify criteria for assessing the relative weight of competing arguments. These rules will be referred to as rules of argument force.33 However, before discussing these rules, I will mention briefly a less common type of rule of argument weight which I will refer to as rules of argument onus. Rules of argument onus are required because, on some occasions, a greater onus of proof is required to justify a finding in favour of one of the parties.34 For example, the Charter requires that parties

32 I take it that judicial notice is often implicit validation of judicial appeals to "common sense." While this appeal is often misused or incorrectly used when judges dubiously assert a proposition that is far from obvious, it does not challenge the suggestion that judges are authorized to accept certain uncontested claims implied in their arguments as "facts" (Bell, 1985, p. 36).
33 Validity refers to its status as a legal argument, while force refers to the extent of influence it is accorded. Arguments that are not legally valid can not correctly be ascribed any legal force (Read, 1986, p. 133).
34 The Crown's onus in criminal cases to establish the facts beyond a reasonable shadow of doubt is a well known example of an
seeking to place limits on constitutional rights establish that their position be "demonstrably justified." In the Protestant School Boards case referred to earlier, Quebec Chief Justice Deschenes noted that there were numerous significant arguments supporting both the parents' English language rights and the government's right to protect the province's francophone heritage. However, the absence of a clear preponderance of support for the government's position justified upholding the parents' position.

As indicated above, most rules of argument weight specify criteria for establishing the relative weight of competing positions. Assessing the strength of each side's positions requires establishing the relative force of individual arguments. At least four factors determine this calculus: (1) the weight or legal importance of the rule upon which the argument is grounded, (2) the weight or legal importance of the standard implied in the underlying rule, (3) the magnitude of the implications in the given case for the implied standard, and (4) the degree of conviction about the truth of claims supporting an argument.

(1) Weight of the rule. It was suggested in the section dealing with argument validity that the validity of every argument is established by a secondary rule. The interpretive presumption against interfering with personal liberty, for example, holds that in situations where legislation is ambiguous, exception to the general rule that it is sufficient that one side provide stronger support than the other.
the courts should lean towards the interpretation that protects the freedom of the individual. Implicit in this rule of argument validity is a weighting of the importance of this type of reason. The presumption against interfering with personal liberty is a less compelling reason for an interpretation than a reason derived from the "plain-meaning" rule - an interpretation of a statute based on the unambiguous meaning of the terms would typically override an interpretation based on an interpretive presumption. Similar weighting occurs in other modes of reasoning. For example, in reasoning from prior cases, the ratio of a case may be binding on subsequent judges whereas obiter dicta merely have persuasive authority, the level of the court in the judicial hierarchy determines the authority its decisions carry, an unanimous court opinion carries more weight than a split decision, and so on. An implicit rule of argument force is the "Practice Statement on Judicial Precedent"35 issued by the English House of Lords which announced that that Court was no longer (absolutely) bound by prior decisions.

(2) Weight of the standard. Another factor affecting the force of an argument is the weight attached to the standard implicit in the rule underlying the argument. For example, in a case involving ambiguity over parental rights to exempt their children from school activities, the interpretive presumption against interfering with personal liberty might imply an appeal to religious freedoms. That is, it might be suggested that

interpreting an educational exemption clause in a particular way would curtail parents' freedom of religion. Since religious freedoms are considered to be "fundamental freedoms," the argument would carry greater weight than if the presumption implicitly appealed to other personal liberties, such as those dealing with rights to engage in certain leisure activities. The weight of implied standards is a function of the hierarchical ordering of legal values - the fact that the law punishes murderers more severely than thieves indicates that human life is considered a more important legal value than personal property.36 Weightings are also implied by our constitutional structure. For example, the principle of legislative supremacy means that, in general, standards established by statutory provision will supersede those embedded in judicial decisions,37 and constitutional paramountcy means that constitutional provisions will be afforded even greater weight than statutory provisions. Notice, for example, that religious freedoms had less weight prior to the Charter when their protection was not entrenched in the constitution. Often the respective weight of conflicting standards is implicit in prior court decisions. For example, the U.S. ruling that personal freedom would yield only if there was "clear and present danger" to public security establishes a ranking of those two values (Lloyd, 1981, p. 165).

36 In Steel v. Glasgow Iron and Steel Co. Ltd. [1944] S.C. 237 at pp. 248-249, the Court expressly recognized the greater value attached to saving a life than to protection of property.
37 This effect of this weighting principle is moderated by the nonderogation presumption that a statute shall not be interpreted in a manner that substantially alters the common law unless there is clear indication it was so intended (Johnson, 1978, p. 417).
(3) Implications for the standard. A third factor affecting the force of an argument is the magnitude of the implications for the standard implied in a given argument - that is, an argument's weight depends on the degree to which the implied standard is violated or respected in a given situation. For example, an argument based on the presumption against interfering with personal liberty would be more compelling if the interference involved extensive denial of religious freedoms for large sectors of society than if it presented a minor limit on a small group. Implicit in this distinction is a rule of argument force to the effect that, other things being equal, judges should prefer the alternative that most advances legal values. It is important to appreciate that this does not imply a simple maximization principle (MacCormick, 1978, p. 115). The greater weight attached to some standards, specifically constitutional rights, means that individual rights may be upheld despite implying significant negative consequences for other groups. Consideration of consequences in light of legal values also implies, as is authorized by the Charter's reasonable limits clause, that constitutional rights can be overridden provided there is sufficient justification for doing so. As we will see

38 Unlike the two previous weighting factors, which are established independent of their application in a given case, this factor is tied to the particulars of a case.
39 The determination of the consequences of, or implications for, a particular standard are largely regulated by the rules of argument verification.
40 Vlastos (1962, pp. 60-62) claims that maximization of protected interests and rights is a requirement of justice: "given any two levels of production of goods known to be possible in given circumstances, then, other things being equal, the higher should be preferred on grounds of justice."
later in this chapter, weighing competing arguments of varying force is often very difficult, and typically requires that judges exercise judgment in determining the relative weighting of standards and the magnitude of the implications for those standards in particular situations.

The distinction between the implications for the standard and the importance of the standard is often confused. Judicial decisions based on the former are often erroneously construed to imply a ranking of the standards themselves. For example, suppose a case where a reason for a particular interpretation of a statute implied an appeal to religious freedoms, and a reason against that interpretation implied an appeal to economic freedoms. Assume, for the sake of argument, that both freedoms were constitutionally entrenched and regarded to be of approximately equal weight. It would be most appropriate to assess the relative force of the two arguments by considering their implications for each standard. If it was decided that the extent of infringement to religious freedoms would be significantly less than the infringement to economic freedoms, the latter argument would have greater force. However, this decision would not imply that the judges determined that economic freedoms per se are more important in law than religious freedoms. It would merely mean that, in this case, the negative implications for one standard was judged to be less severe than the implications for another, equally important standard. Occasions often arise where a small affront to a fundamental
principle will be outweighed by the significance of the consequences for an admittedly less fundamental standard. This occurs because no standard, regardless of how fundamental a right it involves, has absolute force (Mackie, 1984, p. 164).

(4) Degree of certainty. A fourth factor affecting the weight of an argument is the degree of certainty about the implications for the standard in the given case. If it is questionable whether or not a particular consequence follows or an inference is implied, then an argument is less compelling than if these conclusions are clearly supported. For example, a claim that the legislators' intentions may be assumed to exclude interference with religious freedom has less force than an argument that convincingly establishes that intention. The justification for this criterion of weight is apparent - other things being equal, it would not be rational to attach equivalent weight to two sets of consequences when it is uncertain if one set of consequences will actually arise.

Before leaving this discussion of secondary rules, a further clarification is warranted. It is potentially misleading to

41 In International Fund for Animal Welfare v. The Queen [1987] 30 C.C.C. (3d) 80, the Federal Court ruled that the limited restrictions to freedom of information imposed by curtailing access to the ice flows during the seal hunt were offset by the significant disruption to the seal harvest. (Concern for the safety of participants to the seal hunt was also a reason for limiting access.)

42 Justice Learned Hand wrote in Dennis v. United States [1951] 341 U.S. 494 at p. 501: "In each case [courts] must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasions of free speech as is necessary to avoid the danger."
distinguish three types of rules of application since, in actual
practice, accepted secondary rules often specify all three types
of standards. Consider, for example, the interpretive rule known
as the "golden rule." An early formulation of the rule stated
that,

the grammatical and ordinary sense of the words is to be
adhered to, unless that would lead to some absurdity, or
some repugnance or inconsistency with the rest of the
instrument, in which case the grammatical and ordinary sense
of the words may be modified, so as to avoid that absurdity
and inconsistency, but no further. (Grey v. Pearson [1857]
6 H.L.Cas 61 at p. 106.)

Implicit in this master rule are at least five sub-rules of
argument validity. In interpreting law, judges are authorized to
appeal to: the accepted grammatical use of words, the ordinary
meaning of words, possible absurd consequences, possible
repugnant consequences, and possible inconsistency with the rest
of the statute. In addition, it can be inferred that grammatical
and linguistic conventions would be accepted as rules of argument
verification. Finally, the explicit priority of absurdity,
repugnancy, or inconsistency arguments over ordinary meaning
arguments, and the implicit priority of ordinary meaning
arguments over other forms of argument (e.g., arguments from
legislative intention) constitute two rules of argument force.

4. Controversy and rules of application

The preceding discussion of secondary rules should not be
taken to imply that disputes over the validity, verification and
force of arguments are infrequent. Often there is no obvious
secondary rule controlling a particular situation, or its application in a given situation is controversial. However, these controversies are not, as some critics suggest, inconsistent with a rule-guided account of judicial reasoning. I propose to defend this position by exploring briefly (1) how judges resolve disputes over contentious primary and secondary rules in a rule-guided manner, and (2) how controversial decisions about the application of rules may still be controlled by legal standards.

4.1 Disputes over validity

In many cases, judicial decisions hinge on the validity of a contested secondary rule of argument validity, verification or force. In other words, it may often be uncertain whether or not a particular rule of application is acceptable. Controversies over acceptable standards of judicial reasoning are not antithetical to a model of rules account of judicial reasoning as long as there are valid criteria for resolving these disputes. As we will now see, Anglo-American law provides these sorts of criteria. In fact, disputes over the validity of secondary rules of application, like disputes over the validity of primary rules, are resolved by application of criteria embodied in other secondary rules of recognition in accordance with the sanctioned modes of reasoning.
The Supreme Court of Canada’s decision in *R. v. Big M Drug Mart Ltd* 43 is a clear example of reliance on accepted legal standards and modes of reasoning to establish the validity of disputed primary and secondary rules. In this case, the validity of a primary rule - provisions of the Lord’s Day Act - depended, in part, on the acceptability of a particular legal argument which, in effect, required determining the validity of a secondary rule of application. More specifically, a crucial issue in deciding the constitutionality of the Lord’s Day Act was the validity of an established American rule of application known as the "shifting purpose" theory. The American rule held that the purpose that an act could be taken to serve could change significantly if sufficient amendments had been made. The Lord’s Day Act, which required the closing of retail stores on Sunday, was originally enacted to promote observation of the Christian holy day. Acceptance of this sectarian objective meant that the Act failed to meet a Charter requirement that limits placed on rights be consistent with the principles of a "free and democratic society." If the Act could be shown to have subsequently acquired a secular effect - say, to safeguard a uniform day of rest for employees - then it would be less likely to violate the Charter. The Crown defended this argument by appealing to several United States decisions as evidence for the validity of the shifting purpose theory. The validity of the Crown’s argument was challenged and ultimately rejected by the Supreme Court in the face of counter-arguments based on reasoning.

from principle and an implicit rule of argument force. The Court held that the shifting purpose theory was inconsistent with fundamental principles of Canadian law (i.e., the doctrines of legislative intention and *stare decisis*) and that these negative implications outweighed the merely persuasive authority of arguments from foreign precedents. In short, the Crown's argument, that the purpose of the Lord's Day Act was defensible, was rejected because the required secondary rule establishing the purposes that acts could be taken to have was found invalid under Canadian law.44

While this case illustrates the capacity for secondary rules to resolve disputes over particular rules of application, it should not be assumed that all disputes over the rules of application are resolved in this way. As was suggested in chapter two, individual judges may recognize the validity of different and sometimes conflicting rules of application.45 This situation is a potentially serious impediment to the administration of justice since it conflicts with the ideal of

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44 I regard the shifting purpose theory to be a rule of argument verification, although the difference between a rule of argument validity and argument verification is often arbitrary depending on what the judge considers to be the basic argument. The rule of application clearly implied by (then) Justice Dickson is that interpretation of statutory provisions is to be carried out in light of original purpose (at p. 353). A distinction can be drawn between the basic argument - that interpretation is to be carried out in light of statutory purpose - and various rules (of argument verification) about how that purpose is to be identified (e.g., legislative debates, earlier drafts of the statute, or subsequent amendments). Others might construe the "shifting purpose" and "original purpose" theories as a rival rules of argument validity.

45 A more detailed explanation of this type of confusion is discussed in the next chapter.
the rule of law as a uniformly applied set of preexisting rules. However, the existence of rival secondary rules does not repudiate a conception of law as a union of primary and secondary rules provided the validity of these different standards are established by secondary rules of recognition. For example, suppose judges within a legal system are split over the weight to be given the actual intentions of the original framers of the constitution. If judges consistently cite two rival strands of cases and constitutional principles as authority for their positions, then they have accepted implicitly the same rules of recognition - the validity of the rival rules of application depends on authorization by prior judicial decisions and consistency with constitutional principles. On this account, the parties are divided over the extent to which the rival rules of application meet these criteria. It may be that this issue raises such basic questions about the court’s authority that the most fundamental rules of recognition fail to provide conclusive direction. As Hart suggests, disputes at the penumbra of these rules often have no further levels of appeal:

The truth may be that, when courts settle previously unimagined questions concerning the most fundamental constitutional rules, they get their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success. (CL, p. 149)

The possibility that there are no further legal grounds for resolving disputes over the validity of some secondary rules does
not undermine a model of rules account. A model of rules account need not claim that there is a uniquely correct resolution to every disagreement; it is sufficient that, for the vast majority of secondary rules, there are grounds for adjudicating disputes of validity.

4.2 Disputes over application

All judicial disputes do not depend on assessing the validity of a particular secondary rule. Controversies arise in another way that is considered by some to threaten the very nature of rule-guided decision making. This challenge, which is typically referred to as the problem of judicial discretion, runs as follows: the high incidence of controversial judicial decisions suggests that, while judges are supposed to "play by the rules," the constellation of accepted rules often do not prescribe a verdict; thus judges must of necessity be deciding many difficult cases on grounds not controlled by accepted rules. Dworkin (1980) was the first to raise this problem as a challenge to a model of rules account of judicial reasoning.

46 See Eekelaar (1973, pp. 37ff.) for a discussion of the possibility of rule-guided standards governing judicial decisions in extreme situations such as court decisions following a revolution.

47 Some positivists, including Raz, believe that whenever the rule established in a prior case is "extended" to cover a new situation judges are necessarily exercising discretion. Significantly, Raz (1983b, pp. 208-209) wonders why judges don't more clearly distinguish between occasions when they apply law and when they create law. The justification for regarding the application of a ratio to a new situation as applying, and not creating, the law is discussed at some length in the chapter on reasoning from prior cases.

48 It has been suggested that the primary source of Dworkin's dissatisfaction with a model of rule account of law is that it
He correctly observed that the exercise of judicial discretion flies in the face of recognized legal standards (e.g., it conflicts with the prohibition against retroactive application of law and the doctrine of the separation of powers in a constitutional democracy) and contradicts disavowals by many judges of any authority to exercise discretion in most hard cases (TRS, pp. 84). Where I differ with Dworkin is over his claim that a model of rules fails to account for the standards that judges rely upon in deciding difficult cases (LE, p. 129). In chapter eight, I will consider Dworkin's specific reasons for claiming that a rule-guided account of judicial reasoning is vulnerable to the problem of discretion. For the present, I propose to explain why controversy over application of rules is not inconsistent with rule-guided decision making.

This explanation will be addressed in several stages. First, the notion of judicial discretion will be clarified by drawing distinctions between "strong" and "weak" discretion, between "exercising discretion" and "having discretion," and between "exercising judgment" and "exercising discretion." It will be suggested that exercising judgment, but not exercising or having discretion, is a reasonable expectation of judges operating within a rule-guided conception of judicial reasoning and a likely feature of Anglo-American judicial practice. Finally, explanations will be offered why many supposed instances (supposedly) implies that judges are required to exercise strong discretion in hard cases (Bell, 1972, p. 923).
of judicial discretion may more appropriately be characterized as involving the exercise of judgment.

(1) Clarifying the concept. Dworkin distinguishes between discretion in strong and weak senses. A judge exercises discretion in the strong sense when a decision "is not controlled by a standard furnished by the particular authority" (TRS, p. 33) or when he is "simply not bound by standards set by the authority in question" (TRS, p. 32). This is contrasted with use of the term discretion in a weak sense to indicate that the standards a judge "must apply cannot be applied mechanically but demand the use of judgment" (TRS, p. 31). Throughout I will refer to this sense of weak discretion as "exercising judgment" and limit the use of the phrase "exercising discretion" to refer to Dworkin's notion of discretion in the strong sense.

Waluchow (1980, p. 89; 1983, p. 333) draws an important distinction between what he calls "having discretion" and "exercising discretion." A judge would not have discretion if and only if (1) there is always a uniquely correct legal answer for every dispute, (2) the judge believes that there is a uniquely correct answer, and (3) the judge believes that he can ascertain the correct answer. A judge would not exercise discretion if and only if he believes that there is a purported correct legal answer for every dispute and that he can ascertain

49 Dworkin offers a second use of discretion in a weak sense to refer to that fact that an official's decision is final (TRS, p. 32).
it. The difference is that according to the latter account "the proposition that judges lack strong discretion does not mean that all cases are fully controlled by binding legal standards; only that judges are required by the legal system always to proceed on the assumption that they are" (Waluchow, 1980, p. 67). On this view, as long as judges consider themselves obligated to reach the most defensible legal resolution in every case and believe that, in the particular instance, there are valid legal grounds for selecting one conclusion over the others, they do not exercise discretion.

Dworkin appears to accept the notion of exercising discretion as the relevant concern. For example, he suggests that "[t]he law may not be a seamless web; but the plaintiff is entitled to ask the judge to treat it as if it were" (TRS, p. 116). Even Hart's account of judicial reasoning in hard cases is compatible, in important ways, with this understanding of discretion:

At this point [choosing between competing "moral" principles] judges may again make a choice which is neither arbitrary nor mechanical; and here often display characteristic judicial virtues, the special appropriateness of which to legal decisions explains why some feel reluctant to call such judicial activity "legislative". These virtues are: impartiality and neutrality in surveying the alternatives; consideration for the interests of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision. No doubt because a plurality of such principles is always possible it cannot be demonstrated [Hart's emphasis] that a decision is uniquely correct; but it may be made as the reasoned product of informed impartial choice. In all this

50 Waluchow (1983, pp. 325-328) suggests that most likely Dworkin intends that judges do not exercise discretion.
we have the "weighing" and "balancing" characteristic of the effort to do justice between competing interests. (CL, p. 200)

While Hart believes that judges are forced to go outside the law to solve cases at the penumbra of legal rules, his explication of those appeals implies crucial features of a rule-guided, non-discretionary account of judicial decision making. He recognizes a judicial obligation to make an "informed impartial choice" that is neither arbitrary, mechanical, nor (necessarily) uncontroversial. If, as Hart correctly suggests, judges are expected to make an impartial choice, then judges must not be free to select arbitrarily the criteria for deciding between alternatives. These criteria, in some way, must be presented to, or be discoverable by, judges and not be imposed by personal predilection. Finally, as Hart suggests, none of this implies that there is a single correct conclusion to the dispute. I suggest, following both Hart and Dworkin, that a judge would have met his judicial obligation to apply the law if his decision is the product of a conscientious assessment based on sincerely held beliefs about the appropriate legal standards for deciding the case and the most defensible conclusion to draw from those standards.

51 Hart suggests that judges appeal to "moral" principles (CL, p. 220). However, the examples he cites can be explained by the notion of embedded legal principles which will be discussed in chapter eight. The standards described in the passage are essentially the considerations involved in what I refer to as reasoning from principle.

52 Consider the following remarks about the "received view" of judicial obligation:

We pride ourselves that this is a government of laws, a government under law, and most of us are not willing to give
It follows from the previous discussion that, if a model of rules account of judicial reasoning is to avoid the judicial discretion objection, the following conditions must be met: judges must believe (1) that legal rules specify the appropriate criteria for deciding a case, including the weight to be afforded each criterion and (2) that these criteria control the decision in the instant case. (The term "control" means that a judge sincerely believes that one of the alternative resolutions to the case is more defensible on legal grounds than the others, and that he can ascertain which it is.) The task facing proponents of a rule-guided conception who also deny judicial discretion is to explain both how the law meets these conditions and why controversy is often present even when these conditions are met.

Before proceeding further, it is important to note that a rule-guided conception need not claim that judges never exercise this up as a false ideal. Of course we know full well that law must be administered by men, and that human judgment is an inevitable element in the application of law. But it is one thing to act according to one's personal predilections or choice, and a wholly different thing to come to one's own best conclusion in the light of his understanding of the law as it has been established by statute, decision, tradition, received ideals and standards, and all the other elements that go to make up our legal system. Of course, no one thinks that any judge decides any case in a capricious or curbstone manner. The question is how far and how hard he seeks to be guided by an outside frame of reference, called for convenience "the law," in arriving at his conclusion, rather than focussing his intellectual effort, perhaps unawares, on justifying his conclusion arrived at somehow or other in some other way. The process is assuredly not a merely mechanical one. But it is a tightly guided process. The scope of individual decision is properly narrow. And the place for individual decision is not reached until the guides of the law have been thoroughly explored and evaluated, with detachment as well as skill. (Griswold, 1960, p. 92)
discretion. In fact, there are several reasons for doubting a priori claims about the possibility of a uniquely correct legal answer to every dispute. Mackie (1984, p. 165) raises the possibility of incommensurate competing arguments,53 prominent judges have indicated that on occasions they feel compelled to exercise a free choice,54 and even Dworkin admits the theoretical possibility that a situation will not be fully controlled by legal standards (TRS, pp. 286-287, 360).55 It is sufficient to defend against the judicial discretion objection if it can be shown that only in the most extreme situations does a rule-guided conception of Anglo-American law require the exercise of discretion.

(2) Exercising discretion and exercising judgment.

Obviously, if a set of appropriate and unambiguous legal standards is apparent, and the application of the standards in a given instance is straightforward, a judge would not be exercising discretion. However, in these situations the judge

53 See Waluchow (1980, pp. 267-278) for a defense of Mackie's challenge in light of counter objections advanced by Dworkin.
54 Waluchow (1980, pp. 101-102) reports that Justice Holmes wrote that sometimes judges must exercise "the sovereign prerogative of choice" and Justice Cardozo wrote "(e)very judge must be conscious of times when a free exercise of will, directed of set purpose to the furtherance of the common good, determined the form and the tendency of a rule which at that moment took its origin in one creative act."
55 Hart (1977, pp. 139-140) conjectures that Dworkin will be attacked most for "his insistence that, even if there is no way of demonstrating which of two conflicting solutions, both equally well warranted by the existing law, is correct, still there must always be a single correct answer awaiting discovery." For a critical discussion of Dworkin's arguments regarding the possibility of a uniquely correct answer for every case see Waluchow (1980, pp. 263-278).
would also not be exercising judgment - the decisions would be mechanical. The need to exercise judgment arises only if the conclusion is not a certainty. As Green (1971, pp. 176-178) suggests, the term "judging" is properly used only when the answer is not self-evident. Thus, in every case that deserves to be contested on a point of law, there must be some grounds for warranting a decision either way. While judges are not free to set the standards for decision or their relative weight, judges frequently will be required to identify, clarify and apply those standards. The need to exercise judgment in performing these tasks and, therefore, the potential for controversy may arise in, at least, three ways. Judgments may have to be made: (1) about the appropriate legal standards for the decision, (2) as to whether these standards are sufficiently discriminating so as to control the decision in the given situation, and (3) about which alternative resolution best satisfies the standards taken to control the decision. Getting clearer about what may be involved in the exercise of these judgments will illustrate how rule-guided decisions can be both non-discretionary and controversial.

As indicated above, judges may be called upon to make judgments about the appropriate standards for adjudication. The need for judgments on this issue can be explained by considering the simple example that Dworkin offers of a lieutenant ordering a sergeant to select five men for patrol. According to Dworkin, if the lieutenant's order is to select the five most experienced men then the sergeant is required merely to exercise judgment;
whereas if the order is to select any five men, then the sergeant is required to exercise discretion \( (\text{TRS, p. 32}) \).\(^{56}\) Dworkin acknowledges that in the first situation the sergeant's judgment about the five most experienced men may be controversial because the standards could be vague or difficult to apply \( (\text{TRS, p. 32}) \). For example, it may be unclear which five men are the "most experienced." Some men may have been enlisted in the service longer, others may have spent greater amounts of time on patrol duty, and still others may have less total hours of patrol duty but have participated in a richer range of patrol assignments. Since all of these are apparently reasonable measures of experience it is not obvious that the order, as such, controls the sergeant's decision.

At this point, it might be suggested that if five and only five men are not clearly identifiable as the "most experienced" then the order does not control the sergeant's decision and, therefore, the sergeant must exercise discretion. However, if there are recognized second-order criteria for resolving ambiguities then, while the order itself does not control the decision, the order and second-order standards collectively may control the decision. In determining the most appropriate

\(^{56}\) Apparently, in the first situation, the sergeant is not required to exercise discretion because the order "purports to govern" the sergeant's decision \( (\text{TRS, p. 32}) \), while the sergeant in the second situation must exercise discretion because he has latitude in selecting the criterion upon which to choose five men \( (\text{TRS, p. 33}) \). This account is too simplistic because under certain conditions the first sergeant, as we will see, may be required to exercise discretion and, depending on the pool of available soldiers, the second sergeant may have no discretion.
interpretation of "most experienced," the sergeant might refer to a variety of second-order criteria: to the lieutenant's likely intended meaning; to the meaning implied by previous orders involving selections of men; to military guidelines on criteria for selection; and to the nature of the patrol assignment. In the terminology I employ, in order for these criteria to be valid criteria they would have to be authorized by rules of argument validity. Deciding whether or not the relevant rules authorize appeals to these criteria may be difficult - if the relevant secondary rules are ambiguous or vague, for example, it may be necessary to interpret them in light of other second-order criteria. (As discussed in the prior section, the validity of some of these rules of argument validity may be disputed). Only if the sergeant believes that the relevant second-order rules fail to specify appropriate criteria for interpreting the order, will the sergeant need to exercise discretion. As we will see when discussing the Riggs case, there is typically a multitude of valid legal arguments that can be offered in support of positions. Judges are unlikely to feel as though there are insufficient, legally valid criteria to entertain when making a decision one way or another. It is more likely that judges will disagree as to which position is most defensible in light of these criteria. (I will consider this possibility when discussing the third type of judgment that judges are often required to make.)
As indicated earlier, judgments may also be required in deciding whether or not the valid criteria determine a clear resolution. In our example, the sergeant must believe that the interpretation of "most experienced" is sufficiently discriminating to allow him to identify five and only five men. It is possible that the above mentioned second-order criteria would justify interpreting "most experienced" to mean the men with the widest range of experiences. However, this interpretation may not control the selection - the sergeant may believe (correctly or not) that some men may have a wider range of experiences with different geographical terrain but a lesser range of tactical experiences than other men. In this event, additional second-order criteria must be found to further narrow the interpretation. There may be, for example, a maxim of military strategy suggesting that natural obstacles be treated as posing a greater threat to success than human obstacles. In which case, this principle would provide a reason for selecting the men with the greater range of experiences with geographical terrains. Only when appeals to all the appropriate second-order criteria are exhausted without five "most experienced" men being identified might the sergeant reasonably conclude that the order requires him to exercise discretion. A parallel situation applies in judicial decision making. Only when judges have exhausted all legal standards and continue to believe that the law fails to provide sufficiently discriminating criteria to support a single, most defensible resolution, are they forced to exercise discretion. Again, it is an empirical question as to
how often this situation arises, although it is not obviously a frequent occurrence. As we will see when discussing reasoning from principle, the law provides a rich and diverse body of principles that guide judicial decisions in difficult cases.57

A third type of judgment that may be required involves assessing which of the alternatives offers the most defensible resolution given the appropriate criteria. Accusations of judicial discretion are most likely to arise in these situations since different conclusions may be drawn from apparently similar standards (Bell, 1985, pp. 27-28). One reason for these disagreements was suggested in the discussion of weighing arguments. In deciding which conclusion is most defensible, judgment is often required to assess the force of competing arguments. For example, suppose that military regulations specify that the prime consideration in carrying out an order is to effect the issuing officer’s wishes, if known. Suppose, further, that the available evidence suggests that the lieutenant probably regards length of military service as the measure of experience. Let us also suggest that another relevant criterion, say, knowledge of the mission for which the men are being selected, strongly suggests that breadth of experience is most appropriate. The greater weight attached to the lieutenant’s intentions must be discounted somewhat by the lack of certainty.

57 Bell (1985, p. 27) writes that: "(t)he notion of judicial discretion is often connected with the idea that there are ‘gaps’ in the law and that, when the law runs out, the judges has to exercise a degree of personal choice. Given that the legal materials are more extensive than simply the rules of the system, the number of situations is less than might first appear."
about his actual wishes. These factors are to be balanced against the lesser weight, but clear implications, of the argument based on knowledge of the mission. The sergeant has to judge whether breadth or length of experience is most defensible in this situation. To decide this, the sergeant must, among other things, determine the most plausible account of the lieutenant's intentions, assess the probabilities of particular events, and anticipate the likely consequences of each event. A sergeant may regard the evidence of the lieutenant's wishes to be somewhat speculative. If effecting the merely suspected wishes of the lieutenant was viewed as significantly increasing the chance of failure with disastrous military consequences, it would be appropriate (and non-discretionary) for the sergeant to decide that "most experienced" should be interpreted to mean breadth of experience. Another sergeant might assess the probability of disaster, if the longest serving men were selected, to be less likely than the first sergeant thought and, therefore, may feel compelled to comply with what he regards as the lieutenant's probable wishes. Alternatively, a third sergeant might consider the evidence about the lieutenant's wishes to be sufficiently clear that, while believing the lieutenant's criterion to be ill-advised, he would feel obligated to interpret "most experienced" according to the lieutenant's intended meaning. Notice that all three sergeants recognize the validity, and respect the same relative weight, of the standards - hence they meet the conditions necessary to avoid exercising discretion. The
conclusions they reach differ because of judgments made in light of their reading of the particular situation.

The need to make judgments of the kind discussed above is often confused with the exercise of discretion. For example, the third sergeant may be characterized as exercising discretion simply because he attached greater weight, than did the first sergeant, to the lieutenant's wishes, and less weight to the standard of military success. This explanation is unfounded, since both sergeants accorded comparable weights to the standards - it was the force of the arguments from these standards that were judged to be different. The first sergeant's assessment of the dubious plausibility of the evidence about the lieutenant's intended meaning caused him to discount the force of that argument. Alternatively, the third sergeant may be accused falsely of electing to apply different standards since, unlike the other two, he did not consider the implications for military success. In fact, the third sergeant would not need to consider the consequences of the decision if he believed that the evidence about the lieutenant's wishes was sufficiently convincing to compel him to decide the issue on that basis alone. These two hypothetical examples suggest how different conclusions, all of which are controlled by similar standards, may be interpreted falsely to imply an exercise of discretion. As Green (1971, p. 178) reminds us: "[t]he fact that reasonable men may differ in their judgments does not mean that they are merely expressing some personal preference or a mere groundless opinion."
Bell's (1985, pp. 88-93) assessment of the decision in Royal College of Nursing v. Department of Health is indicative of a tendency to confuse judicial exercise of judgment with the exercise of discretion. The issue in this case was whether the legislative requirement that pregnancies be "terminated" by a doctor should be interpreted to allow for terminations "supervised" by a doctor (at p. 828). A key contention was the purpose of the legislation. Bell (1985, p. 91) claims that the judges exercised discretion in reaching their decisions because they reached different conclusions about the legislative purpose. His justification for this attribution is that "(t)he determination of the policy [the legislative purpose] and its weight in relation to other considerations was not established by Parliament, but was made by the judges themselves" (Bell, 1985, p. 90). In other words, since the legislative purpose was not specified in law, the judges, of necessity, must have chosen a purpose by making personal value judgments about the desirability of competing social goals. This explanation is unsatisfactory. The identification of the statute's purpose and the relative weight of other considerations may be implicitly derivable from recognized standards - Parliament need not have expressly announced its purpose or expressly established these priorities. To justify his attribution of judicial discretion, Bell must show

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59 In pregnancies terminated by a doctor, a doctor would physically perform a major part of the actions involved in aborting the foetus; in pregnancies supervised by a doctor, a doctor need only authorize and take responsibility for the actions of others in aborting the foetus.
that the judges did not consider their decisions controlled by valid legal standards.

The opinions in this case show clearly that the judges believed that second-order standards controlled their decision. While the purposes that the majority and dissenting judges attributed to the statute were not identical, both sides considered them inherent in the statute (at pp. 827, 831) and apparent in the legislative history (at pp. 825, 829). Significantly, one majority justice remarked: "I have reached this conclusion simply as a matter of the construction of the Act" (at p. 838). The "root issue" was one of construction of an admittedly poorly drafted, privately sponsored statute, and a majority judged that the force of arguments was greater for construing the act to allow for "supervised" abortions. Neither dissenting nor majority judges argued that one policy was more desirable than the other. Rather, they argued that their assessments, based on valid legal arguments, of the relative force of competing positions required that they reach the conclusions that they did. It should not be presumed, as Bell alleges, that a lack of explicit indication of the proper resolution of the case and the ensuing disputed conclusions establishes that the judges exercised discretion. As I have tried to illustrate, the need to make judgments about the most

60 See, for example, Lord Edmund-Davies' remarks in dissent (at p. 831). Bell (1985, p. 92) admits as much when he concedes that "it would be fair to say that there is little evidence of consideration given to wide-ranging social implications of any interpretation."
defensible resolution of a case in light of the standards and relative weightings implied by secondary rules of application is consistent with the possibility of considerable disagreement.

