

Give Me One Good Reason: The “Principled Approach” in the Canadian Judicial Opinion

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In a number of areas of Canadian law, including evidence and vicarious liability in tort, courts have moved away from hard and fast rules and have instead adopted principled approaches. Using the principled approach, a court will set out a series of general guiding principles that underlie that area of law for lower courts to use in coming to decisions. This is a stark contrast to the rule-based approach where authority comes from its automatic and self-contained nature. The author breaks down the distinctions between rules and principles and examines why courts have increasingly shown a preference for the principled approach. The author contends that while the use of the principled approach in Canadian jurisprudence has not had a significant effect on outcomes of cases, it is used because of its rhetorical power. She argues that the principled approach allows judges to use their written opinions to convey authority through persuasion. Finally, the author articulates potential dangers of the principled approach, given its rhetorical power, and suggests that courts should be aware of the power conferred upon such decisions by their very structure.

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Introduction

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Introduction

Over the last thirty-five years, there has been a definite shift in Canadian judicial discourse toward “principled” decision making. In 1992, the Supreme Court of Canada declared that principled reasoning was a “triumph” over “ossified” categories¹ and went on to endorse the principled approach in many areas of Canadian law.² When a judge takes a “principled approach”, she unearths the reasons motivating the relevant legal rule and then reaches her decision by applying those principles instead of the rule itself.

Bazley v Curry is a typical example.³ In *Bazley*, the Supreme Court of Canada held an employer vicariously liable for an employee’s intentional tort of sexual abuse. The applicable common law rule⁴ stated that an employer was vicariously liable where an employee’s tortious actions fell within the “scope of employment”.⁵ The Court found this rule analytically unhelpful because the rule provided “no criterion” on which to distinguish between different kinds of acts.⁶ A “unifying principle” was needed—some animating force that was present in all cases where vicarious liability had been found.⁷ A “principle” was located with the “benefit of hindsight”⁸ (“employers may justly be held liable where the act falls within the ambit of the risk that the employer’s enterprise creates or

1. *R v Smith*, [1992] 2 SCR 915 at 930, 94 DLR (4th) 590.

2. See Justice R Sharpe, “Good Judgment: Judicial Method and Judicial Decision Making—The Evolution of the Decision Making Process” (2012) (Paper delivered at the National Judicial Institute, Ottawa, 5–7 December 2012) [unpublished] [Sharpe, “Good Judgment”]. In Part I, I further explain what areas of Canadian law are affected by the principled approach.

3. [1999] 2 SCR 534, 174 DLR (4th) 45 [cited to SCR].

4. Referred to as a test, but operating as a rule in the sense of being specific and categorical. I further explain what constitutes a rule in Part II.

5. *Bazley v Curry*, *supra* note 3 at para 6.

6. *Ibid* at para 11.

7. *Ibid* at para 22.

8. *Ibid*.

exacerbates”⁹), supplemented by two other “underlying” and “animating” goals (fair compensation and deterrence¹⁰) as well as a non-exhaustive list of subsidiary factors for courts to consider. The Court concluded that determinations of vicarious liability ought to be guided by the principles it had set out, and that future courts “should openly confront the question of whether liability should lie against the employer rather than obscuring the decision beneath semantic discussions of ‘scope of employment’ and ‘mode of conduct’”.¹⁰ Ultimately, as one might expect, the employer was found liable.

Bazley illustrates several consequences of the principled approach. First, the approach typically increases judicial discretion because of the broad nature of principles and the “weighing” involved in applying principles directly to facts.¹¹ The *Bazley* opinion lacks imperative language, relying instead on the ability of courts to be “guided” by a cluster of considerations. This increased doctrinal flexibility is thought to achieve particularized justice, assisting the court when faced with a “difficult case” that appears to fall outside the rule.¹² The principled approach can thus help judges develop the common law when the strict application of a narrow legal rule or category might exclude what is perceived to be the just result. Critics of the principled approach typically respond by arguing that to reject categorical rules is to frustrate important legal values—namely, certainty, efficiency and constraint¹³—in the pursuit of overrated “perfection” in judicial decision making.¹⁴ However, *Bazley* also illustrates that the effects of principles and rules are not necessarily distinct—the Court *may* have reached the same conclusion under the existing “rule” (the rule was not overturned or abandoned), but instead chose to explicitly reason through guiding principles.

9. *Ibid* at para 37.

10. *Ibid* at para 41.

11. See Ronald Dworkin, *Taking Rights Seriously* (London, UK: Gerald Duckworth & Co, 1977) at 26 (what characterizes principles is that they have “weights” relative to one another).

12. *Bazley v Curry*, *supra* note 3 at para 16.

13. See generally Alex Mills, “The Identities of Private International Law: Lessons from the US and EU Revolutions” (2013) 23:3 *Duke J Comp & Intl L* 445 (certainty, efficiency and constraint are at the heart of most criticism from civil lawyers on the principled approaches of American and Canadian law to issues of private international law).

14. See e.g. Antonin Scalia, “The Rule of Law as a Law of Rules” (1989) 56:4 *U Chicago L Rev* 1175 at 1178.

An academic plea to replace rules with principles in Canadian judicial reasoning was made as early as 1969 by Michael Schneiderman.¹⁵ Justice Beverly McLachlin (as she then was) signalled the Supreme Court's move toward principles in the 1990 case *R v Khan* by endorsing "a more flexible approach" to the problem of hearsay, where decisions would be "rooted in the principle and policy underlying the . . . rule".¹⁶ In 1992, the Supreme Court wrote that *Khan* was a "triumph" of "principled analysis".¹⁷ The Supreme Court first expressly referred to the "principled approach" as an alternative to categorical rule-based reasoning a few months later,¹⁸ when considering the "criteria present in all cases of unjust enrichment".¹⁹ In 1993, L'Heureux-Dubé J argued in dissent in *Canada (Attorney General) v Mossop* that the principled approach should be adopted to help determine the appropriate level of deference in administrative law cases: "[The principled approach] does not focus on formal categories, but rather seeks to determine the rationale [for a course of action]".²⁰ Gradually since *Khan*, the principled approach has been applied in much of Canadian law, including the law of evidence,²¹ private international law,²² administrative law,²³ family law,²⁴

15. Michael Schneiderman, "Toward a Public Policy Oriented Jurisprudence: 'Principles' as a Substitute for 'Rules' in the Legal Syllogism" (1969) 34:1 Sask L Rev 314.

16. [1990] 2 SCR 531 at 540, 79 CR (3d) 1. See also Ian Bushnell, "Justice Ivan Rand and the Role of a Judge in the Nation's Highest Court" (2010) 61:1 UNBLJ 101 at 102.

17. *R v Smith*, *supra* note 1 at 930.

18. See *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762 at 784, 98 DLR (4th) 140 [*Peel*]. Here the Court is actually referring to the approach it had set out earlier in *Pettkus v Becker*, but this is the first time that approach is called "principled". [1980] 2 SCR 834, 117 DLR (3d) 257.

19. *Pettkus v Becker*, *supra* note 19 at 784.

20. [1993] 1 SCR 554 at 595, 100 DLR (4th) 658.

21. For a thorough overview of the evolution of the principled approach in evidence law, see Robert J Currie, "The Evolution of the Law of Evidence: Plus ça change . . . ?" (2011) 15:2 Can Crim L Rev 213.

22. See e.g. *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572.

23. See e.g. *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 23, [2003] 1 SCR 226 (where the Court specifically compared the "pragmatic and functional approach" to the "principled approach" it developed in the law of hearsay).

24. See e.g. *Gordon v Goertz*, [1996] 2 SCR 27 at 98, 134 DLR (4th) 321 ("the best interests of the child" in custody determinations).

tort law²⁵ and the law of restitution.²⁶ The phrase “principled approach”, virtually unknown in the Canadian judicial opinion before the 1990s,²⁷ has now been used in over 2,000 decisions.²⁸ Whatever else an approach is, courts seem to be saying it ought to at least be principled!

Despite its popularity in judicial discourse, I suggest that explicitly “principled” judicial reasoning has not had a revolutionary effect on the actual *outcomes* of Canadian cases in the last three decades.²⁹ The use of principles to nudge along changes in the common law in the face of contradictory precedent is not a recent invention.³⁰ The supposed incongruence of rules and principles is also likely overstated. Courts often apply rules with the same flexibility as principles, while principles imbued with enough precedential force take on the rigidity of rules.³¹ Lastly, principled and rule-based approaches will frequently lead to the same outcome, especially where the principled approach accurately and completely sets out the reasons motivating the rule.³² Principled approaches often do not completely abandon categories and precedents but retain them as a preliminary analytical step.³³ As most cases that come before courts fit within the four corners of the rule, issues of injustice

25. See e.g. *Bazley v Curry*, *supra* note 3.

26. See e.g. *Peel*, *supra* note 19.

27. However, Bushnell argued the “principled approach” was set in motion much earlier through Rand J’s anti-formalist reasoning. See Bushnell, *supra* note 17.

