

INDEX

- Adams v. New Jersey Steamboat Co.*, 83–84
Aiello Construction, Inc. v. Nationwide Tractor Trailer Training and Placement Co., 11
 Alexander, Larry, 9–12, 13, 31, 43
 on analogy-based legal reasoning, 83
 on distinguishing principle, 81
 on stare decisis principle, 17–18
 Alexander rule model, 9–12
 in *Aiello Construction, Inc. v. Nationwide Tractor Trailer Training and Placement Co.*, 11
 in *Louise Caroline Nursing Home, Inc. v. Dix Construction Co.*, 10–11
 in *Valentine v. General American Credit, Inc.*, 11
 in *Vitex Mfg. Corp. v. Caribtex Corp.*, 11
 Alexy, Robert, 2
 American Bar Association, 2
 American Law Institute, 2, 4
 ALI Principles [of Corporate Governance] . . ., 3–4
 on authoritative rules, 39–40
 analogy-based legal reasoning, 7–8
Adams v. New Jersey Steamboat Co., 83–84
 Alexander on, 83
 datasets for, 7–8
 Dworkin on, 83
 fact analogy and, 85
 limitations of, 8
Oppenheimer v. Kroidel, 84–85
 scope of, 82–83
 Sherwin on, 82–83
 Weinreb on, 82, 83
Angel v. Murray, 28–29
 authoritative although not legally binding
 rules in common law reasoning
 American Law Institute on, 39–40
 Contemporary Mission v. Famous Music Corp., 39
 contract law and, 39
 Cukor v. Mikalauskus, 37
 dicta, 36–37
 Greenawalt on, 35–36
 Kirksey v. Kirksey, 37–38
 McIntyre v. Ballentine, 36
 primary rules, 35
 Restatement of Contracts and, 34, 37
 Section 90, 38
 rule of recognition and, 34
 secondary rules, 35
 Bartha, Paul, 82
 Bayern, Shawn, 29–30
 Bell, John, 14
 Benditt, Theodore, 18–19
Bing v. Thunig, 101–2
 Brewer, Scott, 7, 83
 British Law Commission, 51
 Calabresi, Guido, 27
 Cardozo, Benjamin N., 70
Case Interpretation (Bayern), 29–30
 charitable immunity doctrine, 99–104
Christensen v. Thornby, 106–8
 civil law systems, 1–2
 common law systems and, convergence
 between, 1–2
 Coleman, Jules, 51
 Committee on Uniform Laws, 2

- common law reasoning. *See also* authoritative although not legally binding rules in common law reasoning; rule-based reasoning
- Alexander rule model, 9–12
 - in *Aiello Construction, Inc. v. Nationwide Tractor Trailer Training and Placement Co.*, 11
 - in *Louise Caroline Nursing Home, Inc. v. Dix Construction Co.*, 10–11
 - in *Valentine v. General American Credit, Inc.*, 11
 - in *Vitex Mfg. Corp. v. Caribtex Corp.*, 11
 - deferred standards and, 63
 - doctrinal propositions, 41
 - social propositions, 41
 - stability of, 19–20
 - stare decisis principle, 7, 9
 - stability of common law, as justification for, 19–20
 - common law systems, 1
 - civil law systems and, convergence between, 1–2
 - stare decisis principle in, 7, 9
 - in U.S., 3–4
 - ALI Principles [of Corporate Governance] . . .*, 3–4
 - Cukor v. Mikalauskus*, 3–4
 - comparative negligence, doctrine of, 57–58
 - Comparing Precedent* (Bell), 14
 - The Concept of Law* (Hart), 48–49
 - Contemporary Mission, Inc. v. Famous Music Corp.*, 66–67
 - Contemporary Mission v. Famous Music Corp.*, 39
 - contract law
 - authoritative rules and, 39
 - Restatement of Contracts and, 34, 37
 - reliance and, 45–46
 - Section 90, 38, 45–46
 - social policy in, 52–54
 - contributory negligence rule, 104–6
 - Corbin, Arthur, 39
 - corporation law
 - Model Business Corporation Act, 2
 - Cukor v. Mikalauskus*, 3–4, 37
 - Day v. Caton*, 92–93
 - deduction, definition and scope of, 86–88
 - deferred standards, 63
 - common law rules compared to, 63
 - Determining the Ratio Decidendi of a Case* (Goodhart), 25
 - dicta, dictum and, 29–30
 - authoritative rules and, 36–37
 - legal statements as, 29
 - as non-binding, 29–30
 - distinguishing principle, 78–81
 - Alexander on, 81
 - exceptions compared to, 80–81
 - fact-based, 78–79
 - hiving off new legal rules compared to, 80–81
 - rule-based, 79–80
 - Sherwin on, 81
 - Donoghue v. Stevenson*, 25–26
 - Doughy v. Underwriters at Lloyds, London*, 29–30
 - Dreier, Ralf, 2
 - duty of good faith principle, 47–48
 - Dworkin, Ronald, 54–55, 60–61
 - on analogy-based legal reasoning, 83
 - Easterbrook, Frank, 20, 36–37
 - Edlin, Aaron, 13
 - evidence, 74–75
 - Federal Rules of Evidence, 74–75
 - hearsay rule, 74–75
 - exceptions, legal, 73
 - distinguishing principle compared to, 80–81
 - inconsistent, 76–78
 - explicit overruling, 99–106
 - Bing v. Thumig*, 101–2
 - charitable immunity doctrine and, 99–104
 - contributory negligence rule, 104–6
 - Li v. Yellow Cab*, 105–6
 - President and Director of Georgetown College v. Hughes*, 100–4
 - Restatement (Second) of Torts and, 99–100
 - fact-based analogy, legal reasoning by, 85
 - fact-based distinguishing, 78–79
 - fairness, under stare decisis principle, as justification, 16–19
 - Federal Rules of Evidence, 74–75
 - formal justice argument for precedent, 17
 - France, legal precedents in, non-binding, 2

