Legal Reasoning: Description

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B. Methods of Reasoning
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This is an outline of the book: Christopher Enright (2015) Legal Reasoning
Sinch: Canterbury.

Introduction

Benefits of an Outline
This outline or summary highlights both the key concepts and the relationships between them. This benefit may be needed since the subject of this book is hard wrought. Readers may benefit from this summary at any of three stages – before, during and after reading the book or part of it:
  # Before Reading. Before reading the book the summary indicates the shape and rationale of what is to come
  # During Reading. If during the course of reading the reader is overcome by detail it may settle the structure and benefit their understanding to read the summary.
  # After Reading. When a reader has finished the book reading a summary is a way of refreshing and recapping.

Methods of Reasoning and Legal Tasks
Methods of reasoning are use for performing tasks with law. From a structural perspective it would be simple if each task had its own distinctive method of reasoning. Unfortunately this is not the case. Some methods of reasoning apply to more then one task, while some tasks incorporate more than one method of reasoning.
A. Rationality and Irrationality

To entitle a book *Legal Reasoning* connotes a distinction between the rational and the irrational, although the distinction may not be hard and fast and is contestable:

# Chapter 1 Outline and Chapter 2 Rationality make some attempt to deal with rationality. At the same time they make some mention of irrationality, as a way of introducing it before fuller discussion of irrationality in Chapter 27.

# Chapter 27 Irrationality presents some alleged manifestations of, and reasons for, irrationality in the world.

B. Methods of Reasoning

There are several methods of reasoning involved in law:

# Logical reasoning
# Policy
# Analysing ambiguity
# Observing facts

Logical Reasoning

**Introduction**

The basic forms of logical reasoning are conditional statements,\(^1\) deduction,\(^2\) induction,\(^3\) abduction,\(^4\) analogy\(^5\) and probability.\(^6\) Chapter 3 explains conditional statements. Chapters 4 outlines the other major forms of logical reasoning, which are explained in subsequent chapters.

These forms of reasoning bob up and down in various places on the map of legal reasoning. Each of the chapters describing these forms of reasoning indicates the places where they are used. This summary now provides an outline of their fundamentals.

**Conditional Statements**

A conditional statement takes the form ‘If A occurs then B subsequently occurs’. Most legal rules are conditional statements. They take the form: ‘If facts of a designated kind occur, these legal consequences follow.’ This is an extremely important analytical tool for working with law.\(^7\)

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1. Chapter 3 Structuring Law
2. Chapter 5 Deduction
3. Chapter 6 Induction
4. Chapter 7 Abduction
5. Chapter 8 Analogy
6. Chapter 9 Probability
7. Chapter 3 Structuring Law
Deduction
Deduction is a logically perfect form of reasoning. Deduction involves a form of reasoning called a syllogism. This has three parts, a major premise a minor premise and a conclusion that follows from the two premises. The major relevance of deduction is in the process of using law when law applies to facts to generate legal consequences:

# Major Premise. The major premise is constituted by the legal rule that creates the cause of action. This, as stated above, consists of a conditional statement. The major premise accordingly says: ‘If facts of a designated kind occur, these legal consequences follow.’

# Minor Premise. The minor premise says: ‘Facts of this designated kind have occurred.’

# Conclusion. The conclusion says: ‘The consequences designated by the rule now apply’.

This syllogism can be set out in a table:

<table>
<thead>
<tr>
<th>Components</th>
<th>Relationships</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Major Premise</strong></td>
<td>If facts of a designated kind occur, these legal consequences follow.</td>
</tr>
<tr>
<td><strong>Minor Premise</strong></td>
<td>Facts of this designated kind have occurred.</td>
</tr>
<tr>
<td><strong>Conclusion</strong></td>
<td>The consequences designated by the rule now apply.</td>
</tr>
</tbody>
</table>

Summary Diagram 1 Syllogism for Applying Law to Facts

Induction
A simple example will illustrate induction. We observe, directly or indirectly, that the sun has risen every day of our lives and for many days before that. Given this we may include from these observations that the sun always rises. This shows how induction works. Essentially when many observations of things happening in a certain way with no exceptions it suggests that things always happen in this way. Induction can be formally set out in the following way:

| Premise | In all observed instances something, called X, occurs when Y occurs. |
| Conclusion | There is a rule, Rule R, which says: ‘X always occurs when Y occurs. |

Summary Diagram 2 Form of Induction

Abduction
Abduction seeks explanations for events. Let us assume that B has occurred. Assume also that there are four identifiable possible explanations (or hypotheses) for the occurrence of B, namely X causes B, Y causes B, Z causes

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8. Chapter 5 Deduction
9. This explanation of abduction is taken directly from Chapter 4 Logical Reasoning.
B and A causes B. Investigation suggests that the most likely or plausible explanation is that A causes B.