28. Determined by a search on the legal search engine “QuickLaw” made in April 2014.

29. The exception to this argument is Canadian constitutional law, which is outside the scope of this article, where “principled” reasoning has played an extremely important role in enabling Canadian courts to implement the values and aims of the *Canadian Charter of Rights and Freedoms* and the Constitution. See e.g. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

30. See generally Stephen Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge, UK: Cambridge University Press, 2011) at 230 [Waddams, *Principle and Policy*].

31. See *ibid* at 18–19.

32. See e.g. *Zoic Studios BC Inc v Gannon*, 2012 BCSC 1322, 221 ACWS (3d) 346 (the Court writes “substantively there is little difference between the categorical and principled approach to determining whether an employee is a fiduciary” at para 112).

33. See e.g. *Bazley v Curry*, *supra* note 3.

arising from the rule's strict application tend to be exceptional.³⁴ Consider H. L. A. Hart's classic "no vehicles in the park" hypothetical.³⁵ If, instead of the rule, judges were "guided" by principles like "the park should be free from excessive noise", "park paths should be safe for pedestrians" and "park wildlife should be protected from pollution", a car would still be excluded—a judge using the principled approach would just take longer to arrive at that conclusion and give more reasons for it.

Although the "principled approach" is now a familiar phrase in the Canadian judicial opinion, the trend as a general phenomenon has had little treatment in Canadian legal scholarship. Canadian academics tend to focus on the effects of principled reasoning in specific areas of law and not as a general phenomenon.³⁶ It is my position that the "principled approach" is worthy of study, not necessarily for its effect on case outcomes, but for demonstrating an explicit judicial preference for principles *instead of* rules. Hard rules have fallen out of fashion. Rex Ahdar calls the "extreme reluctance [of courts] on occasions to affirm an existing categorical rule" yet "another manifestation of the movement of late towards greater doctrinal flexibility and individualised justice and away from fixed, (seemingly) harsh and rigid rules".³⁷ So what makes rules now seem bad and principles now seem better, especially when, historically, these concepts have been relatively fluid?

To answer this question, judges must be looked at not only as arbiters but also as arguers in the legal community. The judicial opinion serves many purposes beyond stating the outcome of a case. It is an argument, self-consciously concerned with establishing its own authority. Choices in judicial discourse betray what a judge herself finds rhetorically persuasive. An opinion that takes the principled approach must then mean that the authoring judge sees a principled opinion as "better" in the circumstances than an opinion that operates within the discourse of rules. The principled

34. See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and in Life* (Oxford: Clarendon Press, 1991) at 229 [Schauer, *Playing by Rules*].

35. HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv L Rev 593 at 607.

36. See e.g. Currie, *supra* note 22.

37. Rex Ahdar, "Contract Doctrine, Predictability and the Nebulous Exception" (2014) 73:1 Cambridge LJ 39 at 39.

approach is not only an analytical tool, but also a rhetorical device.³⁸ It is the judiciary's attempt to be more persuasive by reasoning with the reasons behind rules.

In what follows, I consider why judges think giving *more* reasons (and calling them principles) is so persuasive. In Part I, I continue my discussion of the structure of the principled approach by explaining how rules and principles are defined and operate. Part II returns to the topic of judicial authorship. I suggest that shifting perspectives on legal authority provide one explanation for the judicial trend toward valuing the persuasiveness of principled reasoning over rules. In Part III, I conclude that because the principled approach possesses such significant rhetorical power, it should be exercised with some caution as the approach carries the risk of unduly emphasizing select reasons at the expense of others and imbuing these reasons with accidental precedential force.

I. Ruling with Principles

To observe that Canadian judicial opinions have trended away from rules and toward principles is to assume some difference between those two legal devices, at least theoretically. But what exactly is a legal rule? What is a legal principle? And is there a reliable way to distinguish between them? Courts and jurists have not agreed on the answers to these questions.

The terms “rule” and “principle” have been muddled by centuries of imprecise legal usage, and their respective effects (intended or otherwise) in modern judicial reasoning are not always clear.³⁹ “Rule” and “principle” are sometimes used as interchangeable legal concepts,⁴⁰ typically when contrasted with what are perceived to be extra-legal “policy” concerns.⁴¹

38. I use rhetoric in the non-pejorative sense of “modes of persuasion which are rational and yet not in the logical sense conclusive”. HLA Hart, “Introduction” in Chaim Perlman, ed, *The Idea of Justice and the Problem of Argument* (New York: The Humanities Press, 1963) vii at vii, cited in Gene R Shreve, “Rhetoric, Pragmatism and the Interdisciplinary Turn in Legal Criticism: A Study of Altruistic Judicial Argument” (1998) 46 Am J Comp L (Supp) 41 at 56.

39. See Waddams, *Principle and Policy*, *supra* note 31 at 17 (referring to principles expressly, and writing that “principles cannot be fully distinguished from legal rules” at 18).

40. See Scalia, *supra* note 15 at 1177.

41. See Waddams, *Principle and Policy*, *supra* note 31 at 17.

“Principle” is sometimes, confusingly, used instead of “rule” in order to avoid the word “rule” and its supposed connotations.⁴² Even principles themselves, once applied to cases, are apt to be later rephrased as rules, while especially persuasive rules are then reframed as principles.⁴³

Still others have further confused the meaning of terms like *law*, *principle*, *rule*, and *policy* by refusing to attach specific definitions, arguing instead that “when our categories become over-defined we lose touch with reality”.⁴⁴ That reality, presumably, is that the common law judges have never been too particular about the rule/principle distinction and so fussing about it in academic writing is something of a fiction.⁴⁵ But I intend to make arguments about choices in judicial discourse, and so some parameters must be set about the relevant terms. Therefore, for the purposes of this article, I accept the conventional understanding of the legal rule as a directive aimed at controlling human behaviour (*rule* comes in part from the Latin *regere*—to lead straight) that is both specific and categorical.⁴⁶ A rule is specific because its purview is limited to circumscribed conduct,⁴⁷ and it is categorical because, where the conditions are met, its application is supposed to be automatic,⁴⁸ triggering

42. See Schauer, *Playing by Rules*, *supra* note 35 at 12.

43. See Waddams, *Principle and Policy*, *supra* note 31 at 17–18.

44. Grant Gilmore, “Legal Realism: Its Cause and Cure” (1961) 70:7 Yale LJ 1037 at 1039.

45. A note about “policy”: In this article, I write about judicial decision making as though rules and principles exhaust the potential frameworks for reasoning. This is partly because I would like to keep my analysis neat. Rules, in this article, represent a mode of decision making that defers analysis to the rule maker, whereas principles represent the motivating reasons behind hard directives. Undoubtedly, as I try to explain in this article, principles (as I have construed them) often behave like rules, and vice versa. But I use these terms to capture particular kinds of thinking nonetheless. It is for this reason that “policy”, and its distinction from either “rules” or “principles”, does not play a role in my analysis. Policy tends to operate like principles in the sense of being justificatory. See e.g. *Bazley v Curry*, *supra* note 3 at para 36 (the “policy” goals). But the precise line between principle and policy (and the debate over whether policy is properly within the purview of the court) is beyond the scope of my work here. For a recent work in this area, see Waddams, *Principle and Policy*, *supra* note 31.

46. See “Understanding the Model of Rules: Toward a Reconciliation of Dworkin and Positivism”, Note, (1972) 81:5 Yale LJ 912 at 940 [“Model of Rules”].