Before considering an extended account of judges' reasoning in an actual case, it may be useful to summarize the discussion to this point. I have suggested that applying the law in particular situations is a rule-guided task - that is, there are secondary rules of application which govern judges' reasoning when deciding what is legally required by a primary rule. Describing judicial reasoning in terms of secondary rules of argument validity, argument verification and argument force provides a perspicuous way of explaining why judges overwhelmingly assert that their mandate is to apply the law. The model of rules account of judicial reasoning explicates law's capacity both to accommodate diverse and unanticipated situations and to resolve confusions about the validity of its own rules. In short, the model accounts for two predominant features of judicial practice - the possibility for controlled decision making and considerable disagreement.

Excursus to chapter four - A case study

The opinion in Dworkin's celebrated case, 
Riggs v. Palmer,61 will be examined in detail as a way of illustrating the extent to which judicial reasoning is grounded in rules and, also, as a vehicle for critiquing rival conceptions of judicial reasoning.

The account of judges' reasoning in this case provided by Coval and Smith (1986) will be examined critically in this chapter, and Dworkin's account of the reasoning in *Riggs* will be examined in chapter eight.

*Riggs* involves a teenager who murdered his grandfather in order to safeguard and expedite his inheritance under his grandfather's will. In a split decision, the Court decided to deprive the convicted murderer of any benefit under the will. What follows is an attempt to characterize succinctly and faithfully all the arguments offered in the majority and dissenting opinions. As a way of illustrating the perspicuousness of the proposed model, presentation of the arguments has been divided into the reason advanced and the secondary rules which validate the reason and verify its conclusion.

1.1 Summary of majority arguments

(1) Reason: the exact words of the statutes cannot be presumed to determine that the murderer is allowed to benefit under the will (at p. 509).
Rules of application: mentions doctrine that interpretation of statutes must be guided by the intentions/purposes of the legislators - plain meaning is not necessarily determinative of intention; cites accepted canon of construction "that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers" (at p. 509).

(2) Reason: since it is unreasonable to assume legislators intended to allow a murderer to collect from his victim's will (if they were put the question it is inconceivable they would intend otherwise), the statutes should be interpreted to exclude the grandson's claim (at pp. 509-511).
Rules of application: cites legal authorities confirming
cases where "probable or rational" interpretation of statutes have been upheld (at p. 510) and statements that manifestly absurd consequences are to be avoided (at p. 511).

(3) Reason: the common law is against vesting oneself with title by crime - e.g., profiting from own fraud, or acquiring property by one's own crime (at p. 511). Rules of application: cites doctrine that fundamental maxims of common law control scope of statutes (at p. 512); refers to cases where wrong doing voided expected benefits (at p. 512).

(4) Reason: the common law should be presumed to prohibit benefit accruing to murderer of testator since there is explicit civil law provisions in, inter alia, Napoleonic Code and Roman Law to this effect (at p. 513). Rules of application: asserts a presumption that in the absence of explicit legislation in home country, well accepted, long standing law in other countries it is to be presumed to be reflected in existing common law (at p. 513).

(5) Reason: denial of benefit under the will is not additional punishment for crime, merely preventing acquisition of property to which he was not entitled (at p. 514). Rules of application: none cited nor apparent.

(6) Reason: prior case upholding accrual to an accessory to murder of benefit arising from victim's death was wrongly decided since it failed to apply an established common law maxim (at p. 514). Rules of application: implied (and somewhat questionable) claim that judges have authority to disapprove of cases that, in their view, are wrongly decided.

1.2 Summary of dissenting arguments

(1) Reason: the unconscionable behaviour of the grandson does not preclude entitlement to benefit under will (at p. 515). Rules of application: cites judicial obligation to decide case on determination of the relevant law (at pp. 515-516).

(2) Reason: the explicit words and clear purpose of legislation regulate very closely the necessary and sufficient conditions for execution, alteration and revocation of wills; in this area there is no room for liberal interpretation (at p. 516). Rules of application: implicit reference to doctrine that when words and purpose are clear, law must be applied in accordance with its provisions.
(3) Reason: majority appeal to civil law argument is invalid (see majority argument #4); those civil laws were remedial, the loss of benefit under Roman law was a form of punishment imposed on the offender (at p. 517). Rules of application: asserts a presumption that in issues of remedial justice, there must be explicit legislation to effect a remedy, civil law provisions in other countries cannot be relied upon (at p. 517).

(4) Reason: the statutes expressly prohibit revoking wills except in non explicitly mentioned ways (at p. 517). Rules of application: cites cases where intended alterations to wills were not executed in the prescribed manner and wills were held to be unchanged (at p. 517).

(5) Reason: a suggestion that the testator would have altered his will had he known of his grandson’s plans is irrelevant to the will’s validity (at p. 518). Rules of application: cites several cases where existing wills were held to be valid despite use of force or fraud to prevent testators from altering wills (at p. 518).

(6) Reason: the majority argument (because a criminal act vested the grandson’s title to property under the will, he should forfeit title) requires, in effect, that judges do what they have no authority to do, namely rewrite wills (at p. 519). Rules of application: implicit reference to judicial obligation to exercise authority within the limits of law (at p. 519).

(7) Reason: denial of benefit under the will would do what judges are prohibited from doing, namely, impose an additional punishment for the murder (at p. 519). Rules of application: cites case prohibiting judges from enhancing punishments beyond those provided by law (at p. 520).

1.3 Assessing the judgment

In a two-to-one decision, a majority of the Court decided that the preponderance of weight warranted interpreting the statute so that the grandson would be prevented from inheriting under his grandfather’s will. The dominant dissenting arguments were that the legislators’ intent was adequately captured in the explicit language and the apparent purpose of the legislation.
The dominant majority arguments were predicated on the view that the legislators could not "reasonably" be presumed to have intended to allow named beneficiaries to vest in the estate under circumstances like those presented in Riggs. It might be thought that the opposing opinions in Riggs are based on seemingly conflicting rules of interpretation, and that this case is an example of the inadequacy of a rule-guided account of judicial reasoning. For the reason suggested in our discussion of judicial discretion this is not a fair assessment — it is important to distinguish between discretionary preference for one standard over another, and different judgments about the success of particular arguments. The dissenting judge regarded the seemingly explicit wording of the statute — that no deviations from the will were allowable unless effected in a prescribed manner — to be a sufficiently strong indication of the legislators' intentions to control the decision. In his words, the wording "has left no room" for resort to the legislative mischief or to common law principles (at p. 516). This approach is consistent with remarks made seven years before Riggs, when the plain meaning rule was cited in Holy Trinity Church v. United States.62 The plain meaning rule states: "[w]e are to adhere to the ordinary meaning of the words of a statute and to the grammatical construction unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance."

Significantly, the majority also relied on the same rule, except

they disagreed that the literal meaning of the statute controlled the situation. They were moved for a variety of reasons, including inconsistency with the legislators' most likely intentions and with common law principles, to reject the inference that the statute's wording compelled presuming that the legislators intended that persons like the grandson should inherit under the act. Thus, the validity of both lines of argument stems from the same general interpretive rule. Where they differed was in their conclusions about how the details of the case satisfied the standards implied in the rule. Also, it is plausible to assume, given the conviction with which the opinions were offered, that each side felt that their conclusion was compelled by the statute and by the second-order rules controlling application of the statute. Thus, the argumentation and the judgment in *Riggs* appear to support a rule-guided account of judicial reasoning.

1.4 Coval and Smith's account of *Riggs*

In *Law and its Presuppositions*, Coval and Smith offer an account of judicial reasoning as a rule-governed practice. Unlike the "conductive argument" structure, they suggest that disputes about law can be settled by "anomaly resolving rules" - rules which can be generated from basic conceptions of the point of law. They see law as essentially concerned with maximizing the ability of agents to act, and they argue that this tenet provides a mechanism for resolving conflicts about the law. Since the maximization of agency is the *summum bonum* of our
system, it is defensible, when presented with a dispute about the application of law in a particular situation to decide the case in the way that maximizes the values embedded in agency. Seven standard features of agency (or more precisely occasions for attenuation of agency) are offered as the grounds for resolving anomalies in rule application. For example, a judge would not be promoting agency if he punished an individual when the individual could not have foreseen the consequences arising from his action. This principle is reflected in the criminal law defense of inadvertence - the law against killing, for example, is not enforced if the individual could not reasonably have foreseen that his actions would result in the death of another.

In discussing Riggs, Coval and Smith suggest that the relevant grounds for deciding whether or not to enforce the statute on wills stem from the attenuation of agency due to inadvertence. In deciding the case, a judge must ask: "if I enforce rule W in this case will I secure the goals of agency promoted by rule W but in the process bring on an undesirable result all things considered, perhaps, by undermining other more important agency-related goals promoted by other legal rules?" In adjudicating Riggs, the anomaly resolving argument would be as follows: "since enforcing the rule (the statutes on inheritance)
produces appropriate conduct (a duly executed will) and the desired goal (testamentary succession) but also something worse than the desired goal (the death of the testator at the hands of the beneficiary), the rule will not be enforced" (Timmis, 1988, p. 414). Thus, the decision not to enforce the inheritance rule is explained by the fact that the goals of criminal law are more important in the legal scheme of things than those of testamentary succession. A hierarchy of rules (and, by inference, goals) establish when one goal is to be preferred over another.

A number of objections can be raised about Coval and Smith’s account of judicial reasoning in Riggs.64 While this account provides a way to rationalize the decision, it bears little resemblance to the way the judges actually argued and justified their judgment. Riggs was argued and decided by the judges on several grounds. The single reason formulation, implied by the anomaly resolving rule, ignores the reality of the actual justification. In addition, the judges never implied, as the proposed formulation of the anomaly resolving rule suggests, that the dispute was whether or not to enforce the statutes on wills. On the contrary, they emphasized their responsibility to apply the law according to its intended purposes. Their principal

64 Critics have challenged their account on other grounds including the justification for claiming that maximizing agency exhausts what is important in law (Cassels, 1988; Timmis, 1988).
disagreement was about the proper interpretation of that intention.65

It might be suggested that this objection could be avoided by reformulating the anomaly resolving argument, perhaps, in the following form: "since applying the rule according to the letter of the law advances testamentary succession while applying the rule according to a reasonable interpretation advances protections against murder, enforcing a reasonable interpretation maximizes agency because it avoids the inadvertence of failing to protect important criminal law values." While it might be legally appropriate for judges to weigh the consequences of accepting one interpretive approach over another, this argument was not advanced explicitly in Riggs, and certainly it was not the reason for the decision. The majority argued that the values of testamentary succession, properly understood, were advanced only by adopting the reasonable interpretation approach. Coval and Smith might claim that implicit in the reasonable interpretation approach is a preference for promoting what I have labelled criminal law values. Clearly, this is one way to rationalize the judges' decision, however it does so at the expense of dismissing the expressed statements. I would be surprised, if the dissenting judge understood the issue to be whether or not to deter killing, that he would argue against the idea. The actual arguments suggest that neither the dissenting

65 As will be seen in the next chapter, interpretation in light of legislative intention is not equivalent to interpreting according to the actual intentions of legislators.
nor majority judges believed that the case rested, and certainly not solely rested, on a weighing of competing values. Rather, they wrote as though they faced questions of *identification* of legislators’ intended values and *consistency* with prior decisions.

Even if we concede that some formulation of the anomaly resolving rule can account for the (successful) majority argument in the case, a second line of criticism is open. If Coval and Smith’s formal anomaly resolving rules are guides to resolving disputes, as opposed to being mere *post facto* summations, the rules must prescribe a decision in favour of one side or the other. For two reasons, it is not clear that their anomaly resolving rule does this in *Riggs*: (1) it is possible to formulate a countervailing anomaly resolving rule that would justify a finding in favour of the grandson and (2) the weighing of goals presupposed by the anomaly resolving rule does not exhaust the issues facing the judges in weighing competing positions.

The first shortcoming of the notion of anomaly resolving rules stems from the potential for the dissenting judge to counter with an equally compelling argument using the same anomaly resolving rule relied upon by the majority. The counter formulation of the anomaly resolving argument might go as follows: "applying succession rules according to a reasonable interpretation has the effect of promoting goals of criminal law (e.g., deterring murder) but it has worse consequences by
punishing individuals twice for crimes (the grandson has already been sentenced for the murder) and by preventing the grandfather’s apparent choice of beneficiary from inheriting."

Which formulation should the Court adopt in deciding Riggs? The short answer to this question is that the Court has to decide the case before it can answer the question. Each formulation of the anomaly resolving arguments presupposes resolution of the key issues faced by the judges. The dissenting judge’s formulation of the anomaly resolving rule is acceptable only if one already agrees with the dissenting judge’s arguments. Since the majority rejected both the double jeopardy and the bona fide beneficiary arguments, they would deny the negative consequences presupposed by the counter formulation. But they would not know to reject these arguments until they had already determined the acceptability of the reasonable interpretation argument. (The double jeopardy argument evaporates because the judge, following a reasonable interpretation approach, believes that the grandson never acquired title to the estate upon the grandfather’s death since the grandson committed the murder.) In other words, the choice of which formulation of the anomaly resolving argument to adopt requires, not prescribes, resolution of the key issue in Riggs.

Even if, in principle, the majority accepted the negative consequences cited in the counter formulation, it is not clear that they would agree that these consequences were worse than, say, failing to discourage murder. This raises a second
difficulty with Coval and Smith's account of anomaly resolving rules. The problem of weighing consequences cannot be resolved simply by prioritizing goals. As we saw in our discussion of the weighing of arguments, the extent to which a particular action impairs a standard has an effect on the force of that argument. For example, even if we accept that, in general, physical security takes precedence over rights to property it is not obvious, in the Riggs case, that it is worse to decide on behalf of property interests. If personal security would be advanced only marginally by barring these beneficiaries from their inheritance, then the complete rejection of property interests might be regarded as a worse consequence.

The criticisms of Coval and Smith's account of Riggs and the outline of the multiple arguments in the actual opinions help confirm the "conductive argument" characterization of the basic structure of judicial reasoning. It appears that judges entertain many, often independent reasons for and against potential dispositions of a case. Further, while these reasons are grounded in secondary rules, there are no obvious, simple

66 It is not obvious that the loss of an inheritance adds significantly to the deterrent force of execution or life imprisonment. Coval and Smith (1986, p. 80) cite a possible counter-argument to this suggestion in the Fauntleroy's Case. In this case, the assignees of a life insurance policy on an executed felon were prevented from collecting because the court was concerned that enforcing the policy might remove a deterrent to criminal activity — namely, it might alleviate a criminal's concern to look after his family. My point is simply that it is not obvious that the potential loss of deterrence clearly outweighs the other consequences. Consider, for example, the injustice of denying a family the right to collect on a life insurance policy that had been in force for years because the father was executed for a crime.
rules for assessing the relative force of rival positions. In
the end, justifying a conclusion is often a matter of assessing
the relative weight of numerous competing arguments. I will now
consider in detail each of the three forms or modes of reasoning
used to construct these diverse arguments.
Chapter Five:

Reasoning from Interpretive Guidelines

Reasoning from interpretive guidelines refers to a constellation of rules concerned with judicial interpretation of enacted statutory and constitutional law. This chapter has two basic purposes: to outline the range of secondary rules that constitute this mode of reasoning and to explore some of the major objections to the characterization of judicial reasoning as rule-guided. As much as possible, justification of the claims will be documented with actual decisions. But before discussing these issues, it will be important to get clearer about the meaning of "interpretation" in the context of applying laws.

1. Interpreting law

As I suggested earlier, interpretation is a vague and often ambiguous notion. One writer on judicial reasoning has called it an "overworked concept" with such a "spectacular breadth of uses" that "its meaning drifts in a most treacherous manner" (Gottlieb, 1968, p. 95). The sense in which it is used in the present context reflects its narrow use by legal practitioners in regard to "statutory construction or interpretation".¹ It is centrally

¹ Strictly speaking, in law "interpretation" is a narrower notion and is limited to what is implied by the written text, while "construction" allows reference to considerations of effects and other presumptions that are beyond the direct expression of the text but are presumed to limit or control meaning (Black's Law Dictionary, 1979, pp. 282, 734).
concerned with judicial efforts to ascertain the meaning of an enacted legal rule, although as I will discuss, it is not what was earlier referred to as "interpretation as deciphering". That is, statutory interpretation is not essentially a discovery of the meaning of a speaker's utterance although it is connected with what is called the "legislative intent."

To explain this apparent paradox it is important to identify two Anglo-American maxims of constitutional and statutory interpretation. First, it is largely uncontested that a primary duty of judges is to interpret the law in accordance with the "legislative intent." This duty has variously been characterized as the uniformly acknowledged proper function of Canadian courts (Nova Scotia Commissioners, 1975, p. 218), as an article of faith among American lawyers (Murphy, 1975, p. 1299), as a fundamental rule in English law (Payne, 1956, p. 96), and as a constitutional tenet of Anglo-American legal systems (Kernochan, 1976, p. 346). Second, legislative intent is to be understood figuratively - or as what is often called a "legal fiction" (Gall, 1983, p. 253; Llewellyn, 1960, p. 218; Payne, 1956, p. 111; Willis, 1938, p. 3). This does not mean, when applying law, that judges ought not attend to the actual expectations of legislators.2 And certainly

2 We must be clear to distinguish the broader, fundamental tenet from a more specific, literal sense of "legislative intention." The latter refers to the actual intentions the legislature had in passing the legislation and the former refers to a construct. It is suggested that a recent tendency to talk about "legislative
there are proponents, particularly in the United States, of the view that judicial interpretation of constitutional provisions should not be inconsistent with the actual intentions of the original framers (Tushnet, 1988, pp. 22ff.). It means that intentions of individual legislators or a collective "state of mind" of a legislative body3 does not adequately account for the diversity of considerations that are accepted as constituting the legislative intent. In other words, while interpretation of laws may involve resort to the legislators' actual intended meanings, Anglo-American judicial interpretation cannot be reduced to that.4

Before proceeding to justify why interpretation of laws is not essentially a matter of determining the legislators' actual intended meaning, it is important to emphasize the paramount role in Anglo-American jurisdictions of interpreting laws in light of what the legislature actually intended to achieve. A majority of interpretive rules are linguistic and grammatical conventions covering interpretation of the words legislators use to formulate legal rules. As Postema (1982) argues, the ability of

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3 Payne (1956, pp. 97-98) suggests "the legislature, being a composite body, cannot have a single state of mind and so cannot have a single intention." Mac Callum (1966, pp. 769-775) argues that Payne merely demonstrates that legislatures may not always have a common intent.
4 This is why Willis (1938, p. 3) calls legislative intention a "very slippery phrase." For arguments why legislative intention must be understood figuratively see Payne (1956), Dworkin (MP, pp. 38-54; LE, pp. 315-327), Tushnet (1988, pp. 23-45) and to a lesser extent Mac Callum (1966).
legislators to predict how judges will interpret laws is greatly enhanced if there are mutually acknowledged, relatively clear, stable interpretive conventions. If legislators know the "rules of the game", they can formulate a law so as to increase the likelihood of its application in ways consistent with their intentions. However, there is an important difference between deciding on an interpretation of the law because the legislators intended it and because the rules of interpretation authorize it.

1.1 Laws as performatives

Rather than conceive of judicial interpretation as essentially an attempt to discover what legislators mean by a communication, it may be helpful to view interpretation as an elaboration of what is implied by the legislative act. To draw out this distinction let us contrast statements of direct communication with what are called "performative utterances."5 When an individual writes in his will "All of my progeny will share equally in the estate," he is not simply reporting his intentions about the division of his estate upon his death.6 Rather, he is performing an act - he is creating a rule for the division of that property. By virtue of signing the will, authorizations are issued and commitments are implied beyond what the words mean or may have been intended to mean (MacCormick, 1978, pp. 209-210). This conferring of powers and undertaking of

6 As we will see shortly, the testator may intend a much different disposition than is implied in his will.
duties arises by virtue of the rules forming the institutions of marriage and succession. What makes a document containing a statement like "I hereby bequeath," a will, or an oral statement like "I do," a marriage vow, is the constellation of rules within their respective practices which the writer or speaker invokes when uttering those words.

For two reasons, interpreting performative utterances issued in a formal institutional setting is not reducible to a speaker's actual intentions. One, finding out what a speaker intends by a rule does not exhaust what is implied by the speaker's utterance—other rules that can only be assumed to be intended are invoked. Two, the limits of our knowledge of actual intentions means that disputes over the "intended" application of a rule are inevitable. I will briefly look at each of these.

In a number of ways, performative utterances issued in a legal context, may give rise to obligations and rights which are not intended by the agent but, nevertheless, are implied by her action. For example, whether a testator is aware of it or not, signing a will invalidates any prior will and, unless replaced in writing, remains in effect even if the testator changes her mind and makes these changes widely known. The possibility of implied outcomes is not restricted to events that the creator of the rule could (and even should) have foreseen but also those that could not be predicted. Many of the background rules invoked when a

7 Of course, the speaker has to intend to enter the community of rules invoked by that performative utterance, although he need not know much about what is implied.
performative utterance is made may not have been formulated at the time of the performance. For example, changes in divorce or family support laws establish new marital rights and obligations implied by marriage vows exchanged twenty years earlier. Furthermore, the implications of a performative utterance may be clearly at odds with many of the actual intentions of the speaker. A will may not express the testator's conscious intentions if the wording of the will did not capture what the testator had hoped it stated. Or, for example, persons often marry with no intention of keeping any of the commitments implied by their action.

There is an important contingent reason why the set of implications following from a performative utterance cannot be equated with what the individual actually intended in making the utterance. It is this reason which helps to explain why the notion of legislative intent is a legal fiction. Regardless of the clarity of a rule laid down by an individual, or our knowledge of the rule-maker's actual intentions, inevitably ambiguities and unanticipated situations will arise after a testator has died (or a given legislature has ceased sitting). In these situations we cannot go back to, say, the testator to get clarification of what the will is supposed to mean in respect of the contested issue, and yet we must resolve the issue of distribution of the estate according to the testator's will. If we are to resolve these situations according to what we can presume the testator had historically, or would reasonably have,
intended we must agree on a construct for what will be taken to be those intentions. While the constructs are potentially very complex, we can illustrate the effect of conventions about what will be taken to represent the rule-maker's intentions with two simple variations. One construct which we will call the "letter of the law" construct supposes that the rule-maker expressed exactly what he meant and only what he meant in the words used to formulate each provision. This can be distinguished from the "spirit of the law" construct which holds that the overall apparent thrust of the document should be accepted to represent the rule-maker's intention more than the particular words in any given clause. In situations where there is some doubt about what are the rule-maker's actual intentions, the construct provides the criterion for deciding what is to be taken as the rule-maker's intentions.

1.2 Secondary rules and legal meaning

Analogous to situations where citizens' performative utterances (e.g., the signing of wills and the taking of marriage vows) create legal obligations and rights, are those where legislators enact legislation. The legal rights and obligations, 8 We need not insist that the testator's intentions be the criteria for selecting among alternatives. We could, for example, agree to resolve these sorts of disputes on the basis of what appears fair in light of the needs of the potential beneficiaries.

9 These latter two actions are part of the law-making capacity of citizens conferred on them by secondary rules. MacCormick (1974b) uses the examples of wills and contracts in the context of a speech act theory to explore the rules for invoking these legal institutions.
not all of which are anticipated by the legislators, that follow from enacting a statute depend on the constellation of implied rules operating within that system. Most, but not all, of these secondary rules are extant at the time of the law's promulgation. One cluster of these rules is the rules judges are expected to follow in applying the law. While judges must attend to the words used in the formulation of the rule when applying the rule, this type of consideration is only one of a complex set of secondary rules controlling the interpretation of the rule. What is implied by a statute or constitution may bear little resemblance to what was intended by the drafters of those documents.

There are countless examples from which to draw. Consider the interpretive presumption against construing statutes so as to interfere with personal liberty. Willis (1938, p. 23) suggests that this presumption has been used to justify decisions that are clearly at odds with what the legislators had intended to occur.

10 As we will see later in this chapter, secondary rules of application have changed over time. If statutory interpretation was committed to legislators' actual intentions, only those secondary rules which were known, or could be anticipated, at the time the legislation was passed, would apply.

11 Proponents of the framers' intention thesis often argue for interpretation in light of the "general" as opposed to the "specific" legislative intention. For reasons why these attempts are unsuccessful see critics mentioned in footnote 4 above.

12 MacCormick (1974b, p. 125) suggests that, [i]t would scarcely be an exaggeration to say that the whole of the law of judicial review of administrative action consists in the judicial elaboration and use of wide principles of law which are presented as justifying an open-ended range of implied exceptions to the expressed statutory institutive rules of administrative adjudication, decision-making and legislation.

13 While at one point interpretive presumptions were taken to represent the legislators' actual intentions, they have long
Thus, it is suggested that interpreting the law - deciding what a law means in a given case - is less a matter of deciding what most plausibly the legislature actually intended by the words as much as it is a matter of determining the most plausible conclusion to be drawn given the institutional rules governing interpretation of laws. In this way, the meaning of a (primary) rule is a product of the (secondary) rules governing the use of the words. As Gottlieb (1968, pp. 100-101) suggests, deciding that a "pram" is a "vehicle" is not a matter of discovery of the "single right meaning" inherent in the primary rule but determining whether the inference about the primary rule is authorized in light of interpretive rules. In a similar vein, Justice Frankfurter speaks of the extent to which considerations other than the language of the rule could be assumed to "infiltrate the text" as if "written in ink discernible to the judicial eye" (Johnson, 1978, p. 430). The contingent relation between the meaning of a law and legislators' actual intentions explains why it is not contradictory to claim that judges are sometimes legitimately (i.e., legally) authorized to interpret since ceased to be more than presumed intentions (Willis, 1938, p. 17). While most legislators (or at least the drafters of legislation) would be aware of these presumptions, it can not be presumed that legislators actually intended that the presumptions be applied in the ways that they have. Of course, many of these secondary rules will be rules of ordinary language meaning. It is interesting to note that, while not denying the legitimacy of legislative history, Frankfurter offered these remarks in the context of expressing concern about the appropriate emphasis placed on information about actual legislative intentions.
statutes in ways unimagined by those who drafted the law and, in fact, in ways contrary to actual legislators' intentions. As de Sloovere explains, judges are expected:

> to attribute a meaning to a statute within the limitations prescribed by the text and by the context. . . . In other words, a single meaning which the text will reasonably bear must, if genuine, be considered not as the conclusion that the legislature would have arrived at, but one which the legislature by the text has authorized the courts to find. (Mac Callum, 1966, p. 781)

There is, I suggest, a constitutive relation between interpretive rules and the meaning of a primary rule.

The distinction between a rule and its formulation may help to clarify the role of interpretive guidelines in establishing the meaning of a law. A rule can be understood as a norm prescribing (or prohibiting) a set of actions; the rule's formulation is the set of words used to specify the prescribed behaviour. The same rule may be formulated in different ways. For example, the primary rule prescribing on which side of the street cars are to be driven may be formulated either as "all cars must be driven on the right-hand side of the road" or "no cars may be driven on the left-hand side of the road." The set of actions prohibited under the first formulation is equivalent to the set of actions prohibited under the second formulation, hence the formulations specify the same rule. Significantly, the meaning of a rule is not restricted to its formulation. For example, it is widely understood that legal rules are understood

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16 Hogg (1987, p. 96) suggests that a "progressive" approach to interpretation in light of changing social conditions may be consistent with drafters' original intentions.
to have unformulated exceptions. In addition, dramatic changes to a legal rule are possible with no accompanying change in the formulation of the rule. For example, the passage of an interpretive law stipulating that foetuses would thereafter be considered to be legal persons would not alter the formulation of a rule stating "All persons have the right to life," but the set of prohibited actions - i.e., the rule - would change. The converse is also true - drastic changes in the formulation of a rule may present no changes to the legal rule. This is the explicit contention of what is called the "plain language" movement. This movement insists that many statutory provisions and lawyer-drafted documents can be reformulated in simpler language without loss of meaning (Eagleson, 1988).

The relation between rules and their formulations and the recognition of legislation as performative utterances accent an important feature of law. In a more fundamental way than Hart realized, statutory and constitutional law is a union of primary and secondary rules. The rule enacted by a legislature is best understood not simply as the expressly formulated primary rule specifically voted upon but also as the constellation of secondary rules recognized by that particular legal system as regulating this type of primary rule. In this way, secondary

17 Each rule has countless implied exceptions, for example, it is understood that "where the law imposes a duty to act, noncompliance with the duty will be excused where compliance is physically impossible" (Coval & Smith, 1986, p. 63).
18 Secondary rules of application differ for constitutional and statutory provisions (Gibson, 1986, p. 45) and criminal law statutes differ from other types of ordinary legislation (Posner, 1982).
rules of application can be seen not as mere indications of the meaning of a legal rule but as constitutive of its meaning - they determine the range of situations that can properly be taken to be covered by the rule.

2. Rules of interpretation

At the foundation of reasoning from interpretive guidelines are what have been referred to as "interpretive approaches" (Willis, 1938, p. 1) or "main principles" or "basic rules" of interpretation (Zander, 1980, p. 37). While it is recognized that there are three traditional approaches - the plain meaning rule, the golden rule and the mischief rule - other rules of interpretation have appeared in judicial opinions or, at least, have received attention as potential fundamental rules in the academic literature.

A "basic rule," as here construed, establishes the foundation for more specific rules of interpretation. Or, to put it another way, it establishes a context within which more specific interpretive arguments are constructed. These more specific arguments are based on what have been referred to as "minor rules of construction" (Willis, 1938, p. 1) or "subordinate principles of interpretation" (Zander, 1980, p. 82). It is reported that the minor rules of interpretation fill 350 pages of Maxwell on the Interpretation of Statutes, the classic authority on the subject (Zander, 1980, p. 84). These minor rules have traditionally been identified under four groups:
intrinsic aids, extrinsic aids, interpretive presumptions, and general stylistic, semantic and grammatical rules.

2.1 The minor interpretive rules

Intrinsic or internal aids refer, as the name suggests, to rules which direct judges to sources within the act for guidance in interpreting a particular provision. For example, in considering the Charter, judges will look to other provisions (within the Charter) dealing with rights that overlap or are otherwise related to the one at issue so as to try to avoid conflict or inconsistency. Extrinsic or, as sometimes called, "external" materials refer to rules that direct judges to sources which are not part of the legislative document, but are assumed to be extensions of the document. These include documents dealing with the legislative history, legal commentaries or

19 For example, in Law Society of Upper Canada v. Skapinker [1984] 9 D.L.R. (4th) 161 at p. 179 the Supreme Court looked at the common purpose of a cluster of rights - to guarantee freedom of movement between provinces - as evidence that the surface reading of the right "to pursue the gaining of a livelihood in any province" was not a general right to work in a particular province, but a restriction against using provincial barriers to prevent someone from working. In another Supreme Court decision, Dubois v. the Queen [1985] 2 S.C.R. 350 at p. 374, Justice Lamer argued that the protection against self-incrimination in "other" proceedings should be understood to include prohibiting the Crown's use of the accused's earlier testimony in a retrial. To interpret the provision otherwise would be to infringe on two other legal rights.

20 For example, Elliot (1982, pp. 18-22) argues that earlier published drafts of the Charter may be referred to by the courts to resolve interpretive disputes. Comparing one version to another can help clarify what the final choice of words can be presumed to have intended. Elliot (1982, p. 16) explains that two early versions of the freedom of expression provision referred to the phrase "media of information." The change to the broader phrase "media of communication" and the explanatory notes accompanying the revised version suggest that freedom of
reference materials, and other domestic and international legislation and agreements. "Interpretive presumptions" refers to an extensive repertoire of generic assumptions about what any legislation can be presumed to include or exclude. The final group of interpretive rules includes a wide range of stylistic and grammatical conventions and semantic rules. 

expression extends to the performing arts, which are not normally considered to be sources of information but nevertheless express ideas. Many Charter judgments refer to government studies such as Royal commissions, public inquiries and law reform commissions. In Morgentaler v. The Queen [1988] 1 S.C.R. 30 at p. 100, for example, the Badgley Report and the Powell Report were cited as evidence that the existing legislation on abortion was not in accordance with fundamental principles of justice because the legislation did not result in equality of access to abortion services.

For example, a central issue in deciding R v. Videoflicks Ltd. [1984] 5 O.A.C. 1 at p. 20 was whether freedom of religion implied more than a freedom to hold religious opinions. The Ontario Court of Appeal looked to the International Covenant on Civil and Political Rights which Canada had ratified in 1976. Article 18 of this document clearly indicates that freedom of religion extends to the freedom to "manifest his religion or belief in worship, observation, practice and teaching." Because Canada has an obligation to support this covenant in its domestic law, this was a valid reason for adopting that interpretation of freedom of religion.

For example, there is a presumption in favour of the rationality of legislation. It asserts that, unless proven otherwise, legislators shall be presumed to have acted reasonably in crafting the legislation. In Quebec Association of Protestant School Boards v. A.-G. of Quebec (No. 2) [1982] 140 D.L.R. (3d) 33 at p. 57, this presumption was offered as one reason for construing the burden of proof onus under the Charter's reasonable limits clause to extend to legislative aims only. It is worth noting that this argument was not compelling (i.e., the presumption was overridden) because the wording of the Charter's reasonable limits clause was seen to require demonstrable justification of legislative ends and means (at pp. 58-59).

The format, grammar and style in which laws are drafted follow accepted conventions. One of these conventions is that no words are redundant. The inclusion of both "conscience" and "religion" in the Charter guarantee of religious freedom suggests that these are not identical. The guarantee obviously extends to deeply felt, non-religious ethical beliefs - those of atheists, for instance.
These "minor rules" have been the object of harsh criticism: "Looking at these rules and approaches today one finds a maze of conflicting, mutually inconsistent prescriptions, a veritable jungle" Kernochan (1976, p. 335); or "the less stable, less consistent and less logically satisfying branches of jurisprudence" (Gottlieb, 1968, p. 91). A major source of this confusion stems from the fact that the basic approach to statutory interpretation has shifted over the last several centuries. Before looking more specifically at the challenges to a model of rules conception posed by these criticisms, it is necessary to take a closer look at the basic rules and to explore their relation to the minor rules.

