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JUDICIAL PREFERENCE

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ABSTRACT

In this paper I claim that, where the judge possess strong discretion, she has both a legal power and the legal right to decide whichever way she wishes. Neither law nor morality provides a decisive ground for decision and all that is left is her taste or inclination.

Perhaps because it looks like a naked exercise of power, the judge’s predilections are not a terribly popular basis for judicial decision. Preference is often characterized as non-rational: as having no basis in reason because not based upon some unique reason requiring a particular decision. Reason-based decision, by contrast, is represented as demonstrating that some decisive reason overrides competing ones to settle the outcome of a legal dispute, independent of the judge’s will. Absent such a reason, judicial decision consists an arbitrary exercise of the power authoritatively to resolve cases.

I claim that the judge’s personal preference or predilection operates as a legitimate basis for judicial decision in cases presenting strong discretion. Strong discretion exists wherever legal rules conflict, and there is no decisive reason determining the outcome. In such circumstances, each of the conflicting rules is undefeated and there is no correct thing to do. The judge has both a legal power and a legal right to decide whichever way she wishes.

I contrast my strong discretion thesis with the claim that the judge has only “weak” discretion to resolve the case because extra-legal reasons bind the judge. In particular, I demonstrate that Ronald Dworkin and Joseph Raz, who are often thought to entertain diametrically opposed theories of law, both endorse weak discretion in adjudication and do so for similar, though mistaken, reasons.

Whatever the merits of the weak discretion thesis generally, I argue that strong discretion and preference-based decision is an inevitable and useful feature of complex legal systems. It encourages judges to experiment with different outcomes in circumstances in which they have only a limited ability to foresee the consequences, and no way to determine which among the possible consequences is best.

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I. INTRODUCTION

Can personal preference operate as a legitimate basis for judicial decision?¹ Sometimes, it appears, the outcome of the case is up to the predilections of the judge: she can decide whichever way she wishes. Neither law nor morality² provides a decisive ground for decision and she is presented with a “choice between open alternatives.”³ The problem here is not just one of constraint, but of rationality. Not only does reason fail to require a particular outcome, but the judge cannot choose between the options on the basis of reasons at all. All that is left is her taste or inclination.

Standard descriptions of preference-based choice identify a familiar range of psychological sources for the resulting judicial decision. These include the “judicial hunch” or what the judge had for breakfast, as well as political ideology, whether conscious or not.⁴ Whatever the psychological basis for the resulting decision, having picked a particular option the judge can only try to render her decision acceptable post hoc, by operation of the “characteristic judicial virtues . . . : impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle.”⁵ None of these virtues are decisive; rather, they provide the judge with cover for her personal preference.

Perhaps because it looks like a naked exercise of power, personal preference, as a basis for judicial decision, is not terribly popular. preference-based choice is often characterized as non-rational: either as

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¹ I use judicial preference as an equivalent to what Oliver Wendell Holmes called the judge’s “instinctive preferences and inarticulate convictions,” OLIVER WENDELL HOMES, THE COMMON LAW 1 (1881). Decisions based on an individual's instinctive preference or personal taste do not count as reasons for decision. Rather, our tastes, inclinations, and preferences are “reason-dependent” endorsements of values or goods. See JOSEPH RAZ, THE MORALITY OF FREEDOM 140, 308 (1986); JOSEPH RAZ, ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION 50-54 (1999).

² Nor ethics, politics or some other determinate, extra-legal scheme of value.


having no basis in reason because not based upon reasons or, more accurately, as not based upon a particular type of reason — what might be called a decisive or “conclusive” reason for decision. Absent such a reason, judicial decision is often presented as an act of will or fiat, an arbitrary exercise of the power authoritatively to resolve cases.