47. See Joseph Raz, “Legal Principles and the Limits of Law” (1972) 81:5 Yale LJ 823 at 838.

48. See Steven L Winter, *A Clearing in the Forest: Law, Life, and Mind* (Chicago: University of Chicago Press, 2001) at 187.

a “definite legal consequence”.⁴⁹ The legal rule is *on* or *off*; it is applied in an “all-or-nothing” fashion;⁵⁰ it leaves, at least theoretically, “no doubt about the proper course of action”.⁵¹

The legal rule is authoritative by virtue of its logical form. It represents a “complete justification” for judicial action.⁵² The legal rule becomes, in other words, a conclusive reason for deciding a case in a particular way because it stands in place of the *original reasons* for the formation of the rule itself.⁵³ This is why rules are “all or nothing”—if a set of facts is captured by a rule, the rule does not invite any further discussion. This is also why rules are metaphorically imagined as figures of authority, leading us down a “clear-cut” trail, the confines of which are “firm and unyielding”.⁵⁴

The formulation of a rule itself signifies that the rule maker (whether judge or legislator) has already weighed all the considerations relevant to the issue and transformed the most persuasive reasons into the rule’s conditions.⁵⁵ The rule thus absolves the current legal decision maker of any duty to (re)analyze reasons in the circumstances of a particular case. The reasons that motivated the rule are irrelevant in the rule’s subsequent applications.⁵⁶ The rule’s “use or value” is no longer important because it has already been “solved and left behind”.⁵⁷

A rule’s rhetorical strength flows from its assertion of inherent, structural and absolute authority. The legal rule stands for clarity, certainty and predictability⁵⁸ because by definition it promises to treat like cases

49. See The Honourable Mister Justice EW Thomas, *A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy* (Wellington, NZ: Victoria University of Wellington Law Review, 1993) at 6.

50. See Dworkin, *supra* note 12 at 24.

51. Winter, *supra* note 49 at 207.

52. See *ibid* at 187.

53. See Jaap C Hage, *Reasoning with Rules: An Essay on Legal Reasoning and Its Underlying Logic* (Dordrecht, Neth: Kluwer Academic, 1997) at 109.

54. See Winter, *supra* note 49 at 207.

55. See Hage, *supra* note 54 at 111.

56. See *ibid*.

57. Karl Llewellyn, *The Theory of Rules*, ed by Frederick Schauer (Chicago: University of Chicago Press, 2011) at 79–80 [Llewellyn, *Theory of Rules*].

58. See Winter, *supra* note 49 at 187; Schauer, *Playing by Rules*, *supra* note 35 at 157.

alike⁵⁹ and to make no exceptions.⁶⁰ The rule also gives the impression of an efficient adjudicative process by abbreviating legal reasoning. The rhetorical value of perceived efficiency can be very persuasive in a legal system constrained by precedent and progressing only under the enormous weight of recorded decisions. A rule-based system of decision making gives the impression of abbreviating what might otherwise be an “[un]manageable array of factors” in a legal system where judges frequently have “too little time to consider too much”.⁶¹

But in recent judicial discourse, the legal rule has also come to imply rigidity and ossification.⁶² The legal rule muzzles the judge by rendering re-discussion of competing reasons unnecessary. This constraint on judicial conversation is not exactly what Scalia J meant in writing “[o]nly by announcing rules do we hedge ourselves in”, but the essential image of the constrained judge is the same.⁶³ The mechanical nature of rule-based decision making suggests a shackled judge, unable to respond to the demands of justice in the case at bar because he is bound by the requirements of a generally just rule. It connotes a willingness to sacrifice particularized justice in order to process more cases at a lower financial and intellectual cost. This is certainly the tone of legislated Canadian family law, where the need for swift adjudication for frequently impecunious clients has resulted in a strict rule-based regime that severely curtails judicial discretion.⁶⁴

Proponents of rule-based reasoning emphasize that occasions for potential injustice (“the recalcitrant experience”⁶⁵) are statistically rare; yes, “a few” corners of every rule of law “do not quite fit”,⁶⁶ but legal rules achieve, in the vast majority of cases, results identical to those that would have been achieved had the rule’s background reasons themselves been

59. See Scalia, *supra* note 15 at 1178.

60. Note that a rule can have exceptions, but its exceptions must be stated in the rule and not tacked on after the fact to deal with new situations. See *ibid* at 1177.

61. Schauer, *Playing by Rules*, *supra* note 35 at 229.

62. See e.g. *R v Smith*, *supra* note 1.

63. Scalia, *supra* note 15 at 1180. Here, Scalia J is concerned with the precedential effect of cases and the difficulty of distinguishing cases decided on the totality of the circumstances.

64. For provisions that only allow departure from the rules in cases that demonstrate exceptional hardship, see e.g. *Federal Child Support Guidelines*, SOR/1997-175.

65. Schauer, *Playing by Rules*, *supra* note 35 at 229.

66. Scalia, *supra* note 15 at 1177.

applied. The method applied does not necessarily determine the outcome. The legal rule is valuable, then, for what it makes absent. The rule takes legally irrelevant items “off the agenda”.⁶⁷ It brings an analytical “silence” into judicial decision making—and, ninety-nine out of a hundred times, it achieves the result its formulators intended.⁶⁸

The supposed straightforwardness of the legal rule masks a complex underlying issue—whether the given legal rule is applicable in the first place. The triggering conditions set out in rules generate the same uncertainty that the form of the rule purports to avoid. As Professor James Boyd White has observed:

[The legal rule] appears to be a language of description . . . but in cases of any difficulty it is actually a language of judgment, which works in ways that find no expression in the rule itself. In such cases the meaning of its terms is not obvious, as the rule seems to assume, but must be determined by a process of interpretation and judgment to which the rule gives no guidance whatever. The discourse by which it works is in this sense invisible.⁶⁹

The Court in *Bazley* seems to have implicitly recognized this problem when it struggled with the hollowness of the common law rule for strict liability.⁷⁰ The rule applied to tortious acts performed in the “course of employment”, but did not assist in determining what the “course of employment” included and so was functionally meaningless. A legal rule’s discourse, then, is actually “invisible” in two senses—the rule itself displaces both the reasons for its formulation and the reasons justifying its application. I suggest that to give only rules as reasons may be, in effect, to give no reasons at all.

In principled judicial reasoning, conversely, “principles” are usually characterized as the reasons behind legal rules.⁷¹ Principles are rules’ underlying arguments, and the word “principle” itself suggests that the legal author feels the argument is well reasoned.⁷² Legal principles are broad, prescriptive statements that do not attach defined legal

67. Schauer, *Playing by Rules*, *supra* note 35 at 230.

68. See *ibid* at 233.

69. James Boyd White, “The Invisible Discourse of the Law: Reflections on Legal Literacy and General Education” in James Boyd White, ed, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, Wis: University of Wisconsin Press, 1985) 60 at 65.

70. *Supra* note 3 at para 11.

71. See generally Schneiderman, *supra* note 16.

72. See Waddams, *Principle and Policy*, *supra* note 31 at 18.

consequences to conduct or facts.⁷³ Because their purview is so generally framed, principles, unlike rules, do not have automatic application and may come into competition with one another, even when they are considered to be “fundamental” within a legal system.⁷⁴ Competing principles form the justificatory background of legal rules, and the value judgments made in assigning these principles their relative weights are abbreviated by the rule.

The “principled approach” then may be thought of as a deconstruction of the rule-making process. It is the process of determining the reasons (i.e., the principles) behind rules, and allowing those principles to “operate directly on the facts”.⁷⁵ Professor Karl Llewellyn calls the technique one of “explicit principle”, hinting that the rule/principle distinction in practice is not so neat:

Its essence lies in that it articulates the *reason* of the rule, and incorporates the reason into the rule itself. Its effect is to provide open-endedness, it leaves the rule free to meet new conditions with *guidance*; it *presses* the variant official personnel *toward* resolving questions on new emergent fact along similar lines, or even the same lines; it *enables* them, under the use and guidance of the rule itself, to solve such problems in a satisfying fashion.⁷⁶

The judicial practice of reasoning explicitly through principles is deeply controversial. Ronald Dworkin’s observation that judicial decision making was at times done according to legal principles when rules could not do the job was severely criticized by legal positivists.⁷⁷

Dworkin’s position here is so unusual that some comment seems desirable. Moral and social goods are usually thought of as justification for a *law*, rather than as justification for a ruling in a court case. *Rulings*, in turn, are not justified by principles and policies, but by laws that serve principles and policies.⁷⁸

73. See “Model of Rules”, *supra* note 47 at 943.

74. For example, reconcile the “fundamental principle” that compensation is the primary goal of private law remedies with such doctrines as punitive damages and the exclusion of collateral benefits. See *Hodgson v Trapp*, [1988] 3 All ER 870 (HL).

75. Schneiderman, *supra* note 16 at 320.

76. Llewellyn, *Theory of Rules*, *supra* note 58 at 80 [emphasis added].

77. Dworkin, *supra* note 12 at 26.

78. “Model of Rules”, *supra* note 47 at 922, n 21 [emphasis added].