2.2 The basic interpretive rules

A useful way to organize the range of basic rules that historically have been accepted is to consider a continuum ranging from a "letter of the law" focus to a "spirit of the law" focus. A letter of the law focus is based on the view that the legislators expressed exactly what they meant and only what they meant in the words used - the ascribed meaning of the rule is to be restricted to the meaning of the words. In some cases this meant that the statute's title or preamble, since they were, strictly speaking, not part of the rule formulation, would not be considered when interpreting the rule (Murphy, 1975, p. 1299). A

25 Often semantic rules (i.e, definitions) appearing in the legislation itself or in special interpretive statutes will prescribe what particular words are to be taken to mean. For example, section 30 of the Charter stipulates that the term "province" shall be taken to include "territories."
spirit of the law focus is based on the view that the exact wording of the rule does not exhaust the meaning of the rule and, in many situations, may be less important than the purpose or objective that the rule was intended to serve. In some cases judges following this approach would be willing to contradict what appears to be expressly stated in the wording of the formulation in order to further the rule's implicit purpose.26

In an extreme form of the letter of the law focus the meaning of a rule is confined to what the terms meant at the time the law was passed.27 This approach, which has been referred to as the "frozen concept" theory (Hogg, 1982, p. 10), requires that judges limit their interpretation of the rule to fixed legal meanings of words (CL, p. 126).28 The "plain meaning" or

26 For example, in R v. Stover [1947] 2 D.L.R. 874, the word "or" was read to mean "and."
27 In the Supreme Court of Canada appeal in the Persons case (In Re Meaning; of the Word Persons [1928] S.C.R. 276) Chief Justice Anglin wrote that provisions of the B.N.A. Act (now the Constitution Act, 1867) bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted. If the phrase "qualified person" in s.24 includes women to-day, it has so included them since 1867. (at p. 282)
28 I use the term "frozen concept" somewhat arbitrarily to refer to a plain meaning approach that limits the meaning of words to what they plainly meant at the time the legislation was passed. It might legitimately be suggested that original intention espouses a frozen concept approach, although some original intention proponents would allow terms to acquire a more modern meaning if doing so in the given situation better effected the legislators' intentions. The justification for this approach is that strict adherence to the established meaning of the terms was the only reliable way to interpret the legislators' intention. However, a plain meaning approach often led to conclusions that were known to be at odds with those intentions.
"literal meaning" rule is a less extreme version of the letter of the law focus. The Canadian and British version of this rule requires, if the language is clear, that judges confine their interpretation to the meaning of the words, but allows them to accept contemporary legal and ordinary meanings of terms. Closer to the middle of the continuum is the "golden rule" which requires that the plain meaning rule be followed except in cases where it results in contradiction, impossibility, or some other absurdity. On the other side of the mid-point in this continuum is the "mischief rule" which allows that the explicitly articulated objective of a rule may be used to interpret the rule. An approach that is slightly further along the continuum

29 The American version of the plain meaning rule approximates what in Canada and Britain is known as the golden meaning rule. For example, citing a Canadian judicial opinion, Willis (1938, p. 10) reports that the plain meaning rule directs that "if the precise words used are plain and unambiguous in their ordinary sense . . . we are bound to construe them in their ordinary sense, even though it leads . . . to an absurdity or a manifest injustice." Without directly referring to Willis, but using identical words, Gall (1983, p. 253-254) offers this same account of the rule in his textbook on the Canadian legal process. Zander (1980, pp. 37-38) offers a similar account of the rule in Britain. This Anglo-Canadian account is to be compared with an American definition of the plain meaning rule as cited from a leading case: "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." (Murphy 1975, p. 1299). See also Johnson (1978, p. 417).

30 The classic British statement of this rule, cited with approval by Willis (1938, p. 12) appears in Grey v. Pearson [1857] 6 H.L. Cas. 61 at p. 106:

the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther.

31 The mischief rule was first formulated in Heydon's case [1584] 3 Co. Rep. 7b. Bell (1985, p. 85) suggests that before
is "originalism" or the "framers' intention" approach. It allows statements, such as those appearing in the records of legislative debates or in government reports, about the actual or likely intentions of the legislators to be used to decide in cases of vagueness or ambiguity. Finally, the most liberal of the interpretive approaches is the "purposive" approach. It does not restrict interpretation to actual intentions but allows judges to consider a wider range of historical, philosophical and linguistic evidence about purpose when interpreting laws.

The eighteenth century the "mischief rule" was the basic approach to statutory interpretation in British courts. An emerging notion of the separation of legislative and judicial power led to a strict literal approach to statutory construction. The narrowness of this approach became apparent with increasing realization that legislators could not foresee all contingencies. In the 1960’s and 1970’s, the more generous "purposive" approach to interpretation gained acceptance. 32 Significantly, in Anglo-American legal systems, neither "originalism" nor the "purposive" approach appeared much before this century and the "purposive" approach has only recently been accepted as a dominant consideration. 33 The Canadian articulation of this recent rule of constitutional interpretation was stated in R. v. Big M Drug Mart Ltd. [1985] 18 D.L.R. (4th) 321 at p. 359:

the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter’s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophic and historical contexts.

It has been suggested that the difficulty of imputing and discovering the intention of a collective body has motivated the transition from talk of the "legislative intention" to "purpose of the legislation" - "purpose is to be elicited from the Act and
Following the letter, as opposed to the spirit, of the law is more a matter of degree than it is a choice between discrete alternatives. Partly, the reasons for this stems from the need to have some understanding of what the words mean before we can decide what purpose the law is trying to achieve, and the meanings of words depends not only on their "linguistic" rules, but also on the context in which they appear and the general purpose they are implicitly taken to serve (Fiss, 1979, pp. 251-254; Driedger, 1981, p. 784). The differences between any two basic interpretive approaches can be explained in terms of the addition or deletion of minor interpretive rules. For example, both the "purposive" and "original intention" approaches would likely consider evidence about the intentions of the legislators at the time of passage of the legislation to be important. However, the former approach regards it as only one of a number of arguments and therefore attaches less authority to it than the latter approach which considers it a source of compelling argument. Judges adopting the plain meaning rule, at least according to some proponents, would be unlikely to entertain information about legislative intention (Murphy, 1975). And, as was suggested earlier, a "strict" plain meaning approach would prohibit resort to a statute's preamble and heading.

The basic interpretive rules are not static - over time exceptions to the basic approaches have enlarged the range of minor rules identified by the original formulations. For its context, not from the minds of the legislators" (Kernochan, 1976, p. 351).
example, the traditional formulation of the mischief rule required interpretation in light of expressly formulated accounts, usually found in the preamble to the statute, of the mischief or "defect in the common law" that was being remedied. Thus statutory interpretation was still restricted to "the four corners of the printed act" although not limited to the wording of the provision. The mischief rule, as traditionally formulated, can no longer be properly applied since the "mischief" is rarely explicitly stated in preambles (Willis, 1938, pp. 14-15).34 Willis notes that the continued use of the basic rule, in a more extended sense of "mischief," refers to what might now be called a "purposive" approach.

I will now consider several objections to characterizing interpretation in terms of basic and minor rules to ascertain the extent to which these criticisms challenge the model of rules conception of judicial reasoning.

3. Objections to rule-guided interpretation

There appear to be three challenges to the adequacy of describing interpretation as a rule-guided practice. Two of these criticisms deal with the basic interpretive approaches and the other relates to the minor rules. One challenge to a rule-guided account of interpretation stems from the fact that judges are at liberty to rely on different, yet conflicting, approaches and, in effect, are free to choose the conclusion they consider

34 See also Lord Diplock in Black Clawson [1975] A.C. 591 at p. 638.
more desirable (Willis, 1938, pp. 11-16, 21; Murphy 1975, p. 1315). For example, Willis (1938, p. 2) suggests that some authorities treat the three historical principles [i.e., the plain, golden or mischief rules] "as if, having been enunciated by a court, they remain equally valid at all times." This claim is corroborated by the author of a standard Canadian textbook who writes that in determining legislative intent "a judge may resort to one of the three major canons of construction" [i.e., the plain, golden or mischief rule] (Gall, 1983, p. 253). Murphy documents the refusal of American courts to abandon the supposedly, discredited plain meaning rule (i.e., the American version of this rule) despite its apparent death blow administered by the Supreme Court in 1940.35

A second criticism is that the basic rules are, at best, inconclusive if not inherently vague, and therefore license any interpretation that the judge prefers. As Peck (1987, p. 13) suggests, the so-called rules of statutory construction "do not dictate meaning but may be manipulated to rationalize the selection of any of a number of possible meanings." For example, critics have identified cases where all the judges announce that the case should be decided in light of its plain meaning and yet they argue for different conclusions (Willis, 1938, p. 11; Murphy, 1975, pp. 1301-1302). It has been suggested that the determination of "absurdity" implied in the golden rule is

35 The Court, in United States v. American Trucking Associations [1940] 310 U.S. 534 at p. 545, was accepted as deciding that evidence of legislative intent was admissible even though the meaning of the words seemed clear on "superficial examination."
largely a matter of individual judicial opinion (Payne, 1956, p. 111; Willis, 1938, p. 13). Reference was made earlier in the chapter to critics of the view that judges should decide cases in light of the actual intentions of legislators. These critics deny that "originalism" provides a clear legal answer to interpretive questions. Bell (1985, p. 92) suggests that in attempting to follow a purposive approach judges will often be required to make value judgments about the proper balance between competing purposes.

Criticisms of the minor rules focus on the fact there is an extremely large number of so-called rules that invariably conflict or oppose each other - judges seem at liberty to rationalize a decision either way. It is said that the canons tend to "hunt in pairs" (MacCormick, 1978, p. 207) or, as Llewellyn (1960, p. 521) suggests, "there are opposing canons on almost every point." Llewellyn documents the apparently offsetting direction provided by these conflicting canons in a widely cited comparison. For example, "A statute cannot go beyond its text" and "To effect its purpose a statute may be implemented beyond its text" (Llewellyn, 1960, p. 522); or "Where design has been distinctly stated no place is left for construction" and "Courts have the power to inquire into real - as distinct from ostensible - purpose" (Llewellyn, 1960, p. 523); or "The meaning of a word may be ascertained by reference to the meaning of words associated with it" and a "word may have a character of its own not to be submerged by its association"
The upshot of this potpourri of conflicting minor rules is "unmistakable and shameless cross guidance" (Llewellyn, 1960, p. 528).

3.1 Confusions about proper practice

When considering these criticisms, it is important that we distinguish between criticisms of confused or improper practice that are consistent with the model of rules conception of judicial reasoning and those which challenge it. Rule-guided practices are not always well understood, perfectly obeyed or entirely consistent. While these defects may significantly impair the workings of the practice they do not necessarily undermine the essential rule-guided nature of the practice. Wittgenstein's observation that misunderstanding is a form of understanding underlies this point (Fiss, 1982, p. 748). The fact that judges often disagree about the validity of a rule or the conclusion it suggests does not mean that judges regard themselves as unconstrained by rules. On the contrary, to a considerable extent, disputes over these issues are affirmations, not repudiations, that the practice is essentially rule guided.

Many of the criticisms mentioned above would appear to be resolvable misunderstandings as to what constitutes proper practice. For example, consider the criticism that the "jungle" of minor rules of statutory interpretation licenses opposing conclusions. First of all, it is an exaggeration to suggest that they invariably cancel each other. Most of the so-called "paired
canons" negate each other only in a subset of the contexts in which they apply. Consider a pair of examples mentioned earlier: "Where design has been distinctly stated no place is left for construction" and "Courts have the power to inquire into real - as distinct from ostensible - purpose." At the very least, in occasions where there was no explicit statement of design, the courts would be left to follow the second canon and inquire into the "real" purpose. More importantly, however, when they do provide conflicting advice it is considered to be a misapplication to follow one rule over the other without further justification. For example, consider another pair of canons: "The meaning of a word may be ascertained by reference to the meaning of words associated with it" and a "word may have a character of its own not to be submerged by its association." These are obviously permissive rules, that is they allow judges to consider arguments drawn both from the context of the words and from the terms in isolation. In situations where the canons produce conflicting conclusions, the prevailing view is that these rules must be presumed to be inconclusive. While they both serve as argument validating rules for interpreting the meaning of a rule, further reasons for and against these competing interpretations must be considered before a decision is justified. As one Canadian expert explains:

They [interpretive conventions] all represent valid points of view - competing values to be taken into account before reaching a conclusion. As in all balancing exercises, it is the cumulative weight of all relevant considerations that is significant rather than the conclusive influence of any one of them. (Gibson, 1986, p. 44)
This explication of interpretive conventions is consistent with Llewellyn's justification for compiling the account of competing rules. He sought to debunk the view that "there is only one single correct meaning" of a statute (1960, p. 521) and to help "cease drivel about some compelling 'legislative intent' which flatly controls the court, even in cases where no such intent existed or can be found" (1960, p. 528). Notwithstanding their inconclusiveness, Llewellyn (1960, p. 521) regarded them as "needed tools of argument." 36

Recognizing that some judges and academics may have misunderstood the nature of reasoning from interpretive guidelines does not address all the criticisms mentioned above. Numerous cases can be cited where judges have not made obvious errors in weighing competing interpretive arguments and yet have reached different conclusions. It is typically suggested in these sorts of situations that either judges are accepting the same rules, in which case the rules must be inconclusive, or they are following different rules, in which case the rules are, in effect, discretionary. Either way, reasoning from interpretive guidelines is not rule-guided.

3.2 Inconclusive direction

36 A sterling example of judicial attention to the cumulative effect of arguments arising from interpretive rules is the Saskatchewan Court of Appeal decision in Borowski v. Canada [1987] 56 Sask. R. 129 rejecting the inclusion of a foetus within the meaning of "person."
Let us first consider the objection that because interpretive rules are inconclusive, judicial reasoning is not rule-guided. The suggestion that interpretive rules are often inconclusive implies that, even after weighing similar factors, in many situations no one interpretation will be more defensible than the rest. Thus, when judges interpret the law they must often be deciding cases on other grounds, and possibly be disguising the real reasons for their decisions behind the pretext of appeals to interpretive guidelines. There are two responses to this objection: (1) many critics may mistake controversial application of interpretive guidelines for inconclusive rules; and (2) the fact that interpretive guidelines fail to produce a conclusive result does not mean that other legal standards do not control judicial reasoning in these cases.

It is possible that judges are acting in a rule-guided manner even though they will disagree about the most defensible interpretation of a law. We must recall the earlier discussion of differences of opinion that arise when judges exercise judgment and when judges exercise discretion. Since an interpretive approach is essentially a constellation of complex competing arguments, it is conceivable that judges following, say, the plain meaning approach may reach different conclusions about what is the plain meaning of a rule. It need not be, as some infer,37 that the basic rule is inconclusive, rather it may mean merely that individual judges, acting in good faith, may

37 See, for example, the Canadian case cited by Willis (1938, p. 11) and the American case cited by Murphy (1975, pp. 1300-1301).
reach conflicting conclusions because of the need to weigh complex arguments. These situations, where the need to exercise judgment often results in differences of opinion, are to be expected in complex rule-guided practices. Therefore, the challenge to the model of rules conception must be that in a more fundamental way the shared rules of interpretation are inconclusive.

3.3 Disputes about validity

The second challenge to the model of rules conception of reasoning from interpretive guidelines is the claim that judges often appeal to different or disputed rules in justifying their decisions. In other words, differences of opinion result from an apparent lack of consensus as to the validity of particular interpretive rules. The issue at stake is not that some judges get it wrong, but that there is considerable inconsistency and transition in what Anglo-American judges recognize as valid interpretive rules. While it is beyond the purpose of this present work to engage in doctrinal analysis of the current valid rules of statutory and constitutional interpretation, some explanation consistent with a model of rules conception must be offered for this seemingly fundamental and extensive confusion.

Why is there so much confusion about the validity of basic interpretive rules? I will begin my answer by exploring how changes occur in statutory interpretation. Willis (1938, p. 17) offers an interesting theory about the impetus for resorts to
actual legislators' intentions and more recently to legislative purpose. Beginning in the twentieth century, legislation was directed to lay persons and not predominantly, as it once was, to lawyers. Increasingly, statutes tended to be framed in "wide and general language" and therefore questions of interpretation regularly fell outside the ambit of clear and unambiguous meaning of the rule's formulation. The traditional approaches to interpretation were found inadequate since they required that judges interpret statutes within the "four corners of the act." It has been hypothesized that the mischief rule was extended to allow judges to consider extrinsic factors when addressing the "object" of the legislation (Willis, 1938, pp. 15-16; Kernochan, 1976, pp. 356-357). In other words, and somewhat paradoxically, the very approaches which were adopted because they were considered to be reliable ways of ensuring that judicial interpretation respected legislative supremacy (Kernochan, 1976, p. 345) had to be supplanted because, in their original formulations, they no longer provided a defensible construct of legislative intent.

The grounds for justifying changes in the rules of application and, in particular, the possibility of these being rule-guided changes will be explored in the chapter on reasoning from principle. However, an indication of how this occurs is provided by changes to the rules on admissibility of legislators'
In the United States, the "turning point" was a 1892 Supreme Court decision in *Holy Trinity Church v. United States* where legislative history was apparently first relied upon to decide legislative intent (Johnson, 1978, p. 420). In this case, a statute prohibiting groups from assisting with the importation of aliens for "labor or service of any kind" was held not to prohibit a congregation from obtaining an ordained minister from abroad. The apparent inconsistency of a superficial reading of the statute's wording with the more reasonable solution unambiguously suggested by the legislative history made it unacceptable for the Court to ignore this argument. Thus a precedent was set for the admissibility of extrinsic evidence in cases where the plain meaning produced "absurd results."

This case is typical of how these sorts of changes occur. The particulars of a given case force a sharp contrast between consistency with a fundamental legal value or principle - in this case, effecting the legislative intentions - and a less fundamental rule or principle - in this case, the prohibition against any use of legislative history.40 In subsequent cases, 38 It is reported that the British rule on legislative history is that it "should be used not at all or only with the greatest restraint" - Professor Dickinson cited in Murphy (1975, p. 1316). Elliot (1982, p. 19) suggests that the traditional Anglo-Canadian rule that "the Parliamentary history of legislation is not a permissible aid in construing a statute" has been relaxed in Canada. 39 [1892] 143 U.S. 457. 40 The Senate Committee explicitly stated that, if it weren't concerned that amendments would delay passage of the bill until a later session, the committee would have recommended that the wording be changed to reflect the clear purpose of the bill which was to prohibit importation of manual labour (at p. 464).
additional exceptions are made. For example, when the conclusions from a plain reading were not obviously absurd but were merely somewhat controversial, the court justified the admission of extrinsic evidence because of the unreasonableness of excluding evidence that could provide reliable assistance in settling an ambiguity.41 The inevitability of legitimate exceptions to rules explains, even within a model of rules conception, an important source of change in judicial standards. A case establishes authority for an exception to the general rule and, in time, if reaffirmed repeatedly and extended with application, the exceptions may eventually "eat up" the older rule.42

The evolution of secondary rules also suggests why there may be considerable uncertainty (or at least inconsistent recognition) among judges about the validity of a given rule. The problem, as Hart suggested in connection with the need for rules of adjudication, is caused by the absence of an unequivocal declaration of the status of a particular rule. Consider, for example, Driedger's (1981, p. 780) observations about the traditional basic rules of interpretation:

After struggling with these so-called rules for many years, I have finally come to the conclusion that, although they may have been separate and distinct "rules" at one time, they have been fused into one, which I have expressed as

42 The expression was used by Lord Denning in Davis v. Johnson [1978] 1 All E.R. 841 at p. 857 in reference to the possibility that exceptions to the doctrine of stare decisis had reduced it to mere guidance.
follows: The words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously within the scheme of the Act, the object of the Act and the intention of Parliament.43

This observation helps to explain Willis' concern that the three traditional rules seem to be accepted as equally valid - the traditional rules have, it would appear, become a single more complex rule. As MacCormick (1978, p. 208) suggests, lingering reference to the golden rule and the mischief rule are "simply to express in terms of standard justifying reasons the justification for departing from the more obvious meaning." This explanation also helps to account for Murphy's complaints about continuing references in judicial opinions to plain meaning after 1940 when the U.S. Supreme Court delivered the supposed death blow to the plain meaning rule. The Court's decision was not an abandonment of judicial concern for interpreting statutes in light of their plain meaning,44 but an extension of the basic rule to allow

43 MacCormick (1978, pp. 207-208) offers a largely compatible view. He argues that there is a presumption in favour of applying statutes in their more "obvious" meaning and treats appeals to the golden rule and the mischief rule (defined in terms of legislators' actual objectives) as exceptions to the plain meaning rule. Later, with a reference to Rupert Cross, he suggests that "the 'literal rule' is defeasible in favour of the other 'rules' provided that the statutory words can bear a meaning other than the more obvious one" (MacCormick 1978, p. 210).

44 Murphy's misunderstanding of judicial reliance on plain meaning and legislative history begins with his failure to appreciate the ambiguity of his characterization of the plain meaning rule as a "denial of the need to 'interpret' unambiguous language" (Murphy, 1975, p. 1299). The notion of what would constitute the "plain" or "unambiguous" meaning of expressions is contestable (MacCormick, 1978, p. 208). What interpretive guidelines can be used legitimately to define the plain meaning of a rule? Some of the courts that Murphy (1975, p. 1306) chides for continuing to apply the plain meaning rule regarded a clear indication of legislative intent as settling the plain meaning of statutory words. Murphy's exclusion of all non-intrinsic
evidence from legislative history to be used in that deliberation. In other words, the plain meaning rule was extended, not invalidated, by the Court’s ruling. Deciding whether or not that extension was consistent with a model or rules account must await consideration of the standards involved in reasoning from principle.

The preceding discussion of disputes over the validity of interpretive rules and of concerns about the failure of interpretive guidelines to control judicial decision making in all cases has attempted to explain the confusions surrounding interpretive guidelines. I suggested that shifts in the basic interpretive approach and the introduction of new minor rules have given rise to confusion and divisions among judges (and legal commentators) as to the acceptable standards for interpreting statutory and constitutional provisions. However, these changes in interpretive standards and the accompanying inconsistent application of them are compatible with a rule-guided account of judicial reasoning. I will now move on to consider a second mode of reasoning that judges employ when applying the law - reasoning from prior cases.

Interpretive rules from his definition of plain meaning is curious since Murphy (1975, p. 1301) notes that the classic American article on statutory interpretation recognized that the inclusion of extrinsic materials had begun before 1940. In other words, the death blow that he ascribes to the Supreme Court decision had already been delivered to his idiosyncratic formulation of the plain meaning rule. The Court actually stated that "there certainly can be no 'rule of law' which forbids" reliance on an available extrinsic aid "however clear the word may appear on 'superficial examination'." Murphy incorrectly views these remarks as a discrediting of the plain meaning rule because he equates plain meaning with superficial meaning.
Chapter Six:
Reasoning from Prior Cases

Not all cases can be decided on the basis of interpretive guidelines; often judges rely on cases previously decided by the courts in resolving disputes. Reliance on precedent involves a particular mode of reasoning called reasoning from prior cases. I begin this chapter with a brief look at differences between reasoning from prior cases and reasoning from interpretive guidelines. The body of the chapter explores several challenges to the explication of reasoning from prior cases as a rule-guided practice. Three interrelated sets of objections, based on claims that reasoning from prior cases almost inevitably involves discretion, are explored. One set of challenges stems from difficulties in determining the rule that a prior case can be taken to have settled. A second set of challenges deals with problems in deciding whether or not the factual differences between a prior case and a subsequent case warrant treating the cases differently. Also considered is the fundamental objection that judicial reliance on case law implies a recognized and undeniable law-making power. This challenge is based on the apparent incongruity between the recognized "organic" character of the evolving body of judge-made law and the claim that judges are merely applying the law. In the course of refuting these challenges to a rule-guided account of reasoning from prior cases, an outline of this mode of reasoning emerges.
1. Interpretive guidelines and precedent

Although precedent plays a role in efforts to interpret law, reasoning from prior cases and reasoning from interpretive guidelines serve different ends and imply different criteria. I will look briefly at the ways in which previous decisions are used in interpreting laws before I distinguish these modes of reasoning. Often the validity of an interpretive guideline will be defended by referring to a prior case that established or applied the rule. For example, justification for appealing to legislative history will be offered in terms of superior court decisions that adopted this rule.1 When a particular meaning has been ascribed to a term in a case, as happened, for example, with the definition of "detention" in R. v. Therens2 that case may be cited as authority for a similar interpretation in a subsequent case.3

Although both reasoning from prior cases and reasoning from interpretive guidelines are concerned with applying preexisting rules, they differ as to the criteria for application of the

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1 Murphy (1975, p. 1306) suggests that after an interpretive rule has been adopted in numerous cases it is no longer necessary to cite particular cases as authority for the rule.
3 Rahn v. The Queen [1985] 1 S.C.R. 659. Citing a prior case as authority for a particular interpretation of a word plays a similar role as a definition provided in a statute - both are interpretive guidelines establishing the meaning of a given word. As such, reference to a case in which a definition is established amounts to asserting the validity of that particular interpretive guideline. The difference between interpretive guidelines that specify definitions of particular words and most other interpretive guidelines is that the latter are used to more generally to determine the meaning of any words.
In interpretation, the point is to apply law on the basis of what the rule-maker intended, can be presumed to have intended, or is imputed to have intended. In other words, do the facts of a given case fall within the acceptable, implied meaning of the formally authorized terms of a rule? Thus, interpretation is carried out in light of a constellation of specific secondary rules which control the ambit of a primary rule by regulating what it can be taken to mean (Levi, 1949, p. 31). On the other hand, as suggested by the doctrine of \textit{stare decisis}, reasoning from prior cases is concerned with deciding whether or not a rule established in a prior case settles the issue raised in a current case. It is not essentially a matter of deciding what an earlier judge intended (Levi, 1949, p. 30); rather it concerns the relevance of the principle underlying the decision in the prior case to the present case. In other words, are the circumstances

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\item This claim is controversial. As we will see, Burton (1985, p. 36) asserts that to the extent that reasoning from prior cases is analogical reasoning, it cannot presume to be explained in terms of pre-existing rules. Others, including Raz (1983b, p. 208) and MacCormick (1978, pp. 213ff.) assert that following a precedent is essentially a form of rule interpretation. As we will see, they hold this view because they do not recognize that justifying whether or not to follow a prior decision is a matter of analogical reasoning.
\item This does not imply a plain meaning approach. Indications of the apparent purpose or actual intentions underlying the provision supply reasons for ascribing a particular meaning to a word or phrase.
\item The full doctrine is \textit{stare decisis et non quienta movere} which translates "to stand by decisions and not to disturb settled matters" (Gall, 1983, pp. 219-220).
\item Of course, a judge will have to "interpret" the judicial opinion to ascertain what was decided in a prior case, but this is a matter of identifying the rule or \textit{ratio decidendi}. Reasoning from prior cases is not essentially determination of what a prior judge meant (or can be presumed to have meant) by the \textit{ratio} he established. Notice that interpreting judicial opinions does not involve the interpretive guidelines used in
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of a prior case analogous to those of the current case so that the rule established in the prior case settles the current case? Declaring an earlier case a precedent for a current one involves establishing that the facts of the cases are not relevantly different. Establishing relevant difference is done in the context of explicit and implicit distinctions in the constellation of rules regulating the area of law within which the cases fall. For example, in *R. v. Carson* the Ontario Court of Appeal upheld the constitutionality of a stipulation that, without benefit of trial, traffic violators would be presumed guilty unless they entered a plea within fifteen days of receipt of the notice of violation. That decision was offered in *R. v. Bryant* as a reason for upholding the constitutionality of a stipulation denying accused persons, who failed to appear for their trial on the scheduled day, the right to be tried by jury. The Court rejected the suggested precedent on the grounds that differences in the severity of the offences - traffic violations versus sexual assault - and the strength of the justification for the forfeiture of rights to trial - necessary to administer the statutory and constitutional interpretation. Furthermore, a judge's formulation of a *ratio* is not authoritative - that is, the words used by a judge do not fixed the *ratio's* formulation in the way that legislators specify the precise wording of a statutory provision (Simpson, 1961, pp. 162ff.). Thus, application of a *ratio* cannot hinge on the meaning of the specific words used by the judge to formulate the *ratio*. 8 This distinction between reasoning from prior cases and reasoning from interpretive guidelines suggests that appeal to a prior case as authority for a particular interpretation involves reasoning from prior cases only to the extent that it entertains questions about the relevance of any differences between the circumstances of the prior case and the current case. 9 [1983] 41 O.R. (2d) 420. 10 [1984] 6 O.A.C. 118.
system versus merely a cost-saving measure - were relevant reasons for distinguishing the cases. Because the legal system attaches greater importance to safeguarding the interests of accused persons as the consequences for the accused become more severe, the severity of the offences and need for the forfeiture of rights were relevant factors.

2. Establishing the ratio

One of the crucial questions in reasoning from prior cases is establishing the ratio decidendi or reason for a decision. Questions about the definition of a ratio and methods of establishing the ratio of a case have been given voluminous treatment in the literature (MacCormick, 1978, p. 83). Cross, regarded as the leading English authority on precedent, offers what he characterizes as a "tolerably accurate description of what lawyers mean by ratio decidendi" in the following terms: "The ratio decidendi of a case is any rule of law expressly or impliedly treated by a judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him" (MacCormick, 1978, p. 215). Others have referred to it as the principle or rule of law which was necessary (or at least thought necessary) for the decision (Simpson, 1961, p. 163). While there is much that could be said about the problems in deciding the ratio that a case has established, there appear to be two general criticisms that are hostile to a rule-guided view of reasoning from prior cases. It is suggested that a given case can stand for several rationales (MacCormick, 1978, p. 83; Stone,
1959, p. 607; Williams, 1982, p. 72) and, a related concern, that identification of the ratio established by a case is arbitrary or at least discretionary.

2.1 Multiple rationes

There are two ways in which a case can be taken as establishing more than one ratio: there may be rationes on different points of law, or there may be multiple rationes on the same point of law. There is nothing problematic about the possibility of a case answering more than one legal question or point of law. For example, the Therens case established both that requesting an individual to accompany a police officer to the police station counts as detention and that, under normal circumstances, evidence obtained from a detained person who has not been informed of a right to counsel is not to be admitted in court.11 Both rationes are necessary parts of the judge’s decision to admit Mr. Therens’ breathalyzer test results. Clearly, the possibility of a case establishing rationes on different points of law does not threaten a model of rules account. However, as was suggested, multiple formulations of a ratio on a single point of law are also possible. In Therens, the issue was raised whether the request to accompany a police officer constitutes detention because the individual would be subject to punishment if he refused to comply, or because the

11 The actual rules established by this case are more complicated than these simple summaries suggest. The point of mentioning them is merely to indicate that cases can be taken to establish rationes on different issues.
individual merely believed (perhaps erroneously) that he might be punished for a refusal to comply. In other words, there are at least two possible rationes on the question of detention:

Ratio #1: Individuals are considered detained if they are liable for punishment should they fail to comply with a police officer’s request to accompany them.

Ratio #2: Individuals are detained if they believe that they are liable for punishment should they fail to comply with a police officer’s request to accompany them.

The possibility of multiple rationes on a given point of law poses a potential challenge to the model of rule thesis since different formulations can have different implications for what a case can be taken to have settled. Let us examine in greater detail the ways in which multiple rationes on a point of law arise because of confusion as to the judge’s reasons for deciding the prior case. I will then consider the apparently discretionary latitude judges have in identifying and characterizing the ratio of a case.

Inconsistency or ambiguity in judge’s (or judges’) reasoning may cloud what a case can be taken to have established. This confusion arises most often when there are multiple judicial opinions offering conflicting accounts, or when a judge has not explicated the issues with sufficient care. For example, *Dubois v. The Queen*, 12 the Supreme Court found that the admission, in retrial, of testimony that an accused had given in his first trial was an infringement of his Charter freedom from self-incrimination. In reaching this conclusion the Court considered

whether or not an earlier case, *R. v. Brown (No. 2)*, had established a precedent for treating the admission of prior testimony in a second trial as tantamount to calling the person as a witness without allowing any right to refuse. It was unclear what the earlier court had actually established since the judge in *Brown* had expressly posed this question and then provided an answer which in the words of the judge in *Dubois* has "nothing to do with, and is not an answer, let alone the best answer, to the question phrased" (at p. 368). Confusion of this sort is largely a matter of human error or oversight and does not challenge the essential rule-guided nature of reasoning from precedent - i.e., mistakes do not repudiate the existence of proper standards for reasoning from prior cases.

In dealing with these situations, judges endeavour to identify the most plausible *ratio*, or otherwise resolve the confusion with maximal deference to the prior judge's reasoning. For example, the judge in *Dubois* suggested that it did not matter what the *Brown* ratio was, since there were excellent grounds for distinguishing the case (at p. 368). Had it not been distinguishable, a subsequent judge would ascertain whether it was necessary that the *Brown* court be taken to have resolved the

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14 One ground for distinction was the fact that *Brown* involved freedom from self-incrimination as protected under the Canada Evidence Act whereas *Dubois* fell under the Charter's freedom from self-incrimination. The Court argued (at pp. 360ff.) that the Charter protection, unlike the statutory protection, was concerned with how evidence was subsequently used and not whether it was initially obtained in a legally acceptable manner.
issue giving rise to the ambiguity. If the reasoning in the earlier case could be explained without resolving the ambiguity, then the prior case could be presumed not to have settled the question.15 If resolving the ambiguity is not required to decide the subsequent case, the courts will avoid drawing conclusions about the ambiguity issue. However, if deciding whether or not to accept the prior case as a precedent requires resolution of the ambiguity, judges will either offer what they regard as the most plausible account of what the prior judges' reasoning would require, or they will conclude that no binding ratio can be extracted and the prior case can not be presumed to settle the issue (Raz, 1983b, p. 184). These ways of dealing with ambiguous or inconsistent reasoning are not a repudiation of the obligation to follow the ratio established in a prior case; rather they are practical impediments to its realization. While some judges will take advantage of ambiguities to rationalize their conclusions, it cannot be assumed correct practice to do so. Judges are expected, to the extent possible, to resolve ambiguous rationes in an impartial manner following the strategies outlined above.