- Garner, Bryan, 16
 good judgment, in legal reasoning, 89
 Goodhart, Arthur, 25–26
 Greenawalt, Kent, 35–36
Gregory v. Cott, 54, 56
- Hadley v. Baxendale*, 28–29, 57–58, 67–69
 Hart, H. L. A., 34, 48–49. *See also*
 authoritative rules
 on common law legal rules
 core of, 64, 87–88
 penumbra of, 64, 87–88
 on critical morality, 43
 on legal positivism, 48–51
 reliance principle and, 50
 tenets of, 49–50
 unconscionability principle and, 50
 on social morality, 43–44
 Hart, Henry, 27
 Hartz, Harris, 15–16
 hearsay rule, 74–75
Hector Martinez and Co. v. Southern Pacific Transp. Co., 69
Hernandez v. Hammond Homes, Ltd., 5–7
 Hindu law, 1
 hiving off new legal rules, 71–73
 distinguishing principle compared to, 80–81
Hoffman v. Jones, 58
 holdings, 27–29
 Angel v. Murray, 28–29
 Hadley v. Baxendale, 28–29
 horizontal stare decisis, 21–22
 law-of-the-Circuit doctrine, 22
 hypotheticals, legal reasoning from
 application of, 90
 Day v. Caton, 92–93
 in legal education, 95–97
 slippery slope reasoning, 93–95
 Roberson v. Rochester Folding Box Co., 94–95
 Vincent v. Lake Erie Transportation Co., 90–92
- implicit overruling, 106–10
 Christensen v. Thornby, 106–8
 lack of candor in, 110
 MacPherson v. Buick Motor Co., 108–10
 Sherlock v. Stillwater Clinic, 106–8
 Thomas v. Winchester, 108–10
- inconsistent legal exceptions, 76–78
 Islamic law, 1
- jurisdictional limits on stare decisis principle, 23–24
- Kaplow, Louis, 63
Kenford Co. v. Erie County, 65
Kirksey v. Kirksey, 37–38
- Lamond, Grant, 82
The Law of Judicial Precedent (Garner), 16
- law-of-the-Circuit doctrine, 22
 legal education, hypotheticals in, 95–97
 legal positivism, 48–51
 reliance principle and, 50
 tenets of, 49–50
 unconscionability principle and, 50
 legal precedent. *See* precedent
 legal principles, 61–63
 legal rules compared to, 62–63
 legal reasoning. *See also* common law
 reasoning; rule-based reasoning;
 social morality
 analogy-based, 7–8
 datasets for, 7–8
 limitations of, 8
 empirical positions in, 41–48, 55–57
 by fact analogy, 85
 good judgment as element of, 89
 rule-based
 doctrine of comparative negligence, 57–58
 Hadley v. Baxendale, 57–58
 Hoffman v. Jones, 58
 right of privacy, 58–59
 similarity-based, 8–9
 social policy in, 41–48
 contract law and, 44–45
 legal rules, in common law, 60–61. *See also*
 rule-based legal reasoning;
 rule-based reasoning; rules
 Contemporary Mission, Inc. v. Famous Music Corp., 66–67
 core of, 64, 87–88
 deferred standards compared to, 63
 Hadley v. Baxendale, 67–69
 Hart on, 64, 87–88