Rulings, argued the positivists, could not be based on principles alone because principles by definition did not “frame legal obligations”.⁷⁹ The ability to apply a legal principle directly to the facts of the case would give judges an enormous amount of discretion to decide what the law required of parties. The early twentieth-century American “revolution” in private international law, later mirrored by Canadian courts, similarly saw decades of debate about the role of principles in reasoning. When American courts replaced strict categorical jurisdictional rules with principles intended to determine where a case *ought* to be heard according to the interests of justice, civil law academics decried the discretion afforded to the judges who made these determinations.⁸⁰

At this point, it is important to consider why judges give reasons. Giving reasons for legal outcomes is frequently thought of as an essential aspect of justice, but *not* giving reasons is certainly common in legal decision making.⁸¹ There are many legal contexts in which reasons are withheld—among them, unwritten opinions, statutes, jury verdicts and objections rulings.⁸² In these contexts, conclusions are not illegitimate merely because no reasons are given. So why does abbreviated decision making matter if the result is right?

I suggested above that offering a rule as a reason for a legal outcome is, in a sense, to offer no reason at all. I did not mean this as a necessarily critical observation. There are good reasons for not giving reasons. One is certainly efficiency—a judge who is not required to explain everything has a lot more time for judging.⁸³ But the effect of giving or not giving a reason is not merely practical. Professor Frederick Schauer has argued that to give a reason is to make a commitment to that reason, akin to promises and contracts.⁸⁴ His thesis of commitment is primarily derived from social observation: When we give a reason, we “induce reliance on the part of another, and inducing reasonable reliance places obligations

79. *Ibid* at 943.

80. See e.g. Mills, *supra* note 14.

81. See Sharpe, “Good Judgment”, *supra* note 2 at 10.

82. See Frederick Schauer, “Giving Reasons” (1995) 47:4 *Stan L Rev* 633 at 636–37 [Schauer, “Giving Reasons”].

83. See Frederick Schauer, “Opinions as Rules” (1995) 62:4 *U Chicago L Rev* 1455 at 1466–67 [Schauer, “Opinions as Rules”].

84. Schauer, “Giving Reasons”, *supra* note 83 at 649.

on the one who does so”.⁸⁵ For example, imagine I tell you that I love the smell of second-hand books.⁸⁶ In reliance on that statement, you buy me a vintage copy of *Pride and Prejudice*. But I actually hate *Pride and Prejudice* because I received a poor grade on a book report I submitted on that book as a teenager. If I balk at your gift, I now have to explain myself. “But you love the smell of old books!” you tell me. I have committed to a reason by giving it, and my departure from it is now not really permitted. In this way, giving a reason is like formulating a rule, in the sense that rules have automatic application.⁸⁷

In a legal system governed by precedent, the necessity of committing to reasons does not at first seem to be much of an issue. On the contrary, it would seem to work toward the goal of treating like cases alike. But the problem with committing to principles has less to do with the idea of commitment itself than with *the kind of reason* to which we are committed. Professor Schauer argues that “to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself”⁸⁸—it is, in other words, to “transcend the particularity of [the] case”.⁸⁹ This holds true for rules and principles as well: “The narrower principle is sound because it is subsumed under the stipulated-to-be-sound broader principle.”⁹⁰ And because offering a reason for action is committing to a proposition of relatively greater generality, offering reasons in the present decides future cases:

If a decisionmaker is *prima facie* committed in the future to the reasons she gives for a conclusion now, and if those reasons are typically more general than the conclusion they support, then she commits herself to deciding some number of cases whose full factual detail she cannot possibly now comprehend.⁹¹

This “commitment” effect of giving reasons through principles is ironic considering that the principled approach deconstructs rules precisely to avoid their automatic application. Giving principles as reasons commits

85. *Ibid* at 645.

86. See *ibid* at 644.

87. See *ibid* at 651.

88. *Ibid* at 649.

89. *Ibid* at 641.

90. *Ibid* at 642.

91. *Ibid* at 651.

the judge not only to those principles, but also to principles-as-reasons—a discursive style with particular rhetorical effects. The commitment effect is particularly problematic where principles are given as reasons because principles are already, by definition, meant to be general. When imbued with precedential force, these supposedly general principles can instead behave like rules.

Legal rules have not operated in the common law judicial opinion with the absolute rigidity their structure demands:

[T]here are things the common law undoubtedly refers to as “rules”, but if they are always subject to modification when the circumstances of some case appear to indicate the desirability of a modification, then the normative purchase is provided not by the supposed rule . . . the rule itself furnishes no constraint.⁹²

Principles behave like rules once they have been given as *the* reasons under the principled approach, and rules are frequently modified with the flexibility of principles anyway. Therefore, the explicit use of principle *instead* of rule in recent judicial decision making may seem suspicious. As Dworkin’s critics have argued:

If rules are the function of, and are subservient to, principles, it seems pointless to maintain the hard and fast distinction between rules and principles At some point a principle manifests itself with sufficient clarity and firmness to be called a rule The point in making the distinction is lost.⁹³

Why call it the “principled approach” when the effect is to create a new rule, merely at a higher level of abstraction? And what does the shift to “principles” tell us about how judges view “rules”?

II. Principles of Authority

The fluidity of rules and principles raises the questions of why the principled approach so adamantly privileges principles over rules, and what triggered this change in the 1990s. In this Part, I argue that the shift in Canadian law toward the principled approach has been largely rhetorical in that the principled approach makes a judgment more

92. Schauer, *Playing by Rules*, *supra* note 35 at 177.

93. Thomas, *supra* note 50 at 39.

persuasive without necessarily affecting substantive outcomes. This is not a pejorative statement; a judicial opinion is not the same thing as judging.⁹⁴ Differences in the form, discourse and rhetoric of judicial opinions do not necessarily correspond with—or compel—differences in the substantive results of judging. Judges *may* and often do arrive at a just outcome in spite of cumbersome analytical constraints.⁹⁵ And reasons are often selected after a judge has formed her initial “hunch” about the case.⁹⁶ This means that we can read a judicial opinion and infer more than just what the judge was thinking or how the judge was reasoning while she wrote. The move from rule-based reasoning to the principled approach suggests that the application of a strict rule no longer carries the authoritative weight it is supposed to in rule-based systems. A rhetorical shift to principles-not-rules may bolster faith in judicial reasoning without dramatically affecting case outcomes.

I do not mean that a judicial opinion is wholly unconnected to the process of judgment or to the outcomes of cases. But the conflation of arriving at a decision with giving reasons for that decision is the product of assuming that the judicial opinion only does one thing—provide an accurate representation of the actual reasoning that led to the holding. This is in part because the style of most Canadian opinions gives the impression that judicial reasoning is being conveyed in real time, the words read aloud in a courtroom directly to the parties of the dispute.⁹⁷ Presuming that a written judgment accurately conveys the reasons for judgment is also a critical part of appellate review.⁹⁸ But isolating the legal opinion—assuming that the opinion is distinct from processes of judging—can also be useful. Doing so allows us to ask *why* judges write

94. See Schauer, “Opinions as Rules”, *supra* note 84 at 1466–67.

95. See Theodore M Benditt, *Law as Rule and Principle* (Hassocks, UK: Harvester Press, 1978). See also Brainerd Currie, “Notes on Methods and Objectives in the Conflict of Laws”, in Brainerd Currie, ed, *Selected Essays on the Conflicts of Laws* (Durham, NC: Duke University Press, 1963) 177. Currie noted: “A sensitive and ingenious court can detect an absurd result and avoid it At the same time, we constantly run the risk that the court may lack sensitivity and ingenuity; we are handicapped in even presenting the issue in its true light.” *Ibid* at 181.

96. See Sharpe, “Good Judgment”, *supra* note 2 at 7–8.

97. See generally RA Ferguson, “The Judicial Opinion as Literary Genre” (1990) 2:1 Yale JL & Hum 201 at 205.

98. See *Cojocaru v British Columbia Women’s Hospital and Health Centre*, 2013 SCC 30, [2013] 2 SCR 357 [*Cojocaru*].

reasons at all and whether some aspects of judicial writing can teach us more about the law than just how it is applied.⁹⁹

The isolated text of the judicial opinion is often framed in terms that imply artificiality—in the sense of being both deliberately constructed and not quite forthcoming. The opinion has been called legal performance,¹⁰⁰ representation,¹⁰¹ rhetoric,¹⁰² literary text,¹⁰³ ceremony¹⁰⁴ and self-portrait.¹⁰⁵ It is an “image of judging”;¹⁰⁶ it *purports to look like* the process behind the judgment, but it is not precisely that process. There is “a complex relation between what a judicial decision says it is doing and what it might actually be doing. . . . [W]hat the judicial decision says it is doing and how the decision’s language transmits this information are, in and of themselves, significant facets of the decision”.¹⁰⁷ Justice Albie Sachs’ “tock tick” metaphor neatly sums up the duplicity of the legal opinion: “Every judgment I write is a lie.”¹⁰⁸ By this, Sachs J means that the orderly and reasonable progression of a written judicial opinion is deliberately chosen to make sense out of judicial intuition. Although judgment appears to flow as a “forward-moving train of thought that arrives at a logically pre-destined terminus”, the “tock” of the judicial opinion often precedes the “tick”.¹⁰⁹ A judicial opinion is not quite what it represents itself to be, and this invites deconstruction.