2.2 Arbitrary or discretionary rationes

Judicial latitude in identification and characterization of the material facts or key features of a case may mean that the

15 There is a clear requirement that judges are not to be taken to have resolved any questions of law beyond those that are necessary to decide the issue before them. This necessity requirement will be explored more fully when considering other occasions for multiple rationes on a point of law.
identification of a rations is often discretionary.16 The
problem of discretion is not a matter of uncertainty over the
correct ratio but the apparent authorization to adopt any of a
variety of rations on a single point of law. Donoghue v.
Stevenson17 is frequently cited as an illustration of extensive
latitude in identifying and characterizing material facts. In
this case a manufacturer of ginger beer was held responsible for
personal injury to a woman caused by the presence of dead snails
in an opaque bottle containing the beer. Stone (1959, p. 603)
suggests that any of the material facts can be characterized
within a wide spectrum ranging from a very specific to a very
general description. For example, has Donoghue established that
liability arises if the source of the harm is a dead snail? Or,
could it have been any snail, or any foreign, noxious object, or
simply any noxious object? If an exact characterization of the
material facts is offered, the ratio established by the case

16 Distinguishing between latitude arising from identification
of different material facts and from different characterizations
of material facts is somewhat arbitrary. For example, the
Therens case could be reclassified as a dispute between two
levels of generality - the narrower characterization of a "real
threat of sanction" versus the broader characterization of "real
or perceived threat of sanction." The ambiguous reasoning in
Brown appears to offer latitude in the identification of material
facts that cannot be translated to a difference in level of
generality. In that case, the accused's freedom from self-
incrimination was not infringed either because the accused failed
to invoke protection under the Canada Evidence Act or because
admitting the testimony in the retrial, even if the Act had been
invoked, did not amount to forcing a witness to testify.
Uncertainty over the reason for the decision is not the same as
judicial latitude to choose the material facts. The problem
here, as was earlier indicated, is that it is difficult (and
sometimes impossible) to decide which one is the correct ratio.
This does not imply that subsequent judges are authorized to
exercise discretion in choosing the ratio.
would be very narrow. Yet it is clear from the language used in judicial opinions that judges often generalize or abstract from the particulars of a case (Williams, 1982, p. 72). Some have suggested that the criteria judges rely upon to establish permissible limits of abstraction include "common sense" and "a feeling for what the law ought to be" (Williams, 1982, p. 73). For his part, Stone (1959, p. 615) suggests that judges must exercise a "fresh creative decision" when selecting from among different levels of generality. In short, there would appear to be inevitable judicial discretion in characterizing the generality of each category of material facts in the ratio.18

This may be considered to pose a serious problem to a model of rules account of judicial reasoning since a number of writers believe that a subsequent case is decided by a prior case only if the material facts of the subsequent case fall within the ambit of the prior case's ratio (Raz, 1983b, pp. 180ff.). Proponents of this view draw a distinction between "direct" and "analogous" precedents (Goodhart, 1930, pp. 80-81). A prior case would be a direct precedent for a current case only if a prior and current case are identical in all their material facts. Or put another way, the ratio in the prior case would cover the facts of the second case. The characterization of the ratio determines the range of subsequent cases that are bound by the decision.19

18 It is immaterial whether judges in the initial or the subsequent case are charged with formulating the ratio.
19 In the event of several prior cases, a situation that fell within the ambit of the cumulative ratio of earlier cases would be decided by direct precedent.
Analogous precedents refer to cases where the material facts of a current case are merely relevantly similar to the facts of a prior case. That is, the current case does not fall within the formulation of the ratio of a prior case. A judge may ultimately decide to follow a prior case even though the current case is outside the ratio, but he would not be bound by the prior case to do so (Raz, 1983b, p. 202; Goodhart, 1930, pp. 80-81). In fact, as we will explain shortly, proponents of the direct/analogous distinction believe that extending a ratio by analogy to include a current case that is not "precisely similar" to a prior case amounts to the exercise of judicial discretion (Lloyd, 1981, p. 278).

The challenge to reasoning from prior cases as a rule-guided practice might proceed along the following lines. If judges have latitude in selecting the breadth of a ratio and if judges necessarily exercise discretion when deciding by analogy whether to extend or restrict a ratio, then precedent actually determines only those cases which are identical to earlier decided cases.20 While judges may suggest that reasoning from prior cases determines more than these identical situations, they are either deluding themselves or hiding the inevitable discretion exercised in bringing the different situation under the ratio (Frank, ____________

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20 Determining whether or not an earlier decision, that a ginger beer manufacturer is liable for injury, establishes a precedent for holding a lemonade manufacturer liable requires either that the earlier judge abstract the facts of the first case to include all beverage manufacturers, or that the subsequent judge extend the narrow ratio dealing with ginger beer manufacturers to include other types of beverage manufacturers.
1958). Since very few cases involve identical material facts and it would be even rarer to expect litigants to contest an issue that has already been decided, most cases, supposedly decided by precedent, are actually discretionary calls by judges.

As will be explained shortly, this challenge essentially hinges on one issue, the extent to which reasoning by analogy can be considered to be controlled by legal standards. The distinction drawn by some between direct and analogous precedent is a false and an unnecessary one. It disguises the fact that even the so-called direct precedents require analogical reasoning and ignores the extent to which reasoning from prior cases is rule guided. Apparently, the motivation for drawing the distinction is the belief that unless a case is shown to fall within a preexisting, formulated rule it cannot be claimed that the law requires the decision. As Raz (1983b, p. 202) writes:

A court relies on analogy whenever it draws on similarities and differences between the present case and previous cases which are not binding precedents applying to the case. . . . [A]rgument by analogy is not a method of discovering which rules are legally binding because of the doctrine of precedent. That discovery requires nothing more than an interpretation of the precedent to establish its ratio. Analogical argument is a form of justification of new rules laid down by the courts in the exercise of their law-making discretion.

Supposedly, if appeals to case law actually involve reasoning by analogy then the rules can not be said to have preexisted, otherwise it would be unnecessary to reason

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21 Strictly speaking, it is impossible that two cases are identical and therefore no subsequent cases are determined by a prior case. However, for practical purposes, descriptions of the material facts of cases can said to be identical.
analogically - one would merely have to apply the established law to the new situation (Burton, 1985, p. 36). I will argue against conceiving reasoning from prior cases as necessarily requiring the exercise of judicial discretion in two stages: (1) by explaining, in the remainder of this section, why so-called direct precedents involve reasoning by analogy and (2) by examining, in the next section, the extent to which this form of reasoning is rule-guided.

We can see why all precedents are analogous precedents by examining at some length the "duty of care" ratio established in Donoghue. MacCormick (1978, p. 216) suggests that this ruling was applied in a "straightforward way" in the Daniels case where a women sued the manufacturer of a lemonade drink heavily contaminated with carbolic acid. MacCormick (1978, pp. 80-81) characterizes the ruling or proposition established by Donoghue as "manufacturers of products have a duty of care to consumers of their products." There are two interpretations of MacCormick's use of the terms "ruling" and "proposition." They might appear to refer to what is generally regarded as the ratio decidendi of a case; but as we will see they cannot properly be understood to mean this. More plausibly, MacCormick is referring to what

22 MacCormick (1978, p. 216) talks about "applying a precedent" in the way that one would apply a statutory provision - a clearly formulated case law rule can "be applied according to its terms when its operative facts are satisfied; when they are not, it cannot be directly applied, though it may be given other sufficient good grounds to be used as an analogy justifying extension of the law" (MacCormick, 1978, pp. 219-220).

23 Because the manufacturer was shown to have exercised reasonable care, he was not held liable for injury to Mrs. Daniels.
should accurately be called the common law principle enunciated in \textit{Donoghue}. In either case, we will examine the plausibility of MacCormick's suggestion that \textit{Daniels} is subsumed under a rule established by \textit{Donoghue}.

(1) Analogous reasoning and applying rationes. If \textit{Donoghue} established the \textit{ratio} that MacCormick asserts - that manufacturers have a duty of care to consumers - then MacCormick is right in claiming that \textit{Daniels} is a noncontroversial "application of case-law rules." But \textit{Donoghue} clearly cannot be taken to have establish this \textit{ratio}; it is an excessively broad account of the \textit{ratio} of that case. It is a fundamental rule (of recognition) in Anglo-American jurisdictions that cases are taken to settle only the issue before the court (Levi, 1964, p. 268; MacCormick, 1978, p. 160; Simpson, 1961, p. 160).24 Furthermore, a judge's formulation of a \textit{ratio} is not an authoritative statement of the minimally necessary grounds for a decision. As Goodhart (1930, p. 166) remarked:

a judge's statement of law does not necessarily contain the true \textit{ratio decidenti} of the case. This, however, does not in any way conflict with my view that, in determining the principle of the case, we are bound by the judge's statement of the material facts on which he based his judgment.

Perhaps, as I suggested, MacCormick's justification that \textit{Daniels} involved "application in a straightforward way of the \textit{Donoghue} ruling" is not to be understood as treating \textit{Donoghue} as

24 This practice is graphically illustrated by Lord Wright's metaphor that judges proceed "from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea. Cited by Justice Dickson (1982, p. 3).
a direct precedent for Daniels. Merely, that it was without
doubt that the differences between the two manufacturers and the
two customers were immaterial.25 While there is no reason to
suspect that a manufacturer of ginger beer has a different
responsibility to consumers than a manufacturer of lemonade, this
issue has not been directly determined by the Donoghue decision -
it cannot be said to be included in the ratio - because resolving
this question is not necessary to reach a decision in Donoghue.
MacCormick appears to be aware of this fact.26 Therefore, on
this reading, saying that Daniels is a straightforward
application of the Donoghue ruling means simply that there are no
plausible grounds for asserting a relevant legal difference
between the two sets of manufacturers and customers. The prior
case settles the subsequent case not because the prior case's
ratio subsumes the facts of the subsequent case, but because the
cases are relevantly similar the prior ratio can legitimately be
extended to include the facts of the subsequent case.

Clearly, MacCormick has more in mind than applying the ratio
(as traditionally understood). In Donoghue, Lord Atkin notes

25 MacCormick (1978, p. 216) admits that "(e)ven if a doubt
could have been raised whether that [the Donoghue] ruling covered
all manufacturers of consumer goods as per Lord Atkin, or only
manufacturers of articles of food and drink as per Lord
Macmillan, it would have been immaterial to the instant case
which concerned lemonade."

26 In an earlier article he wrote that "the binding rules
derived from these and other precedents [referring to Donoghue
and another case] are relatively narrow and specific in terms" (MacCormick, 1974a, p. 221). He also acknowledges that "every
law student knows" that the neighbour principle [the principle
about the nexus required for a duty of care to exist between an
agent and an injured party] is obiter dictum not a ratio
that the state of English and Scottish law regarding the duty to others consists of a case-by-case classification of duties for disparate classes of persons. Just prior to announcing his neighbour principle, Lord Atkin suggests that "the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist" (at p. 579). Thus, the ruling that MacCormick has in mind is not the simple ratio established by the facts of the case, but the broader principle that rationalizes the collective rations of prior cases dealing with duty of care.27. It is this common law principle enunciated in Donoghue that is applied in a "straightforward way" in Daniels.

27 MacCormick (1978, p. 83) suggests that his discussion of Donoghue shows that "in deciding a particular case [judges] should act only in accordance with some ruling which covers not only the particular case, but all other possible cases which are like cases just because they would be covered by the same ruling." A few pages later, MacCormick (1978, p. 85) refers to "an express ruling . . . encapsulating the kind of 'proposition' wherewith Lord Atkin concluded his speech in Donoghue." Lord Atkin in Donoghue wrote that

[t]he [sole] question is whether the manufacturer of an article of drink sold by him in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. (at pp. 578-579)

Significantly, Lord Atkin rephrases the ratio in different words throughout his opinion referring to it as a duty held by manufacturers of an "article of drink" and, at a later point, by manufacturers of products sold to consumers (at p. 599) and variously describes the manufacturer's responsibility extending to "injury to health" and later to "injury to the consumer's life or property" (at pp. 579 and 599 respectively). Lord Tomlin, in dissent in this case, suggests that recognition of the duty in this case would mean it applied to every repairer as well as every manufacturer (at p. 599).
(2) Analogous reasoning and applying common law principles.

I will now consider how general, common law principles, such as the duty of care principle, evolve and why, contrary to MacCormick’s claim, their application requires analogous reasoning. The key to this explanation is found in Home Office v. Dorset Yacht Co. Ltd.28 which considered the duty of care principle enunciated in Donoghue. In the later case, the Court suggested that the duty of care "is a basic and general but not universal principle and does not in law apply to all the situations which are covered by the wide words of the passage" (at p. 1054). Strictly speaking, and Lord Atkin says as much in Donoghue (at p. 579), a duty of care has been established to extend only to those situations in which the courts have upheld a duty and the exact wording of the principle - essentially a loose aggregate of rationes on the issue - is not authoritative. Since numerous judges have repeatedly and widely upheld a duty of care, it is reasonable to regard this duty as a broad legal principle and useful to refer to it in summary form rather than attempt a detailed accumulative formulation of individual rationes. In fact, Lord Atkin refers to his attempt to articulate a common principle as "a valuable practical guide" (at p. 580). Thus, the evolution from a ratio to a common law principle is essentially the formulation of a general norm that underlies or is embedded in the accumulated, more specific rules specified in numerous

cases. Of course, the enunciation of a common law principle is likely to mislead if the principle is formulated too broadly (or too narrowly) - i.e., if it fails to be an accurate summary or explication of the range of rationes it subsumes. Just as judges will sometimes overstate the ratio established in an individual case, so too, in their attempts to summarize a body of case law, judges may formulate an excessively broad principle of law. These types of situations do not challenge a rule-guided account of judicial reasoning since the gap between case law and the enunciated principle on the point of law is not the

29 "To enunciate a principle is to make sense of a cluster of rules" (MacCormick, 1974a, p. 222) or "to explicate the principles is to rationalize the rules" (MacCormick, 1978, p. 157). However, MacCormick (1978, p. 126) believes that the formulation of a general principle is "a real effort of the creative imagination." In "expressing the underlying common purpose of a specific set of rules" a judge does more than simply find and state the rationale of the rules; to a greater or less degree, he makes them rational by stating a principle capable of embracing them, and he uses that as a necessary jumping-off point for a novel decision, which can now be represented as one already "covered" by "existing" law.

MacCormick (1978, p. 107) arrives at this assessment, as was suggested earlier, because he believes that unless a case is directly covered by a rule it must be an extension of the law. Therefore, if a common law principle is used to justify situations which were not established by the prior decisions, then the new formulation of the principle must be a "law-making" action. As I will argue shortly, reasoning from prior cases is rule-guided and consistent with a "law-applying" view of the judicial mandate.

30 For example, in Donoghue, Lord Atkin criticized Lord Brett's articulation of a duty of care principle in an earlier case for its excessive breath (at p. 580).

31 This complaint has been made in connection with the principle that "no man may profit from his own wrong." Goodhart (1930, p. 166) cites Riggs v. Palmer as a "striking example of an overstatement" of a principle. Coval and Smith (1986, pp. 79ff.) have articulated the many, more specific rules - the rationes of prior cases - that are (grossly) captured by the principle.
authorized exercise of judicial discretion but the inaccurate formulation of a legal principle.

Let us assume that judges have acted properly, and an enunciated principle is justifiably accepted as an accurate explication of relevant case law. How will judges decide if a subsequent case is controlled by this principle? Judges will not resort to interpretive guidelines, since the wording of the principle is not crucial. Rather, they appeal to prior cases for guidance in applying the principle. For example, it would be appropriate to ascertain the legitimacy of reasons for exempting a particular manufacturer from the duty of care, by considering the types of manufactures that prior cases have included in and excluded from the principle. It is suggested that in applying general, common law principles judges follow the same mode of reasoning that they do in deciding whether a single prior case sets a precedent for a current case - judges decide the current case by establishing analogies with prior decisions on the point of law. Lord Wilberforce’s observations, forty-six years after

32 As we will see in the next chapter, this may fail to produce a conclusive result. In such cases judges resort to reasoning from principle by evaluating the consequences of adopting the principle in the current case in light of a broader constellation of legal norms.

33 MacCormick (1978, pp. 163ff.) agrees in general terms with this account of the application of common law principles. Bell’s (1985, pp. 43-46) summary of the judges’ reasoning in Home Office v. Dorset Yacht Co. Ltd., which applied the duty of care principle, also supports this position. Significantly, two of the five judges in that case rejected the presumptive authority of the duty of care principle. Lord Dilhorne (in sole dissent) denied that Lord Atkin’s principle was one of general applicability and required specific authority for any liability to the plaintiff. (As he found no authority, he concluded there was not liability.) Lord Diploch "started with no basic
Donoghue, on the evolution of what is now the duty of care doctrine is compatible with this explanation:

The position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered the damage there is sufficient relationship of proximity of neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negate, or reduce or limit the scope of the duty or the class of person to whom it is owed or the damage to which a breach of it may give rise.

As suggested above, justifying a sufficiently proximate relationship and possible limitations on a duty to care would involve identification of relevant differences between the present case and previous cases that upheld or excepted the principle. The only significant difference between treating duty principle, but thought that the judges should first identify the characteristics common to the cases where a duty of care has already been found and, by this inductive process, produce a general statement of what does give rise to a duty of care." The three remaining judges accepted the presumption, arising from the repeated application of the principle, that a duty of care should apply unless there were compelling reasons to the contrary. In arguing that there were no compelling reasons Lord Morris "was content to describe the process of extending liability in negligence as one of finding a sufficient analogy with previous cases of liability." Lords Pearson and Reid recognized that the issues required the "balancing of social interests" - an evaluation that Bell calls "policy determination" and I refer to as reasoning from principle. As I have suggested, reasoning from principle is required when judges conclude that there are inconclusive reasons for asserting that prior cases establish a precedent for the present case.

of care as a common law principle and as cumulative rationes is that the former establishes a presumption in favour of the damaged party. This presumption is a reasonable inference from the body of rationes since the courts have repeatedly found a duty of care in a wide range of cases. Furthermore, in reasoning from prior cases, in the absence of a legal rule expressly asserting that situations are similar, it is very difficult to "prove" relevant similarity. More often, courts focus on refuting or confirming reasons for distinguishing the prior case. Thus, the prima facie appearance of similarity between cases operates much like a presumption of relevant similarity.

Consider, for example, Justice Dickson’s reasons for following an earlier case which, like the current one, involved a trespassing

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35 MacCormick (1978, pp. 159-160) makes a similar point, although he believes that the enunciation of a duty of care principle made it more likely that earlier cases which had not upheld the principle and as yet unexplored situations would be found to have a duty of care. My view is that, properly understood and formulated, the enunciation of the principle would add negligible normative force to the accumulated rationes on this point. The fact that the duty of care principle has been very broadly applied has a lot to do with the fact that the principle was significantly overstated - many obvious exceptions to the principle at the time of Donoghue were ignored. As Levi (1949, p. 7) notes, a judge is not free to "ignore the results of a great number of cases which he cannot explain under a remade rule." In a similar vein, Pound (1941, p. 7) writes:

Much harm has been done to our common-law technique in America by text writers in the decadence of text writing in the last quarter of the nineteenth century, and by hack writers in encyclopedias dogmatically announcing rules in terms of the exact words of courts without attending to the results of the cases as compared with the language of the decisions. It often requires a long process of judicial inclusion and exclusion to work out a principle or a number of principles which will put a series of new cases in some field of the law in the order of reason and to enable us to formulate a body of rules with assurance.
conviction for refusing to cease picketing on shopping centre property.

There has been no suggestion that Peters [the earlier case] was wrongly decided; therefore, I would think it must be regarded as controlling unless it can properly be distinguished from the case at bar. No distinction can be made on the grounds of contract; there is a copy of the lease from Fairview to Dominion Stores [the landlord and tenant in the prior case] among the papers but it would not appear, nor has it been argued, that any distinction can rest on that document. As to a possible statutory distinction, the Petty Trespass Acts of Manitoba and Ontario do not differ in any material respect and indeed s. 24 of the Labour Relations Act, 1972 (Man.), c. 75, [applicable in the current case] specifically preserves rights against trespassers. Therefore it would seem that the appeal must succeed unless valid distinction can be drawn on the grounds that the president of the Brampton Labour Council in Peters was a mere member of the general public from whom permission to remain on the premises could be withdrawn at will, whereas Mrs. Carswell was an employee of one of the tenants of the shopping centre on strike in support of a current labour dispute from whom permission to remain on the premises could not, as a matter of law, be withdrawn. I find myself unable to accept that any ground in law supports such a distinction. (Harrison v. Carswell [1975] 6 W.W.R. 673 at p. 675)

This discussion suggests that reasoning from prior cases is not the direct subsumption of a current case under a rule established in a prior case. Even with well-established common law principles, it appears that the courts continue to appeal to the relevant similarity between current and prior cases in determining whether the latter establishes a precedent for the former. It would appear that deciding one case in light of what was established by a prior case inevitably involves, even if in a somewhat attenuated form, reasoning by analogy. This brings us to our next challenge, that resorting to analogies between
current and prior cases is inconsistent with a model of rules conception of judicial reasoning

3. Analogies and discretion

A second set of challenges to the model of rules account involves claims that if reasoning from prior cases is reasoning by analogy, then deciding to follow or distinguish prior cases is largely a matter of judicial intuitions and preferences or, at best, a vague assessment of what would be legally most appropriate. As one writer suggests, reasoning from prior cases involves identifying plausible precedents, comparing the material facts of the respective cases, and finally "determining whether the factual similarities or the differences are more important under the circumstances" (Burton, 1985, p. 40). He concludes that "the crucial third step in such reasoning is left unguided. Judging which facts are more important under the circumstances remains a mysterious activity, subject to little apparent governance by the analogical form or the rules of the common law."

It is important to appreciate that this mode of judicial reasoning requires judgment - i.e., it does not involve a mechanical application of standards - and does not always result in a clearly defensible resolution of a case - judges may be required to appeal to reasoning from principle.36 However, this does not mean that reasoning from prior cases is not rule-guided.

36 More will be said on this point later in the chapter.
Before exploring the relations between rules and reasoning from prior cases further, I will clarify the justification for relying on precedent and the nature of the reasoning employed.

Typically, justifications for the doctrine of precedent emphasize the importance of certainty and predictability in law (Frank, 1958). One may speculate that this preoccupation fuels the tendency to regard the doctrine of precedent as the application of an antecedently announced *ratio*. While these are important legal values, they do not exhaust the fundamental reasons for the doctrine. If these were the only reasons then, because of the inherent unpredictability of controversial cases, little reliance would be placed on deciding difficult cases in light of what was previously decided. The fact that judges always attend to relevant prior cases whether their implications for the current case are predictable or not suggests a further justification for the doctrine. It is also generally recognized that the relationship between non arbitrary application of rules and justice is an important reason for adherence to precedent. As Dworkin suggests the authority of precedent relies on an appeal to "the fairness of treating like case alike" (TRS, p. 113). A commitment to formal justice underlies the doctrine of precedent - it would be *prima facie* unjust to decide a current case differently from prior cases that

37 In fact, sometimes the most predictable verdict is not the one which precedent authorizes. For example, after the Supreme Court of Canada's invalidation of the federal Sunday closing legislation in *Big M Drug Mart Ltd.*, many Ontario retailers incorrectly expected their provincial Sunday closing legislation to receive similar treatment.
were similar in all important respects. Thus, justice requires that no distinction be made between cases unless the differences between them are legally relevant or significant (CL, p. 155; Lloyd, 1981, pp. 119-120). However, the difficult question in reasoning from prior cases, as has already been suggested, is in deciding on the legal relevance of any differences. As Levi (1949, p. 3) notes "When will it be just to treat different cases as though they were the same?".

It might be suggested that the basic form of reasoning from prior case is as follows: if a judge in a prior case reaches a particular conclusion in situation x and there are no good legal reasons for distinguishing between situation x and the current situation y, then the decision in x is taken to have also settled the issue in y. As was suggested, considerations of formal justice require that judges treat like cases alike. But as Hart suggests: "to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule" (CL, pp. 156-157). If the ratio of a case is limited to the specific facts of the case, then the rule that covers the prior case and the instant case cannot simply be the ratio of the prior case. Let us consider what sense can be made of the notion of a underlying rule, more general than the ratio of an individual case that extends to all cases relevantly similar to the instant case.
3.1 Underlying rules and *rationes*

The previously discussed distinction between a rule and its formulation may help to clarify the relationship between a rule underlying a body of cases and the *rationes* of individual cases. It is recognized that the *ratio* of a prior case is a "rule fragment" or a "point of law," and only after repeated application and extensions do the accumulated *rationes* become a "complete rule" (Simpson, 1961, p. 171). As has often been mentioned, the words of a *ratio* are not considered to be in "fixed verbal form" (MacCormick, 1978, p. 221) — they are an approximation subject to unending refinement. These characteristics suggest that individual *rationes* are properly understood as partial and often tentative formulations of a rule. Cases which subsequently follow or distinguish the initial case will alter the rule formulation (i.e., extend or restrict the *ratio*) but are, if correctly reasoned, decisions based on the rule underlying the initial case. That underlying rule which

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38 Pound (1941, pp. 10ff.) draws a parallel distinction between what he labels "standards" (i.e., underlying precepts or principles) and "rules" (i.e., rule formulations) in his discussion of the proper exercise of the doctrine of *stare decisis*. He writes:

[What needs rectification is the judicial habit of following language extracted from its setting by text writers, of adherence to formulas instead of the principle of decisions, and the taking of the words for law rather than the judicial action which those words sought to explain. . . . It is the failure to differentiate between rule and standard and the attempt to reduce application of standards to hard and fast rules. (Pound, 1941, p. 13).]

39 Consider MacCormick’s (1978, p. 186) observations that [a]nalogies only make sense if there are reasons of principle underlying them. The difference [between analogies and principles] is only in the degree of explicitness with which a principle has hitherto been
is slowly unfolded in subsequent formulations remains as it always was - a standard requiring (or permitting or forbidding) behaviour in the instant case and, by virtue of the requirement of formal justice, all and only those cases relevantly similar to this case. Of course, the full underlying rule could never be completely formulated as it is impossible to anticipate all the cases that might correctly be seen to to relevantly similar to each other.

Accepting the distinction between an underlying rule and a ratio helps account for an apparent anomaly in the received view of judicial law-making authority. Typically, judges claim that they merely announce or declare the rule that was, until then, merely imminent in the law (TRS, p. 112) and yet, when a precedent is set, the law must have been unsettled. Changes to a ratio arising from following or distinguishing are not regarded by judges generally as altering the rule established by the prior case despite the fact that the ratio in place after the court decisions is not the same as the ratio prior to the decision. On the other hand, critics claim that judges are less than candid for denying that precedent involves the creation of new law since distinguishing and following a prior case unavoidably extends or restricts the ratio and therefore, by definition, implies changes stated. The 'neighbour principle' once stated makes explicit a ground for treating as relevantly similar analogous cases similar in some respects to Donoghue v. Stevenson . . . On the other hand, the following of an analogy in a particular case may often provide the ground for making articulate some new, wider statement of a principle.
in the law (Burton, 1985, p. 36; Raz, 1983b, pp. 185ff.). The "rule" versus "rule formulation" distinction answers these anomalies by suggesting that a ratio is a partial formulation of a more extensive underlying rule. There is no contradiction in claiming that changes in the approximations of a rule do not necessarily imply changes to the rule itself.

Although the decision in a given case implicitly establishes a broad rule - the rule covering the instant case and all relevantly similar cases - judges are restricted to deciding the specific case before them. It would be unrealistic and unwise to expect judges to formulate the complete rule at the time of the initial case. The full rule underlying a case is fleshed out as a string of judges adjudicate novel issues by deciding whether there are relevant differences between their case and all pertinent prior cases. Thus, the doctrine of ratio decidendi

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40 Actually Raz (183b, p. 188) recognizes the distinction between the ratio of a case and its formulation. Witness his comment that: "it is unreasonable to attribute great weight to the actual formulation of the rule in the hands of the court." However he treats this as a problem of the courts being "a little careless in formulating rules" - i.e., what was discussed earlier as ambiguity in identifying the ratio - and not the more fundamental claim that the ratio of a case be accepted as a partial formulation of an underlying rule.

41 If a judge were to speculate about the complete rule formulation at the time of the initial case that formulation would never be identical to the full rule formulation that actually develops. There are numerous reasons for this difference: (1) all the hypothetical cases a judge might consider may not actually come before the courts, (2) the initial judge or subsequent judges may make mistakes, and (3) changes in statutory, constitutional or common law between the time of the initial case and the final formulation will legitimately alter the initial rule. On this last point, it is useful to remember the earlier comment that a change in the legal definition of a word alters the rule that a statute lays down even if the formulation remains unchanged. Lawful changes in the complete
does not refute what judges have widely claimed, namely, that there is an unannounced rule driving the evolving judicial formulations. My earlier discussion of the efforts to enunciate a duty of care principle is a clear instance of attempts to formulate the rule underlying a spate of individual cases. The difference between the broader common law principle and the narrower ratio in Donoghue is that the former is a formulation of the complete rule while the later is a partial formulation only of that rule.

3.2 Establishing relevant differences

For the reasons just discussed, the focus of reasoning from prior cases is not, as many have suggested, subsumption of the current case under a prior ratio. Rather, it looks to ascertain if a proposed expanded (or restricted) formulation of the ratio which subsumes both cases is warranted. Or put another way, judges consider whether recognized legal distinctions preclude a rule underlying a case occur even though the case is not explicitly mentioned or applied. For example, in Gideon v. Wainwright [1963] 372 U.S. 335, the Supreme Court considered whether the American Constitution guaranteed persons accused of serious crimes a right to be provided with a lawyer if they could not afford to hire one. At the time the right to counsel was first raised in court, a judge might correctly have decided that the right extended only in cases of capital crimes. However subsequent changes in constitutional case law appear to have altered the legitimacy of limiting the right to capital crimes — it was admitted that the decision in Gideon was influenced by the fact that the Court had earlier repudiated a distinction between capital and non-capital crimes in connection with military trials (at p. 348). In short, what initially was a relevant distinction ceased to be so because of subsequent changes in other areas of the law, and that may alter the initially established rule.

finding that the broader *ratio*, subsuming the facts both of the prior case and the current case, is an acceptable formulation of the underlying rule. Thus, in deciding whether two cases are relevantly similar, judges determine the appropriateness of classifying the two sets of facts under more general categories. As MacCormick (1978, p. 81) notes: "[c]ases are not alike or unlike in the abstract, or absolutely. They are like or unlike if they can be assigned to given determinate classes."43 For example, in *Steel v. Glasgow Iron and Steel Co. Ltd.*44 the widow of a railway guard who lost his life while trying to avert a train collision sought compensation for the loss of her husband. A key question was whether the previously established right to recover damages arising in the context of attempting to save another's life extended to a right to recover damages arising from an attempt to prevent catastrophic damage to another's property. The answer hinged on the existence of a relevant reason - i.e., a reason related to the justification for awarding reparation - that precluded treating a "rescuer" - a person saving a life - and a "salvor" - a person saving property - as equivalent classes of heroes. As MacCormick (1978, pp 162-163) explains a majority of the judges agreed that the "law of reparation" was based on the reasonableness of the risk incurred considered in light of the magnitude of the consequences to be

43 As earlier argued, MacCormick errs in his determination of the appropriate categories to be used in establishing relevant differences by attaching too much importance to the precise words used by the prior judge. The appropriate classification is the narrowest category required to subsume both material facts.
avoided. Thus, the generally sufficient justification for reparation to rescuers stems from the considerable value attached to human life - it would rarely be regarded as unreasonable to attempt to save a life. If the extent of potential property damage was significant, as it was in this case, then a salvor's risk would also be considered reasonable.

The following hypothetical examples illustrate how the relevance of factual differences between two cases might be explored.

Case #1: A man kills his wife by deliberately firing a loaded rifle at her.

Case #2: A woman kills her husband by deliberately firing a loaded pistol at him.

In deciding whether case #2 is analogous to case #1, a judge would, in effect, match the proven, materials fact of each to see if they could be classified under more general categories without contradicting relevant legal distinctions. A distinction would be a relevant one if the reclassification had a bearing on the legal justification for dealing with people in this type of situation; otherwise the two cases are relevantly similar and the prior case sets a precedent for the subsequent one. This reclassification procedure could be charted as follows:

45 Judges do not actually list the pairs of material facts and verbalize the specific classifications. This explication purports to describe the underlying logic of judicial reasoning from prior cases.
In this straightforward example, the reclassification of each of the categories are acceptable extensions of the material facts. That is, there does not appear to be any reason related to the legal justification for holding persons culpable for killing that would distinguishing between, say, the gender of the agents or the type of guns used. In another context, say, that of affirmative action, it may be appropriate to distinguish material facts on gender grounds. Gender would be a relevant distinction because the justification for affirmative action programs is likely directly related to overcoming systemic inequality on the basis of gender. In the case of culpability for killing, there are no legal standards that preclude, and in fact there may be legal standards that encourage, the extension of these classifications. It is worth reiterating that the words used to express the reclassification are not authoritative. Issues raised by subsequent cases may require "reworking old cases" (Levi, 1964, p. 269) - judges may re-express the ratio formulated by a prior judge provided it can still justify the

<table>
<thead>
<tr>
<th>Case #1</th>
<th>Case #2</th>
<th>New classification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agent</td>
<td>man</td>
<td>woman</td>
</tr>
<tr>
<td>Effect</td>
<td>kills</td>
<td>kills</td>
</tr>
<tr>
<td>Victim</td>
<td>wife</td>
<td>husband</td>
</tr>
<tr>
<td>Means</td>
<td>rifle</td>
<td>pistol</td>
</tr>
<tr>
<td>Intent</td>
<td>deliberate</td>
<td>deliberate</td>
</tr>
</tbody>
</table>

46 Often the law contains specific prohibitions or presumptions against drawing certain distinctions. For example, section 28 of the Charter states that protected rights and freedoms are to extend equally to male and female persons.
decision reached in the prior case. For example, although the judge in case #2 justified his conclusion on the grounds that both agents were adults, it would be appropriate to revise the reclassification to "adults of normal mental capacity" should a subsequent case involve a mentally handicapped adult. The fact that this distinction did not occur to, or was ignored by, the judge in case #2 does not alter what can legitimately be declared as the ratio established in case #2. As was previously stressed, cases are (binding) authority only for that which is required to resolve the issues before the bar. Potential for subsequent reformulation applies when a later case introduces a previously unconsidered category of material fact. The absence of serious earlier consideration of the issue of, say, the person’s motive would not preclude retroactively imputing a motive — say, unprovoked aggression — in the earlier cases. If there were no legally relevant differences between that motive and the agent’s motive in the current case — i.e., the motives could legitimately be subsumed under a more general classification — then the prior cases set a precedent even though the prior judges had not specifically considered the question of motive. Given this explication, it is easy to appreciate why Levi (1964, p. 266) refers to reasoning from prior cases as a "moving classification scheme."