Index

115

- Hector Martinez and Co. v. Southern Pacific Transp. Co.*, 69
 hiving off, 71–73
Kenford Co. v. Erie County, 65
 legal principles compared to, 62–63
 malleability of, 64–70
 Cardozo on, 70
 Schauer on, 70
 penumbra of, 64, 87–88
Rombola v. Cosindis, 65–66
 legal standards, 63
 deferred standards, 63
 common law rules compared to, 63
 prospective overruling, 63
 Leiter, Brian, 51
 Leval, Pierre, 29–30
Li v. Yellow Cab, 105–6
 logic, 86
Louise Caroline Nursing Home, Inc. v. Dix Construction Co., 10–11
Lowery v. Alabama Power Co., 32–33
 Lyon, David, 17, 18
- MacPherson v. Buick Motor Co.*, 108–10
McIntyre v. Ballentine, 36
 mixed legal systems, 1
 Model Business Corporation Act, U.S., 2
The Model of Rules (Dworkin), 60–61
 morality, 42. *See also* social morality
 critical, 43
 of judges, 42
- nongovernmental organizations (NGOs),
 role in private law, 2
- Oppenheimer v. Kreidel*, 84–85
 overruling
 explicit, 99–106
 Bing v. Thunig, 101–2
 charitable immunity doctrine and,
 99–104
 contributory negligence rule, 104–6
 Li v. Yellow Cab, 105–6
 President and Director of Georgetown College v. Hughes, 100–4
 Restatement (Second) of Torts and,
 99–100
 ideals for, 98–99
 implicit, 106–10
 Christensen v. Thornby, 106–8
 lack of candor in, 110
- MacPherson v. Buick Motor Co.*, 108–10
Sherlock v. Stillwater Clinic, 106–8
Thomas v. Winchester, 108–10
 prospective, legal standards for, 63
 stare decisis principle and, 98
- positivism. *See* legal positivism
Positivism and the Separation of Law and Morals (Hart), 48–49
 Posner, Richard, 83
 Postema, Gerald, 7, 83
 precedent, legal. *See also* rules
 Alexander rule model, 9–12
 in *Aiello Construction, Inc. v. Nationwide Tractor Trailer Training and Placement Co.*, 11
 in *Louise Caroline Nursing Home, Inc. v. Dix Construction Co.*, 10–11
 in *Valentine v. General American Credit, Inc.*, 11
 in *Vitex Mfg. Corp. v. Caribtex Corp.*, 11
 definition and scope of, 13–15
 descriptive meaning of, 13–14
 normative meaning of, 14
 dicta, 29–30
 formal justice argument for, 17
 in France, as non-binding, 2
 private law and, 1–2
 stare decisis principle and, as justifications
 for, 20
President and Director of Georgetown College v. Hughes, 100–4
Pretka v. Kolter City Plaza II, Inc., 32–33
Principles of Law (American Law Institute),
 39–40
 privacy, right of, 58–59
 private law, 1
 in Civil Codes, 1–2
 legal precedents and, 1–2
 in U.S., 2–3
 prospective overruling, 63
 public law, 1
- ratio decidendi, 30–31
 Determining the Ratio Decidendi of a Case,
 25
 The Ratio of the Ratio Decidendi (Stone),
 25–26
Reich v. Continental Cas. Co., 29–30
 reliance principle, 45–46, 50
 religious systems, 1