Many have observed that judicial opinions are typically anxious with projecting authority.¹¹⁰ Canadian judges are situated oddly. They are not

99. See Patricia M Wald, “The Rhetoric of Results and the Results of Rhetoric: Judicial Writings” (1995) 62:4 U Chicago L Rev 1371 at 1371.

100. See e.g. Schauer, “Opinions as Rules”, *supra* note 84 at 1455.

101. See e.g. Mitchel de S-O-l’E Lasser, “‘Lit Theory’ Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse” (1998) 111:3 Harv L Rev 689 at 691.

102. See e.g. Wald, *supra* note 100 at 1371.

103. See *ibid.*

104. See e.g. Ferguson, *supra* note 98 at 205.

105. See e.g. Lasser, *supra* note 102 at 691.

106. *Ibid.*

107. *Ibid* at 737.

108. Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009) at 47.

109. *Ibid* at 47–48.

110. See e.g. William D Popkin, *Evolution of the Judicial Opinion* (New York: New York University Press, 2007) at 1.

elected, but neither are they an anonymous extension of the government immune from personal scrutiny. We can imagine how the Canadian judicial opinion might differ if Canadian courts released only unanimous, anonymous decisions, as in some civil law jurisdictions.¹¹¹ But the style of Canadian opinions spotlights individual judicial personalities. Legal trends are frequently traced back to particular judges, and a judge who is found to have erred on appeal is called out (respectfully) by name. A Supreme Court decision may be cobbled together from several opinions, each signed. The personal accountability of judges for what they think, write and decide generates an understandable amount of concern over the issue of authority. A judge seems to be constantly responding to the unasked question—“why should we trust *you* to make this choice?”

In the early twentieth century, the answer to this question was the fiction of formalism. Judges were blindfolded, neutral administrators of laws that emanated from other, greater authorities.¹¹² The rhetoric of “compulsion and continuity” defused personal judicial responsibility;¹¹³ the law required *one* outcome, and all a judge did was bring that outcome into effect. Rule-based decision making worked well under the formalist model, in part because rules technically require no explanation once applicable. Rules are authorities in and of themselves, and so their reasons by definition do not need recitation. In fact, giving lots of reasons for rules under the formalist model would have eroded the authority of the judicial figure. Where the “assertion of authority is independently important”¹¹⁴ (as in the legislative context), *not* giving reasons rhetorically bolsters legitimacy. Professor Schauer goes so far as to argue that “[t]he act of giving a reason is the antithesis of authority” because it responds to an implicit request for justification.¹¹⁵

Much of rule-based discourse is unstated. While discursive “silence” and “invisibility” may have historically projected authority, it did not continue to satisfy Anglo-American legal criticism because it left little

111. See e.g. *ibid* at 179.

112. See generally Bushnell, *supra* note 17.

113. Paul Gewirtz, “Narrative and Rhetoric in the Law” in Peter Brooks & Paul Gewirtz, eds, *Law’s Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 1996) 2 at 11.

114. Schauer, “Giving Reasons”, *supra* note 83 at 637.

115. *Ibid* at 636–37.

for the court's critics to engage with. In rhetoric, silence is noticeable.¹¹⁶ Legal realism attacked judicial silence and challenged formalist opinions on the operation of judicial decision making. Realists rallied to "discover in the court's unmentioned knowledge of the immediate consequences of this rule or that, in the case at hand, a motivation which cuts deeper than any shown by the opinion".¹¹⁷ Realism attempted to "look through words to realities".¹¹⁸ The realist concern with getting at the reasons for judicial decision making mirrors the language of the principled approach—a legal rule must be opened up before it will make any sense.

Professor William Popkin has used extensive historical analysis to argue that the presentation of judicial opinions responds to public concerns about the judicial role.¹¹⁹ Popkin predicted that because realist criticism had led to a modern skepticism about authoritative judging, this public attitude would transform judicial opinions: "[S]eparate opinions should become more common, and judges should write in a more personal/exploratory style, responsive to the multiple legal and political values inherent in making judicial law".¹²⁰ Popkin's predictions describe a way of portraying authority to skeptics—authority by persuasion. The mechanical application of rules and formalism demonstrates authority through "force"—a "none of your business" approach.¹²¹ But authority by persuasion is the authority of reason. It anticipates questions and debate, and holds judges personally accountable for their decision making. Post-realist advice about Canadian judicial opinion writing helped to create the kinds of changes Popkin predicted. Chief Justice Dickson argued that a good judgment should reflect the "intense thought" that had preceded it—a significant change from deferring reasoning to the rule makers of the past.¹²² Judgment writing should "[compel] thinking at its hardest".¹²³ Reasons should be fully explained—phrases like "it is clear" or "no citation or authority is needed" would cause the reader to "suspect that

116. See Shreve, *supra* note 39 at 55.

117. Karl Llewellyn, "Some Realism About Realism" (1931) 44:8 Harv L Rev 1222 at 1244.

118. Benditt, *supra* note 96 at 17.

119. Popkin, *supra* note 111.

120. *Ibid* at 179.

121. Schauer, "Giving Reasons", *supra* note 83 at 637.

122. See Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003) at 204.

123. *Ibid*.

a citation was really needed but could not be found".¹²⁴ Judges should use the active voice because the "passive voice indicates a vague, anonymous thing".¹²⁵ Chief Justice Dickson's comments illustrate an awareness of a skeptical audience and the personal responsibility of a judge to show that she had confronted the task of persuasion head on. Justice Sachs sums it up pithily: "Simple, clear, persuasive to the legal community—that is my dream."¹²⁶

What counts as persuasive in the post-realist judicial opinion? This depends on the audience being asked. Ordinary people, legal academics and lawyers have different ideas about what makes a good judgment because all three have vastly different interactions with the law. Practicing lawyers likely set a low bar for judicial persuasion (outside of its relevance for the purposes of appealing a client's case) as long as a decision constitutes a clear precedent and offers a workable template for constructing future arguments. For our purposes it is more interesting to think about what makes a case compelling for academics and litigants—for people who view the law from a studied distance or personally feel its effects. To begin, it is helpful to consider the standards courts have internally set for the sufficiency of reasons because these standards respond to the need to persuade litigants, including the losing party, that a case has been decided well.

The Supreme Court of Canada recently considered the "nature and function of reasons for judgment" in *Cojocaru v British Columbia Women's Hospital and Health Centre*.¹²⁷ The case dealt with the extent to which a trial judge could copy large portions of party submissions into the reasons for a case. The reasons at issue were not functionally insufficient, and neither was the judge's conclusion unsupported by law. Instead, the concern was that the "the judge's wholesale incorporation of the material of others [might show] that he did not put his mind to the issues and decide them impartially".¹²⁸ The Supreme Court held that judicial copying, without more, did not equate to procedural injustice:

124. *Ibid* at 206.

125. *Ibid*.

126. Sachs, *supra* note 109 at 58.

127. *Supra* note 99 at para 2.

128. *Ibid* at para 26.

Judges are busy. A heavy flow of work passes through the courts. The public interest demands that the disputes and legal issues brought before the courts be resolved in a timely and effective manner, all the while maintaining the integrity of the judicial process. In an ideal world, one might dream of judges recasting each proposition, principle and fact scenario before them in their own finely crafted prose. In reality, courts have recognized that copying is acceptable, and does not, without more, require the judge's decision to be set aside.¹²⁹

In the Court's view, judicial copying is like reasoning with rules—an acceptable form of abbreviated decision making, understandable (and, to some extent, desirable) because of the practical constraints put on judges. Judicial copying, like following a rule, accepts the reasons of others in place of articulating one's own. *Cojocaru* confirmed that, functionally, abbreviated reasoning can work. It can lead to the right result. It provides enough of an answer to ensure that the outcome is grounded in acceptable law and not mere judicial whim. Amongst themselves, judges do not assume that abbreviated reasoning masks inappropriate or faulty judgment.