47 This claim should be qualified. Citing several examples, MacCormick (1978, p. 222) suggests that a failure to consider an issue in sufficient depth or to provide good reasons for a conclusion reduces the authority that subsequent judges will ascribe to the decision.
The following hypothetical example further illustrates how establishing relevant differences is governed by the legal justification for dealing with persons in the type of situation under consideration. In this case, the legal grounds for holding persons culpable for killing determine the relevance of any differences between the material facts.

Case #3: A child kills a passer-by by deliberately firing a pea shooter at her.

In deciding whether the first two cases are precedents for the third case we would again want to attempt to reclassify each of the materials facts into more general, acceptable categories. The extension of the first reclassification to include case #3 might look as follows:

<table>
<thead>
<tr>
<th>Cases# 1-2</th>
<th>Case #3</th>
<th>New classification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agent</td>
<td>adult</td>
<td>child</td>
</tr>
<tr>
<td>Effect</td>
<td>kills</td>
<td>kills</td>
</tr>
<tr>
<td>Victim</td>
<td>spouse</td>
<td>passer-by</td>
</tr>
<tr>
<td>Means</td>
<td>gun</td>
<td>pea shooter</td>
</tr>
<tr>
<td>Intent</td>
<td>deliberate</td>
<td>deliberate</td>
</tr>
</tbody>
</table>

It is unlikely that the earlier cases would be accepted as precedents for the third case because extension of at least two of the categories flies in the face of relevant legal distinctions. In criminal law, adults are often held responsible for their actions in ways that (young) children are not. The extension of the "agent" category to "any person" would likely violate that distinction because the legal culpability of the
accused depends on their capacity to make rational choices. Also, pea shooters which are essentially toys, albeit potentially dangerous ones, are a different order of dangerous object than guns. Legal culpability would depend on the type of object because the level of care that could be expected from a responsible person would differ - a person who fires a gun at another person should expect consequences that would not normally be expected to follow from firing a pea shooter at a person. Despite considerable similarity and differences between cases, the presence of legally relevant differences are required before cases should be treated differently.

3.3 Relevant difference and discretion

Two reasons are commonly offered as to why the law fails to prevent the exercise of discretion in determining relevant differences: (1) it is sometimes suggested that in determining relevance judges appeal to open-ended and seemingly subjective criteria such as common sense, reasonableness, public policy and justice, and (2) it is often correctly pointed out that the direction afforded by prior cases is often insufficient to provide a clear resolution to the case at hand. Before considering these challenges to a model of rule conception, it is important to remember that, as a matter of contingent fact, judges will sometimes (or perhaps even often) defend their resolution of the issues before them by appeal to precedent even though the evidence fails to substantiate their decisions. There are many possible explanations (e.g., mistaken or inadvertent
reasoning, bias). As has often been mentioned, the failure to perform up to standards is not a repudiation of the existence of standards. Most writers, including those who regard reasoning from analogy as law-making, support the view that judges have an obligation to provide defensible reasons to justify the distinctions they draw (Raz, 1983b, 197ff.; Bell, 1985, pp. 17ff.).

There is nothing inherently inconsistent in claims that judges rely on common sense, reasonableness or justice when ascertaining whether relevant differences exist between cases. Take, for example, the difference between cases involving manufacturers of lemonade and ginger beer. The near indistinguishable difference between these two products suggests that it is highly improbable that the law would have any reason to draw, or would actually sustain, a distinction between them. Therefore the appeal to common sense is more the futility of even attempting to build a case on legal grounds for drawing this distinction. It need not imply that judges are free to appeal to extra-legal intuitions about the appropriateness of recognizing a difference.

The second common source of skepticism about the extent to which reasoning from prior case is rule-guided arises because in many cases the law appears to run out. For a variety of reasons prior cases fail to provide a conclusive resolution of every case at bar. Often, existing case law provides some authority for
reaching a conclusion, but it is not sufficiently persuasive to offset opposing arguments or conflicting precedents. Alternatively, it may be unclear whether or not the law recognizes a relevant distinction between earlier cases and the current case either because there are conflicting grounds for asserting a distinction or because there is very little evidence supporting or refuting the relevance of a distinction. Clearly, in these sorts of situations, a judge cannot decide the current case on the basis of what was previously established. In these situations, critics notice that judges move from considering relevant similarity between cases based on existing distinctions towards evaluating the desirability of recognizing certain distinctions. In short, judges resort to what I refer to as reasoning from principle.

While the difference between reasoning from prior cases and reasoning from principle will be explored more fully in the next chapter, a few remarks are in order. While reasoning from principle takes place in the context of discourse about prior cases, it is different from reasoning from prior cases - as I have said, the need for it arises when prior cases are inconclusive. In these situations, judges are forced to decide whether or not to follow a prior case on the basis of the desirability of treating the cases as relevantly similar. In other words, the reasons or "seats of argument" for claiming that

48 As we saw in chapter five, reasoning from principle also arises when legislative guidelines are inconclusive.
particular cases are analogous are no longer the settled distinctions in law but the legally most defensible distinctions. Thus, reasoning from principle involves evaluating the legal implications and consequences of accepting the principle necessary to justify treating a prior case as a precedent. Lloyd (1981) provides us with an instance of the use of reasoning from principle to assess the implications of adopting a common law principle. In the case in question, Candler v. Crane, Christmas & Co.,49 the issue was whether or not the duty of care principle extended to include a negligently carried out property valuation that resulted in an investor losing his money. Lloyd (1981, p. 270) suggests that "much play was made of the point that a decision in favour of the plaintiff [the investor] might have the effect of imposing liability on a cartographer who makes a mistake in one of his marine charts for the loss of an ocean liner whose navigator has relied on such a chart." As Lloyd explains, the Court's objective in raising the hypothetical situation about an ocean liner was "to show that if a certain analogy is accepted it will lead to unfortunate consequences in other cases not easily or rationally distinguished from the present case."

Whether, in every case, the reasoning from principle provides sufficiently clear grounds to justify one alternative over the others and whether that justification is rule-guided are questions to be addressed in the upcoming chapter. However, the

49 [1951] 2 K.B. 164.
fact that reasoning from prior cases does not provide an answer in every situation is neither a flaw in the mode of reasoning nor conclusive indication of judicial discretion. It simply means that in these situations judges cannot legitimately justify their decisions on the basis of precedent.

4. Reasoning from prior cases as law-making

The final challenge to a model of rules conception of reasoning from prior case that will be considered in this chapter is the apparently undisputable fact that case law is judge-made law. It would seem contradictory to assert that judges are simultaneously making and applying the law. Many reviewers conclude that judges cannot simply be applying law, they must also be involved in law "reform," "adaption," or "renovation." While almost all proponents of this view recognize that the "law-making" authority of judges is not identical to the power possessed by legislators (Simpson, 1961, p. 157; Frank, 1958), it is held to be perpetuating a myth or engaging in judicial self-deception to deny some judicial law-making capacity (Frank, 1958). While I do not wish to engage very deeply in what MacCormick (1978, p. 188) characterizes as the "often hot but

50 It is interesting to note the range of metaphors which have been used to try to capture what Justice Dickson (1982, p. 5) referred to as a judicial and legislative partnership in the law-making process. Lord Haldane likens the judicial role as "fleshing out the bare bones" of enacted law (MacGuigan, 1967, p. 660); while Kelsen refers to statutes as "semi-manufactured products" (Gottlieb, 1968, p. 88). And there is, of course, the more recent contribution to the debate, Dworkin's metaphor of judges as "chain novelists" (LE, p. 228).
always arid controversy" over whether judges do and should make law, several observations will be offered to explain why the law-making capacity of judges need not be antithetical to a rule-guided conception of judicial reasoning. In other words, I want to suggest several ways in which judges make law that do not imply the exercise of judicial discretion.51

First, it must be noted that claims that judges make law are ambiguous. Often precedent setting decisions on a point of law are cited as examples of the so-called law-making function of judges. Consider the following comments by Hart:

The open texture of law leaves to courts a law-creating power far wider and more important than that left to scorers [in an athletic match], whose decisions are not used as law-making precedents. Whatever courts decide, both on matters lying within that part of the rule which seems plain to all, and those lying on its debatable border, stand till altered by legislation. (CL, p. 141)

There is a sense that "law-creating" merely refers to the fact that a court's decision is relied upon by subsequent courts as authority for a binding rule. Since the rule had not previously been officially promulgated, it was merely first formulated by that court. Judges may simply have "declared" law by adducing a correct decision from recognized legal standards that had not been applied in the given context. Another sense of "law-creating" implies that judicial decisions are not the upshot of applying preexisting law. I will consider both interpretations.

51 I am not denying that in the early history of Anglo-American common law, judges were clearly authorized to exercise discretion in adjudicating disputes (Sartorius, 1971, p. 151).
In an obvious way, every judicial decision changes the law even when it is a correct application of existing law. The nature of this change is suggested in the following remarks by a proponent of a model of rules conception of judicial reasoning:

Every inference made and every rule enunciated must be authorized or required by preexisting rules and principles, but precedent transforms that which is authorized or required into what authorizes or requires. There is, therefore, no contradiction between the two propositions that courts always apply pre-existing law and the courts create law. (Gottlieb, 1968, p. 88)

In other words, it is reasonable to talk of judicial authority to "create" law without denying that judicial reasoning is regulated by pre-existing standards. This follows from the fact that there is a difference between saying "proposition P is the most defensible legal decision to reach in case C" and "proposition P is the legal decision reached in case C." The authority vested in official court declarations by secondary rules of recognition means that the legal status of proposition P in the first statement is different from its status in the second statement. Each declaration of a judicial decision has performative force and carries with it law-making powers. However the justification for the declared decision may be entirely consistent with pre-existing standards for applying law. In other words, it might be suggested without contradiction, that judicial reasoning is a strictly law-applying activity and that judicial pronouncements have law-making force.

Much has already been said about the inherent flexibility in the law itself. The existence of broad legal standards whose
application in particular situations is regulated by a complex array of secondary rules provides for incredible scope. This chapter offered a rule-guided explanation for the development of common law from a narrow rule that, say, "a manufacturer of ginger beer is responsible for consumer injury resulting from the presence of a dead snail" to a general principle that, say, "manufacturers are responsible for harms caused by failure to take reasonable care." I have tried to show, given the requirement that like cases be treated alike, how the underlying principle was implicit in the earlier decision. Changes to the rationes of subsequent cases were, if properly decided, merely more complete formulations of that underlying rule. In addition, since the applicability of common law principles is dependant on relevant similarities, dramatic changes in technology or society may produce unexpected, but nevertheless correct decisions. Justice Cardozo’s remarks in *MacPherson v. Buick* are often quoted in this regard: "precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that danger must be imminent does not change, but the things subject to the principle do change" (Levi, 1949, p. 21; Waluchow, 1980, p. 213). The evolving formulation of an implicit principle through application in successive and often diverse situations provides at least a partial answer to Lord Wright’s famous query about how the seemingly "perpetual process of change" in common law could be reconciled with judicial reasoning
restricted to application of existing law (Gottlieb, 1968, p. 88).

The failure of many observers to appreciate the dynamic quality of law may help explain frequent accusations of judicial law creating power. For example, MacGuigan (1967, pp. 660-661) characterizes the Privy Council's decisions in various cases involving the British North America Act as "blatant indulgence in judicial legislation." Notice, however, the grounds for this assessment:

As many writers have shown, [a footnote cites three reputable authors] on the basis solely of a process of pure textual interpretation the Judicial Committee could not possibly have reached results so far removed from the clearly expressed structure and meaning of the British North America Act. (MacGuigan, 1967, p. 661)

As I argued in the previous chapter, the apparent assumption underlying this accusation - that deviations from a "plain meaning" reading of constitutional documents are symptoms of judicial license - reflects a questionable theory of constitutional interpretation.52 In other words, many of the supposed legal changes, attributed to deviations from a plain meaning reading of the law, may be imagined - that is, observers may incorrectly assess the state of pre-existing law and mistakenly attribute changes to judicial decision making.

52 Weiler (1974, pp. 168-169) refers to the view that the "law" inheres in the ordinary meaning of the surface language of a document like the British North America Act as a "limited" and "legalistic" perception.
The unwarranted attribution of changes in law to judicial discretion may be particularly likely in the common law. Consider the following case involving the application of common law principles in a novel situation. In *Fleming v Atkinson*, the Supreme Court of Canada held a farmer responsible for damages resulting from an accident involving his cattle which had wandered on the road. This ruling was issued despite a medieval English common law holding farmers immune from damage to travellers caused by stray cattle. In a split decision, the Court ruled that developments in negligence law arising from the duty of care principle, and the drastically different conditions in twentieth-century Ontario justified rejecting this explicit but "irrational legal anomaly" (Weiler, 1974, p. 59). While it will always be open to debate whether the decision changed law in Ontario or simply reflected the most legally defensible formulation of the law in that jurisdiction, it cannot be claimed that just because the Court rejected the common law rule it was originating new law. One is reminded of (then) Justice Dickson's remarks about a controversial case over which he was accused of engaging in judicial activism:

54 The law arose at a time when it was not customary for farmers to fence in their pastures and the immunity was offered by the government to induce farmers to allow the building of roads throughout the countryside. Considering users of the roads were likely travelling in animal-drawn carts, it was not an unreasonable law at the time.
55 While Weiler (1974, pp. 63-64) refers to this decision as "judicial innovation" and "an intelligent change", the majority of the Court denied that the English common law immunity from stray cattle was ever the common law of Ontario.
was I declaring the law as it has always existed or was I making law? Irrespective of the answer, my firm conviction is that I was fulfilling the duty of a judge to decide the case before him or her in a "reasoned way from principled decision and established concepts." (Dickson, 1982, p. 6)

Judicial pronouncements that do not reflect "law as it always was" can often be explained in ways that do not involve the exercise of judicial discretion. Dramatic changes in law might have occurred long before official formulations of those changes are made. For example, it has been suggested that any time judges overturn a prior decision or invalidate existing statutes they engage in judicial initiative (Raz, 1983b, pp. 189ff.). It may be that judicial overruling merely changed a rule formulation that had ceased to be an accurate account of a rule sometime before. This suggestion is borne out in Big M Drug Mart. On April 24, 1985 the Supreme Court of Canada struck down the Lord's Day Act effective as of April 15, 1982 - the day the Charter came into effect. The Court decision to invalidate the Act was the official declaration of a change in the law that occurred three years earlier. While the statute was still on the books up to the time of the decision, it was declared not to be enforceable since 1982. Thus, while the Court's decision

56 This is consistent with judge's talk of overruling as required by law.
57 This presumes that the Court correctly decided Big M Drug Mart. If they erred or there was no controlling legal justification for a decision, then the Court changed the law, not merely the formulation of the law. However, neither of these possibilities threatens the proposed model of rules account of legal reasoning. If the result is an error, the decision merely reflects incorrect practice. Alternatively, it is not essential that there be a controlling legal justification for every case. As long as the Court tried to resolve the case according to valid secondary rules, and there is every indication in the judgment
changed the official rule formulation by eradicating section 4 of the Lord's Day Act from the law books, the earlier promulgation of the Charter had changed the legal rule. Since promulgation of the Charter was an obvious instance of a legal change with ramifications on a wide variety of issues, judges were less likely to be accused of engaging in law making if they reversed pre-Charter decisions. It is important to remember that less sudden changes in law occur which alter the relevance of differences between apparently like cases (Weiler, 1968, p. 423).

Finally, there is at least one way in which judges dramatically alter pre-existing law without threatening a model of rule conception of judicial reasoning. This occurs when judges err or, either inadvertently or deliberately, decide a case not in accordance with the most appropriate legal standards. This is an important and, perhaps, insufficiently admitted force in the dynamic quality of law. As Goodhart (1930, p. 163) suggests many important (and often desirable) developments in common law are the result of incorrect judicial reasoning. The "famous or infamous" doctrine of common employment first laid down in Priestly v. Fowler is cited as a principle based on that it did, then the requirements of a rule-guided account of judicial reasoning have been met.

58 The Court expressly struck down section 4 of the Act - leaving it open as to the extent to which the rest of the Act is invalid - since that was all that was required to resolve the issues presented by the case.

59 The leading case prior to Big M Drug Mart was Robertson and Rosetanni v. The Queen [1964] 1 C.C.C. 1 and it had upheld the legality of the Lord's Day Act.

60 Goodhart (1930, p. 163) suggests that: "Paradoxical as it may sound, the law has frequently owed more to its weak judges that it has to its strong ones. A bad reason often makes good law."
arguments that are "palpably incorrect" (1930, p. 162). More generally, Goodhart (1930, p. 164) suggests "Our modern law of torts has been developed to a considerable extent by a series of bad arguments, and our property law is in many instances founded on incorrect history." The performative force of judicial pronouncements means that decisions, correctly reasoned or not, have the authority of law.61

In closing, I have argued that reasoning from prior cases requires reasoning by analogy, and that this is consistent with a rule-guided account of judicial reasoning. Explanations that are consistent with judges regarding their decisions to be controlled by legal standards were offered for changes in case law that arise as prior cases are distinguished and followed. Also, since reasoning from prior cases will not resolve all disputes that come before the courts, it was suggested that judges will appeal to reasoning from principle. I will now consider this third mode of reasoning.

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61 Subject, of course, to the overruling of obviously incorrect decisions.
Chapter Seven:

Reasoning from Principle

Many cases cannot be decided solely on the basis of precedent or interpretation. In these situations a third mode of reasoning - reasoning from principle - is relied upon. It requires that judges reach a principled resolution of the case by evaluating their alternatives in light of the broader constellation of legal standards. In this chapter the nature of reasoning from principle is explained and an account is offered of the interrelations and differences between this mode and the other modes of reasoning. It is suggested that the standards to which judges appeal when "testing" the acceptability of alternatives are not always explicitly identified in law. Many standards underlie or are "embedded" in legal rules, practices and institutions. A contentious aspect of this mode of reasoning - the problem of distinguishing legally authorized standards from unauthorized, "extra-legal" standards - is discussed. Finally, the capacity of reasoning from principle to provide a rule-guided explanation of disputed secondary rules of application is discussed in the context of Davis v. Johnson.1 In this case, the English Court of Appeal relied upon reasoning from principle to determine whether or not the doctrine of precedent bound the Court to follow an incorrectly decided prior case.

1 [1978] 1 All E.R. 841.
1. The nature of principled decisions

In discussing the two previous modes of reasoning, mention was made repeatedly of reliance on principles. To call something a legal principle is to imply that it is a generalizable prescription - that it is a standard that should be considered across a range of situations as opposed to regulating a singular event (Henkin, 1964, pp. 306-307). For example, a judge who flips a coin in order to resolve a case would be acting on a principle only if the judge considered it acceptable to decide all cases similar to that one by flipping a coin. As Wechsler (1959, p. 17) suggests, a reason for a decision is a principle only if it transcends the case at hand. The ratio of a case is a principle because it would apply to all cases with the same material facts. On the other hand, the res judicata - the ruling on the specific dispute between the actual litigants - is not a principle because it is a ruling that is limited to the parties in a specific case.

1.1 Appeals to principle v. matters of principle

While principles are involved in reasoning from prior cases and from interpretive guidelines, their role in these modes is different from what is involved in reasoning from principle. This difference is reflected in the distinction between decisions that merely involve "appeals to a principle" and deciding "as a matter of principle." An appeal to a principle signifies that a

2 As long as a decision is not completely arbitrary it is to some extent a principled decision (Hare, 1966, p. 213).
principle is referred to as a reason for a particular decision. For example, the presumption in favour of international law is a principle of interpretation. The principle states that, in the absence of clear evidence to the contrary, legislators should be presumed not to have intended to pass legislation that conflicts with international law or treaties. The fact that this is a recognized legal principle qualifies an appeal to it as a valid reason for ascribing a particular interpretation to a statute. Thus, to appeal to a principle is simply to refer to an established principle as a reason for a decision. This is the role that principles play in interpretation and reasoning from prior cases - that is, judges will appeal to recognized principles of interpretation and principles established in previous cases as reasons for their decision.

Reasoning from principle implies more than appeal to principles that are recognized as applying in the case at hand. It requires that judges establish whether or not a particular principle warrants being accepted as a reason for the decision (and for other similar decisions). For example, suppose the presumption in favour of international law was not recognized as a valid interpretive principle and that, in a given case, the only difference between two plausible interpretations of a statute was that only one was consistent with international law. Accepting this difference as the reason for deciding the case would require demonstrating that it is legally justifiable to adopt this presumption as a standard for judicial decision making.
in these sorts of cases. It involves deciding the case as a matter of principle - i.e., that the presumption should be accepted as a legal reason for decisions in these types of situations.

While this brief account may explain what reasoning from principle refers to, it says little about the more important (and controversial) question of the proper standards for justifying whether or not a particular principle warrants acceptance as a reason for a decision. The title of Dworkin's second book, A Matter of Principle, attests to the centrality of reasoning from principle in his account of judicial reasoning. Many writers on this subject (Bell, 1985, pp. 22-39; Gottlieb, 1968, pp. 74-77; Hart, 1982, p. 200; 1968, p. 271; MacCormick, 1978, pp. 149-150; Wechsler, 1964) agree that when interpretive guidelines and precedent fail to produce a conclusive result, judges justify decisions on principle by evaluating the options on two general grounds: consistency with established legal principles and desirability of consequences in light of accepted standards. In effect, judges "test" the principles implied by the alternatives they are asked to consider against the broader constellation of explicit and implicit (embedded) values (MacCormick, 1978, p. 103).

3 The ways in which Dworkin's account differs from mine are discussed in the next chapter.
4 Appeal to reasoning from principle is not an inevitable way of resolving disputes when the meaning of words or prior cases fail to provide conclusive results. For example, Bell (1985, p. 18) points out that the 1907 Swiss Civil Code authorizes a judge to decide "according to the rule which he would enact if he were legislator."
in favour of international law as a principle could be justified because doing so is consistent with other, more fundamental legal principles such as the rule of law and Parliamentary supremacy. Also, it could be argued that a failure to adopt publicly accessible standards, such as those embodied in international law, to resolve these types of disputes would have negative consequences for certainty and predictability in law - two recognized values of our legal system. Resolution of the dispute is seemingly straightforward in this case because only one of the alternatives is consistent with recognized legal principles and its consequences are clearly more desirable. It may not always be obvious that, all things considered, one alternative is more acceptable than the others. In these situations, judges will have to weight the implications and consequences for each alternative in light of the relative importance of the legal principles and standards involved. As was suggested in chapter four, the weighing of arguments is often very difficult and invariably requires the exercise of judgment.

1.2 Interrelated reliance on principles

Before looking more closely at the specific types of considerations judges entertain when reasoning from principle, it may be useful to illustrate why it is often difficult to draw a clear line between the various modes of reasoning. One reason is that judges employ various forms intermittently. For example,

5 It is consistent with Parliamentary supremacy since international treaties are generally ratified by Parliament.
before concluding whether or not a prior case is analogous to a current one, a judge may first have to resolve a threshold question whether or not a particular distinction is recognized in law. This might require reasoning from principle – evaluating the legal implications of accepting this distinction generally. Only after resolving this question could a judge consider the relevance of any differences between cases implied by this distinction.

This interplay between reasoning from prior cases and reasoning from principle arose in Big M Drug Mart. As we saw in chapter four, several U.S. Supreme Court cases upholding the constitutionality of Sunday closing legislation were offered as authority for a similar finding in connection with the Lord’s Day Act. The American cases held that the purpose of Sunday closing legislation had shifted because of repeated amendments and changing conditions from the initial drafters’ pro-Christian intentions to a secular purpose. The American courts had accepted the constitutionality of Sunday closing legislation on the basis of a "shifted" legislative purpose. These cases could be distinguished from the instant case if Canadian law recognized a relevant distinction between the initially intended purpose and what might be considered the current purpose. In other words, if Canadian law recognizes a "shifting purpose" theory these cases provide authority for the current case; otherwise the American cases are relevantly different. There was no clear Canadian authority for or against acceptance of this distinction, thus the
Court evaluated the consequences if repeated use was made of this approach to interpreting legislative purpose. 6 The shifting purpose theory was rejected in principle because, if widely adopted, it was potentially damaging to the doctrine of precedent (at p. 352) and it was considered inconsistent with fundamental tenets of "Parliamentary intention" (at p. 353).

Another reason why distinguishing among the modes of reasoning is difficult is that there is often a fine line between appeals to those principles involved in reasoning from prior cases and interpretation, and those implied by the test of consistency with fundamental principles. It will be remembered, for example, that interpretive presumptions specify legal principles or clusters of principles (e.g., presumptions in favour of the common law, of international law, of liberty) that judges presume to be implicit in legislators' intended meanings. Any interpretation that is inconsistent with those principles is to be rejected unless there is clear indication that the legislators intended otherwise. These qualify as interpretive principles because they are recognized to be part of the implied meaning of a statute. In the case of a disputed interpretation, consistency with fundamental principles would qualify as reasoning from principle if the principle appealed to was not considered to be a principle controlling legislative intent. 7

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6 One case was cited by the Court but it appears to be authority for the undesirability of litigating the same question more than once, and not an indication of the validity of the shifting purpose theory, per se.
7 Since the notion of legislative intent is a legal fiction, many appeals to fundamental principles will be justified by
For example, in *Riggs* we saw that a majority of judges decided that a teenager who murdered his grandfather in order to expedite inheriting under his grandfather’s will was not to benefit under the will. The dissenting judge argued that interpreting the statute so as to deny the grandson his inheritance contradicted the prohibition against double jeopardy - i.e., the prohibition against punishing persons twice for the same crime. Since this appears to be a clear example of evaluating the implications of alternative interpretations in light of general legal principles, it would qualify as reasoning from principle. This can be contrasted with the majority judges’ appeal to the common law principle that no man may profit from his own wrong. Appeal to this principle qualifies as interpretation because of the then prevalent interpretive presumption in favour of the common law - statutes were not to be interpreted in derogation of the common law without explicit indication of legislative intent to do so (Willis, 1938, pp. 17-21). A lack of clear demarcation also exists between appeals to principles in reasoning from prior cases and consistency with fundamental principles. An appeal to a principle qualifies as reasoning from prior cases if the principle directly affirms or denies a relevant distinction between the facts of two cases. If it is unclear whether or not a principle establishes a particular distinction, it would be appropriate to reason from principle and assess whether either claiming that it should not be presumed that the legislators would intend to contradict the principle in question. It is inconsequential whether this amounts to consistency with fundamental principles (reasoning from principle) or appeal to interpretive principle.
affirming or denying the contested distinction is consistent with other fundamental legal principles. The fact that sometimes it may be arbitrary whether or not an appeal to a principle qualifies as reasoning from principle suggests that this consideration is merely an extension of the same form of reasoning required when the established interpretive and precedential standards fail to control a decision.

2. Considerations in reasoning from principle

As suggested above, judges entertain two basic types of considerations when deciding a legal issue on the basis of principle: consistency with fundamental principles of law and consequences in light of accepted legal standards. In regards to the second consideration, the possible consequences of a decision are examined from at least three perspectives: judges consider the impact of the decision on the interests of all parties who may be affected, and they assess the effects if other relevantly similar cases arose either because the consequences in individual future cases would be undesirable or because the cumulative consequences of repeated instances would be undesirable.8 Examples drawn from Canadian, American and British cases will be cited for each type of consideration as a way of documenting how judges rely upon these considerations when testing the acceptability of a principle.

8 These formulations of the ways of testing principles are adapted from Coombs' (1980) work in the area of value reasoning.
2.1 Consistency with fundamental principles

When interpretive guidelines and precedent fail to produce a conclusive result, judges will look to see which alternatives are consistent with fundamental legal principles. In cases where a judge is faced with two alternatives, only one of which is consistent with recognized legal principles, it would be arbitrary for the judge to ignore this distinguishing standard in reaching his conclusion. In fact, as we saw above, this appeal is an obvious extension of, and in some contexts virtually indistinguishable from, judicial use of principles in interpretation and precedent. Consider the following three examples of this type of appeal.

(1) In *R. v. Bryant*, the issue was the constitutionality of a Criminal Code provision that denied persons the option of electing to be tried by jury if they failed to show up for their trial at the scheduled time. The Crown argued that the failure of an individual to show up at the appointed time should be presumed to constitute a waiver of his right to a jury trial. In rejecting this conclusion, Justice Blair reasoned that the

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9 MacCormick (1978, p. 106) uses "consistency" in a strict sense to refer to logical consistency or non-contradiction, and uses the term "coherence" to refer to a looser sense of consistency implying merely that a norm can be subsumed under - shown to be justified by - a more general legal principle. I use the term "consistency" to include both senses. Unlike Dworkin's use of the term "coherence," MacCormick (1978, p. 107) does not imply that individual principles must be tested in light of overall coherence with the larger constellation of legal principles in a system, or in light of coherence with broader political standards.

10 [1984] 6 O.A.C. 118.
principle implied by the argument was inconsistent with the notion of constitutionally entrenched rights:

I cannot fail to note the serious implications of the Crown's argument. If it prevailed, it might be possible to legislate the denial of Charter rights simply by providing that persons whose rights are taken away by statute are concurrently deemed to have waived them. Charter rights cannot be destroyed in this fashion. (at p. 122)

(2) In Davis v. Johnson,11 the English Court of Appeal considered whether an obviously incorrect decision by that Court in a prior case was binding in the present case. For Sir George Baker, the most compelling reason why an exception should be made to the doctrine of stare decisis was that to do otherwise would be inconsistent with his judicial oath. The judge averred that following a decision which he firmly believed to be based on an incorrect reading of a statute conflicted with his vow "to do right to all manner of people after the laws and usages of the Realm" (at p. 863).

(3) In McCulloch v. Maryland,12 U.S. Chief Justice Marshall argued against the constitutionality of allowing the State of Maryland to tax federal bank notes issued by the Baltimore branch of the United States Bank on the grounds that, among other reasons, to allow the tax was inconsistent with the principle of no taxation without representation. As Bodenheimer (1968, p. 385) writes:

Counsel for the state asserted that, since the federal government may tax state-chartered banks, a corresponding power must be held to exist in the states. Marshall replied

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12 [1819] 4 Wheat. 316.
that the analogy was improper since the people of all the states, and the states themselves, were represented in Congress, while a state taxing the operations of the federal government would act upon institutions created by people over whom it had no control. In contrast to federal taxation, an exercise of such power by the states would constitute a form of taxation without representation, contrary to the basic intent of the Constitution.

2.2 Consequences for all parties

A second way in which judges evaluate the acceptability of a principle is by assessing the consequences, should the principle be adopted, for all of the parties that are likely to be affected. This consideration extends beyond the litigants in the case to include third parties whose interests may be at stake (TRS, p. 308). One justification for this consideration is that it is a requirement of the principle of equal treatment before the law - of the impartial consideration of everyone's interests. Vlastos (1962, p. 55) suggests that implicit in the notion of equal treatment is the requirement that one's rights and, I might add, legally sanctioned interests be respected as impartially as those of any other party who may be affected by a decision. However, as Gottlieb (1968, p. 75) reminds us, not all consequences of a decision are legally relevant:

Although the consequences of a decision are innumerable, just as the facts of a case to be decided, they are not all "material". It is thus again necessary to identify the criterion in terms of which the material consequences can be distinguished from those that are irrelevant. We shall see that the purpose of the rule applied and those of other rules upheld by the legal system furnish the standards in terms of which it is possible to evaluate these consequences.
Thus, the "all parties test" requires that judges consider the consequences implied by each alternative for the legal rights and sanctioned interests of each of the parties likely to be affected by the decision. Consideration of these parties' interests is consistent with the court's willingness, especially in constitutional cases, to allow intervener status to individuals and groups with a legitimate stake in the outcome. Consider the following examples:

(1) In *M. v. Director of Child Welfare*, the Court decided that provincial welfare officials had the right to apprehend S., a premature baby, and authorize blood transfusions for her. As S.'s parents were Jehovah's Witnesses, it was against their sincerely held religious beliefs to allow their child to receive blood from another person. In deciding that the welfare officials' actions were warranted, despite their violating the parents' Charter rights to liberty and religious freedom, the Court considered the consequences of the alternative in light of S.'s rights.

Even if one were to accept the view that one of the liberty interests to be protected by s. 7 is the parental right to be free from state intervention as suggested in *T.T. v. C.C.A.S. of Metro Toronto* (1984), 46 O.R. (2d) 347, 39 R.F.L. (2d) 279 (Fam. Ct.), that case recognizes that the application of s. 7 "requires in some cases an obvious balancing of protected but competing rights" (p. 358). In the circumstances of the case before me, S.'s right to life must take precedence over any competing right of the parents where to do otherwise would seriously endanger her chances for survival. (at pp. 394-395)

In the case before me, it is true that the effect (although not the purpose) of the relevant sections of the Child

Welfare Act is to impinge on the parents' rights to direct the medical treatment of their child in accordance with their religious beliefs. Nonetheless, if the exercise of the parents' right would result in the withholding of essential medical services to S., then the need to protect the health of S. and her right not to be deprived of life may result in her parents being required to act in a way contrary to their religion by giving up S. for the purpose of medical treatment including blood transfusions. . . . It would overshoot the actual purpose of the Charter if religious freedom were allowed to be exercised in such a way as to deprive a baby of a realistic chance of life. (at pp. 395-396)

(2) In Express Newspapers Ltd. V. McShane,14 the English House of Lords considered whether British labour relations legislation, that provided union officials with immunity for acts done "in contemplation or furtherance" of labour disputes, required merely that union officials honestly believe that their acts would further the dispute or, the more stringent condition, that union officials hold rational beliefs about their actions' likely effects on the dispute. One of the arguments against the less stringent interpretation appealed to the interests of non-litigants. As Bell (1985, pp. 87-88) explains:

Lord Wilberforce thought that it would give no protection to innocent and powerless third parties against the actions of enthusiasts and extremists, who believed that their excessive action was necessary. Similarly, Lord Salmon argued that grievous harm could result to others, such as in the recent instance of pickets preventing oil deliveries to Charing Cross Hospital, which brought some cancer patients near to death.