Reason-based decision, by contrast, is embraced as impartial or objective. The court demonstrates that some dominant or decisive reason overrides competing reasons and operates to settle the outcome of a conflict or dispute. In the law, a decisive legal reason identifies that outcome antecedently required by the pre-existing norms of the legal system. The judge’s decision is legally valid only to the extent that it matches the legal rules or standards to the facts of the instant case. Reason thus constrains the judge to defer to that outcome, identified by the law independent of her will.

A major recent trend in legal positivism has been to suggest that legal gaps do not entail discretion. When none of the legal rules or standards provides a decisive reason for decision, the judge should nonetheless seek some decisive extra-legal reason in order to break the deadlock. Extra-legal reasons may operate to close the gap, and the judge has only “weak” discretion to resolve the case. The goal of such weak-discretion theories is to demonstrate the manner in which extra-legal reasons, though prima facie not legally obligatory, nonetheless bind the judge.

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9 Joseph Raz calls this type of reasoning “reasoning according to law.” For a full discussion, see Joseph Raz, On the Autonomy of Legal Reasoning, 6 RATIO JURIS, 1, 8 (1993). See also JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 339 (1995) (discussing the role of moral and institutional reasons for decision in legal decision-making).
Whatever the merits of the weak discretion thesis generally, I argue that judges can and do possess the sort of strong discretion symptomatic of judicial preference. I take for granted that rules can provide determinate guidance and that there is a core meaning to the language of a rule that renders it applicable across a range of cases. Even when rules provide clear direction, however, multiple legally valid rules may conflict in such a manner that none overrides the other. There is no tie-breaking rule to decide the outcome. At this point, preference-based choice is both available and permissible.

My claim is that judicial reliance on personal preference is an inevitable feature of legal decision in a complex legal system, one in which there is a certain amount of indeterminacy and, in particular, conflicts among incommensurable reasons for decision. Complex, modern, municipal legal systems are gappy: on occasion, no single legal reason determines the outcome. Where legal incommensurability is matched by moral or other incommensurability there may be no correct thing to do. The judge is free to pick among the available options. Far from being an unfortunate or illegitimate exercise of legal power, I suggest that legal systems, because sufficiently complex, provide an implied right to rely upon personal preference, a right that derives from the structure of reasoning rather than any express grant of legal discretion.

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My goal is to demonstrate that strong discretion exists, and that it operates in ways that are both mundane and notable. In Section II, I consider two exemplary cases that exhibit strong discretion. The mundane case, *Morrison v. Thoelke*, demonstrates that conflicting legal rules may generate a gap, and that such a gap is replicated in conflicts present in morality and doctrine. The case illustrates the choice facing the judge: to simply pick one side or the other without some further tie-braking reason settling the outcome. Accordingly, in the humdrum case, even though a judge can close the gap by simply

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12 See H.L.A. Hart, CONCEPT OF LAW 124 (2d ed. 1994). Neil MacCormick glosses Hart thus: “it is (certainly in Hart’s view) a particular feature of governance that under law that state legal orders are characterized by the existence of institutions and procedures for formulating in relatively clear, precise and authoritative ways those governing standards of conduct which are ‘legal.'” Neil MacCormick, H. L. A. Hart 42 (1981). Whether or not Hart is correct is not the subject of his paper; if he is wrong, we are much closer to the Realist “nightmare” than Hart would care to think.

13 155 So. 2d 889 (1963).
choosing one of the competing outcomes, that choice has no basis in some further, decisive reason.

The notable case, *Argersinger v. Hamlin*,\(^ \text{14} \) demonstrates the consequences of thoroughgoing legal, political, moral, and doctrinal conflict. *Argersinger* extends *Gideon v. Wainwright*’s\(^ \text{15} \) requirement that indigent defendants receive the assistance of counsel to offenses in which the potential sentence is less than six months. It does so although *Duncan v. Louisiana*\(^ \text{16} \) differently interprets the same language in the Sixth Amendment a precluding the right to jury trial for similar offenses. *Argersinger* generated a line of cases including *Scott v. Illinois*,\(^ \text{17} \) and *Alabama v. Shelton*,\(^ \text{18} \) that further explored the right to counsel’s relation to the sentence imposed. In none of these cases was the result precluded by pre-existing doctrine; in each, there were conflicting legal rules, and choice among them did not depend upon some decisive moral, political, or doctrinal reason.