Cojocaru shows that abbreviated reasoning primarily disturbs members of the community other than judges. We are not, it appears, easily satisfied that *those* reasons, articulated at *that* time by *those* people, are appropriate for *these* facts *right now*. We want to be sure that our position has been fully understood,¹³⁰ and not simply equated with the positions of past parties. We think that our issues are important and complex enough to warrant fresh analysis, not the analysis of prior decision makers, and we want to make sure that analysis has taken place. The concerns in *Cojocaru* about inadequate judicial reasoning are more urgent in decisions that rely on rules because they are specifically supposed to replace the need for judicial reasoning in certain fact situations. To return to Hart's example, if you bring a car into a park, you are breaking the rule, and the rule relieves the judge from reasoning whether *this* person really ought to be liable for bringing *this* car into *this* park at *this* time, etc.

There are a number of issues with the idea that a judicial opinion ought to be primarily justificatory. Giving more and more reasons takes up much of the court's time and may unnecessarily commit judges to particular sets of principles over others. Are these observations fair?

129. *Ibid* at para 37.

130. Understood and not heard.

The stakes are high when a judge picks up her pen. Judicial writing is powerfully performative. An opinion is not just an explanation for a legal outcome, it brings that outcome into existence. A judge writes and “somebody loses his freedom, his property, his children, even his life”.¹³¹ A decision ought to conform in form and outcome to the standards of the legal community. But why does it matter whether or not the litigants themselves are satisfied with what is written? And what will it take to satisfy them?

In one sense, whether non-lawyers are satisfied with judicial reasons does not really matter. People have to obey legal orders whether or not they find the reasons for those orders persuasive. The democratic process permits people to change judicial decision making that is perceived to be systematically unfair or out of touch. And the reality is that disappointed litigants will rarely feel, after investing the time and money it takes to bring a case to court, that a judgment not in their favour was still the right judgment, however much time the court spends trying to explain otherwise. *Cajocarú* illustrates that a party can have serious and understandable suspicions about whether an outcome was carefully reasoned, but that the bar for setting aside a judgment on those grounds is nevertheless very high where the judge manages to articulate a legally supported conclusion. Therefore, as *Cajocarú* explains, persuasiveness to particular litigants and the non-legal community generally is nice but not necessary. Abbreviated reasoning is not ideal, but it can suffice. What matters most is that decisions rest on things deemed appropriate in the legal community, like rules or principles or chunks of reasons copied from other decisions.

This makes sense. Judges and lawyers use their knowledge to attempt to resolve complicated legal issues. When it is easy to tell what the law requires, people do not make it to court. And if it were always easy to decide and agree on what was just and fair, we would not need laws to govern human behaviour. It would be odd, then, for a decision based on reasons acceptable and understandable in the legal community to be set aside simply because it did not satisfactorily explain the law to non-lawyers. It would impose an unreasonable educative requirement on judges and imply that if only judges worked hard to explain to non-lawyers, they could understand, appreciate and respect the law.

131. Robert M Cover, “Violence and the Word” (1986) 95:8 Yale LJ 1601 at 1601.

Reasons are important, but can every decision involving contracts be a course on contracts? For that might be what is needed before a disappointed party is truly satisfied that a court reasoned well.

These realities do not sit comfortably with the prevailing judicial attitude that a court has a duty of “public reason”.¹³² Chief Justice Dickson’s early-1990s remark that legal opinions ought to “be understandable to people who have not had legal training” because they “affect every man, woman, and child in the country” no longer strikes anyone as particularly radical or inappropriate.¹³³ The public accessibility of judicial opinions seems laudable. Decisions do affect real people. Judicial writing ought to be as clear as possible and not encumbered by unnecessarily technical language or legal concepts added for show.¹³⁴ But claiming that judgments on serious issues should be wholly understandable to non-lawyers understates the complexity of the law and overestimates how much time non-lawyers are willing to invest in comprehending legal decision making.

The principled approach allows a judge to reconcile her desire to demystify the law with the reality that much of what goes into decision making is difficult to put simply. The template of the principled approach can be summarized this way: A legal rule or category is identified and the court agrees that the rule is difficult to understand, apply or explain. The precedents are confusing, conflicting or do not address the precise facts at hand. But! The court has located a controlling principle—a general proposition that we can all agree is fair. People should bear the costs of risks they create or profit from; evidence should be heard if it is reliable and really needed; money should be given up if you benefitted at someone else’s expense for no good reason, etc. Of course, the precise meaning and effect of the controlling principle will depend on a particular judge’s assessment of the facts, which should be guided by a subset of non-exhaustive factors, which may be lengthy and involve technical or difficult legal concepts. But judges will reason with the controlling principle in mind and not obscure their opinions with empty rules and distinctions.

132. See Sharpe, “Good Judgment”, *supra* note 2.

133. Sharpe & Roach, *supra* note 123 at 203.

134. See *ibid.*

My depiction is an exaggeration, but the central observation stands. In the principled approach, the controlling, underlying principle that unifies precedents and motivates the rest of the judgment is characteristically something that most people would find both fair and fairly easy to understand. Try saying to a non-lawyer that “hearsay is not permissible evidence unless it falls into one of the excepted categories” and see what reaction it provokes. On the other hand, most people can likely appreciate the idea that “evidence should be allowed where it is reliable and necessary”. A court gives a simplified, explanatory impression by organizing its analytical approach around a more easily digestible principle—even though the bulk of the reasoning to follow actually remains nuanced and complex. By beginning with the comment that an existing rule is difficult to understand, the court aligns itself with the people whom the law affects. And by illustrating that good arguments can be made on both sides under the unclear rule, the court validates the positions of all involved without detracting from the authority of the final decision made pursuant to the clearer principle.

Outside of active litigants with a direct interest in the outcomes of cases, judicial opinions do not really reach “ordinary people”.¹³⁵ Arguing otherwise ignores several realities that obstruct access to legal opinions. Thousands upon thousands of cases are released every year, and their interaction, relative authority and scope are not easily discernable. Cases are not organized in any way that facilitates access to quick answers—how could they be? The process of locating relevant case law in the vast thicket of Canadian jurisprudence is so unintuitive that it is a skill taught in law school. I was once stopped outside of the University of Toronto Faculty of Law by a non-lawyer who was looking for the law library in order to “read some cases” on a legal issue she was dealing with. I did not have the heart to explain what she was in for. The amount of prior legal knowledge it takes just to know *where to look*, never mind what to make of what one finds, shows that the proposition that cases are, or ought to be, written for ordinary Canadians is absurd. Clarity in judicial opinions for the purported benefit of “ordinary Canadians” is a rhetorical device, actually aimed at the legal community. It is a fiction that further distances judges from the portrait of the mechanical, formalist arbiter. The post-realist appellate judge is acutely aware that her decisions change

135. See Schauer, “Opinions as Rules”, *supra* note 84 at 1463.

the lives of ordinary Canadians outside of her courtroom and gestures to this responsibility by including them in her audience.

This leaves the legal academic. Unsurprisingly, once a person has accumulated legal knowledge, it becomes more difficult for her to admit what she finds compelling in judicial argument. The answer will always appear deficient from some angle of principle, policy or practicality. The answer is also self-revealing: "[A]ssertions that a particular opinion is persuasive often tell us as much about the commitments of the person who is persuaded as it does about the abstract qualities of the argument itself".¹³⁶ Lawyerly argument is expected to be somewhat unsatisfying because lawyers are tasked with representing only one side. But much more is demanded of the judicial opinion. Judges are supposed to persuade us not of who is right, but of "what is right".¹³⁷

Professor Sanford Levinson describes asking students to select the judicial opinion they found most persuasive and comments that he is quite happy not to have to answer his own question.¹³⁸ It is far easier to focus on the inadequacies of a judicial opinion or to speculate on its impact than to suggest that it performs its task well. Much legal criticism seems convinced that judges cannot be persuasive in any meaningful sense because they are forced into duplicitousness by the structural indeterminacy of either law or language (or both). Judges are "liars"¹³⁹ and we are asked to pay no attention to the man behind the curtain.¹⁴⁰

But not all criticism is so cynical, and some academics are open to the question of what is persuasive in judicial opinion. Professor Levinson provides the decision of Jackson J in *Youngstown Sheet and Tube Company v Sawyer*, an American constitutional case on President Truman's power to seize property during the Korean War.¹⁴¹ Jackson's opinion is "the best example . . . [of] a self-consciously postrealist encounter with the nature of legal judgment".¹⁴² Professor Levinson finds Jackson's opinion compelling because it does not "retreat" into legal formalism, but rather

136. Sanford Levinson, "The Rhetoric of the Judicial Opinion" in Brooks & Gewirtz, *supra* note 114, 187 at 204.

137. See Shreve, *supra* note 39 at 47.

138. Levinson, *supra* note 137 at 202.

139. See Martin Shapiro, "Judges as Liars" (1994) 17:1 Harv JL & Pub Pol'y 156.

140. This reference is to the "Wizard of Oz"—judges are, of course, often women.

141. 343 US 579 (1952).