(3) In Miranda v. Arizona,15 the U S. Supreme Court confronted the issue of the proper treatment of accused persons

by criminal justice officers. In dissent, Justice White offered the following observations:

The Court's duty to assess the consequences of its action is not satisfied by the utterance of the truth that a value of our legal system of criminal justice is "to respect the inviolability of the human personality" and to require government to produce the evidence against the accused by its own independent labor. Ante at 715. More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. Thus the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight. (at p. 537)

2.3 Consequences in new cases

Another way of testing a principle involves considering the consequences should the decision in the present case establish a precedent. This test is an obvious extension of the principle of formal justice that like cases are to be treated alike. Clearly, if the principle implied by an alternative would have undesirable consequences if applied in a relevantly similar case, then this is a reason for not accepting the principle in the present case. As Wechsler (1959, p. 15) suggests: "To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply?"

It has sometimes been thought that this consideration requires that judges "work out the full impact upon future cases" (Levi, 1964, pp. 274-275) or have "fully elaborated theories" of
an area of law (Tushnet, 1983, p. 810). This objection is based on a misunderstanding. The test requires that judges consider the principles before them in light of other hypothetical cases that are clearly covered by the principle to be affirmed and indistinguishable upon valid grounds from the instant case (Wechsler, 1964, pp. 297-298). Consideration of the consequences in new cases does not presume a before-the-fact resolution of controversial future cases—judges need not consider hypothetical cases with uncertain results or those that might be distinguishable from the present case. If a later court encounters a situation that an earlier court has explicitly cited as a clear (hypothetical) instance of a principle, the later court is not bound to regard the case in that way—the later court could distinguish its case from the prior case that established the principle. As Goodhart (1930, p. 179) suggests, conclusions about hypothetical situations are regarded as *obiter dicta*.17

The following three examples show judges testing the acceptability of a principle by assessing the consequences in hypothetical cases considered to be relevantly similar to the one at issue.

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16 Tushnet’s concern is that this expectation in effect requires that judges perform tasks that are impossible to do.
17 In *Big M Drug Mart* [1985] 18 D.L.R. (4th) 321 at p. 351 the Supreme Court confronted a case that an earlier court had cited as a paradigm infringement of religious freedom. The earlier court’s observation about the then hypothetical situation was not binding on the later court.
(1) In Morgentaler v. The Queen,\textsuperscript{18} one of the lawyers urged the jury to find Dr. Morgentaler not guilty if they thought that the law restricting abortion was a "bad" law. This suggestion was sharply criticized for several reasons. One criticism addressed the undesirable consequences of setting a precedent whereby lawyers could encourage juries to reject any law of which they did not approve. As Chief Justice Dickson explains: "To give a harsh but I think telling example, a jury fueled by the passions of racism could be told that they need not apply the law against murder to a white man who had killed a black man" (at p. 76).

(2) In Donoghue v. Stevenson,\textsuperscript{19} Lord Macmillian considered the desirability of adopting the duty of care principle by entertaining the following scenario:

suppose that a baker through carelessness allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to the customers of his bread to take care that it was free from poison, and that, as he did not know that any poison had got into it, his only liability was for breach of warranty under his contract of sale to those who actually bought the poisoned bread from him? (at p. 620)

(3) In Riggs v. Palmer,\textsuperscript{20} Justice Earl offered a number of arguments why the grandson should not be allowed to inherit under his grandfather's will. One argument appealed to the consequences arising in a variety of cases if a precedent was

\begin{itemize}
  \item \textsuperscript{18} [1988] S.C.R. 30.
  \item \textsuperscript{19} [1932] A.C. 562.
  \item \textsuperscript{20} [1889] 115 N.Y. 506.
\end{itemize}
established allowing persons to vest their interest in property through crime.

If he had met the testator and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house and by force compelled him, or by fraud or undue influence had induced him to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative, it seems to me, would be a reproach to the jurisprudence of our state, and an offense against public policy. (at pp. 511-512)

2.4 Consequences for repeated instances

Another way in which judges test principles is by considering whether the desirability of deciding the case in a particular way would change if repeated instances of this type of case were to occur. Bell (1985, p. 70) refers to it as the "floodgates" argument and Bodenheimer (1968, p. 378) as the "parade of horribles" argument. Unlike considering the consequences in new cases, which is based on the desirability of results in any relevantly similar case, the test based on repeated instances considers whether the consequences of numerous occasions are desirable. This test is derived from the principle of treating like cases alike. Although a single instance of the application of a principle may not be undesirable, if the consequences of repeated instances are, and if there is no non-arbitrary way to justify allowing only some instances of the act, then it is unjust not to prevent everyone from acting in that way.21 The following cases illustrate this test.

21 Singer (1958, p. 162) refers to this as the generalization argument: "if the consequences of everyone's acting in a certain
(1) A second argument raised in *Morgentaler* against the lawyer's suggestion that juries disregard "bad" law focused on the undesirable consequences of every jury acting on that advice. The cumulative effect would be to make it impossible to predict the law since the decision in every occasion would be dependent on how members of that jury happened to feel at the time. In presenting his opinion, Chief Justice Dickson cited an argument offered in an eighteenth century English case involving criminal libel charges against a newspaper.

In opposition to this, what is contended for? - That the law shall be, in every particular cause, what any twelve men who shall happen to be the jury, shall be inclined to think; liable to no review, and subject to no control, under all the prejudices of the popular cry of the day, and under all the bias of interest in this town, where thousands, more or less, are concerned in the publication of newspapers, paragraphs, and pamphlets. Under such an administration of law, no man could tell, no counsel could advise, whether a paper was or was not punishable. (at p. 78)

(2) In *London Street Tramways v. L.C.C.*, 22 a significant reason for the House of Lords' rejection of an invitation to reverse an earlier precedent was captured in the following application of the repeated instances test:

I do not deny that cases of individual hardship arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice compared with the inconvenience - the disastrous inconvenience - of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth there can be no final court of appeal. (at p. 380) 23

way would be undesirable, then no one has the right to act in that way without a reason or justification."

23 While the point of the example is to illustrate the judicial use of this test, it is not clear that its use in this case is
(3) A second argument offered by Chief Justice Marshall in *McCulloch v. Maryland*, 24 against allowing the states to tax federal bank notes was the cumulative negative effects on the federal government's capacity to operate effectively should the constitutionality of the tax be upheld.

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mint, they may tax the mail; they may tax patent-rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all ends of government. (at p. 432)

The outline of the general types of considerations that judges entertain when reasoning from principle is complete. These considerations form the tests by which judges evaluate the legal acceptability of adopting one alternative over another. While I have discussed the form of these tests, I have said little about the standards to which these tests appeal, beyond the claim that these tests must be carried out in light of recognized legal standards. As we will now see, a crucial issue in explicating this form of reasoning is distinguishing bona fide legal standards from what are often called "extra-legal" standards.

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compelling. An argument based on repeated instances has force only if there is no non-arbitrary way to distinguish the present case from a rash of like cases with undesirable consequences. 24 [1819] 4 Wheat. 316.
3. Identifying *bona fide* legal standards

The need to distinguish legal standards from the domain of other standards that might be affected by deciding a case one way or another arises because of the problem of judicial discretion. If there were no grounds for distinguishing legally valid reasons from "extra-legal" arguments, reasoning from principle would not control judicial decision making - judges would be free to select their own criteria for deciding the case. For example, in reasoning from principle on a case involving blood transfusions, judges might decide to evaluate the alternatives in light of their private religious convictions. This would not qualify as an appeal to *legally valid* standards as it is widely recognized that judges are not authorized to decide issues according to their personal visions of what may be morally desirable. We saw, for example, that the constitutionality of state-imposed taxes on federal currency was rejected because it violated the fundamental constitutional principle of no taxation without representation. However, state taxes would not have "failed" the principle test if the negative consequences were in terms of extra-legal standards - say, for example, that repeated occurrence of state taxes would negatively effect the gross national product. Although there have been advocates of the view that judges ought to be authorized to rely on fiscal benefits, *per se*, as a criterion for judicial decision making, Anglo-American judges are not currently authorized to do so. If reasoning from principle is rule-guided, we should expect to find rules (of argument
validity) which establish the legal validity of the criteria to which judges are authorized to appeal when evaluating alternatives.

As we saw in the examples above, judges sometimes appeal to recognizable rules, such as the principle of no taxation without representation or a constitutional right to life, to provide the standards against which an alternative will be evaluated. However, in reasoning from principle judges often appeal to standards, such as "public policy," "social policy," "justice," "community values" which are not obviously bona fide legal standards. These seemingly moral standards are regularly cited by judges as "matter-of-fact" legal principles even though the specific principles have not been expressly and authoritatively stated beforehand. For example, as was stated above, the judge in Miranda confirmed the truth of the claim that "respect for the inviolability of the human personality" was a "value of our legal system of criminal justice" (at p. 537). This affirmation of the validity of judicial appeals to respect for persons was made without there being any previous, expressly stated rule to that effect. In other words, many so-called moral and social principles, are relied upon by judges as reasons for deciding a case. How can these appeals be reconciled with the above-made claim that judges are not authorized to appeal to "extra-legal" standards?
3.1 Legally embedded standards

The first point to appreciate is that the labels used to refer to standards can be arbitrary: it is immaterial whether, for example, "justice" and "community values" are called "legal," "moral," or "social" values (Eekelaar, 1973, p. 37). The relevant feature from our point of view lies in deciding which of these sorts of standards judges are authorized to appeal to when resolving a dispute. In other words, the key issue is distinguishing appeals to "moral" and other values that can legitimately be said to be recognized in law from appeals to considerations of personal or political morality that are not legally sanctioned. What makes the former legally valid standards is that they are recognized as embedded in law - that is, they are clearly instantiated in laws, are implicit in judicial decisions, and underlie institutional practices (Sartorius, 1968, pp. 175-177; 1971, 154-155).25 The values that are embodied in these legal rules and practices are values which justify the existence of these rules and practices. For example, moral principles about keeping a certain range of promises underlie contract law, the principle of avoiding injury to others underlies the law of torts, principles of fairness are reflected in our procedures for establishing the guilt of accused persons, and so on. Lloyd (1981, p 135) refers to them as "the built-in values of the system." Thus, the law has "moral content" -

25 Levenbook (1984) argues that some principles may be legal principles by virtue of their being presupposed by the point of law generally.
embodies social and political values - but it is permissible to appeal to those values only because they are embodied in accepted legal norms and not because they are morally attractive (Coval & Smith, 1986, p. 74). Or, as was suggested in a passage cited above, "the purpose of the rule applied and those of other rules upheld in the legal system furnish the standards in terms of which it is possible to evaluate these [i.e., the legally relevant] consequences" (Gottlieb, 1968, p. 75).

The U.S. Supreme Court's reasoning in *Miranda* illustrates why consideration of standards such as "justice" and "community values" is not an unauthorized appeal to "extra-legal" standards, but a valid appeal to standards grounded in law. For example, Justice Warren opened his majority opinion with the remark that the case raised "questions which go to the roots of our concepts of American criminal jurisprudence" (at p. 439). He traced the rationale for protection for accused persons starting in seventeenth century England with the abusive treatment of prisoners (at p. 442). The protection against such "iniquities" had become "firmly embedded in English, as well as in American jurisprudence" (at p. 443). In addition, Justice White admitted that the principle of respect for the "inviolability of the human personality" was "a value of our system of criminal justice" but added that it was also vitally important to protect other "community values" and in particular "society's interest in general security" (at p. 537). In justifying consideration of the latter value, he suggested that "(t)he most basic function of
any government is to provide for the security of individual and property. [cites case authority] These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime" (at p. 539). Notice, that in justifying reliance on these standards, the Court explicated the legal grounding of these values.

3.2 Disputed legal standards

It should not be presumed that judges will always agree over which values are legally embedded values. For example, it will often not be obvious which values constitute the purpose of a statute or underlie a legal practice. Before attempting to reason from principle in light of these standards, it is essential that threshold disputes about the standards be resolved. In resolving these disputes, as in resolving all legal disputes, judges are expected to adjudicate between alternatives by appealing to other secondary rules of recognition and application. The reasoning in Law Society of Upper Canada v. Skapinker26 is a typical example of judicial reliance on secondary rules to resolve a disputes about embedded legal values. In this case, the Supreme Court was confronted with several "arguably applicable" interpretations of the Charter's guarantee "to secure the gaining of a livelihood in any province" (at p. 170). A key issue in deciding between rival interpretations was the underlying purpose of the provision. Was the point to secure a right to work, or merely to prevent

impediments to inter-provincial migration? The validity of the latter interpretation hinged on the appropriateness of relying on arguments tied to the heading of the section - "mobility rights" in which the provision fell. The Court referred to Canadian interpretation acts (at p. 171), prior Canadian and foreign judicial decisions (at pp. 172-175), and Canadian authorities on interpretation (at pp. 172, 175) as justification for deciding that headings were legitimate means for ascertaining the purpose of a specific provision. In other words, the dispute over the underlying purpose of the section was resolved by appeal to recognized valid arguments (reasons validated by rules of interpretation) to resolve a threshold dispute over the proper use of section headings.

Critics of a rule-guided account of judicial reasoning often fail to understand how disputes about the validity and application of primary rules and secondary rules can be rule-guided. The fact that judges seemingly establish new secondary rules of application in the midst of deciding a case and the fact that, apparently, they have considerable latitude in selecting and interpreting those rules is frequently regarded as refutation of a rule-guided conception of judicial reasoning (LE, pp. 89-90, 137-139). In its more cynical version, it is the claim that judges disguise the exercise of discretion behind the rules of application they choose to recognize as valid or in the interpretation they ascribe to them. For example, Moles (1987, p. 260) suggests that selection from among competing legal
arguments often presupposes principles that judges "bring to" the law rather than those they "find in" the law. As I have frequently suggested, judges are not free to adopt a particular version of a secondary rule because they like the result it produces in the instant case; they are expected to decide which secondary rule of application to adopt on the basis of sincerely-held, impartial beliefs about what is the legally most defensible alternative. If judges are in doubt as to the validity of a secondary rule or its proper interpretation in a given context, they must appeal to other legal criteria to resolve the issue. As I have suggested repeatedly, the existence of these secondary and tertiary levels of appeal to legal standards does not eliminate judicial disagreements. However, it does explain how it is that even when the law is vague, ambiguous or otherwise unsettled judges can plausibly claim that their decisions are controlled by law. It will be useful, as a way of illustrating these points, to consider the judges' reasoning about a disputed secondary rule of application - the rule about the binding nature of precedent.

Excursus to chapter seven - Davis v. Johnson

In Davis v. Johnson, 27 a majority of the English Court of Appeal rejected the traditional rule of precedent which held that, with few exceptions, courts were bound to follow earlier decisions of the same court. This is a particularly appropriate case to examine when considering the rule-guided nature of

judicial resolution of disputed secondary rules since Moles (1987, pp. 260-261) regards Davis as a clear instance of judges bringing differing principles to the law.28

The case involved consideration of the Domestic Violence and Matrimonial Proceedings Act 1976 and two nearly identical Court of Appeal cases that were decided several months before Davis. There was some confusion about the protection that this Act offered to women who were living with, but not married to, men who abused them. Despite what appeared to be explicit language to the contrary, in two earlier cases the Court of Appeal decided that, in the event of family violence, a married woman, but not an unmarried woman, could retain possession of the home held in common with her mate. When Davis reached the Court of Appeal, five judges who were not party to the earlier cases were confronted with a dilemma: the majority of them considered the earlier decisions by their brothers to be clearly incorrect29 and yet the doctrine of precedent seemed to require that they adhere to those rulings. The "received view" of the doctrine of precedent had been set out by the Court of Appeal in Young v. Bristol Aeroplane Co. Ltd.30 It specified that the Court of Appeal was bound to follow its own prior decisions with three

28 Moles' (1987, p. 143) most general purpose in discussing this case, and two other cases, is to show the inadequacy of Hart's account of rule application in terms of core and penumbra cases. As I have argued, Hart's account is inadequate.
29 A four judge majority discredited the earlier decision as inconsistent with both a plain reading of language of the Act and with a seemingly unambiguous reading of the important purposes it served. The House of Lords confirmed that the earlier cases were wrongly decided.
30 [1944] 2 All E.R. 293.
exceptions: if there were conflicting decisions, if prior decision were clearly inconsistent with a House of Lords decision, or if a prior decision was reached per incuriam - i.e., without consideration of an important statutory provision or other binding authority.

The Court of Appeal judges in *Davis* responded to the received doctrine of precedent in various ways. Lord Denning challenged the basic validity of the rule established by *Young*. Three judges - Sir George Baker, Lord Justice Shaw and Lord Justice Cumming-Bruce - accepted the basic rule in *Young* but disagreed about its application in *Davis*. Only one judge, Lord Justice Goff, felt compelled to accept the *Young* ruling without alteration. In a split decision the Court of Appeal overruled the earlier precedents and allowed unmarried women who were battered by their mates to retain possession of the family home. On further appeal, the House of Lords rejected the Court of Appeal's conclusion that deviating from earlier decisions was warranted in this instance, although they confirmed that the earlier cases had been wrongly decided.31 Our primary concern in raising this case is with the standards relied upon by the Court of Appeal in justifying its rejection or modification of an established secondary rule of application. More particularly, we will ascertain whether or not the model of rules conception of judicial reasoning can account for their justifications.

31 [1978] 1 All E.R. 1133. Since the doctrine of precedent does not bind a higher court, the House of Lords was clearly entitled to overrule the Court of Appeal decisions.
Lord Denning argued, as a matter of principle, that since the prior decisions were clearly wrongly decided, it would be unjust to the injured parties to delay, or even to risk never, remedying the situation by waiting for the House of Lords to overrule the earlier decisions (at pp. 852-853). He also argued that, eighty years earlier, Seward v. The Vera Cruz had established that precedent was a matter of judicial comity - a matter of respect and deference but not an obligation. Thus, precedent was not a rule, in the strict sense, but merely a principle of practice. Lord Denning cited eleven cases heard between 1852 and 1941 in which the Court of Appeal reconsidered prior decisions and, when necessary, had reversed them (at pp. 853-855). Further, Lord Denning suggested that the House of Lords’ shift in its view of precedent from its 1898 position - that the Court considered itself bound by its own prior decisions - to its 1966 position - that it was no longer absolutely bound by precedent - was evidence that precedent was not binding (at p. 855). Lord Denning also suggested that the exceptions that already had been added to the Young formulation, combined with other exceptions that ought to be made, had the effect of "eating up the rule," and therefore it would be better to adopt the House of Lords’ position on precedent (at pp. 856-857).

Lord Denning’s reasoning was rejected by Lord Justice Goff (and also by the House of Lords) on the grounds that the view expressed in The Vera Cruz had been considered and rejected by

the Court in *Young* and that that decision had been expressly approved of in the House of Lords (at pp. 864-869, 1138-1139, 1152). Also, the House of Lords dismissed Lord Denning's comparisons between the House of Lords' shifting position on precedent33 and the Court of Appeal's right to do the same on the grounds that there are obvious, relevant differences between the two courts (at p. 1152-1153). While the House of Lords had sympathy for Lord Denning's principled argument, they considered the injustice caused by delays in reversing a few, clearly incorrect decisions to be overshadowed by the injustice caused by the inconsistency and uncertainty arising from an abandonment of the doctrine of precedent (at p. 1137-1138, 1146-1147, 1152-1153). Their view was captured in the following argument from principle stated by Lord Salmon.

There are now as many as 17 Lords Justices in the Court of Appeal, and I fear that if stare decisis disappears from that court there is a real risk that there might be a plethora of conflicting decisions which would create a state of irremediable confusion and uncertainty in the law. This would do far more harm than the occasional unjust result which stare decisis sometimes produces but which can be remedied by an appeal to your Lordships' House. (at p. 1153)

In general, the House of Lords was critical of Lord Denning's "one-man crusade" to undermine the doctrine of precedent (at p. 1139) and expressed surprise that the issue of the validity of the doctrine was "even arguable" (at p. 1153).

33 The reversal of the House of Lords position in 1966 was not taken in the context of a case, but was issued as a practice statement ([1966] 1 W.L.R. 1234). As such it is not in the strict sense a judicial precedent although it clearly was accepted as a binding legal pronouncement.
The approach taken by three of the Court of Appeal judges was to accept the basic rule enunciated in Young and to argue for an interpretation that could accommodate the present case. Two strands were pursued within this approach. Lord Justice Cumming-Bruce argued that the earlier decisions could be considered *per incuriam* on the grounds that a clearly incorrect interpretation of a statute qualifies as a decision reached *per incuriam* (at pp. 879-881). This is an incorrect conclusion (Moles, 1987, p. 165). Lord Justice Cumming-Bruce wrongly inferred that an obviously incorrect reading of a statute is sufficient reason for rejecting the reading as *per incuriam*. Apparently, a proper reading of this exemption also requires that the error be attributable to "ignorance or forgetfulness of some inconsistent statutory provision" (at p. 869).

Lord Justice Shaw and Sir George Baker argued that the Young formulation of the rule did not exhaust the exceptions that a proper understanding of the rule of precedent would allow.

34 Strictly speaking, a third strand was suggested which was to by-pass Young altogether and distinguish Davis from the earlier cases. This suggestion is mentioned by Sir George Baker, rejected explicitly by two others, and not entertained by the remaining two. It does not avoid the dilemma that creates the problem of interest to us - it would leave the clearly incorrect earlier decisions intact.

35 Lord Justice Cumming-Bruce was the only judge who considered the earlier two cases to be properly decided. Therefore, his argument is hypothetical.

36 I consider this to be a challenge to the application and not the validity of a secondary rule because it essentially accepts the underlying rule in Young and seeks to determine its force in a given context. It many ways its is analogous to the issue facing the court in Riggs. Although the statute expressly stated that the only way to alter a will was in writing, the court decided, in effect, that another exception could be implied. As discussed in chapter six, the authority to reformulate rules in
Given the circumstances in *Davis*, a reformulation, not a rejection, of the rule underlying *Young* was warranted. One set of arguments in support of this proposition was based on precedent. Lord Justice Shaw suggested that the *Young* decision itself recognized that some exceptions to application of the doctrine of *stare decisis* are warranted. The *Young* formulation need not be accepted as exhausting those exceptions—especially since that Court admitted some authority for a power to overrule incorrect decisions (at p. 877). The bulk of the arguments offered by Lord Justice Shaw (at pp. 877-879) and Sir George Baker (at pp. 862-864) relied heavily on reasoning from principle.

(1) In effect, both argued that requiring courts to follow an obviously incorrect decision is inconsistent with promoting respect for the administration of justice.

(2) Sir George Baker suggested that failing to allow the exception would give preference to an incorrect judicial decision at the expense of the seemingly obvious legislative will. This would be inconsistent with both the principle of the supremacy of Parliament and more importantly the judicial oath to uphold the laws of the Realm. 37

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37 In a conflict between a judicial decision and a statute, Sir George Baker consider the latter to be a proper indication of the law.
(3) Lord Justice Shaw considered the consequences for the parties in this case and in similar cases. Not allowing the exception would perpetrate an irreversible injustice on the women who were entitled under the statute to protection from violence. There was concern that unless the Court of Appeal took immediate steps, protection would, at best, be delayed until the House of Lords could reverse the earlier decisions and, at worst, could be denied indefinitely in the event that the appeal did not reach the House of Lords.

Lord Justice Shaw offered a very specific exemption (at p. 878) which he thought deserved to be added to the exemptions cited in Young; Sir George Baker's suggested exemption was much broader (at p. 863).

The House of Lords had considerable sympathy for Lord Justice Shaw's arguments based on the irreversible injustice of the individual case before the court (at p. 1153). His formulation was referred to as a "one-off" exception - i.e., an exception that is unlikely to apply to any other than the present case (at pp. 1139, 1153). As such, it was not regarded as undermining the doctrine of precedent by establishing a new class.

38 The judges plausibility concluded that, unless allowed to occupy the matrimonial home, many women would be forced to return to the abusing mate or live without their children in whatever accommodation they could secure.
39 Because of the expense of further appeal, Lord Justice Shaw was concerned that Davis might not reach the House or Lords.
40 Lord Justice Shaw's view was that the eventual House of Lords' reversal of the incorrect decision would not address the injustice during the interim period caused to women who would be forced by financial reasons to stay with their abusive mates.
of exceptions. The House of Lords thought that Sir George Baker's suggestion "was wide enough to cover any previous decision on the construction of a statute which the majority of the court thought was wrong" and that the effect of his exception would be to seriously undermine the doctrine (at p. 1139).

As the sole voice in support of the Young position on precedent, Lord Justice Goff offered three arguments for the received view: the previously mentioned references to the case law in support of binding precedent and the following arguments based on reasoning from principle.

(1) The consequences of repeated instances of rejection of earlier decisions would impair a fundamental legal value - the need for certainty (at pp. 865, 869).

(2) The consequences of judges trying to correct perceived injustice by ignoring the law has the effect of destroying the rule of law. This is captured in the adage that "hard decisions make bad law" (at p. 865).

What sense can be made of these conflicting arguments? Is the reasoning in this case incompatible with a model of rules account of judicial reasoning? Let us consider each judge's position in light of the capacity of the model of rules conception to account for their respective arguments. However, in doing this we should be clear about a difference between judicial behaviour that repudiates the existence of accepted standards of reasoning and judicial behaviour that fails to
perform well in light of them. As Fiss (1982, p. 748) remarked "[n]ot every mistake in adjudication is an example of lawlessness." The fact that human beings must reason with these standards and on occasion do so poorly or prejudicially is a separate, albeit important, issue from the question of the existence of rule-guided standards of judicial reasoning.

There would appear to be little need to question Lord Justice Goff's views on the precedent issue. His arguments from precedent and on principle were echoed unanimously by the five-member bench that delivered the House of Lords decision (at pp. 1137-1140, 1146-1147, 1149, 1152-1153, 1157). The principled arguments presented by Lord Justice Shaw and Sir George Baker suggested that the limited amount of uncertainty and inconsistency likely to result from their exceptions would be offset by the benefits of reversing the injustice caused by the incorrect interpretation of the Act. The House of Lords' agreed with Lord Justice Shaw's assessment41 and disagreed with Sir George Baker's assessment. As I said earlier, the House of Lords rejected Sir George Baker's exception because they thought that its acceptance would undermine the doctrine of precedent; Sir Baker regarded his exception as a "carefully limited" one (at p. 863). Thus, the difference between Sir George Baker's position and the House of Lords' position may depend on differences of

41 It in unclear whether the House of Lords approved of Lord's Shaw's decision in Davis or merely accepted that his exception would not undermine the doctrine of precedent (at pp. 1139, 1153).
opinions as to the likely incidence of exceptions that would be allowed under his formulation.

Lord Cumming-Bruce was, evidently, obviously mistaken in his understanding of the requirements of *per incuriam* (at p. 1136).

As suggested earlier, the dominant response of the House of Lords to Lord Denning's position was criticism of his "heterodox" views on the doctrine of precedent (at p. 1139). In the face of clear and repeatedly affirmed decisions to the contrary, Lord Denning's "one-man crusade" was considered inconsistent with the rules of acceptable practice as understood by the general body of practitioners (at p. 1137). These rebukes suggest either that Lord Denning was grossly mistaken about the law or that he had hoped to alter what was considered by the judicial community to be the acceptable standards. Either way, Lord Denning's reasoning does not threaten the existence of rules of judicial reasoning any more than a person who is confused about, or refuses to adhere to, the rules of a game, challenges the proper rules of the game. In fact, practitioners' criticism of the person's failure to conform to the proper rules is evidence of the rules' existence.

In summary, the broad disagreements in *Davis* are explicable in terms of human error or bias, and the inevitable and not unhealthy judgment that must be exercised when dealing with complex issues. These explanations of the reasoning in this
contentious case are consistent with the rule-guided account of judicial reasoning presented in this thesis.
For twenty years or more, Dworkin has been critical of attempts - most notably Hart's attempt - to portray law in terms of rules. Dworkin's major complaint with the conception of law as a union of primary and secondary rules is that it has not properly accounted for the standards to which judges are expected to adhere when applying the law (TRS, p. 81; LE, pp. 125-126). Because of the importance of this criticism and because of Dworkin's prominence in the field of legal philosophy, his challenges to a model of rules account warrant special consideration. Two interrelated sets of objections will be examined. I will explore three of Dworkin's explicit claims that a model of rules conception fails to account adequately for the range of disputes that judges and lawyers have about the law. And the two major challenges implied by Dworkin's rival account of judicial reasoning will be explained and assessed.

1. Rules and legal disputes

In *Law's Empire*, Dworkin launched a new set of attacks (and intensified old criticisms) against a model of rules account of

1 One of Dworkin's earliest criticisms rested on putative logical differences between "rules" and "principles" (TRS, pp. 22-28). In *Taking Rights Seriously*, Dworkin argued that principles are undeniably part of the norms of a legal system, and that Hart's model of rules fails to account for the role of principles in judicial decision making. Since then, Dworkin's
law or, as he now calls it, "conventionalism." The underlying theme of these interrelated criticisms, as he explains in the book's opening chapter, is the inability of the model of rules to account for the way jurists commonly talk about disputes over law. According to Dworkin, Hart's account implies that answering the question "What is law?" is relatively uncontroversial and largely a matter of historical fact - "[l]aw exists as a plain fact, in other words, what the law is in no way depends on what it should be" (LE, p. 7). This arises because conventionalism requires "that the tests for law should be matters of social history rather than matters of policy or morality that might be inherently controversial" (TRS, pp. 346-347). In other words, conventionalism requires a "more-or-less mechanical test" of legal pedigree as the "necessary and sufficient conditions for the truth of propositions about what the law is, as distinct from propositions about what the law contentions about the logical differences between rules and principles have been successfully criticized by many writers (Bell, 1972, pp. 934-948; Coval & Smith, 1986, pp. 73-95; Eekelaar, 1973, pp. 30ff.; Hughes, 1968, p. 419; MacCormick, 1978, pp. 153ff., 229-246; Raz, 1983b; Soper, 1984; Waluchow, 1980, pp. 116ff.). There is no need to rehearse these arguments, especially since it appears that Dworkin is no longer committed to the view - significantly, in Law's Empire, Dworkin does not revive this challenge.

Dworkin refers to rules as "conventions," but he must be prepared to accept the more typical "rule" label. Otherwise it is questionable whether he can be taken to be arguing against Hart.

The same argument is used in Taking Rights Seriously and in A Matter of Principle.

In an earlier piece, Dworkin writes: "Legal positivists believe that propositions of law are indeed wholly descriptive: they are pieces of history. A proposition of law, in their view, is true just in case some event of a designated lawmaking kind has taken place, and otherwise not" (MP, p. 147).
should be" (TRS, p. 346). Yet, informed jurists often disagree about what the law requires and judges often ask themselves how they should resolve the dispute (LE, pp. 122-123). These commonplace disagreements about law, so the criticism goes, are evidence that Hart's model of rules is unable to account for a key feature of legal practice.

It will be useful, in becoming clearer about the specific dimensions of this criticism, to heed Collingwood's advice: "never think you understand any statement made by a philosopher until you have decided, with the utmost possible accuracy, what the question is to which he means it for an answer" (Moles, 1987, p. 4). Despite the apparent similar form of their guiding question - "What is law?" - Hart and Dworkin have set different tasks for themselves. As we will see, the differences hinge on a fundamental ambiguity in the use of the term "law." Clarifying this ambiguity will help to explain why Hart is not committed to the identification of all law in terms of a mechanical test of pedigree.

In The Concept of Law, Hart's primary concern is with problems related to the identification of legal rules as opposed to their application in particular circumstances. His

5 As Summers (1983, p. 18) puts it: "The law is not something that simply 'is the case' -- a hard chunk of reality. Rather 'the law' must often be argued for."
6 Collingwood is also reported to have written that "every statement that anybody ever makes is made in answer to a question" (Moles, 1987, p. 2).
7 Hart was more concerned to address legal realist objections to, and legal formalist pitfalls in, characterizing law as a
conception focusses on conditions for recognizing rules as valid norms of a legal system and not on the criteria for subsumption of specific cases under those legal norms. In other words, he attends to questions about the existence of a legal rule not its application (CL, p. 106; Soper, 1984, p. 8). Hart admits this preoccupation when he suggests that it is beyond the scope of his present project to "show the varied types of reasoning which courts characteristically use" (CL, p. 144). It is not surprising then, as was discussed in chapter four, that Hart's account of law as a union of primary and secondary rules includes little explication of the standards for applying those rules (Waluchow, 1980, pp. 3-4). In short, the question driving Hart's work is "What is a law?".

For his part, Dworkin sees the classic jurisprudential question in terms of justification for claims about specific legal entitlements or prohibitions (LE, p. 4).8 Thus the focus of the debate is on the question "What is the law?" (TRS, p. 14). This way of casting the issue collapses a distinction between a law and its application in specific cases—between primary rules and the "scope and ambit" of primary rules (Soper, 1984, p. 8).9

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8 In an early article, Dworkin (1965, p. 640) wrote: "What, in general, is a good reason for decision by a court of law? This is the [his emphasis] question of jurisprudence; it has been asked in an amazing number of forms, of which the classic "What is Law?" is only the briefest."

9 Raz (1985a, p. 315) uses the labels "pure" and "applied" legal statements to draw the same distinction. He defines the former as a statement about the law depending for its truth on law only, while the latter depends on both law and fact. These descriptions are inaccurate since, according to Hart, a primary
Dworkin prefers to talk in terms of "propositions of law"—"statements and claims people make about what the law allows or prohibits or entitles them to have" (LE, p. 4). Thus, propositions of law refer both to official formulations of legal rules contained, inter alia, in statutes, constitutions, and common law, and to assertions about the disposition of specific cases according to those legal rules.10

As should be apparent, Dworkin’s claim that a simple (formal) rule of recognition cannot account for all propositions of law is not a challenge to Hart’s position. Hart is committed only to the claim that the validity of all primary and secondary legal rules (with the exception of the ultimate rule of recognition) can be accounted for by criteria of validity contained in the rules of recognition for that system (e.g., it must have been passed in the prescribed fashion by a duly authorized agency). Contrary to Dworkin’s inference, Hart is not committed to the claim that the truth value of propositions about the application of a primary rule is decided on the basis of a mechanical test of pedigree. Dworkin has confused recognizing the validity of a norm with construing its content (Coval &

rule is, itself, the product of the application of a secondary rule of recognition in a specific situation. For example, a bill becomes law only when it meets the conditions required by the rule of recognition, say, that it receive approval of both Houses of Parliament and be signed by the Queen’s representative. This is not significantly different from deciding that I am guilty of drunken driving if my breathalyzer score is found to be above the specified limit and I have had control of an automobile. 10 Dworkin draws attention to the difference between "a law" and "the law" admitting, among other things, that the former expression "certainly does suggest a rule." (TRS, p. 38).
It is clear that Dworkin's criticism that primary rules and secondary rules of recognition cannot account for the disputes that judges have about the law must be restated. Dworkin must be understood to argue that disputes about "the law" cannot be explained in terms of clearly agreed upon, preexisting rules of application. As we will see, Dworkin has two reasons for this criticism: a model of rules account fails to explain judicial decision making in virtually all novel or problematic situations and the model cannot account for extensive historical changes in the standards judges use to apply the law. I will refer to these as the difficult cases criticism and the shifting standards criticism, respectively. Also, Dworkin must be understood to argue that what practitioners call "a law" can not entirely be identified, as Hart apparently supposes, by some historical social fact such as their passage by an authorized legislature or their announcement by the courts. I will call this the pedigree criticism.