<table>
<thead>
<tr>
<th>Observation</th>
<th>B has occurred</th>
</tr>
</thead>
<tbody>
<tr>
<td>Explanation</td>
<td>There is a rule, Rule R, that says ‘A causes B’.</td>
</tr>
<tr>
<td>Strength of Explanation</td>
<td>No other explanation explains B as well as Rule R.</td>
</tr>
<tr>
<td>Conclusion</td>
<td>Therefore, Rule R that ‘A causes B’ is probably correct.</td>
</tr>
</tbody>
</table>

**Summary Diagram 3 Form of Abduction**

**Probability**

Probability has a descriptive function. It describes how certain we are about the truth of something. For example, when we require reassurance about something we ask: ‘Are you 100% sure?’

Probability also has a derivative function, which is how it operates as a form of reasoning. When one or more probabilities are known and quantified, it is possible to derive further probabilities by rules based on deduction. For example, if there is a 60% chance that an event will happen we can use the complementarity rule to devise the probability that the event will not happen. The probability of an event not happening is the complement of the probability that it will happen. In the example the probability of the event not happening is (100-60)% namely 40%.

**Policy**

Frequently humans engage in purposive action, where they take action to achieve a purpose. Making law constitute purposive action and interpreting law does so sometimes. Those engaging in purposive action make a rational decision where they identify and choose the option that achieves the best result in terms of both costs and benefits (which include all costs and benefits whether financial or not). This is the outcome with the highest net benefit. This means that the outcome is as successful as human endeavour can make it. It is impossible to do better than this or to be more rational than this. Law changes the world so for making and interpreting law, the desired outcome is to change the world in the best possible way.

Policy involves two difficult tasks:
1. **Causation.** Policy makers have to predict the outcome that each option will cause.
2. **Evaluation.** Policy makers must have an available set of values to evaluate each option to determine the best, which is the one that causes the best outcome.

10. This explanation of policy taken directly from Chapter 10 Policy.
Analysing Ambiguity

When a court interprets law it needs to identify all of the meanings of the ambiguous provision. To do this a court needs the skill of analysing ambiguity.11

There are three methods that can assist in this task:
2. Reusing Words. Reuse the relevant words in a variety of context to see when they do and do not make sense.
3. Classification of Ambiguity. Use a classification of ambiguity as a tool of analysis.12

Observing Facts

Observing facts is really the prelude to the reasoning process here. The reasoning is that seeing is believing. This is widely accepted as true, but with a qualification. Sometimes we do not see what we think we see. There is an additional problem in practice. The notion of ‘seeing is believing’ underlies a witness’s giving evidence in court of what they have seen and also what they have observed with their other senses. The additional problem is that the court hearing this evidence cannot be sure that the witness is telling the truth.

C. Tasks with Law

There are four tasks with law to consider:

<table>
<thead>
<tr>
<th>Structuring Law</th>
<th>Interpreting Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Making Law</td>
<td>Using Law</td>
</tr>
</tbody>
</table>

As the text explains these tasks it will indicate the types of reasoning that they incorporate.

Structuring Law

Unfortunately the concept of structuring or organising or analysing legal rules is unfamiliar to many lawyers, yet it is the key to numerous other tasks. There are two aspects to structure – micro structure and macro structure.13

Micro Structure

With a few exceptions that do not matter, all legal rules have a common structure (called the micro structure because it applies to particular rules and not a whole area of law). There are three components:
1. Elements. Elements determine the type of facts to which the rule applies.

11. Chapter 25 Analysing Ambiguity  
12. Christopher Enright Legal Method Chapter 14 Classifying Meanings  
13. Chapter 3 Structuring Legal Rules and Chapter 29 Model for Organising Law
2. Consequences. When a legal rule applies to a set of facts it brings legal consequences.

3. Conditional Statement. The third part of a rule is its overall shape or nature. It consists of a conditional statement that says as follow – when the elements of a rule apply to the facts of a case the consequences designated by the rule apply.