The *Argersinger* line of cases is notable for its impact on the criminal justice system, and the economic, social, legislative, and ethical consequences of the choices it forces on courts, prosecutors, and legislatures as a result of the “actual imprisonment” standard it helped create. It also illustrates the sort of conflict among legal and extra-legal rules that others have attributed to, at one end of the scale, some “fundamental contradiction” or inherent instability in liberal attempts to construct a legal order,\(^ \text{19} \) and at the other, some “pragmatic conflict” inherent in the nature of any modern system of laws as a system of political conflict and compromise.\(^ \text{20} \) Whether due to necessary or accidental conflicts between the rules of the legal system, I contend such conflicts are: (1) likely to exist in any complex modern legal system; and (2) may only be resolved by personal preference rather than by pointing to some independent, tie-breaking rule.

After introducing *Morrison* and *Argersinger*, I suggest that underlying various proposals for “weak”\(^ \text{21} \) forms of judicial decision-making

\(^{15}\) 372 U.S. 335 (1963).  
\(^{16}\) 391 U.S. 145 (1968).  
\(^{17}\) 440 U.S. 367 (1979).  
\(^{19}\) See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 210-213 (1979) (discussing the "fundamental contradiction that relations with others are both necessary to and incompatible with our freedom").  
linking jurists as disparate Dworkin and Raz, is the demand for some decisive reason to determine the outcome. The various theories under consideration have in common the proposal that law embodies a system of heteronomous rather than autonomous judicial choice, and adjudication relies upon something other than the judge’s whims or biases. Accordingly, decisive public reasons exclude the personal preference of the judge, thereby maximizing lay autonomy through minimizing official autonomy.

Heteronomous reasons may have a variety of derivations. In many places the law provides a determinate means of weighing or balancing the strength of competing reasons; to that extent the law decisively regulates the outcome. At other places the law is gappy, the available legal reasons are vague or conflicting, and so no decisive reasons identifying a uniquely required outcome. In such circumstances, while the law may set the boundaries of judicial reasoning, the law does not decisively regulate the result. So long as that something else is a decisive reason — some uniquely authoritative neutral reason — then judicial preference is properly avoided. Accordingly, the task for weak discretion theorists is to identify the permissible heteronomous grounds for the “reasoned elaboration” of, or “reasoning according to,” law.

I suggest as a first line of criticism that heteronomous reasons may prove conflicted and incommensurable. Accordingly, where legal reasons are incommensurable, and that incommensurability is matched by extra-legal incommensurability, no decisive reason dictates the outcome. The judge simply must exercise her personal preference to select one among the legally valid alternatives. Whichever outcome is chosen will have been chosen without some (legal or other) reason deciding the outcome. Because the judge is herself an authoritative source of law, the resulting decision will be legally valid. The judge thus has a legal power (whether or not the legal right) to decide as she wants, within the range of legally available alternatives.

In Section III, I suggest that fragmentation among the applicable reasons or values presents only one set of problems. Whereas fragmented or incommensurable conflicts certainly undermine determinacy, so to do conflicts among reasons that are commensurable

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but of equal value or strength. This type of conflict poses a particular problem for Dworkin, who is willing to accept that they exist (he denies incommensurability), but claims they are exceptional in complex legal systems. I argue that, on the contrary, complex legal systems may have an interest in generating conflicting equally strong reasons as a means of encouraging judicial experimentation.