1.1 The difficult cases criticism

As I have suggested, Dworkin argues that novel or problematic cases cannot be resolved by a model of rules theory of adjudication (LE, p. 129). While the difficult cases criticism is a well-founded criticism of Hart's explication of judicial reasoning, it is less certain that it survives against a more complete articulation of a rule-guided account of judicial reasoning.

11 Hart implicitly draws this distinction as evidenced by the following remarks: "if doubts arise as to what the rules are or as to the precise scope of some given rule" (CL, p. 90).
reasoning, such as the one that I offer in chapters four through seven. We can see why this criticism does more to highlight important gaps or errors in Hart's account of law than it does to refute the possibility of such an account by exploring Dworkin's view of a rule-guided account of judicial reasoning.

Dworkin invites us to distinguish between the "explicit" and "implicit" extension of a rule (LE, p. 123). The former refers to a generally accepted, clearly delineated range of situations covered by a rule. The latter refers to situations that arguably could fall under a rule but do not clearly do so. These distinctions parallel what Hart refers to as the "core" and "penumbra" of a rule. Dworkin refers to the theory that the law is exhausted by the explicit denotation of legal rules as "strict conventionalism" (LE, p. 124). He correctly indicates that many if not all cases reaching appellate courts would likely fall outside the core of legal rules. Therefore, strict conventionalism offers no legal resolution in these situations (LE, pp. 125, 128-129). He refers to the theory that the law also extends to the implicit denotation of legal rules as "soft conventionalism." While this theory avoids the problem of failing to provide a legal resolution in difficult cases, it does so by ceasing to be a rule-governed theory (LE, pp. 126-127). Dworkin suggests that if the rules, by themselves, do not dictate a resolution, then judges must appeal to other factors in

12 "Strict conventionalism must claim a gap in the law . . . whenever a statute is vague or ambiguous or otherwise troublesome and there is no further convention setting how it must be read" (LE, pp. 125-126).
deciding whether or not a given situation will be brought within the implicit extension of a rule. Typically, this would include consideration of "substantive views of justice," "moral principles," and "idealizing law" (LE, p. 128). Since this is tantamount to developing a political theory of law, Dworkin concludes that soft conventionalism collapses into his rival theory of judicial reasoning.

As should be apparent, Dworkin's claim that no model of rules can account for judicial application of the law in novel or problematic situations is predicated on an excessively restrictive view of rules. For example, he suggests that a "rulebook community" sees legislation simply "as negotiated compromises that carry no more or deeper meaning than the text the statute declares" (LE, pp. 345-346). This view is at best an inaccurate assessment of what is involved in statutory and constitutional interpretation. As I have documented, second-order rules provide sophisticated standards for justifying an interpretation of a statute or common law in situations unanticipated by legislators or prior judges. Justice Dickson's interpretation of the troublesome notion of what constitutes "unreasonable" search and seizure in *Hunter v. Southam Inc.* was only one of a number of examples cited to establish this capacity. It is significant, that in asserting the inadequacy of a model of rules account of interpretation, Dworkin discusses statutory interpretation almost exclusively in the context of the use of legislative history (LE, pp. 314ff.). Obviously,
situations not anticipated by the drafters will not be resolved by interpretive rules dealing exclusively with legislative history. It is quite another matter to infer that they exhaust the rule-guided criteria for resolving disputes over interpretation.13 This inference is all the more surprising since, as indicated earlier, resort to legislative history is virtually banned in Great Britain and has limited acceptance in Canada.14 Even in the United States, where greater reliance is placed on legislative history, judges do not accept the "speakers' meaning" theory.15 In short, a grossly inadequate accounting of secondary rules of application undermines the force of Dworkin's difficult cases criticism.

1.2 The shifting standards criticism

Dworkin's second challenge to a model of rules conception of law is its apparent inability to account for changing judicial standards (LE, pp. 89-90; pp. 137-139). Dworkin cites a "sea of changes" in the role of legislative intention in interpreting law

13 Dworkin reduces conceptions of statutory interpretation to two options. Either judges treat statutes as direct communications and interpret legislative intent in terms of the actual thoughts of legislators, or they can treat statutes and legislators' remarks as political events and select the most politically attractive interpretation of these events (LE, p. 314).
14 This is particularly damaging to Dworkin's conception since he urges that official statements of legislative purpose made in legislative debates be treated as being as important as the statutes themselves (LE, p. 343).
15 The reluctance of Canadian and British courts even to consider remarks made by legislators has already been mentioned. In the United States, Tushnet (1988, p. 22) reports that in 1985 former Attorney General Edwin Meese issued the call for a return to a "jurisprudence of original intention" and that Supreme Court Judge Brennan responded that such a jurisprudence was impossible.
as a prime example of judicial practices that defy explanation in terms of rule-guided standards (LE, pp. 90, 137).16 More generally, Dworkin claims that no "common criteria or ground rules" account for the reasons that judges rely upon to justify subsumption of particular situations under a rule (LE, p. 90). This absence of agreed conventions is demonstrated supposedly by the fact that, in the midst of adjudicating disputes, judges often change settled ways of interpreting law in response to arguments based on social and political considerations (LE, pp. 137-139). Unlike the previous challenge which focussed on the apparent inability of a model of rules conception to resolve disputes about application of primary rules, this challenge claims that there is no rule-governed way to account for changes and inconsistencies in the second-order standards judges employ when applying the law.

To a large extent, my defence against this challenge has already been provided in the course of explicating the modes of judicial reasoning. I have argued that a complex set of factors account for changes in secondary rules of application. These factors include the flexibility of legal rules when applied in novel situations, ramifications of changes in other dimensions of legal practice, and judicial error and confusion about proper standards. Most significantly, the modes of judicial reasoning, in particular reasoning from principle, provide what amounts to an internal anomaly-resolving capacity. This capacity allows for

16 Retroactive taxation and the enforcement of popular morality are also mentioned (LE, pp. 89-90).
judicial resolution of disputes about particular secondary rules by evaluating alternatives in light of the broader constellation of legal standards. The rule-guided nature of this second-order decision-making capacity was documented with references to several cases. For example, in the chapter on interpretation, I discussed *Holy Trinity Church v. United States* where an established prohibition against the use of legislative remarks was overruled in the midst of resolution of a case. The Court decided that the consequences of maintaining the prohibition meant that the express intentions of the legislators would not be followed. It was considered contrary to fundamental legal principles to adhere rigidly to a complete prohibition in cases where statutory wording was vague or ambiguous and legislative history was unequivocal. In chapter seven, when considering *Law Society v. Skapinker*, the legitimacy of using section headings to control interpretation of a Charter provision was confirmed by appeal to established interpretive guidelines. In addition, in *Davis v. Johnson*, the Court of Appeal’s justifications for rejecting or modifying the doctrine of precedent were adequately accounted for in terms of a model of rules. In short, there is ample evidence of the ability of a model of rules conception to account for evolving judicial standards.

1.3 The pedigree criticism

Dworkin’s third, but related, criticism challenges the capacity of rules of recognition to establish the legal validity
of all standards relied upon in adjudication (TRS, pp. 41-45, 64-68, 338-345). There are actually two strands to the challenge. One is the claim that, contrary to what Hart suggests, there are no simple, formal criteria for the amount of "institutional support" required for a rule to be recognized as a legal rule. I will refer to this as the mechanical pedigree challenge. The second strand in this criticism is Dworkin's assertion that, while many standards may be identified by rules of recognition, there are no formal criteria establishing the legal validity of all standards relied upon in judicial decision making - the legal validity of at least some standards depends on the political justifiability of the content of those standards. Because this second strand is inextricably linked with Dworkin's rival account of judicial reasoning, I will consider the challenge only after outlining his theory.

Dworkin suggests that the criteria of validity for a legal standard, implicit in Hart's rules of recognition, consist of simple formal tests that are completely independent of the content of any standard (TRS, p. 62). The mechanical pedigree challenge builds on the fact that judges often dispute whether or not a law is a valid law, and that these disputes are not purely empirical or historical disagreements. Thus, the test for legal validity cannot be as Hart's theory suggests (LE, pp. 6-15).

This criticism fails because there is nothing about the rules of recognition, even according to Hart's account of them,
which requires that the criteria of validity they establish be uncontroversial and purely formal. It is true that many of Hart's remarks suggest that rules of recognition establish content-neutral, matter-of-fact criteria of validity. For example, Hart writes that:

Whenever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. The criteria so provided may, as we have seen, take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specific persons, or to past judicial decisions in particular cases. (CL, p. 97)

However, Hart also makes clear, specifically in connection with the United States Constitution, that some rules of recognition establish criteria of validity that "explicitly incorporate principles of justice or substantive moral values" (CL, p. 199). In light of these remarks, it is tempting, but I think incorrect, to conclude that some rules of recognition stipulate straightforward mechanical tests while others involve complex and often controversial considerations. Rather, I suggest that all criteria of validity are of the latter kind and that only as a matter of practical convenience do we regard any criterion of validity as reducible to a prima facie mechanical pedigree test. Consider, for example, the following rule of recognition offered by Hart: "Whatever the Queen in Parliament enacts is law" (CL, p. 108). It typically would be sufficient indication that this criterion was met if the legislation had

17 The following argument builds on ideas suggested by Waluchow (1980, pp. 215ff.).
received three readings in Parliament and the royal seal was attached to the official proclamation of the legislation. However, suppose a legislative step was improperly carried out or voting irregularities resulted in the subsequent invalidation of a national election. On the basis of these breaches of electoral or legislative regulations, the court might invalidate the legislation, deciding that Parliament had not enacted, properly speaking, the law—that is, some criteria required for enactment had not been met. This type of assessment occurs whenever the courts invalidate legislation because it is held to be *ultra vires* of the enacting body.

Nothing about the rules of recognition precludes there being uncertainty over the validity of primary rules of law. The possibility of controversy is not limited to empirical disputes about historical facts (i.e., whether the required actions took place) but also extends to doubts about satisfaction of the procedural and substantive requirements contained in secondary rules of recognition. For example, the validity of unilingual laws passed in Manitoba raised difficult constitutional questions. Determining whether or not a primary rule is "a law" is really a disguised dispute about "the law in a given case"—i.e., about the application of the relevant rules of recognition to the case at bar.

18 Hart expressly suggests that the courts may be asked to settle disputes about what "enacted by Parliament" means (*CL*, p. 145).
Two important features of rules of recognition emerge from this discussion: (1) the validity of a primary rule is determined by the application of what is essentially a complex set of rules of recognition and (2) the reduction of these rules to simple tests is typically sufficient public indication that the conditions of the secondary rules have been met. In other words, a mechanical pedigree test should be regarded as a prima facie indication of validity and, in the absence of grounds for suspicion, is sufficient to establish validity. Notice that the proclamation of a statute is presumed to imply that all procedural and substantive criteria of validity are met. Typically that presumption would stand and the statute would be enforced until a court ruled otherwise.19

There is reason to suspect that Dworkin has modified his mechanical pedigree criticism since, increasingly, he recognizes the need for a high degree of consensus about the standards comprising a given legal system. As he says there must be "enough initial agreement about what practices are legal practices" otherwise judges will not be interpreting the same entity (LE, p. 91). This is the equivalent of literary critics needing to agree on the body of words constituting the text of a book before arguing about the best interpretation of that text.20

Dworkin's recognition that there must be a broad and near

19 In the absence of an appeal to a higher court or overruling, the presumption of validity applies to judicial decisions.
20 The requirement that the object of interpretations contain "roughly the same raw data" is a logical one. Without it we could not begin to talk about which was the better interpretation because they would not be interpretations of the same object.
universal consensus as to the valid elements of a legal system at the "pre-interpretive stage" goes a long way to admitting the existence of clear distinguishing features that legal standards must possess. With one important exception, this is tantamount to acceptance of Hart's rules of recognition by which practitioners identify the legal rules (in the strict sense), legal principles and the host of other legal norms (interpretive conventions and presumptions, doctrines, maxims, and so on) that comprise their legal system. While Dworkin must now admit that there are obvious features which distinguish most legal standards from most non-legal standards, he denies the possibility of identifying all legal standards by appealing to rules of recognition. It is this objection that underlies the thrust of his current criticisms of Hart's model of rules. As Raz (1984, pp. 81-83) suggests, in the later parts of Taking Rights Seriously, Dworkin had already committed himself to some notion of legal validity. Raz believes that Dworkin's remaining dispute with Hart on this point is whether the criteria of validity are exclusively identified by rules of recognition or whether, in disputed situations, they are identified by considerations of political morality - i.e., a standard is a valid legal standard if it fits with the best political justification for legal practice as a whole. In effect, Dworkin claims that his theory

21 Hart appreciates the inevitability of some uncertainty about the validity of those primary and secondary rules at the edges of the rule of recognition (CL, pp. 144-150).
and not Hart's rules of recognition accounts for the criteria of legal validity.22

2. Dworkin's rival explanation

As suggested at the outset of the chapter, a pair of challenges to a model of rules account of judicial reasoning is implied by Dworkin's rival explication of judicial reasoning. I have just mentioned Dworkin's claim that the criteria for legal validity include appeals to political justification of the law's content. The second implied challenge pertains to a requirement that judges justify their decisions in light of overall coherence. I will first outline the major elements of Dworkin's theory of judicial reasoning and then examine these two rival explications of aspects of judicial reasoning.

2.1 Dworkin's theory of judicial reasoning

For Dworkin, judicial reasoning is, at heart, political interpretation (LE, pp. 87ff., 254-258, 410). It is interpretive because judges adjudicate by constructing a theory about what the law requires in a given instance. Particularly in difficult cases, but also in easier cases, judges confront rival explanations of what the law requires and they must select the

22 As indicated earlier, Hart accepts that some rules of recognition establish criteria of validity that are moral values. The difference between Dworkin and Hart on this issue is that Hart believes that these "moral" values are valid legal considerations because they are specified in law, whereas Dworkin believes that "moral" values may be valid legal considerations because if they are part of the most defensible, coherent justification for our legal system.
best from among these plausible alternatives (LE, pp. 264-266). To do so responsibly, judges must interpret what would be consistent with the legal system as a whole, or at least with an area or field of law. The correct disposition of a case must fit with the relevant statutes, prior decisions, and judicial practices. However, alternative dispositions of a case may "fit" with different interpretations of the relevant legal phenomena. For example, as we will see later in this chapter, Dworkin offers three possible interpretations of the constellation of legal data on the equal protection issue raised by the famous U.S. school segregation case, Brown v. Board of Education23 (LE, pp. 382-384). Like interpretations of literature, interpretations of social practices such as law require that the final arbiter decide which set of values ascribed by the varying interpretations shows the enterprise in its best light, all things considered (LE, pp. 45ff.). This is so because different plausible interpretations often impute different values or functions to a particular legal system or area of law (LE, pp. 52-53). In the school segregation case, the one interpretation that supported a finding in favour of segregated schools was, in Dworkin’s view, inconsistent with the values that he believes justify American constitutional practice as a whole (LE, p. 387). In view of this inconsistency, Dworkin concludes that the judges correctly decided in favour of non-segregated education (LE, pp. 388-389).

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Judicial reasoning is political because the values that show the legal system in its best light are the values that offer the best justification for the present legal system. That is, the best interpretation of the law in a particular case depends, in the final analysis, on the judge's assessment of the most acceptable reasons for the continued existence of the legal system (LE, pp. 87ff.). While it is a political decision, it is not identical to the decision a legislator might make in deciding what the law should be. Judicial decision making must conform to special requirements arising from the role judges play in the legal system (LE, pp. 379-380). Dworkin's analysis of British and American legal systems leads him to ascribe four fundamental ideals to legal practice in these jurisdictions: justice, fairness, procedural due process, and integrity (LE, pp. 164-167). These values provide the criteria for distinguishing among rival plausible interpretations of the law. Dworkin's explication of these virtues, which does not correspond to typical uses of the terms, has been summarized by one reviewer as follows:

**Justice** requires that the outcomes of all processes of government respect substantive individual rights such as freedom of religion, and it requires as well that the community's resources should be distributed in a way that treats each citizen as equally entitled to the community's concern. **Fairness** concerns the lawmaking process, and requires that political power be distributed democratically so that people will have a roughly equal chance to have their opinions count. **Procedural due process** concerns the

24 Dworkin admits that "[t]hese names are somewhat arbitrary; different names are often used in political philosophy, and sometimes one of the virtues I distinguish is treated as a case of another. Procedural due process is often called a kind of fairness or a kind of justice, for example" (LE, p. 164).
application of law, and requires that people should have reasonable notice of what their legal rights are and access to procedures that give them a reasonable opportunity to enforce those rights. Finally, integrity requires that the law should be principled and internally consistent, so that the community may speak through its laws as if with a single voice (Grey, 1987, p. 34).

Dworkin calls his theory "law as integrity" (LE, p. 94) because, in his opinion, this virtue is the overarching ideal of Anglo-American legal practice (LE, p. 400). This requires that any interpretation of the law reflects, as much as actual practice allows, a coherent justification of the practice as a whole. More specifically, for judges adopting Dworkin's explication of the virtues, 25 it means that the best interpretation of what the law requires will be the one that provides the most coherent arrangement of "justice," "fairness," and "procedural due process" attributable to the legal practice in which the judge operates (LE, pp. 164-167, 225, 404-405).

This summary of Dworkin's theory of judicial reasoning provides a background against which to consider the two challenges to a model of rules raised by his account of judicial reasoning. Dworkin's account places a premium on "integrity" - that judges treat the law as a morally coherent practice (LE, p. 176). This adjudicative principle requires that judges decide a case on the basis of the principle that is consistent with the

25 Not all judges will or need see it the way Dworkin does. In fact, he suggests that each judge (and citizen) has a responsibility to come to his or her own account of the virtues underlying our legal system (LE, pp. 86-87, 408). The proper limits of law are bounded by individual conceptions of what is politically justifiable (LE, pp. 412-413).
best political justification for law as a coherent social practice. There are two important differences between Dworkin's conception of judicial reasoning and the one I outlined in the previous chapters: the legitimacy of appeals to "extra-legal" standards and the requirement of overall coherence.26 A judge under Dworkin's scheme would defend a principled decision by appealing to the political justification for legal practice; the position I put forward requires that judges defend a decision in light of explicit and implicit (embedded) legal standards. For Dworkin, the justification of a decision must be, so far as is possible, in terms of a coherent theory of political morality - i.e., reflect a single, uncompromised justification in light of the community's public standards of justice and fairness (LE, p. 219).27 According to the account I defend, judges are not

26 It has often been incorrectly thought that Dworkin precludes consideration of consequences. Dworkin is opposed to judges deciding on the basis of what he calls a "pure argument of policy" i.e., "a routine utilitarian calculation" of cost versus benefit (MP, p. 77). He believes that a party may be entitled to a judgment even though the public interest would be better served if the decision was in favour of the other side (MP, p. 76). This is consistent with the position implied by the discussion in chapter four of the weighting of legal arguments.

27 For example, Dworkin suggests:

Judges who accept the interpretive ideal of integrity decide hard cases by trying to find in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. (LE, p. 255)

Or, as Dworkin later says, judges must choose between rival interpretations of a statute or line of cases "by asking which [interpretation] shows the community's structure as a whole - its public standards as a whole - in a better light from the standpoint of political morality. (LE, p. 256). In the context of discussing McLoughlin v. O'Brien ([1983] 1 A.C. 410) Dworkin explains:

Deciding whether the law grants Mrs. McLoughlin compensation for her injury, for example, means deciding whether legal practice is seen in a better light if we assume the
required to assume that legal standards are part of a larger coherent scheme, nor must they construct a theory of political morality in order to decide which alternative to select.

2.2 Appeals to extra-legal principles

Dworkin correctly notes that standards that have not been previously cited in textbooks or in prior judicial decisions are often used by judges in justifying their decisions (TRS, pp. 340, 344). Presumably, according to Dworkin, a model of rules equates the validity of legal standards entirely in terms of express statements by authorities. This is not a particularly convincing objection since even Dworkin recognizes that principles which are "embedded" or "implicit" in legal rules, practices and institutions have "institutional support" (TRS, pp. 64-65). However, Dworkin believes that identifying embedded legal standards amounts to moral theorizing. He suggests that in most situations any number of values can qualify as the implicit legal standards: in case law, several principles are often plausible candidates for what is taken to be "implicit" in a set of prior cases (TRS, p. 341); in statutory interpretation, a particular statute could be taken to serve several different purposes (LE, pp. 99-101); and in explicating rules of adjudication, competing political theories provide different versions of the implicit approach (MP, p. 41). Dworkin’s "plausible" suggestion for resolving this predicament is that judges select from among rival community has accepted the principle that people in her position are entitled to compensation. (LE, pp. 225-226)
"embedded" principles or "implicit" values on the basis of the principle providing the most flattering justification for the body of law in question (TRS, p. 342). Thus, according to Dworkin "the process of 'drawing' principles from institutional history is the process of judging justifications of that history" (TRS, p. 343).

Dworkin's justification for appeal to "extra-legal" principles is flawed. His notion of what counts as an embedded principle is inconsistent with accepted practice because it collapses a distinction between the principles that possibly could be offered as justification for particular statutes, decisions and practices, and the principles that are defensibly attributed to a system that enacts those rules, reached those decisions, and adopts those practices.28 To help explain the importance of protecting this distinction let us consider the implications of admitting any possible justification for a rule as the principle or standard implied by the rule.29 Imagine, for the sake of argument, that parents establish a rule limiting to one hour per day the amount of television their children may watch.28 In discussing disputed interpretations of prior cases in McLoughlin, Dworkin has his hypothetical judge, Hercules, offer six different "interpretations of the precedent cases even before he reads them" (LE, p. 240). In testing out these interpretations Hercules is instructed to consider "whether a single political official could [my emphasis] have given the verdicts of the precedent cases if that official were consciously and coherently enforcing the principles that form the interpretation" (LE, p. 242).

29 As was discussed in chapter three, Dworkin's notion of fit is so loose that as long as a principle was a plausible justification for a rule it could be acceptable as the principle implied by the rule.
Suppose, one child realizes that on a given day she will not be available to watch television and so she requests permission to watch television for two hours on another day. The rule’s proper application in this situation depends on what is taken to be the rule’s purpose. If the point is to prevent possible damage to eyesight that is believed to occur when children watch sustained amounts of television in a short duration, then the rule would not allow accumulation of viewing time. However, if the point of the rule is to leave time for the children to develop other long term interests, then, provided her total amount of viewing time is not increased, the rule’s purpose would be met by allowing flexibility in allotting viewing time. Alternatively, if the point is to ensure that children have ample time to complete their homework, then the proper application of the rule would be contingent on the amount of homework she had been assigned on the day in question. The generally accepted notion of "embedded" principle, as I read it, holds that, without further information, we can be no more specific about the point of this rule beyond claiming that its purpose is to limit the amount of television that children watch. If we know no more about the rule’s purpose than is indicated above, (i.e., we cannot determine which of these possible purposes underlies, or is embedded or could be taken to be implied by the rule) we cannot decide whether to allow the child to accumulate television time on basis of the rule’s purpose.

30 This example is suggested by Hughes (1968, pp. 427-428) although he employs it in a different context.
On the other hand, Dworkin invites us to select from the possible reasons for a rule the one that would show the rule in its best light. It may turn out that the purpose that afforded children the maximal amount of autonomy would be regarded by the interpreter as the most defensible justification for the rule. This attributed justification could be at odds with what was the parent's stated or generally agreed point of the rule. As Waluchow (1985, p. 51) observes, Dworkin's account of statutory interpretation does not require speculation about what the legislators as a matter of fact intended, or even on what is explicitly stated or generally acknowledged to be the aim of the statute. It appears that in Dworkin's view it is quite proper for Hercules [Dworkin's mythical judge] to decide a case one way even though the intentions of the legislators clearly were, or are, that it be decided in some other way.

Compare this position with Justice Frankfurter's (1947, p. 539) observation that,

the purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms.

Dworkin justifies appealing to political morality because it is the only defensible way for judges to reach a principled decision when faced with several plausible alternatives. He recommends that judges appeal to the principles that (could) justify these alternatives (LE, p. 250). In other words, resolution of difficult cases pushes judges beyond the law to the political values that subsume the law (LE, pp. 217-219). There
are two reasons for rejecting this view: it is not inevitable that judges will be forced to decide between competing plausible interpretations by appealing to political morality, and appeals of the sort Dworkin suggests are not representative of judicial practices.

The account of reasoning from principle I offered in chapter seven outlined a form of judicial resolution of disputes over primary and secondary rules that does not require appeals to standards that are not clearly grounded in law. The legitimacy of judicial appeals to "extra-legal" principles was also discussed. And, as was suggested above, characterizing a principle as an "embedded" legal principle, merely because it could possibly be offered as a desirable justification for a statute or legal practice, is inconsistent with the recognized interpretation of this notion. As the Justice Frankfurter reference indicated, speculating about the politically most desirable justification for legislation or legal practices is considered beyond the authority of judges. In addition, cases like Miranda, suggest that embedded legal principles refer to legally sanctioned values such as the recognized purpose(s) of legislation and legal institutions, and the interests clearly protected by individual laws and bodies of laws. As MacCormick

31 The likelihood of profoundly different justifications being offered for any particular rule or practice is one explanation why judges would not be authorized to resort to further levels of justification (Raz, 1985b, pp. 22-24).
(1973, p. 166) suggests, the norms of the legal system supply the concrete conception of justice.

2.3 Overall coherence

A second discrepancy between Dworkin's conception of judicial reasoning and the one I propose concerns appeals to overall coherence. As we saw, overall coherence requires that judges assess the acceptability of an individual legal proposition by evaluating its fit with the most "politically" defensible conception of law. There are several reasons for dismissing Dworkin's claims about the "integrity" of law as a challenge to the account of judicial reasoning I propose. One reason is that Dworkin's proposal may, in fact, collapse into the account I offer. A second reason is that Dworkin may not purport to claim that judges regard appeals to overall coherence as acceptable practice. In the next section, I will consider a third reason - the implausibility of Dworkin's account of overall coherence when considered in light of two judicial opinions.

In the final chapter of Law's Empire, Dworkin announces what amounts to a significant compromise in his account of the role of overall coherence in judicial reasoning when he admits that his conception of integrity is an idealized picture of law. This admission is raised in the context of distinguishing two levels or kinds of integrity: inclusive and pure integrity. Pure integrity is the ideal of a coherence justification of legal practice unsoiled by the constraints imposed by actual
institutional practices (LE, p. 407). However, judicial implementation of this ideal is possible only if the legislation within a jurisdiction reflects a coherent theory of the political morality of the community. As Dworkin says,

[w]e hope that our legislature will recognize what justice requires so that no practical conflict remains between justice and legislative supremacy; we hope that departments of law will be rearranged, in professional and public understanding, so that local priority presents no impediment to a judge seeking a natural flow of principle throughout law. (LE, p. 406)

Dworkin admits that legislators often fail to live up to this ideal and judges are left to implement inclusive integrity (LE, p. 407) - "[t]he law we have, the actual concrete law for us, is fixed by inclusive integrity. This is law for the judge, the law he is obliged to declare and enforce" (LE, p. 406). Unlike pure integrity which implies substantive coherence - the content of individual principles must be consistent with the interpreter's perception of the overall justification of law -

32 Pure integrity "declares how the community's practices must be reformed" (LE, p. 407).
33 It is implausible to expect that laws regulating diffuse aspects of political life, passed by countless different bodies espousing opposing political ideologies will share a common justification sufficiently coherent to be useful in providing direction in controversial cases. Hart (1978, p. 2), for one, suggests that "any morally tolerable account of this institution [criminal punishment] must exhibit it as a compromise between distinct and partly conflicting principles." Hart (1978, p. 10) also suggests that the law of contract exhibits "a plurality of features which can only be understood as a compromise between partly discrepant principles." Harry Kalven, cited as one of America's most insightful legal scholars, is reported to believe that U.S. constitutional law is "a sprawling body of judge-made law fashioned out of the gradual accretion of individual judgments" and to doubt whether "any theory or underlying philosophy could embrace the motley array of problems that courts actually confront in applying First Amendment law to life" (Schmidt, 1988, p. 12).
inclusive integrity is tied to formal criteria - a principle may be acceptable simply because it is embodied in legislation or implied by precedent.

Legislative supremacy, which obligates Hercules to give effect to statutes even when these produce substantive incoherence, is a matter of fairness because it protects the power of the majority to make the law it wants. Strict doctrines of precedent, the practices of legislative history, and local priority are largely, though in different ways, matters of procedural due process [i.e., deal with "the right procedures for enforcing rules and regulations the system has produced"] because they encourage citizens to rely on doctrinal pronouncements and assumptions that it would be wrong to betray in judging them after the fact. (LE, p. 405)

In other words, judges are precluded from appealing to coherence theories of political morality (i.e., pure integrity) until the recognized legal standards protected by the principle of "fairness" are exhausted.34 It is interesting to note that Dworkin refers to three types of second-order criteria for applying the law - precedent, interpretation and local priority35 - as requirements of procedural due process. If the modes of reasoning I offer are the accepted "procedural" standards of adjudication - part of what Dworkin calls "the legal standards of the day" (LE, p. 218) - then Dworkin's commitment to inclusive integrity requires that his judges adhere to them.36 Thus,

34 Dworkin allows that in "particular and unusual circumstances" considerations of political morality may outweigh respect for explicitly sanctioned legal standards (LE, pp. 218-219).
35 Local priority is a scaled down version of coherence which recognizes that individual areas of law may be governed by their own set of legal standards. In other words, the acceptability of a principle would depend on it not contradicting established principles in that area of law (LE, p. 250).
36 Because Dworkin believes that judges must develop their own theory of judicial reasoning by interpreting legal practice, he would claim that judges are authorized to draw different
Dworkin's notion of inclusive integrity may collapse into the modes of reasoning I articulate. If this is so, there may be few occasions, if any, where the recognized first- and second-order standards fail to control the decision in the instant case and thereby authorize judicial resort to Dworkin's overall coherence.

If Dworkin concedes that my account (or a similar account) of the modes of reasoning are faithful representations of acceptable judicial practice (i.e., what Dworkin calls "the legal standards of the day"), he must relegate his theory of adjudication to the most extreme cases, where the modes of reasoning I articulate fail to control judicial decision making. There is some attraction to the notion that, after exhausting the recognized standards of adjudication, judges would appeal to their view of the overall (idealized) point of law - to conceive of law in its best light - in attempting to decide the otherwise unresolved issue before them. Since Dworkin apparently holds a narrow and inflexible view of the "legal standards of the day," (viz., rules apply only to the extent of their explicit denotation), it is not surprising that he believes judges would need to resort to his adjudicative criteria in all "difficult" (i.e., most appellate) cases (LE, pp. 126-128). However, a recurring emphasis of the account of the modes of reasoning I have presented has been to show that a rule-guided model of conceptions of the standards of judicial reasoning depending on their vision of legal practice in its most justifiable light (LE, p. 255). As was argued in chapter three, this suggestion is suspect especially in virtue of Dworkin's loose standards of "fit" with legal practice.
judicial reasoning can account for standards that control judges' decisions in almost all cases. Thus, if Dworkin accepts that the account I have articulated reflects the "standards of the day," and if I am right about the extent to which they control decision making in difficult cases, then Dworkin renders his theory superfluous. If Dworkin's theory is not superfluous, then we would expect that his theory could account faithfully for the reasons that judges offer for their decisions in difficult cases.

Before examining Dworkin's explication of two judicial opinions, a few passing remarks will be made about the plausibility of Dworkin's theory. There is reason to suspect that Dworkin may not purport to offer his theory as a faithful representation of judicial practice. For most of Law's Empire, Dworkin appears to urge judicial adoption of integrity rather than to describe its acceptance by judges.37 Consider the following typical comments.

Law as integrity supposes that people are entitled to a coherent and principled extension of past political decisions. (LE, p. 134)

I shall argue that a state that accepts integrity as a political ideal has a better case for legitimacy than one that does not. If that is so, it provides a strong reason of the sort we have just now been seeking, a reason why we would do well to see our political practices as grounded in that virtue. (LE, pp. 191-192)

37 Dworkin seems aware that his justification of integrity's fit with legal practice (LE, pp. 176-186) is not compelling. He quickly shifts to justifying it in terms of its desirability as a theory (LE, p. 186). A number of critics have raised concerns about Dworkin's appeal to overall coherence on the grounds that it is an impractical and undesirable recommendation (Mackie, 1984; Shiner, 1986; Raz, 1985a).
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. (LE, p. 225)

We accept the adjudicative principle of integrity because we want to treat ourselves as an association of principle. (LE, p. 404)

In light of the conclusions we reached in chapter three about the inability of Dworkin's criteria of legal theory building to distinguish between a faithful representation and an instrumental representation, it is not surprising that Dworkin might conflate theories of currently acceptable judicial practice and theories of desirable judicial practice. In the final analysis, perhaps the best way to assess Dworkin's account of judicial reasoning as a defensible formal theory is to examine the adequacy of his explications of actual judicial opinions.

3. Dworkin's account of Riggs and Brown

In Law's Empire, Dworkin provides accounts of the opinions in Riggs v. Palmer and in Brown v. Board of Education. Dworkin's accounts of these cases will be used as vehicles for assessing the adequacy of his theory of overall coherence. We will find, when examining the reasoning in Riggs and Brown, little evidence of the sorts of considerations that Dworkin suggests and ample evidence of the adequacy of the model I offer.