The following diagram portrays the format for the micro structure of a legal rule. It portrays Elements 1-n. It depicts the Consequences. It represents the conditional statement by an arrow that joins elements to consequences. This is saying that when the right types of facts satisfy the elements, the consequences apply. So, in civil litigation for example, a court visits a defendant with legal consequences when the plaintiff has proved to the required standard the material facts that satisfy each element. Here now is the diagram:

<table>
<thead>
<tr>
<th>Law</th>
<th>Element 1</th>
<th>Element 2</th>
<th>Element n</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>↓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consequences</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Macro Structure**

There are three key propositions:

1. Any area of law or a legal subject has an overall or macro structure.
2. But unlike the situation with individual legal rules there is not a standard structure that applies to all rules but a variety of structures (although some structure are shared among a few areas of law).
3. There is no standard technique for finding the overall structure but in practice it is not difficult. Look for the relationships between the various parts of the subject, which are generally not difficult to find, especially if a person does two things:
   a. Think. They think carefully about the area of activity that the subject regulates.
   b. Look. They look with a fierce intent.

**Benefits of Structuring Law**

Structuring law is a gateway to heaven (if I can slightly overstate the position) because proper performance of every other major task with law depends on it. These tasks include making law, interpreting law, using law in litigation, using law in transactions, reading law, writing law, teaching law and studying law.
Two specific comments will highlight the problem caused by the neglect of the skill of organising law.

1. Teaching Law. Teaching law is diminished. It is sad to see the efforts of dedicated and knowledgeable teachers squandered to a significant extent by lack of knowledge of the reasoning processes requires to structure law. In the biblical phrase it is akin to, or even worse than, making bricks without straw.\[14\]

2. Writing Law. There is a feasible argument that the widely recognised problem of the poor quality of legal writing is not really a plain English problem but, to some extent at least, a manifestation of the fact that most lawyer do not understand how to structure law. In other words it is an organisational problem that is easily solved – teach lawyers how to structure law and it is likely that you will teach them how to write more clearly.

Forming Law

Introduction
Forming law is a collective name for two similar and connected tasks, making law and interpreting law.

Making Law
Making law happens in three ways:
1. A legislature enacts a statute
2. Some official or body makes delegated legislation pursuant to power conferred on them by statute
3. A court makes a new common law rule or amends a common law rule

Interpreting Law
When a court interprets law it decides which of two or more possible meanings of an ambiguous provision is the legally correct or best meaning of the ambiguous provision. This law may be statute law, delegated legislation or common law.

Methods of Reasoning
Policy
This book argues that policy is the only rational way to make and interpret law. There is a summary of policy below.

14. In the Bible, in Exodus 5: 1-23 Pharaoh punishes the Israelites by telling his supervisors: ‘Ye shall no more give the people straw to make brick, as heretofore: let them go and gather straw for themselves’ (Exodus 5:7). Straw is needed to make bricks because it causes the clay to dry more quickly so that the bricks harden sooner.
Other Methods
Four other methods are used, or in the view of some are used, for interpreting law. These are deduction, precedent, maxims of interpretation and secondary sources.

Policy

Introduction
The word ‘policy’ can be ambiguous. In one sense it is a set way of doing things as in the statement: ‘We have a policy of checking all applicants carefully.’ A second meaning is the one used here where it refers to a method of reasoning that seeks the best outcome. There is a strong argument that governments should use policy for making law and interpreting law. Some of the discussion in this area, or even much of the discussion, focuses on determining which of several competing policies a legislature or court should use.

Nature of Policy
Any law or any interpretation of a law will cause some outcome or effect. The controlling proposition is that it is rational to want the best and irrational to want anything less than the best. Consequently reasoning with policy involves identifying then choosing and implementing the version of a law or the interpretation of a law that is predicted to cause the best outcome.

In order to choose the best it is necessary to identify all possibilities. To illustrate this, assume that a legislature is contemplating making a law on a subject such as consumer protection, industrial regulation, housing or education. The possible statutes are labelled ‘Statute’ and numbered for identification. Statute 0 is the option not to enact a statute. Statutes 1–n are the possible versions of statutes on the topic. Now each statute will cause an effect, although prior to passing a statute the best a legislature can do is to predict its likely effect. Since policy is concerned with the best outcome it is necessary to measure the outcome. Net benefit is the way to go. It consists of total benefit minus total costs. All of this can be conveniently represented in a table in the following way:

<table>
<thead>
<tr>
<th>Statutes</th>
<th>→</th>
<th>Effects</th>
<th>→</th>
<th>Net Benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statute 0</td>
<td>→</td>
<td>Effect 0</td>
<td>→</td>
<td>Net Benefit 0</td>
</tr>
<tr>
<td>Statute 1</td>
<td>→</td>
<td>Effect 1</td>
<td>→</td>
<td>Net Benefit 1</td>
</tr>
<tr>
<td>Statute 2</td>
<td>→</td>
<td>Effect 2</td>
<td>→</td>
<td>Net Benefit 2</td>
</tr>
<tr>
<td>Statute n</td>
<td>→</td>
<td>Effect n</td>
<td>→</td>
<td>Net Benefit n</td>
</tr>
</tbody>
</table>

Summary Diagram 5 Statutes, Effects and Net Benefits
Let us assume that the net benefit with the highest value is Net Benefit 2. This is the net benefit of Effect 2. Effect 2 is the predicted effect of Statute 2. This means that Statute 2 is the best statute to enact since it is predicted to cause the best outcome – Effect 2, which yields Net Benefit 2.