- Restatement* (American Law Institute), 39–40
- Restatement of Contracts, 34, 37
 Section 90, 38
 reliance and, 45–46
- Restatement (Second) of Torts, 99–100
- Roberson v. Rochester Folding Box Co.*, 94–95
- Rombola v. Cosindis*, 65–66
- rule of law, stare decisis principle and, 20
- rule of recognition, 34
- rule-based distinguishing principle, 79–80
- rule-based legal reasoning
 doctrine of comparative negligence, 57–58
Hadley v. Baxendale, 57–58
Hoffman v. Jones, 58
 right of privacy, 58–59
- rule-based reasoning in common law reasoning
 Alexander rule model, 9–12
 analogy-based reasoning, 7–8
 datasets for, 7–8
 limitations of, 8
 in *Hernandez v. Hammond Homes, Ltd.*, 5–7
 similarity-based reasoning, 8–9
- rules established from precedents
 contract law and, 73–74
 dicta, 29–30
 authoritative rules and, 36–37
 legal statements as, 29
 as non-binding, 29–30
- distinguishing principle, 78–81
 Alexander on, 81
 exceptions compared to, 80–81
 fact-based, 78–79
 hiving off new legal rules compared to, 80–81
 rule-based, 79–80
 Sherwin on, 81
- Donoghue v. Stevenson*, 25–26
- of evidence, 74–75
 Federal Rules of Evidence, 74–75
 under hearsay rule, 74–75
- exceptions to, 73
 distinguishing principle compared to, 80–81
 inconsistent exceptions, 76–78
 hiving off new legal rules, 71–73
 distinguishing principle compared to, 80–81
- holdings, 27–29, 32–33
Angel v. Murray, 28–29
Hadley v. Baxendale, 28–29
 justifications for, 31
 ratio decidendi, 30–31
- Rules v. Standards* (Kaplow), 63
- Sacks, Albert, 27
- Sampson, Margy, 65–66
- Samuelson, Pam, 39
- Schauer, Frederick, 8, 31, 61, 70, 93–95
- Seventh Circuit Rule 40(e), stare decisis principle, 22
- Sharia law, 1
- Sherlock v. Stillwater Clinic*, 106–8
- Sherwin, Emily, 7, 13, 43
 on analogy-based legal reasoning, 82–83
 on distinguishing principle, 81
- similarity-based legal reasoning, 8–9
- slippery slope reasoning, 93–95
Roberson v. Rochester Folding Box Co., 94–95
- Slippery Slopes* (Schauer), 93–95
- social morality, in legal reasoning, 41–48
 definition and scope of, 43–44
 judge’s personal morality, 42
 legal positivism and, 48–51
 reliance principle and, 50
 tenets of, 49–50
 unconscionability principle and, 50
- tort law and, 44–48
 duty of good faith principle, 47–48
 reliance principle in, 45–46, 50
 Restatement of Contracts, Section 90, 45–46
 social policy, 44–45
 unconscionability principle in, 46–47, 50
- social policy in legal reasoning, 41–48, 51–54
 in contract law, 52–54
 Dworkin on, 54–55
Gregory v. Cott, 54
 in tort law, 44–45, 52–54
Vasilenko v. Grace Family Church, 53–54
- standards. *See* legal standards
- stare decisis principle
 Alexander on, 17–18
 arguments against, 20–21
 in U.S. Courts of Appeals, 32–33

Index

117

- in common law, 7, 9
 - stability, as justification for stare decisis, 19–20
- definition of, 13
- horizontal, 21–22
 - law-of-the-Circuit doctrine, 22
- justifications for, 15–20
 - assessment of future legal impact, 16
 - efficiency as, 15–16
 - fairness as, 16–19
 - precedent theory as, 20
 - stability of common law as, 19–20
- limits on, 23
 - jurisdictional, 23–24
 - substantive, 24
- Lyon on, 17, 18
- overruling and, 98
- rule of law and, 20
- Seventh Circuit Rule 40(e), 22
- vertical, 21–22
- Stone, Julius, 25–26
- substantive limits on stare decisis principle, 24
- Sunstein, Cass, 7, 8, 83
- syllogisms, 86–88
- The Textualization of Precedent* (Tiersma), 26–27
- Tiersma, Peter, 26–27
- tort law. *See also* contract law
 - Restatement (Second) of Torts, 99–100
 - social morality and, 44–48
 - duty of good faith principle, 47–48
 - reliance principle in, 45–46, 50
 - social policy, 44–45
 - social policy in, 44–45, 52–54
- unconscionability principle, 46–47, 50
- Uniform Commercial Code, 2, 46
- United States (U.S.)
 - common law in, 3–4
 - ALI Principles [of Corporate Governance] . . .*, 3–4
 - Cukor v. Mikalauskus*, 3–4
 - Court of Appeals, stare decisis principle
 - arguments in, 32–33
 - Model Business Corporation Act, 2
 - private law in, 2–3
 - nongovernmental organizations' role in, 2
 - United States v. Johnson*, 33
- U.S. *See* United States
- Valentine v. General American Credit, Inc.*, 11
- Vasilenko v. Grace Family Church*, 53–54, 56
- vertical stare decisis, 21–22
- Vincent v. Lake Erie Transportation Co.*, 90–92
- Vitex Mfg. Corp. v. Caribtex Corp.*, 11
- Weinreb, Lloyd, 7, 82, 83
- Wesley-Smith, Peter, 20–21
- Williston, Samuel, 39