38 [1889] 115 N.Y. 506.
3.1 Riggs v. Palmer

In chapter four, I outlined how a rule-guided account was consistent with the arguments offered by the majority and dissenting judges in Riggs v. Palmer. Let us now consider how adequately Dworkin explicates the reasoning in this case. Dworkin casts the opposing judicial arguments in Riggs as justifications for competing theories of statutory interpretation. According to Dworkin, the dissenting judge "argued for a theory of legislation" known as the theory of "literal" interpretation (LE, p. 17). The majority opinion is said to justify an interpretive theory "that judges should construct a statute so as to make it conform as closely as possible to principles of justice assumed elsewhere in the law (LE, p. 19). Contrary to Dworkin's assertions, neither opinions can plausibly be interpreted as justifications for a theory of statutory interpretation. While it is true that judges require "working theories about the best interpretation of their responsibilities" it is not to be presumed that they are authorized to choose a theory "in response to their own convictions and instincts" (LE, p. 87). And it is certainly not the case that Riggs was argued from the judges' personal convictions of which approach to statutory interpretation would show judicial practice in its best light. There is no evidence of any attempt, as would be expected of judges arguing for a theory, to demonstrate that their interpretive theories were grounded in some "conviction about the 'point' - the justifying
purpose or goal or principle - of legal practice as a whole" (LE, pp. 87-88). In short, while the judges' reasons for their respective opinions necessarily presuppose a theory about proper interpretive practice, the judges did not attempt to justify the theory nor is it apparent that they had different theories of interpretation. Rather, as I suggested in chapter four, both sides operated within the "plain meaning" rule.

Dworkin thinks otherwise, and provides what he regards as the judges' reasons for electing rival theories of interpretation. Dworkin suggests that Judge Earl - the judge who wrote the majority opinion - offered two theory-justifying reasons.

First, it is sensible to assume that legislators have a general and diffuse intention to respect traditional principles of justice unless they clearly indicate the contrary. Second, since a statute forms part of a larger intellectual system, the law as a whole, it should be construed so as to make that larger system coherent in principle. Earl argued that the law elsewhere respects the principle that no one should profit from his own wrong, so the statute of wills should be read to deny inheritance to someone who has murdered to obtain it. (LE, pp. 19-20).

While the first proposition may be true, it is not a reason Judge Earl offered. Judge Earl was clearly not referring to legislators' intentions when justifying his appeal to the common law maxims that Dworkin summarizes into the principle "no man may profit from his own wrong." Rather, he cited the following established rule (of argument validity): "all laws as well as contracts may be controlled in their operation and effect by general, fundamental maxims of the common law" (at p. 511). The
attribution of the second reason is without foundation - no reasons were offered as to why judicial practice is best seen as requiring overall coherence. No attempt was made to justify why the proposition "No man may profit from his own wrong" belongs to a more defensible, coherent picture of existing law than the proposition, say, "Sometimes a man may profit from his own wrong." Furthermore, the inference that concern for principles of justice was the dominant reason for Judge Earl’s decision is unwarranted. As was seen in the synopsis of the Riggs opinion provided in chapter four, the appeal to the principle is only one of a number of reasons and certainly not the principal justification offered for the decision. In fact, the argument is introduced by the term "besides" suggesting that it is an additional and not a principal argument. Reasons were offered why the principle was a principle of law - e.g., that it had been upheld in prior cases - but that merely established its legal pedigree not its political desirability nor its place in a coherent justification for law. A more plausible explanation as

40 It is doubtful if Dworkin’s formulation of this "principle of justice" is an acceptable summary of the common law principles referred to in the opinion (at p. 511). Certainly his principle was not "cited" by the court as claimed by Dworkin and it appears to overstate the expressed principles (TRS, pp. 28-29). A more accurate summary principle might be that a person "cannot vest himself with title by crime" (at p. 513). For a discussion of the particular rules that might be subsumed under Dworkin’s principle, see Coval and Smith (1986, p. 80).

41 Judge Earl’s major reason for his decision is the argument from what he refers to as "rational interpretation" - that legislators could not reasonably be assumed to have intended to allow persons who murdered their benefactors to inherit (at pp. 509-511). Ironically, since this argument is inconsistent with Dworkin’s view of the best theory of statutory interpretation, he must ultimately characterize this reason as an anomaly (LE, p. 417).
to why Judge Earl considered the principle a reason for the decision is that the validity of appealing to the principle is established by a secondary rule permitting the use of the common law to limit the application of legislation in certain circumstances.

Dworkin's account of the dissenting opinion is equally unsatisfactory. Dworkin suggests that much can be said in support of that judge's theory of "literal" interpretation and mentions several arguments, only one of which is mentioned in the opinion (LE, p. 18). Furthermore, that reason - the double jeopardy argument - is not a reason for adopting a theory of literal interpretation of statutes but a consequence of interpreting the statute literally. In summary, Dworkin's account of the dissenting and majority judges' reasoning in Riggs cannot be sustained in light of the actual opinions.

3.2 Brown v. Board of Education

The opinion in Brown v. Board of Education offers another opportunity to compare Dworkin's account of judicial reasoning with a model of rules account. Dworkin's discussion of the reasoning in the school desegregation case is divided into two parts: an extended criticism of the framer's intention theory of constitutional interpretation (LE, pp. 359-369) and an account of three theories justifying a decision in Brown (LE, pp. 381-389). We need not concern ourselves with the details of

42 This is the implicit view reflected in the counter-argument offered by the majority. (See chapter four, majority reason #5).
Dworkin's criticism of the framers' intention theory of interpretation since original intentions were not a factor in deciding the outcome - the Warren Court clearly stated that legislative history was inconclusive on the question of equal protection.

Dworkin offers three candidates for theories that might justify the Court's decision - "suspect classifications," "banned categories," and "banned sources" (LE, pp. 381-384). The suspect classification theory holds that discrimination along racial lines is permissible provided the interests of all persons are given equal consideration. The banned categories theory holds that the state cannot legally distinguish among persons on the basis of certain categories, including race and ethnic background. The banned sources theory holds that distinguishing along racial lines is permissible provided prejudice is not the reason for the distinction. The artificiality of Dworkin's explication of the Court's reasoning in terms of these theories is stunning. No reference, oblique or otherwise, is made in the opinions to them. Furthermore, the choice of arguments appears somewhat arbitrary. For example, the "suspect classification," theory is the only argument offered in favour of deciding for school segregation. Curiously, Dworkin does not entertain the "separate but equal" doctrine laid down in Plessy v. Ferguson,43 which preoccupied the Court's actual opinion. Presumably, the dominant justification for consistency with this doctrine is

stability and certainty and that, Dworkin stipulates, is not as important in constitutional cases involving individual rights as integrity — "the system of rights must be interpreted, so far as possible, as expressing a coherent vision of justice" (LE, p. 368). In addition, the suspect classification theory is rejected on questionable grounds. The theory is "inadequate" because "[i]t gains little support from ideals of political fairness. The American people would almost unanimously have rejected it, even in 1954, as not faithful to their convictions about racial justice" (LE, p. 387). It is important to appreciate that no argument from popular support for racial justice was mentioned in the Court’s opinion nor, as far as I know, is it an acceptable (i.e., valid) legal argument in deciding constitutional issues (Fiss, 1982, p. 752; Vieira, 1979, pp. 1453-1454).

Furthermore, it is not clear that the claim about popular support for racial justice is true; although that may depend upon the specific proposition that is implied. Given that many Americans were in favour of segregation, the proposition would appear to imply a relation between justice and drawing distinctions on racial grounds. For example, Dworkin might have the following in mind: acting on the basis of prejudice is unjust (by definition), therefore any convictions about fair race relations that would qualify as convictions of racial justice could not accommodate segregation which is motivated by prejudice (MP, pp. 65-68). Thus, the many supporters of segregation, even those who thought that their position was morally justified, were holding positions inconsistent with their own (unrecognized) convictions about racial justice. Of course, the problem lies in the stipulated connection between drawing distinctions on racial lines and unfair or unwarranted discrimination (i.e., racial prejudice). Dworkin admits that proponents of segregation justified their right to the continued existence of separate, but equally supported schools on grounds of religious freedom and an unabating affection for liberty. It is very likely that these justifications for drawing racial distinctions were consistent with many Americans’ conception of what constituted fair race relations.
In looking at the actual opinion in *Brown*, we find arguments from two sources: interpretive arguments based on framer’s intention and arguments from precedent dealing with application of the *Plessy* doctrine of separate but equal in the field of public education. The eleven-page opinion is suspiciously short given the complexity of the issues, the extent of submissions, and the length of the deliberation period. It is obvious that much is left unsaid in the opinion. Certainly other arguments could have been offered against racial segregation. For example, overruling the separate but equal doctrine could be justified on the grounds that the doctrine was inconsistent with the letter and the spirit of the equal protection provision. Also, arguments for segregation based on framers’ intention could be undermined by challenging the validity of that approach to constitutional interpretation. Conceivably, there were political reasons for not raising certain arguments. Nevertheless, while the opinion does not exhaust the arguments that could be made, it is important to appreciate that the Court regarded the two lines of argument it presented as sufficient justification for its conclusion.

(1) Framers’ intention. The Court concluded that the framers’ intention arguments (both for and against segregation) were inconclusive for two reasons. One, an extensive review of the legislative history on racial segregation *per se* revealed

45 Levi (1964, pp. 271-274) suggests that in constitutional matters because of the primacy of the written document a court has the power to abandon a prior interpretation it considers incorrect.
staunchly opposed camps (at p. 489). Two, because of the fact that public education was largely unestablished at the time of the equal protection amendment, the Court found little evidence about framers' intentions regarding racially segregated public schools (at p. 490).

(2) The "separate but equal" doctrine. The Court's position regarding the doctrine established in *Plessy* was to accept the doctrine as a valid principle in the field of transportation but, in effect, to distinguish it in the field of education.46 *Plessy* established that racial segregation *per se* was not inherently unequal. It had held that in transportation, providing equal (i.e., equivalent facilities) but separate accommodations was not a violation of equal protection. Consistent with the view of reasoning from prior cases offered in chapter six, the Court regarded it as an open question whether or not racial segregation in public education is inherently unequal (at p. 495). The key issue was whether legally relevant differences between the fields of public education and public transportation would warrant deciding that, while separate but equal "tangible" transportation services may not interfere with equality of opportunities in transportation, separate but equal "tangible" educational resources does interfere with equal educational opportunities (at

46 The Court referred to the fact that in none of the prior cases involving public education "was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff" (at p. 492). On the other hand, the case at bar was identified as "directly" presenting the question "whether *Plessy v. Ferguson* should be held inapplicable to public education."
The Court's unanimous decision was that the doctrine of separate but equal had no place in the field of public education (at p. 495).

While the segregation of transportation facilities may not have negatively affected the equality of access to the benefits of transportation, the Court reasoned that merely insisting on equal physical facilities and other "tangible" factors in education failed to recognize important intangible factors affecting equality of educational opportunities. Two arguments were advanced for the legal relevance of intangible factors: (1) intangible factors generally had been recognized in law as relevant factors in determining educational equality and (2) the intangible factor of racial segregation itself has been linked to dramatic inequality of educational opportunity. In documenting the legal recognition of intangible factors, the Court referred to the six Supreme Court cases involving public education issues where the separate but equal doctrine was raised. None of these cases affirmed a "tangible facilities" only interpretation and two cases specifically mentioned factors that the Court regarded as intangible considerations - e.g., "qualities incapable of objective measurement" including the ability to study, to engage

47 Another way to argue would be to accept the validity of the principle established in Plessy and to show that properly interpreted it requires intangible as well as tangible factor equality. This is a legitimate argument since a ratio is open to reformulation in light of its application in subsequent cases. The effect of this argument would be that the "separate but equal" doctrine is relevant to public education and, in fact, is the basis for establishing the inequality of racially segregated education.
in discussions and to exchange views (at p. 493). In documenting the inequality arising from racially segregated schools, the Court referred both to explicit statements made in judicial opinions about the effects of racially induced inferiority on children's motivation to learn and to an extended body of studies by educational psychologists.48

While one might argue that the Court erred in concluding that the legislative history was inconclusive or that the evidence from educational psychologists warranted the conclusions that were drawn,49 it is difficult to find any instance where the form of the Court's reasoning deviates from a model of rules conception. Thus, the opinion in Brown v. Board of Education provides further evidence that a model of rules conception accounts more faithfully for judicial practices than does Dworkin's theory.

48 The Warren Court regarded low esteem and the accompanying negative educational consequences as inevitable effects of sanctioned racial segregation. It was obliquely noted that Plessy had denied the connection between segregation and inevitable feelings of inferiority: "Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority" (at p. 494). This comment appears directed to remarks in Plessy that deny the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. ([1895] 163 U.S. 537 at p. 551) These remarks are clearly obiter (Leflar & Davis, 1954, p. 380). The Warren Court "rejected" this argument in Plessy (at p. 495).
49 See, for example, Wechsler (1959, pp. 32-33).
In chapter one, the thesis' two objectives were identified: (1) to articulate and justify a reasonably perspicuous, generally defensible conception of judicial reasoning, and (2) to justify why an understanding of judicial reasoning ought to be part of basic citizenship education. Meeting the first objective has been the task of the preceding five chapters. I have offered a formal theory of Anglo-American judicial practices in terms of three modes of reasoning. These modes involve applying the law by interpreting the meaning of laws (reasoning from interpretive guidelines), by being consistent with what relevantly similar, previous cases have determined (reasoning from prior cases), and by evaluating the acceptability of alternatives in light of legal standards (reasoning from principle). These modes are constituted by three types of rules - rules establishing the legal validity of arguments that judges and lawyers offer, the claims that can defensibly be drawn from these arguments, and the relative weight of competing arguments. I have argued that this rule-guided model of judicial reasoning represents faithfully what the judicial community regards as proper judicial practices. In particular, the model explains two central tenets of our legal system: that judges apply the law according to the law - that is, judicial decision making is controlled by legal standards - and
that the law is flexible - that is, judicial decision making is not a mechanical task.

The second task - that of justifying the need to understand judicial reasoning - was begun in the first chapter. In that chapter, I drew attention to two almost paradoxical features of the judiciary - its incredible influence and its vulnerability. In documenting its influence, I discussed the court's significant role in giving effect to our laws, especially in giving effect to constitutionally entrenched rights such as those enshrined in the Charter. In Canada, more than ever before, judicial decisions determine the standards for legislative and other government actions. It was suggested that the roots of the court's vulnerability lie in the potential for political interference to compromise its integrity, and for public mystification and unfounded cynicism to challenge the legitimacy of its rulings, particularly in controversial constitutional cases. I suggested that the capacity for informed public debate on issues of judicial adjudication has significant implications for the continued proper functioning of the judiciary. In this concluding chapter, I propose to document how the media and the public generally are confused about proper standards of judicial reasoning and how this confusion is likely to undermine the public's understanding and support for the court's proper functioning. Since the public is unlikely to became sufficiently informed in the face of the inadequate current level of attention to judicial reasoning, civic educators need to be made more aware
of the importance of teaching about judicial reasoning.\textsuperscript{1} Although I will focus on the importance of safeguarding the integrity of the judiciary as the justification for teaching about judicial reasoning in the public schools, I do not mean to suggest that it is the only reason for doing so.\textsuperscript{2} In the final

\textsuperscript{1} The need to recognize the importance of judicial reasoning is a call to be heard by both "liberal" and "conservative" civic educators. By liberal civic education, I mean the efforts over the last twenty-five years, as exemplified in the "New Social Studies," to increase schools' social relevance and to enhance students' political and social awareness (Case, 1985, pp. 3-10). The more recent conservative civic education revival refers to proposals, such as the call for a "renaissance" in social studies, that emphasize respect for national traditions and fundamental values (Sewall, 1988; Finn & Ravitch, 1988; and Gross, 1988). Promoting basic understanding of judicial reasoning is neither a partisan proposal nor a dubious addition to an already crowded curriculum. As I shall argue, it is a vital link in building understanding of and respect for law and the legal system.

\textsuperscript{2} There are other reasons why judicial reasoning warrants inclusion in public school curricula, including its contributions to the teaching of value reasoning. The courts are our most publicly visible model of reasoned adjudication between competing interests, a model based on an airing of views from all sides, careful assessment of evidence and impartial analysis of arguments (Gross, 1977, p. 169). As such, judicial decisions and decision making provide an ideal starting point for teaching about value reasoning, a subject particularly important in light of public confusion about ethics and morality (Hill, 1978, p. 4). This confusion has stymied efforts to address systematically value questions in public schools. Difficulties in deciding which values to promote, disagreement about acceptable ways to reason in the face of dilemmas, and the tendency to see values education as the exclusive prerogative of parents and religious institutions have been the main stumbling blocks. Faced with these sorts of impediments many teachers have preferred to gloss over value questions perpetuating the impression that schools are, or at least should be, value neutral. Not only is value neutrality not possible (to judge that no specific values should be part of the school program is to make a value judgment), it is undesirable - there are important values, such as respect for life and liberty, which ought to be advanced. One approach to resolving disputes about which values to teach, is to appeal to the legitimacy of the values, practices and institutions that underlie the very structure of our society as a model for consideration of value questions (Hill & Wallace, 1976, pp. 8-9). As Kohlberg remarked: "The school is no more committed to value
section of the chapter, I will outline what I consider to be the key elements comprising a defensible educational program on judicial reasoning directed to public school students.

1. The potential for confusion

I propose to consider several instances that illustrate how a lack of understanding of judicial reasoning fuels unwarranted and potentially damaging assessments of the judiciary. The instances I consider were used, or are likely to be used, to justify the following recommendations: (1) that judges ought to be selected on the basis of political ideology, (2) that government should not hesitate to overrule judicial decisions on controversial issues like abortion, and (3) that the courts should engage in judicial activism.

1.1 Politicizing judicial appointments

In a recent article in the Financial Post, it was urged that the judicial appointment procedure be made more political - that is, that judges be selected openly for their political views (Morton, 1989). While I believe that this recommendation is undesirable, I will not argue the point. What is significant is that the reasons offered for the suggestion show a lack of understanding of the proper standards of judicial reasoning. Morton writes that the relevant criteria for selecting judges neutrality than is the government or the law" (Hannay, 1981, p. 43). More broadly, there are good reasons to believe that the study of judicial decision making is a powerful device for improving students' ability and disposition to think critically and responsibly about social issues (Coombs, in press).
under current procedures are "legal expertise, personal integrity and a willingness to work long hours." He views these criteria as grossly inadequate because they ignore what he regards to be the political nature of judicial decisions. Morton suggests that judicial differences of opinion on issues, such as what constitutes a "reasonable limitation" under the Charter, emerge from "the judicial philosophy and political orientation of the judges not from the text of the charter." As evidence for this claim, Morton (1989, p. 2) cites two recent abortion cases - Morgentaler and Borowski as "a telling example" of the political nature of constitutional adjudication:

Morgentaler argues the "principles of fundamental justice" include a woman's absolute right to abortion. Borowski argues the same words protect the right to life of the unborn. Which version is right? Strictly speaking - based on the text and legislative history - neither is correct. [my emphasis] But if either one can garner the support of at least five justices, it becomes the new law of the land.

The passage infers that, because the meaning of the words and that what is known about the drafters' intentions do not indicate an answer, there is no legally most defensible resolution of the abortion question. As a justification for politicizing the appointment of judges, this example is grossly inadequate. The two interpretive guidelines that Morton mentions neither exhaust the interpretive guidelines that the courts used in deciding these cases nor do they include the other modes of reasoning which were used in resolving the abortion questions. In other words, Morton's recommendation to politicize the appointment
process is predicated on an apparently incomplete understanding of the authorized standards of constitutional adjudication.

1.2 Overruling judicial decisions

As was suggested in chapter one, respect for the judiciary is an important impediment to those who might consider overriding judicial decisions. This is a particularly significant factor in light of the Charter's notwithstanding clause - governments have the power to immunize legislation that the courts have found, or will likely find, to be inconsistent with rights guaranteed under the Charter. Faced with constitutionally defensible court decisions of which they do not approve, governments are more likely to invoke the notwithstanding provision if the public has a low estimation of judicial competence and integrity. Two examples should illustrate how ill-informed scrutiny of court decisions can erode public confidence in the judiciary.³

(1) Perceived competence. In May 1985, the Supreme Court of Canada decided Big M Drug Mart.⁴ It ruled that a federal law requiring certain stores to remain closed on Sunday violated freedom of religion guarantees. The following year, in December 1986, the same court ruled in Nortown Foods⁵ that a provincial

³ Tushnet (1988, p. 47) doubts that public perception of the legitimacy of court decisions reduces law's social effect. While this may be true, perceived legitimacy of decisions is centrally connected to respect for the courts and therefore is likely to affect public support for the judiciary even if citizens continue to adhere to its rulings (possibly, out of fear of sanction).
law requiring certain retail stores to remain closed on Sunday did not violate guarantees of religious freedom. It is easy to see how many would regard the apparent contradiction in these verdicts as judicial capriciousness or, at best, as the product of a legal technicality. Only those who know something about reasoning from precedent could appreciate the consistency in the Court's rulings. The later case was distinguished from the earlier case because of the reasons for the Sunday closing restrictions. As we saw in chapter four, the acknowledged purpose of the federal law, which was called the Lord's Day Act, was to promote observance of the Christian holy day. The provincial law was intended to secure a common day where family members could spend time together. While both laws affected religious freedoms, the Court decided that there was a legally relevant difference between legislation that had an avowed discriminatory objective and that which, clearly, had a redeeming social purpose. These decisions were neither inconsistent, nor were they decided on narrow technical grounds. But how would the public appreciate this without some having understanding of the nature of reasoning from prior cases?

(2) Perceived integrity. An example of a tendency to equate controversial decisions with lack of judicial integrity is reflected in a Maclean's editorial immediately following the Supreme Court of Canada decision in Morgentaler. The editor wrote:

it is now more evident than ever that the justices will not hesitate to apply their personal opinions to Charter cases
that come before them. As an illustration of that fact, Madame Justice Bertha Wilson wrote in supporting the abortion case: "Women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being." Wilson does not cite case law to support that position: she states it as a simple personal opinion. (Maclean's, February 8, 1988, p. 2)

It is wrong to infer that because Justice Wilson did not cite case law she was, of necessity, asserting her own personal opinion. Perhaps, like many, the editor has failed to appreciate that there are two other bona fide grounds for justifying a legal decision - interpretation and reasoning from principle. A review of Justice Wilson's arguments clearly shows a grounding in "interpretive guidelines." We may disagree with her conclusions, we may even think she erred in law, but it is ill-informed and unfair to discredit her decision as personal opinion.

1.3 Judicial activism

A third source of potentially damaging public misperceptions about judicial decisions stems from unrealistic expectations about the ability of judges to effect social justice. A striking example of this problem arose over the 1975 Supreme Court of Canada decision in Murdoch v. Murdoch. In this case, the Court ruled that Mrs. Murdoch's efforts, which included working for years jointly with her husband to build a successful ranching operation, did not entitle her to any share of the "family" business. National reaction to the unfairness of the situation

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was vicious; the judiciary, as the bearer of the news, bore the brunt of the abuse. The Court became the scapegoat for the failure of existing provincial family law to protect women in Mrs. Murdoch’s predicament (Snell & Vaughan, 1985, pp. 241-242). As one reviewer put it:

While perhaps legally it is the proper function of the Supreme Court of Canada to apply the law as it is, even if it is harsh and inequitable, and to leave it to government to legislate an end to any injustice, nevertheless, the response of the general public to severe judgments is to criticize the Courts for a lack of humanity. (Anderson, 1980, p. 459)

While court decisions which enforce unfair laws are regrettable, they may be a necessary evil. We can not have it both ways - the requirements of judicial reasoning which constrain the tyranny of judges who would wish to impose their personal morality on our legal system also curb judges’ ability to reverse unjust legislation. As one writer remarked, the rule of law "undoubtedly restrains power, but it also prevents power’s benevolent exercise" (Jowell, 1986, p. 18). If democracy - understood as rule by elected officials - is to be maintained, then the public must not be seduced into expecting too much or, for that matter, too little from the judiciary. Judges exceed their legitimate authority when they usurp Parliament’s right to legislate. It is not obvious, if the public understood the reasons and mechanisms for controlling judicial discretion, that

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7 Not everyone would agree that the Court did not have the authority to overrule the existing legislation. Whether or not the Murdoch decision was legally required is largely irrelevant. The point of the example is that public assessment of the judiciary hinges on public approbation of its results, not on its conformity to standards of judicial reasoning.
the call for judicial activism would be as loud as the call for legislative reform.

2. The role of informed debate

The irony of public perceptions of the judiciary, as was alluded to in the Achilles metaphor mentioned in chapter one, is the need for double-edged vigilance - to safeguard the exercise of legitimate authority while restricting the exercise of abusive power. In *The Paradoxes of Freedom*, Hook asks: "If the Court is to serve as the keeper of the community’s conscience, who is to keep the Court’s conscience?" (Fulford, 1986, p. 9). On one hand, many are concerned about what they see as the unchecked exercise of judicial power (Hughes, 1981). Agresto (1984, p. 161) laments about the American situation: "To the degree that we have reached the point where judges can legislate, judge, and execute their opinions autonomously, unchecked, the situation is manifestly no longer tolerable." On the other hand, as was discussed above, unfounded criticisms may undermine the desired, proper workings of the courts.

Many writers have emphasized the need for responsible but candid public debate about the courts. Weiler (1974, p. ix) notes that because there is a tradition that judges do not enter into public debate, there is an extra responsibility that criticism be fair and impersonal. However, he believes also that academics and other legal commentators would be shirking their responsibility to the Canadian public if they failed to present
"forthright and understandable criticism of inadequate judicial performance wherever it is found" (Weiler, 1974, p. ix). Thus, while we must defend the judiciary against those who would undermine it or distort its role, we cannot regard the courts or its decisions as sacrosanct. As Russell (1983, pp. 53-54) suggests, "public debate and discussion of judicial decisions must not be muted by awe of the judicial office." In a famous 1936 decision supporting the right of a newspaper to criticize the administration of justice, the British Privy Council concluded that: "Justice is not a cloistered virtue. She must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men" (Holt, 1988, p. 12).

Perhaps the judicial process, like the larger democratic ideal, survives only in the presence of informed public scrutiny. It is not sufficient that citizens know the steps in a criminal or civil suit, which is the current mainstay in our education about the courts. While there is some value in this knowledge it does not prepare citizens to pass judgment on the court's performance. Informed lay assessment of the courts is not possible in the face of a general lack of understanding of judicial standards and the confused and often incorrect messages in the media and in popular culture. For example, in discussing the influence of popular culture on public perceptions of the law, one observer suggested:

Judges and law professors put forward their view of law and the legal system. Many never hear nor understand it. Instead fundamentalist preachers or newspaper editorial
writers may distort, translate, or interpret legal ideas for many. (Macaulay, 1987, p. 212)

There is no possibility of meaningful public assessment of judicial decision making if citizens are fundamentally ignorant of the appropriate criteria for review. When naive and unfounded reactions pass for informed evaluations, public respect withers and the integrity of the institution is endangered.

Recommendations to politicize the judiciary or to institute rigid legal standards are not cures. The former likely undermines the rule of law and the latter likely handcuffs it. If we are to improve upon our imperfectly practised, and somewhat flawed, judicial practices, we must resist proposals that will destroy judicial independence and impartiality. It may be that, in the end, the courts' continued proper functioning depends on the level of public understanding and appreciation of the proper standards for judicial reasoning.

3. Key elements of educational programs

What can we conclude about the content of public school programs on judicial reasoning from the conception of judicial reasoning articulated in the preceding chapters, and from the rationale for teaching about judicial reasoning offered in this chapter and in the first chapter? The most general conclusion to be drawn from these discussions concerns the point of teaching about judicial reasoning. Clearly, the considerations that judges entertain when applying the law are extremely complex - our objective in teaching students about judicial reasoning
cannot be to train them to be "mini-judges." There is a crucial
difference, as many law-related educators have pointed out,
between training lawyers to practise law and educating students
to live within a legal system (Case, 1985, pp. 11-12). Students
need not possess the extensive technical knowledge required of
judges and lawyers who must conduct the business of law.
Students need only know enough about the standards of judicial
reasoning so that, in their role as citizens, they may make
informed decisions on matters related to the judiciary. For
example, some knowledge of the types of rules that judges rely
upon would likely be sufficient to enable students to see through
the confusions discussed earlier in this chapter. Thus I suggest
that the principal objective in teaching about judicial reasoning
in public schools is to provide students with a general, but
sufficiently rich, understanding of the modes of reasoning of
judges, and the general principles which explain these modes, so
that students will be able to make informed judgments about the
judiciary. 8 I will now outline what I regard as key components
of civic education programs aimed at fostering an understanding
of judicial reasoning.

At the most general level, programs about judicial reasoning
should explore and correct common misperceptions about key
characteristics of the judicial process. One of the dominant
misperceptions is the view that applying the law is a mechanical

8 For a suggested treatment of judicial reasoning suitable
for senior high school students see Case, Parkinson, Grant, La
and largely uncontroversial exercise. Students need to understand, first, that difficult cases, which involve unanticipated situations or situations where legal values conflict, are not infrequent occurrences and that, in such cases, judges are forced to go beyond the settled meaning of the law. Second, students must come to appreciate that a consequence of judges' responsibility to resolve difficult legal issues is that they have the power to make authoritative pronouncements about the law. This power means that final judicial decisions, whether correctly or incorrectly reached, are the law of the land until supplanted. The greatly increased frequency of Canadian cases involving disputes over constitutional provisions obviously means that constitutional adjudication is a particularly crucial area. Third, public recognition of the courts' increased influence often gives rise to a misperception that judges simply create the law. This is, of course, not correct. Thus, it is important that students' perceptions of the power of the judiciary be tempered by an understanding that the standards of judicial reasoning control judicial decision making. If these complex

9 I am not claiming that there is a uniquely correct legal answer to every legal dispute; rather, I am suggesting that in the vast majority of cases judges sincerely believe that one of the alternative resolutions is more defensible on legal grounds than the others. It should also be pointed out to students that some judges' performances will be inconsistent with correct practice. For example, in reviewing a book about the operation of American courts written by a judge, Hughes (1981, p. 43) writes:

Justice Neely holds too narrow a notion of the job that concepts do in reasoning. Fidelity to precedent is not exhibited, as he seems to think, by a mechanical reproduction of past decisions. Indeed, such a wooden refusal to change would be a disrespect for the validity of the constitutional principle involved.
sets of standards are impartially and skillfully applied, they provide judges with sufficient grounds for resolving legal disputes. Finally, students should come to see why the proper operation of the court system depends on judicial integrity and independence. As Tushnet (1983, p. 784) suggests, there is no effective way to externally enforce judicial compliance with the rules. By and large, judges must be trusted to conscientiously adhere to the proper standards of adjudication.10

Besides having a general understanding about judicial decision making, students should have some exposure to the three modes of reasoning that judges employ. In teaching students about reasoning from interpretive guidelines, the various "basic approaches" to constitutional and statutory interpretation should be explored. It would be useful to contrast the relative advantages and disadvantages of the literal "letter of the law" approach with the more liberal "spirit of the law" approach. Also, students should learn why interpreting the meaning of a law is not identical with deciding what the legislators actually intended by the law. This understanding will be particularly important in dealing with the previously mentioned arguments which Morton (1989) offered when claiming that constitutional adjudication of the abortion issue is necessarily a function of the judges' "political" values. Because of the importance and the high public profile of Charter adjudication, special emphasis

10 Tushnet believes that establishing a further level of scrutiny would not solve the problem - it would merely shift up one level the problem of constraining the individuals who must make the important decisions.
should be placed on understanding the "purposive" approach to interpretation. Finally, to show the breadth and variety of considerations that judges rely upon in interpreting the law, it would be useful to provide students with examples of the "minor" interpretive rules - intrinsic aids, extrinsic aids, interpretive presumptions, and general stylistic, semantic and grammatical rules.

In teaching about reasoning from prior cases it is perhaps most important that students appreciate that reliance on precedent is directly tied to a central feature of our justice system - namely, a concern for fairness which requires treating persons in similar situations in a like manner. Students should see that the doctrine of precedent need not amount to an inflexible adherence to fixed standards - the application of case law requires establishing relevant similarities between the instant case and prior cases. Students should be exposed to principles for establishing the ratio of a case and considerations involved in deciding to follow or distinguish a case. Other parameters of the doctrine of precedent, such as the relative authority and jurisdictions of various levels of courts, should also be explored.

Reasoning from principle may be the least recognized mode of judicial reasoning among laypersons. Students should come to understand what it means to decide an issue on principle. In addition, the common forms of principle testing - consistency with fundamental principles, consequences for all parties,
consequences in new cases and consequences for repeated instances - should be explained. Finally, students should have some understanding of the role that reasoning from principle plays in resolving disputes. Understanding this "internal anomaly-resolving" mechanism, whereby judges assess the legal desirability of alternatives, helps to explain how the law controls judicial decision making in cases where the settled rules appear to "run out."

Finally, throughout the above discussion, I have alluded to students' need to go beyond understanding the standards of proper judicial reasoning and to acquire some appreciation of the reasons for these practices. In other words, students must see the justification for the practices in our judicial system. An important part of the motivation for teaching about judicial reasoning is to develop citizens' capacity to make informed evaluations about the respect warranted by current judicial practices. If we are to avoid indoctrinating students into supporting (or disapproving) of our legal system, students must be encouraged to make their own informed appraisals, and this implies that students see the reasons for and against existing judicial practices and that students be apprised of the appropriate criteria for assessing the relative merits of these reasons (Case, 1985, pp. 21-24; Coombs, in press). In addition, if we are concerned about reducing the likelihood of undeserved assessments of individual judicial decisions, it may be necessary to combat what some regard as the public's preoccupation with
judicial conclusions (Tushnet, 1988, p. 21; Russell, 1983, p. 52). As we saw in the example of Murdoch, a "results-oriented" mentality of assessing judicial decisions means that the courts are often unfairly blamed for inequities in the law. To get beyond this mentality, students should be exposed to judicial opinions (perhaps in an edited form) and should be assisted in seeing the justifications for these decision. Obviously, students can only be expected to engage in critical inquiry of individual judicial decisions in a rudimentary way. However, to the extent possible, students should be encouraged to come to their own informed conclusions about the merits of various aspects of our judicial system.

In conclusion, I have argued in support of teaching a model of rules conception of judicial reasoning - a conception that I offer as a legally accurate and educationally perspicuous conception of judicial reasoning. Various examples and arguments were offered to illustrate the extent to which public misunderstanding of judicial practices threatens the health of our judicial system. In order to combat these potentially damaging perceptions, civic educators must develop educational programs on judicial reasoning, which foster the types of understanding I have just outlined, and begin to make these programs available to public school students.
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