Similar reasoning applies to interpreting law in the absence of specific rules as to how to do it. Assume that a provision (a word or a phrase) in a legal rule is ambiguous such that it may or may not apply in a particular case. The court must identify all possible meanings of the ambiguous provision. The possible meanings of this ambiguous word or phrase are labelled Meanings 1–n. There is generally not a Meaning 0 because a court normally does not have an option when faced with ambiguity – it cannot decline to interpret the provision. Each meaning causes an effect so that collectively Meanings 1–n are predicted to cause Effects 1–n. Each effect yields a net benefit so that Effects 1–n yield Net Benefits 1–n. These relationships can be set out in a table in the following way:

<table>
<thead>
<tr>
<th>Meanings</th>
<th>→</th>
<th>Effects</th>
<th>→</th>
<th>Net Benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meaning 1</td>
<td></td>
<td>Effect 1</td>
<td></td>
<td>Net Benefit 1</td>
</tr>
<tr>
<td>Meaning 2</td>
<td></td>
<td>Effect 2</td>
<td></td>
<td>Net Benefit 2</td>
</tr>
<tr>
<td>Meaning n</td>
<td></td>
<td>Effect n</td>
<td></td>
<td>Net Benefit n</td>
</tr>
</tbody>
</table>

**Summary Diagram 6 Meanings, Effects and Net Benefits**

At one level policy is simple. However, there are some major uncertainties that arise within or around the process of making policy decisions. There are two core issues that pervade the process:

1. Causation. A legislature or court has to predict what Effect (meaning a batch or conglomeration of specific effects) a statute or a meaning of an ambiguous provision will cause. There is no easy and simple method for accurately making this prediction.

2. Evaluation. A legislature or court has to evaluate each effect to establish its net benefit. There are two issues here:
   1. Values. There is a question in relation to determining which values a legislature or court should deploy.
   2. Incommensurability. There is a problem of measuring net benefit. This problem is labelled incommensurability.

There are two additional problems:

1. Social Choice. The choice to determine the questions of causation and evaluation is a social choice. The problem is how to make this choice in a representative way, that is, in a manner such that the ensuing choice represents the wishes of the individuals who make up the society in question.
2. Analysing Ambiguity. To identify the meanings of an ambiguous provision (Meanings 1–n) when interpreting law it is necessary to be able to analyse and understand ambiguity.

**Problem 1. Causation**
What follows sets out an ideal way for legislatures and courts to deal with causation:

1. Legislatures. When a legislature is enacting a statute, ideally it has before it all possible versions of the proposed statute. These are labelled Statutes 0–n. Since the legislature is reasoning by reference to policy it needs to predict as best it can the effect (shorthand for batch of effects) that each statute will cause.

2. Courts. When a court is interpreting a statute, it should have before it all of the possible meanings of the ambiguous provision. The court needs to predict the effect that each meaning will cause. For this, a court needs to perform a ‘what if’ analysis. Assume the court is interpreting an ambiguous provision in Statute X. It takes each meaning in turn then asks, and answers as best it can, the following question. If the court were to choose this meaning as legally correct, what effect would Statute X cause?

How should a legislature or court go about the task of predicting causation? The answer is one or both of two broad possibilities. There is some causal law that makes predicting causation scientific, or there is the absence of such a law so that law-makers and interpreters need to rely on non-scientific means.

**Scientific Means: Causal Law**
In the simple and ideal case there is a causal law that enables a legislature or court to predict the effect that a statute or a meaning of an ambiguous provision will cause. Natural science, and often social science, ascertains and attempts to prove the existence of causal laws by several processes,\(^{15}\) which use various methods of logical reasoning:

1. Hypothetico-Deductive Model. This uses a mixture of deduction and induction.\(^ {16} \)
2. Experimental Method. This uses a mixture of deduction and induction.\(^ {17} \)
3. Correlation Method. This uses a mixture of induction and abduction.\(^ {18} \)

**Non Scientific Means**
There are two reasons why legislators and judges will not always deploy

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15. Chapter 13 Cause
16. The hypothetico-deductive model and the way in which it used both deduction and induction is explained in Chapter 6 Induction. See also Chapter 5 Deduction.
17. Chapter 5 Deduction and Chapter 6 Induction
18. Chapter 6 Induction and Chapter 7 Abduction
scientifically based behavioural laws when making and interpreting law. First, behavioural science is incomplete. It can explain some things but not everything. Second, legislators and judges are generally not trained in behavioural science. Consequently, even if there is a relevant causal law, they may not know of its existence. For both of these reasons, legislators and judges are sometimes forced to rely on causal laws that are not properly grounded in science. In truth, these are assumptions. These assumptions may be derived from sources such as hunch, guesswork and impression, all being processes which are not ‘readily susceptible of precise analysis’.  