142. Levinson, *supra* note 137 at 203.

is a “magnificent, inspiring example of how a serious person wrestles with [a] difficult problem”.¹⁴³ Before offering a tripartite analysis of presidential power, Jackson admitted that his experiences as an attorney general and solicitor general in the Roosevelt administration were “probably [a] more realistic influence on [his] views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction”.¹⁴⁴ For Professor Levinson, this “interplay of analysis and persona” is what makes the opinion great, and what makes Jackson’s actual authorship so critical.

Professor White, whose work is in Professor Levinson’s critical backdrop, takes a similar view of what entails persuasiveness, stressing again the judge’s individual voice:

The ideal would be a judge who put his (or her) fundamental attitudes and methods to the test of sincere engagement with arguments the other way. We could ask, does this judge see the case before him as the occasion for printing out an ideology, for displaying technical skill, or as presenting a real difficulty, calling for real thought? The ideal judge would show that he had listened to the side he voted against and that he had felt the pull of the arguments in both ways. . . . In this sense the judge’s most important work is the definition of his own voice, the character he makes for himself as he works through a case.¹⁴⁵

Although Professors Levinson and White express their views with perhaps more sophistication, they are essentially persuaded by the same thing as ordinary litigants—an expression of judicial personality demonstrating that *this* judge seriously turned her mind to *these* facts and fully engaged with all arguments, including those against her intuition.

These conclusions on persuasiveness show why abbreviated judicial reasoning is vulnerable to post-realist criticism. Individual judicial voice, so essential to the impression that a judge has given a case serious thought, is sacrificed where a judge copies text in order to be expedient. Similarly, if the trend of relying extensively on clerks to draft aspects of judicial opinions intensifies, that practice may become vulnerable to the criticism that it relieves judges from the responsibility of judicial reasoning. Rule-based reasoning displaces precisely what modern audiences find

143. *Ibid.*

144. *Ibid.*

145. James Boyd White, “Rhetoric and Law: The Arts of Cultural and Communal Life” in White, *supra* note 70, 28 at 47.

persuasive in judicial writing. Thus the principled approach reformulates, as Popkin predicted, the judicial opinion to make it structurally more persuasive to its readers in the post-realist age. Principled reasoning lays bare the hidden discourses of common law rules and subjects them to modern analysis and approval. It invites judicial conversation about what reasons of law and policy are compelling in the instant case. Principles perform a dual function under this approach: They not only ground the judicial opinion in the authority of the past by acknowledging precedent, but also structurally reject the formalist model of rule-based authority. They position judicial opinions in the modern, critical era. The function of principles in the principled approach shows, as Professor Waddams has observed, “the concept of principle has prevailed only by appearing to be what it is not”.¹⁴⁶

III. Conclusion and Cautions

Rule-based reasoning conceals the reasons behind rules. Although the principled approach appears to unearth and examine the reasons behind rules, the “principled” judicial opinion does not fully escape displacement. When Sachs J wrote of the falsity of his judgments, he meant that the judicial opinion creates an impossibly neat picture of judicial reasoning:

All hesitations, sometimes even reversals of position on certain points, have been eviscerated from the final version. All to-ing and fro-ing in the process of its construction has been eliminated. Completely left out of account is the complexity of the process by which the final reasoned decision has been arrived at.¹⁴⁷

If all judicial opinions (falsely) represent themselves as complete snapshots of judicial reasoning, what are the implications of judicial opinions that purport to expose the reasons behind rules?

Virgílio Afonso da Silva recently wrote that courts compensate for a lack of democratic legitimacy by asserting legitimacy through public “deliberation”,¹⁴⁸ an idea that originates in John Rawls’ defense of “public

146. Waddams, *Principle and Policy*, *supra* note 31 at 230.

147. Sachs, *supra* note 109 at 50.

148. Virgílio Afonso da Silva, “Deciding Without Deliberating” (2013) 11:3 Intl J Const L 557 at 557.

reason”.¹⁴⁹ The principled approach “reclaims” deliberation in furtherance of judicial superiority—from a Rawlsian perspective, the reclamation of deliberation may be merely in furtherance of judicial legitimacy. But the principled approach lends a peculiar quality to judicial deliberation. While rule-based reasoning appears to guide judges to a particular and inevitable outcome, reasoning through principles compels judges to weigh different legal reasons in writing a decision. This weighing of reasons incorporates a component of argument or debate into the judicial opinion itself. When we conceive of the law as fundamentally argumentative, we concede that the law is to some degree indeterminate.¹⁵⁰ The principled approach thus links competing views of judicial reasoning: While the process of purportedly candid deliberation highlights the law’s indeterminacy, the purpose and thrust of judicial justification is nevertheless to affirm the “certainty” of a decision to write well and convincingly in support of *this* outcome.¹⁵¹

While reasoning with reasons, not rules, is persuasive because it makes room for judicial deliberation in the text of a judgment, that deliberation is still a performance. In *The Educated Imagination*, Northrop Frye wrote:

In ordinary life, as in literature, the way you say things can be just as important as what’s said. The words you use are like the clothes you wear. Situations, like bodies, are supposed to be decently covered. You may have some social job to do that involves words, such as making a speech or preaching a sermon or presenting a case to a judge or writing an obituary on a dead skinflint or reporting a murder trial or greeting visitors in a public building or writing copy for an ad. In none of these cases is it your job to tell the naked truth: we realize that even in the truth there are certain things we can say and certain things we can’t say.¹⁵²

The principled approach is a way to try to tell “the naked truth”, and it comes with all the difficulties that Professor Frye’s comment suggests. The principled approach exposes what rule-based reasoning obscures: that a judge faced with a decision draws on a universe of legally

149. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 216.

150. See Justin Desautels-Stein, “The Judge and the Drone” (2013) 56:1 *Ariz L Rev* 117 at 119 (summarizing Dworkin).

151. See Sachs, *supra* note 109 at 51.

152. Northrop Frye, *The Educated Imagination* (Bloomington, Ind: Indiana University Press, 1964) at 135–36.

relevant considerations. Justice Sharpe recently wrote that judges “view the case from 10,000 feet, from where the entire field of relevant rules, principles and legal values can be surveyed so that the judge’s ultimate decision will cohere with that panorama of rules, principles and values and thereby achieve true justice between the parties”.¹⁵³ Justice Sharpe’s methodology, so candidly stated, departs dramatically from the conventional view of formalist, rule-based systems, where the process of weighing the “entire field” of relevant considerations is the role of the rule maker.

I believe that Sharpe JA is right to say that judges do in fact view cases “from 10,000 feet”, in the sense that the reasoning behind judgments is vastly more nuanced than the judgment can possibly convey. But the principled approach does not attempt to translate the *entire* universe of judicial reasons into the judicial opinion. Even under the principled approach, which purports to be transparent, some operative reasons will always be understated, obscured or forgotten. This is the danger of trying to tell the naked truth—it is difficult to articulate judicial reasoning, and attempts to do so in an increasingly expository fashion may risk unduly emphasizing certain reasons over others, and imbuing *those* reasons with the power of the rhetoric of candour.

Writing nearly a decade after “principled” reasoning had begun to seep into Canadian jurisprudence, Theodore Rotenberg and Howard Gerson observed that “even the principled approach to judicial rule making (buttressed by policy considerations) can lead to an anomalous result”.¹⁵⁴ Rotenberg and Gerson criticized the Ontario Court of Appeal’s decision in *Domicile Developments Inc v MacTavish*, a case that dealt with the obligation of a vendor under an agreement to buy a house where time was of the essence, where the purchaser had already repudiated, and where the vendor was also not able to complete the transaction on the closing date.¹⁵⁵ The purchaser had advised that he did not intend to proceed with the purchase. The vendor did not accept this repudiation. However, the house was not “substantially completed” by the set date. The vendor sold

153. Sharpe, “Good Judgment”, *supra* note 2 at 9.

154. Theodore B Rotenberg & Howard D Gerson, “Thinking the Unthinkable: Will the Courts Penalize an Innocent Party for Refusing to Accept an Anticipatory Breach?—And Other Revolutionary Thoughts Gleaned from *Domicile Developments Inc v MacTavish*”, Case Comment, (1999) 26 RPR (3d) 245 at 245.

155. (1999), 45 OR (3d) 302 at 304–05, 175 DLR (4th) 334.

the house to another buyer at a loss and brought an action against the purchaser.