The power to decide does not, however, entail the right to decide. Neutral theorists might wish the judge to simply refuse to decide and wait for some other body to generate decisive reasons. In Section IV, I argue that this type of deference is not required in a complex system of norms. Personal preference is not only an available but also a permissible basis for judicial decision, conferring not only a power but a right. In deciding on the basis of personal preference, the judge is acting not only upon a legally generated ability, but also upon a legally implied permission.

Permissions confer an express or implied right to choose. Where, for example, the various legal options conflict and are incommensurable, there is no decisive reason to mandate a particular outcome. Incommensurability can thus generate a permission to choose among the legally valid outcomes without giving further, decisive reasons. The judge is both empowered and entitled to rely upon personal preference as a basis for judicial decision when faced with legal incommensurability that is matched by moral and doctrinal incommensurability.

The permission to engage in preference-based decision makes sense given the requirement that the judge render a decision when faced with the parties’ conflicting claims. Judicial decision is not like moral decision: in the latter case, the decision-maker may simply decline to adjudicate. Where the judge is obliged to pick one or other outcome,

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24 It may be mandated by some underlying political theory, such as some accounts of political democracy that require all norms to be enacted by a legislature. My account of judicial preference may be seen as implicitly claiming that such theories cannot work in a complex legal system, and that they underestimate the democratic permissibility of judicial autonomy.


26 Perhaps the most notable argument against the requirement that judges decide the cases before them is advance by Alexander Bickel, see Alexander Bickel, The Least Dangerous Branch (1962), and more recently taken up by Cass Sunstein, see Cass Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999). Both advocate a policy of judicial minimalism, whereby the United
and public, decisive reasons give out, the personal preference may be all that is left to a decision-maker.

The pragmatic permission to judge based on personal preference conflicts with the weak discretion theorists’ emphasis on decisive reasons. The alternative is not, however, an argument that the law is inherently indeterminate. Even if it is somewhat indeterminate, the range of permissible reasons may be somewhat bounded. The proper claim is that, more or less often, in complex legal systems the outcome depends upon the personal preference of the judge exercising strong discretion to select her preferred ground of decision from some bounded set of reasons, and that the legal system permits such an outcome.

II. TWO EXEMPLARY CASES

Law is gappy. In a complex legal system, rules are sometimes vague, ambiguous, open-textured, or conflicting. In such circumstances, the law supports a range of outcomes and there is no tie-breaking legal rule determining which to pick. The judge must somehow choose among them.

In this section, I begin by identifying a couple of cases that confront a gap in the law. Gaps can result from the sorts of indeterminacies in language familiar from vague standards like “reasonableness,” or from legislative inability to foresee and predicted every possible circumstance. Gaps also arise where legal rules conflict; even though the rules may be clearly applicable in the context of the case, the rules are incommensurable, and there is no closure rule to determine which is the stronger. Where rules conflict in this manner, weighing or balancing the strength of the various reasons for decision proves fruitless. My claim is: where the extra-legal reasons proved similarly conflicted, the judge must simply pick which of the options she prefers.

The types of cases I am interested in may be mundane or notable. They may be more or less prevalent in a particular legal system, although I believe they are more prevalent in complex legal systems. But what goes for this type of conflict goes for vague, ambiguous or open-textured cases as well, so long as the intra-legal indeterminacy is matched by extra-legal indeterminacy too.

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States Supreme Court, in particular, avoid deciding controversial cases or issues using a variety of procedural techniques.

A. Strong and Weak Discretion

In the analytic tradition, H.L.A. Hart was perhaps the most significant figure to endorse strong discretion. He suggested that, on occasion, judges are faced with a “choice between open alternatives.” While the law may limit the range of available options, it does not require a particular decision. Without rules to guide her, the judge’s choice as between the available options is unconstrained.

I shall suggest that there are occasions when the judge has strong discretion, at least in choosing among the available legal options. I define strong discretion as any decision made in the absence of a decisive reason; weak discretion, by contrast, is discretion on the basis of some decisive, or tie-breaking reason.