**Problem 2. Evaluation**

Evaluation involves deploying values to determine the worth of the effect of making a law or interpreting a law. There are two aspects – choice of values and imposition of values.

*Choice of Values*

A legislature is generally free to choose the values it will deploy when enacting a statute. A court may or may not be legally free or functionally free to choose the values it deploys. A court will be not free to choose values when some authority imposes values on it – there is discussion of this below.

The operative maxim that underlies policy is the seemingly tautological statement ‘best is best’. Essentially legislatures and courts should seek the best outcome because this is the only rational way to proceed. While the notion that legislatures and courts should seek the best outcome is logically impeccable, there is an issue of evaluation. The issue is how one determines the value or values by which legislatures and courts should judge which outcome is really the best. There are three possible views on the nature of values:

1. **Unity of Values.** According to this view there is a comprehensive, universal and binding set of values that applies to all people at all times (as natural law proclaims). The problem with this view is that there is so far no way that the existence and binding force of these values can be discovered by reason. Deduction, induction and abduction are of no assistance – there is no method of reasoning that can establish the existence of a comprehensive, universal and binding set of values. However, it is possible to use analogy to make new common rules derived from similar and appropriate values in an existing common law rule.

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19. Chapter 13 Cause
21. The hypothetico-deductive model and the way in which it used both deduction and induction is explained in Chapter 6 Induction. See also Chapter 5 Deduction.
2. Diversity of Values. In extreme form this view sees values as highly diverse with little agreement as to what values should underpin society. This extreme view does not hold up since there is a significant amount of values being shared.  

3. Mixture of Unity and Diversity of Values. This view is that a society and even the world at large will exhibit some degree of unity of values and some degree of diversity. Since this view is founded on widespread observation it is the view taken by the author and the basis for any consequential analysis of policy.  

**Imposition of Values**

As noted above a court may or may not be legally free or functionally free to choose the values it deploys when interpreting a law. The reason that a court may be unfree is that some authority, most obviously a constitution or other law, imposes values on the court. There is an illustration of this in Australia. There each jurisdiction has a statutory rule to similar effect. This rule dictates how a court will interpret a statute. It dictates how a court must choose or determine the legally correct meaning of the ambiguous provision in a statute. The rule says that a court must choose the meaning that will best achieve the purpose or object of the statute. When the court makes this choice it implements the values that underlie the chosen meaning – this is how these provisions impose values on a court.

**Problem 3.1 Social Choice: Making Law**

An individual can decide and act by reference to any values that they choose. However, there is a problem when a choice has to be made by a group or society as distinct from being made by an individual. How can society make a choice in a manner that truly represents the preferences of the individuals who compose that society? Traditionally the answer both in theory and practice comes from representative democracy. Parliament represents the people because they vote for it and any choice that parliament makes is perfectly representative of the wishes of the people, which are underpinned by their values.

Despite the superficial appeal of this solution, there is one problem in principle and a second problem in practice. The problem in principle was discovered by Kenneth Arrow and described in his impossibility theorem. It is impossible for a representative body such as a legislature to reflect perfectly the preferences of voters. The answer to this objection is three fold. The legislature is still representative to some significant extent. A government can compensate for defects in representation by participatory democracy in the form of public discussions.

22. Chapter 19 Choice of Values  
23. Chapter 19 Choice of Values  
24. Chapter 21 Social Choice: Making Law
debate and consultation with people affected by a proposal. There is no more representative way of making a social choice for enacting legislation.

The problem in practice is that the function of representative democracy can be marred by failure to take sufficient steps to implement democracy. These involve, for example, providing as full access to government information as can be achieved and a free media, especially with regard to radio and television broadcasting.