The Ontario Court of Appeal held that the purchaser was released from liability because the vendor failed to adjust the closing date to reflect the changed completion date: “[The vendor] could not continue to hold [the purchaser] liable without also giving [the purchaser] a further and reasonable opportunity to perform.”¹⁵⁶ Rotenberg and Gerson characterized *Domicile Developments* as an example of the principled approach gone wrong. How could such an “undeserving party” as the purchaser “merit the application of a legal principle [allowing] him to escape”?¹⁵⁷ For Rotenberg and Gerson, the answer was simple: The Court had applied the wrong principle.¹⁵⁸ Rotenberg and Gerson’s critique raises the question: What happens when a court reasoning with principles chooses the *wrong* principles? Or otherwise inaccurately captures the universe of reasons that go into rule making?

Semelhago v Paramadevan, a 1997 Supreme Court of Canada case about the availability of specific performance, further illustrates this problem with the principled approach.¹⁵⁹ The traditional common law rule was that specific performance was available for purchasers of land. The Court in *Semelhago* changed the rule, deciding that specific performance should only be available for purchasers of land where the land was proven to be unique.¹⁶⁰ Professor Waddams summarized the reasoning of the Court: “The case for change was based on the supposition that the only argument in favour of specific performance was that every piece of land was presumed to be unique, and that, since many pieces of land in modern times were very similar, the rule rested on a kind of factual falsity, and that a change in the traditional rule was required by principle.”¹⁶¹ In his critique of *Semelhago*, Professor Waddams argued that the approach

156. *Ibid* at para 15.

157. Rotenberg & Gerson, *supra* note 155 at 253.

158. *Ibid*.

159. [1996] 2 SCR 415, 136 DLR (4th) 1. I am indebted to Professor Waddams for the insight that *Semelhago* was decided on the “wrong principle”.

160. *Ibid* at para 22.

161. Stephen Waddams, “The Contribution to Private Law of Justice La Forest” (Paper delivered at the 42nd Annual Workshop on Consumer and Commercial Law, Schulich School of Law, Dalhousie University, 12 October 2012), (2013) 54:2 Can Bus LJ 205 at 217–18.

taken by the Supreme Court failed to recognize that the proposition that every piece of land is unique was not the only reason for awarding specific performance.¹⁶² Some reasons were more practical (e.g., specific performance of land sale contracts is usually easy for courts to implement), and some reasons were more principled (e.g., specific performance in land sale contracts facilitates immediate reliance).¹⁶³ But the Court reasoned that only one reason—uniqueness—mattered.

Although the courts in *Domicile Developments* and *Semelhago* do not apply an explicit “principled approach”, these two cases are clear instances where particular principles were isolated and preferred over other available reasons. *Semelhago* is also an example of the coherency technique used in *Bazley*, whereby courts emphasize a “unifying principle” present in all earlier applications of the rule in order to organize puzzling or disparate precedents. The Court in *Semelhago* observed that prior courts had “simply treat[ed] all real estate as being unique” in order to explain the persistence of the traditional rule.¹⁶⁴ Since this reason was, on its own, insufficient reason to award specific performance, the rule had to be changed as a matter of principle.

The effect of emphasizing the wrong reasons is particularly dangerous in the principled approach. The principles of principled approaches are structurally exalted. They have been selected from among many available reasons for their unifying and organizational effect, but the appearance of coherence and candour they provide may give such principles more sway than is really warranted when they are pitted against other important legal values. Ironically, if the principles of principled approaches tend to be treated like rules, then the principled approach may actually restrict the flexible function historically served by principles.¹⁶⁵

Is it possible to offset this danger? Often judges who create principled approaches will state that the relevant list of considerations is open-ended or non-exhaustive, and that other reasons may prove persuasive in future cases.¹⁶⁶ But the boldness of lower courts in adding to the list is

162. *Ibid* at 218.

163. *Ibid*.

164. *Supra* note 160 at para 22.

165. Professor Waddams makes a similar observation throughout *Principle and Policy*. See Waddams, *Principle and Policy*, *supra* note 21.

166. See e.g. *Bazley v Curry*, *supra* note 3.

unlikely, and the provided reasons have tended to remain controlling. Lower courts applying the *Bazley* test have, for example, struggled with the “deterrence” goal of vicarious liability, which supposedly underlies all cases where vicarious liability is justly imposed.¹⁶⁷ Is the possibility of deterrence sufficient or necessary? Is a case without the possibility of deterrence then necessarily unprincipled? Perhaps it would be helpful for a higher court to reflect seriously on the principled approach as an *approach*—that is, as a method of judicial writing with its own strengths and limitations—so that the word “principled” does not itself simply become an abbreviation for careful reasoning.

Or perhaps it is natural for the pendulum of judicial discourse to swing back to more restrictive models of rhetorical authority.¹⁶⁸ Recently, in *AI Enterprises Ltd v Bram Enterprises Ltd*, the Supreme Court of Canada took a decidedly restrictive view of “principled”.¹⁶⁹ The Court overturned the New Brunswick Court of Appeal’s attempt to create a “principled” exception to the requirement of unlawfulness for the tort of causing loss by unlawful means:

My difficulty with the “principled exception” approach is that I cannot, with respect, find any principle on which it is based. Providing trial judges with “wiggle room” to deal “adequately” with cases that do not fall within the scope of the tort’s liability simply confers an unstructured judicial discretion to do what appears to the particular judge to be just in the particular circumstances. This to me is the antithesis of a principled approach and, if adopted, it would largely undercut the efforts to give a certain and narrow ambit to the tort. Allowing for exceptions without clearly outlining the principles to guide the development of the law invites the danger of *ad hoc* decisions tailored to achieve a vision of commercial morality—precisely the danger which the unlawful means requirement is meant to avoid.¹⁷⁰

Justice Cromwell aligns the principled approach *not* with flexibility, individualized justice and progressive legal thinking, but with the ideals conventionally attached to rule-based reasoning—certainty, objectivity and unqualified application. It is easy to imagine a lower court’s frustration in

167. See e.g. *John Doe v Avalon East School Board*, 2004 NLTD 239 at para 66, 205 ACWS (3d) 968.

168. See Joseph R Grodin “Are Rules Really Better than Standards?” (1994) 45:3 Hastings LJ 569 at 572.

169. 2014 SCC 12, [2014] 1 SCR 177.

170. *Ibid* at para 85.

the implication that a “principled approach” ought not to result in loosely structured judicial discretion! Perhaps the Supreme Court is feeling the effect of too much “principle” and has begun its cautious retreat.

The pragmatic reader may ask—why even bother to investigate rhetorical shifts, if such shifts do not necessarily affect case outcomes? I am reminded of Stanley Fish’s recent comment in regards to academic freedom: “The question is not, what are you talking about—you can talk about anything so long as there is something interestingly analytic to say about it—the question is, what are you trying to do by talking about it?”¹⁷¹ The shift from rules to principles raises questions that I cannot answer on my own, about, for example, why judges make particular rhetorical choices and, when those choices become trends, if those trends might reflect other changes in legal or political thought. In this article, I make a connection between principles and persuasion. But I also look forward to further conversation on the implications of the principled approach in Canadian law. For example, after reading a draft of this article, a colleague suggested that the principled approach might support judicial supremacy and therefore have a more concrete effect than my article supposes. The principled approach could be seen as shifting the site of deliberation from the political branches of government to the courts. It not only lays bare judicial reasoning in order to make judgments more persuasive, but also reclaims the deliberative process as part of the judicial territory.

In this article, I have considered principled decision making in Canadian law as a general phenomenon. The development of the principled approach is sometimes seen as a response to the problems of particular areas of law, as in cases like *Bazley* and *Khan*. However, I suggest that the “principled” shift has been a generalized rhetorical response in the post-realist age, and that its introduction in certain areas of law has been more a product of timing than a solution to particular legal problems. I do not suggest that the principled approach is never a good approach, or that it can never be the best approach when making decisions about certain legal issues. However, now that the principled approach has been established as a legitimate alternative to rule-based reasoning, its appropriateness *over* rule-based reasoning in particular areas of law should be specifically

171. Stanley Fish, “My Response” (2013) 9 FIU L Rev 191 at 203.

addressed and not merely assumed.¹⁷² This would ensure that courts are giving good reasons, not just more reasons.

172. See Grodin, *supra* note 169 (this might involve “doctrine-by-doctrine analysis that takes into account the subtleties of particular legal problems, the extent to which the area is pervaded by principles of general application, [and] the ability of a rule both to provide predictability and to do justice” at 572).