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28 H.L.A. HART, THE CONCEPT OF LAW 127 (2d ed., Penelope A. Bulloch & Joseph Raz, eds., 1994). A different situation is where, with or without discretion, the judge opts to ignore the law. One might call this judicial nullification by comparison with jury nullification. Here, the judge’s decision gains its institutional authority, if at all, after the fact. The decision, because not required by the law, has the same status as a mistaken decision: it is authoritative for the parties and subordinate legal officials because the judge is empowered, if not entitled, to render a decision. It becomes authoritative for judges of equal or higher rank subject to their acquiescence and ratification. For a somewhat radical embrace of this position, see Richard A. Posner, Foreword: A Political Court, 119 HARV. L. REV. 31 (2005) (arguing the Supreme Court is not bound by legal norms and acts in a fully political way). Under such circumstances, “all that succeeds is success.” H.L.A. HART, THE CONCEPT OF LAW 153 (2d ed., Penelope A. Bulloch & Joseph Raz, eds., 1994).


30 Brian Leiter points out that, “The distinction between strong and weak discretion is Dworkin's, not Hart's, and it seems to obscure rather than illuminate Hart's actual reasons for thinking judges have discretion. Hart need not maintain that in cases of discretion, judges are bound by no authoritative standards: there may, indeed, be binding standards that narrow the range of possible decisions.” Brian Leiter, Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence, 48 AM. J. JURIS. 17, 21 (2003). What Hart cannot accept, however, is that there is or must be one best or right or tie-breaking answer that further narrows the range of reasons to one. See H.L.A. HART, THE CONCEPT OF LAW 127 (2d ed., Penelope A. Bulloch & Joseph Raz, eds., 1994) (discussing possibility of choice between open alternatives). It is this type of discretion, call it weak, that Dworkin endorses in his later jurisprudence, and is implied in his earlier jurisprudence by his rejection, as a matter
The weak discretion thesis holds that legal indeterminacy need not result in unconstrained decision-making. Rather, the judge must choose among a limited range of options to elaborate the available legal standards where their application in a particular case is not automatic. Ronald Dworkin originally coined weak discretion to demonstrate that adjudication consists in the reasoned elaboration of legal principles that control, albeit non-“mechanically,” the outcome of a case. The judge gets all the guidance she requires from legal principles: she need not turn outside law to find gap-closing standards.


John Gardner also endorses a version of Dworkin’s weak discretion. Gardner, picking up on Dworkin’s definition, believes there is weak discretion so long as the judge’s choice is among a range of undefeated but indecisive legal options. So long as she does not turn outside legal system for any further decisive or tie-breaking reason and simply picks among the available legal sources, then the system remains “closed,” in the sense that no extra-legal reason is required to solve legal issue. See John Gardner Concerning Permissive Sources and Gaps, 8 Oxford J. Leg. Stud. 457, 458 (1988).

Gardner’s definition raises, however, the following anomaly: the judge has weak discretion, according to Gardner, when she simply chooses among the reasons “without resort to any further norms.” Id. at 460, but exercises strong discretion when she bases her decision on a decisive moral (or other extra-legal) reason. This seems to get things back to front. The whole point of the weak discretion argument is to suggest that, though legal rules may conflict or prove gappy or indecisive extra-legal reasons may fill that gap. Furthermore, endorsing a form of discretion that ignores decisive extra-legal reasons is rationally (and potentially morally) sub-optimal. Discretion is weak precisely because, while the law gives the judge a choice, reason determines the outcome. Where those reasons are also moral reasons, then ignoring them and picking against the strongest reason is both irrational and morally problematic. This is to insist that I do not oppose weak discretion as a description of some types of choice facing a judge; just that I reject the claim that all choices facing a judge must be reduced to weak discretion.

31 Ronald Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14, 33 (1967), reprinted in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978). “Sometimes we use ‘discretion’ in a weak sense, simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment.” Ronald Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14, 32 (1967). Dworkin also suggested that weak discretion could refer to a different situation, where “some official has final authority to make a decision and cannot be reviewed and reversed by any other official.” Id.