**Problem 3.2 Social Choice: Interpreting Law**

When reasoning by reference to policy the logical approach is to identify the meaning of the ambiguous provision that causes the best effect and to make this the legally correct meaning of the provision. The best effect is the one that possesses the highest net benefit. There is, however, debate as to how to judge what is the best effect.\(^{25}\) There are three major sides to this debate, which are here labelled judicial legitimacy, legislative legitimacy and metademocracy. There will now be a brief explanation of these approaches to interpretation.\(^ {26}\)

*Judicial Legitimacy*

Judicial legitimacy is feasible in jurisdictions where judges are elected. Because of their election the judges have some claim to legitimacy in making their own assessment as to which effect is best. On this basis, each judge forms their own opinion as to which meaning yields the highest net benefit. In doing this the judges choose the values that they deploy.

*Legislative Legitimacy*

Legislative legitimacy arises because the people elect the legislature. In this case the court refrains from exercising its own independent judgment as to the best effect based on the court’s calculation of net benefit. Instead it yields to legislative intent on the basis that a statute ‘should be construed according to the intent of the [legislature] which passed the Act’.\(^ {27}\) The court interprets the statute in the way that the legislature wanted it to be interpreted as it defers to the judgment of the legislature for determining the most desirable outcome. In doing this the judges do not choose the values that they deploy – instead they adopt the values that underlie the policy or intention of the legislature.

*Metademocracy*

Instead of deferring to the judgment of the legislature as to how to interpret a statute, a court might interpret a statute by taking into account the defects in

\(^{25}\) Chapter 21 Social Choice: Interpreting Law

\(^{26}\) See Christopher Enright *Legal Reasoning* Chapter 22 Social Choice: Interpreting Law.

\(^{27}\) *Sussex Peerage Case* (1844) 11 Cl & F 85, 143; 8 ER 1034, 1057
representative democracy both in principle and in practice. This approach is called metademocracy. It involves interpreting the statute in the way it would be interpreted if the legislature were composed and functioning in a proper way so that it were truly democratic (instead of the partially formed democracy that now exists). Obviously to interpret by this means the court has to somehow divine an imputed popular intent by determining what the people would have wanted. This is no easy task and may involve a substantial degree of guesswork or speculation. Consequently, the result will not possess a high degree of certainty in its claim to be the best meaning. In doing this the judges are likely to be deploying their own values or adopting other values of which they approve.

Table of Options
By way of summary the table below sets out these options. Column 1 lists the meanings of the provision. Column 3 lists the actual predicted effect of each meaning. Column 5 sets out the three schools of thought – legislative legitimacy, judicial legitimacy and metademocracy – on the desired effects that a court should achieve when it interprets a statute. These are the options for the court to use in the task of interpretation. They are put in square brackets to show that they are not at this stage actually matching one of the actual effects. They are simply the options for matching depending on how the court chooses to interpret the provision. This is the diagram:

<table>
<thead>
<tr>
<th>Meanings</th>
<th>Actual Effects</th>
<th>Desired Effects</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meaning 1</td>
<td>Effect 1</td>
<td>[Legislative Legitimacy]</td>
</tr>
<tr>
<td>Meaning 2</td>
<td>Effect 1</td>
<td>[Judicial Legitimacy]</td>
</tr>
<tr>
<td>Meaning n</td>
<td>Effect 1</td>
<td>[Metademocracy]</td>
</tr>
</tbody>
</table>

Summary Diagram 7 Meanings, Actual Effects and Desired Effects

Problem 4. Analysing Ambiguity
To interpret law a court must identify the various meanings of the ambiguous provision that gives rise to the need for interpretation. These meanings can be designated Meanings 1–n. Identifying Meanings 1–n performs three valuable functions:
1. The Problems. They represent the problem – which of them is the legally correct meaning?
2. The Answer. The range contains the answer – one of them must be the legally correct meaning (or two or more are legally correct).
3. The Focus. They create the focus for arguments put to the court – any argument must be directed towards a meaning either to promote it as being the legally correct meaning or to unpromote it as not being the legally correct meaning.

28. Chapter 25 Analysing Ambiguity
There are three techniques for analysing ambiguity to detect correctly the various meanings that it embraces:
1. Consult a reputable English dictionary.
2. Try out the word in various contexts.
3. Obtain assistance from an analysis and classification of ambiguity that the author has performed.  

**Other Methods**

**Introduction**
Policy is arguably king in the field of making and interpreting law. It is the only legitimate means of interpreting statutes since it identifies and indorses the best achievable outcome. Nevertheless there are some other claimants to the throne. These are deduction, precedent, rules or maxims of interpretation and secondary sources all of which can be put forward as possible ways of interpreting law.

**Deduction**

To analyse the argument that interpreting law is rationally and objectively based on the process of deduction it is necessary to identify the form that the relevant syllogism would take. It is a syllogism involving propositional logic. For the syllogism to be sound there must be a rule, that is labelled Rule X, which provides a specific and correct answer for cases of interpretation of a designated kind, labelled Category Y. This syllogism takes the following form:

<table>
<thead>
<tr>
<th>Major Premise</th>
<th>Rule X provides a specific and correct answer for cases of interpretation in Category Y.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minor Premise</td>
<td>This particular case falls into Category Y.</td>
</tr>
<tr>
<td>Conclusion</td>
<td>Therefore, Rule X applies in this case and so provides a specific and correct answer.</td>
</tr>
</tbody>
</table>

*Summary Diagram 8 Syllogism for Interpreting Law*

29. Christopher Enright *Legal Method* Chapter 14 Classifying Meanings
30. Chapter 30 Model for Forming Law
Clearly, this syllogism depends on the content of Rule X. If Rule X provides one, and only one, identifiable and correct answer to the question of interpretation, the process is syllogistic. There are two obvious possibilities for Rule X: 
Possibility 1. Rule X is a rule that requires a court to interpret law by reference to a clearly identified unambiguous policy that has already been formed by the legislature. 
Possibility 2. Rule X is a rule that requires a court to interpret law by reference to a precedent that has already interpreted the law.

**Precedent and Maxims**
Ostensibly courts use precedent and rules or maxims of interpretation when interpreting statutory and common law rules. This creates an apparent conflict with the notion that policy is the only rational way to make and interpret law. The way out of this dilemma is based on the fact that both precedent and the maxims of interpretation are really packaged policy. Viewed in this way they are not a denial of the role of policy but an affirmation of it. The law has manufactured two devices to implement policy. Precedent implements policy at the same time as it puts a high value on continuity and stability against adaptability and flexibility. Maxims of interpretation package and present some presumptions that guide courts and save them from retreading the ground on which earlier courts formulated these presumptions. Later courts inherit the wisdom of earlier courts.

**Secondary Sources**
Secondary sources may state arguments or cast an understanding light on an issue of interpretation. However, they can never be an authoritative source for determining the issue.

**Using Law**
Law is made to be used in litigation and transactions. To explain the reasoning processes the text will build up a model in stages – a model for structuring law, a model for applying law to facts and a model for using law.33

**Structuring Law**
Structuring a legal rule by micro analysis involves identifying the parts of the rule that comprise the elements, the consequences and the conditional statement that imposes the consequences when the rule is applied to facts that satisfy the

31. Chapter 23 Precedent
32. Chapter 24 Rules
33. Chapter 31 Model for Using Law
elements. The model for structuring a legal rule by micro analysis can be set out in a diagram in the following way:

<table>
<thead>
<tr>
<th>Law</th>
<th>←</th>
<th>Facts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Element 1</td>
<td>←</td>
<td>Fact 1</td>
</tr>
<tr>
<td>Element 2</td>
<td>←</td>
<td>Fact 2</td>
</tr>
<tr>
<td>Element n</td>
<td>←</td>
<td>Fact n</td>
</tr>
<tr>
<td>▼</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consequences</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Summary Diagram 10 Model for Applying Law

Elements 1–n describe the categories of facts to which the rule applies. When the rule does apply it brings Consequences on the parties. This bringing or causing of Consequences is designated by the arrow in the diagram that joins Elements 1–n and Consequences. The arrow in the diagram that joins Elements 1–n and Consequences designates this imposing or causing of Consequences.

**Applying Law to Facts**

There are two key propositions:
1. Each legal rule is made to apply to the types of facts designated by its elements. There are two key propositions:
2. When a rule applies to facts it imposes the consequences that are set out in the rules.

There is a model for applying law that can explain the process of applying law to facts. This model is an extension of the model for structuring law. It is set out in the following diagram:

<table>
<thead>
<tr>
<th>Law</th>
<th>←</th>
<th>Facts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Element 1</td>
<td>←</td>
<td>Fact 1</td>
</tr>
<tr>
<td>Element 2</td>
<td>←</td>
<td>Fact 2</td>
</tr>
<tr>
<td>Element n</td>
<td>←</td>
<td>Fact n</td>
</tr>
<tr>
<td>▼</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consequences</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Summary Diagram 10 Model for Applying Law

This model is built on the proposition that elements of a legal rule apply to facts. Consequently the model for applying law is constructed by adding two columns, Columns 2 and 3, to the model for structuring law with micro analysis:
2. Column 2. Column 2 contains an arrow pointing from Column 3 to Column 1 demonstrating the relationship of Facts 1–n to Elements 1–n. There are two ways of expressing this relationship:
   2.1 Elements 1–n apply to Facts 1–n.
2.2 Facts 1–n fit within or satisfy Elements 1–n.

Applying law to facts is a deductive process based on a syllogism. This syllogism for applying law to facts takes the following form:

<table>
<thead>
<tr>
<th>Components</th>
<th>Relationships</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Major Premise</strong></td>
<td>Facts that fall within the categories designated by Elements 1–n cause Consequences.</td>
</tr>
<tr>
<td><strong>Minor Premise</strong></td>
<td>The material facts in this case, Facts 1–n, fall within the categories designated by Elements 1–n.</td>
</tr>
<tr>
<td><strong>Conclusion</strong></td>
<td>Facts 1–n cause Consequences.</td>
</tr>
</tbody>
</table>

**Summary Diagram 11: Syllogism for Applying Law to Facts**

**Litigation and Transactions**

**Introduction**
There is a model for using law that explains and analyses using law in litigation and transactions. One derives this model by extending the model for applying law. This extension is needed to explain how facts are established, in litigation by proving them by evidence and other means, and in transactions by creating them by following processes. This model for using law can be set out in a diagram:

<table>
<thead>
<tr>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law</td>
<td>← Facts</td>
<td>← Evidence/Processes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Element 1</td>
<td>Fact 1</td>
<td>Evidence 1/Process 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Element 2</td>
<td>Fact 2</td>
<td>Evidence 2/Process 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Element n</td>
<td>Fact n</td>
<td>Evidence n/Process n</td>
<td></td>
<td></td>
</tr>
<tr>
<td>↓</td>
<td>Consequences</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Summary Diagram 12: Model for Using Law**

**Columns 1-3**
Columns 1-3 reproduce the model for applying law. This is explained above.

**Columns 4-5**
Columns 4-5 portray two functions, which are explained below:
1. Proving facts in litigation.
2. Establishing facts in transactions.

**Columns 4-5: Proving Facts**
In litigation parties establish disputed facts that occurred in past time by proving them to the satisfaction of the court according to the operative standard of proof.
There are four reasoning processes used in proving facts – induction, deduction, observation (seeing is believing), and deeming provisions. The aim of the party is to convince the court of the truth of facts to a degree of probability that is called the standard of proof. There are two major standards for the positive elements of a case: the standard for a civil case and the standard for a criminal case.

**Civil Case**
At common law in a civil case the standard of proof is the balance of probabilities, which equals 51%. The policy behind this is pure abduction. To the extent that a minimum standard of proof to a degree of 51% is required for both civil and criminal cases the reasoning is purely abductive. Abductive reasoning says that one treats as true the proposition or conclusion that is most probable. A standard of 51% is the minimum standard for an outcome to be the most probable because, by application of the complementarity rule, the next best possibility can be no more than 49%.

**Criminal Case**
At common law in a criminal case the standard of proof is proof beyond reasonable doubt. While this is not commonly expressed as a numerical percentage it is clearly in excess of 51% (and is in excess to a substantial extent). Obviously, though, we can represent this and any other standard in excess of 51% as (51 + X)%.

With the 51% explained, what about the excess of 51%, namely the X%? The justification is found in the precautionary principle. This is a special means of coping with uncertainty. It deals with cases where there are at least two outcomes and one outcome yields a highly unacceptable state of affairs. In this context, the highly unacceptable outcome is that an innocent person will be convicted. Generally jurists have regarded the conviction of an innocent as a far greater wrong than the acquittal of a guilty person. Here the reasoning is that a higher standard of proof makes it less likely that an innocent man will be convicted, although more likely that some guilty people will be acquitted.

It is possible to explain the precautionary principle in simple policy terms. It applies when drastically negative consequences may follow or are more likely to

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34. Chapter 6 Induction
35. Chapter 5 Deduction
36. Chapter 26 Observing Facts
38. Chapter 7 Abduction
follow if those in control do not take proper precautions. While the precautions may seem extravagant when viewed in isolation, they are not disproportionate when measured against the severity of the harm that will or might ensure if the precautions are not taken. This is expressed in the popular maxim ‘desperate times call for desperate measures’.

Columns 4-5: Creating Facts
In transactions parties establish the relevant facts in present time by following or carrying out the processes laid down by the rules governing the transaction. For example the rules for the sale of land may require that the seller hand to the purchaser a signed transfer form for the piece of land that is the subject of the sale. To create this fact the seller prepares the transfer form in the format that the law requires, signs it and hands it to the purchaser. The fact that parties to a transfer create the required facts in present time by following processes causes a major consequence – it explains why transactions are so often successful because there is commonly no uncertainty from the need to prove past facts.

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