Dworkin soon reformulated his thesis to include among the relevant legal principles those derived from “political morality.” More recently, Dworkin has emphasized the relative transparency of legal reasoning to moral theorizing about public reasons. The judge is to approach each legal problem by attempting to provide the morally best and most coherent reconstruction of the rules and values of her legal system. The general requirement that the judge select one side in a dispute and the fact that the judge does not reinvent the law but must accommodate the outcome within an extant body of legal and political materials entails, Dworkin believes, that in each case there can be only one “best” justification.

The contrast between heteronomous and autonomous reasons plays a significant role in Dworkin’s discussion of adjudication as a process of principled decision-making. Principles are simply heteronomous reasons for decision that operate to give purpose or meaning to the legal materials. They may be contrasted with the sort of autonomous reasons or judicial predilections compatible with strong discretion.

The weak-discretion argument forms one of the many routes by which Dworkin attacks legal positivism: the belief that law is a limited system of norms, one that is separate from morality. Dworkin asserts that, because positivists believe that the law “runs out,” they must endorse some version of strong discretion whereby judicial decision is unconstrained by legal principles. According to Dworkin, in other words, the positivist “sources thesis” entails that when there is a legal gap the judge may base her decision on any reason, unconstrained by law.

35 RONALD DWORKIN, LAW’S EMPIRE (1986).
37 Dworkin suggests that positivists claim “that when judges disagree about matters of principle they disagree not about what the law requires but about how their discretion should be exercised. They disagree, that is, not about where their duty to decide lies, but about how they ought to decide, all things considered, given that they have no duty to decide either way.” Ronald Dworkin, Social Rules and Legal
One positivist response to Dworkin points to the limited range of options generally facing a judge. Her discretion is “weak” in that she is constrained to pick one among the legally valid options. I am concerned primarily with Joseph Raz’s alternative thesis that morality, though not part of law, nonetheless provides reason-based limits to judicial discretion.

I have no quibble, in certain circumstances, with the positivist embrace of weak discretion. Indeed, the weak discretion thesis is not limited to Dworkin and Raz: it is embraced by anyone who believes that reason rather than fiat should govern the process of adjudication. In a system of artificial reasoning such as the law, one would hope that most of the time judges are constrained by determinately applicable rules in deciding cases. In this section, however, my point is that weak discretion is not always the only option open to a judge. On occasion, judges are constrained to exercise weak discretion; but strong discretion is an inherent possibility in a system in which legal indeterminacy is matched by extra-legal indeterminacy. In such circumstances, none of the available reasons for decision are decisive, and some remain undefeated. Reason fails to provide a determinate outcome to the legal problem.

The alternative to my partial endorsement of weak discretion is a full embrace of the weak-discretion thesis. I will suggest that Raz endorses a positivist variant of the weak-discretion thesis. His weak-discretion positivism rejects the claim that existing law is sufficient to
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determine all legal problems. Existing law, Raz claims, may be
indecisive or gappy; nonetheless, morality often provides a determinate
outcome where law does not (and if morality does not, doctrine will).
The Raz thus joins those who agree that some decisive reason is
required to justify judicial decision; they disagree is over whether that
gap-closing morality is part of the law or not.42

B. Two Cases: Morrison v. Thoelke and Argersinger v. Hamlin

I have selected two cases, one of which might appear mundane and of
casebook significance only, the other of which had a major impact on
the operation of the criminal justice system, to demonstrate that, on
occasion, judges may exercise strong discretion. I make no claim about
the quantity of strong discretion in modern legal systems: that will vary
from system to system dependant upon the extent to which the system’s
rules conflict. The two cases do, however, demonstrate that sometimes
strong discretion may have a major impact on society (or at least, some
area of law) and sometimes not. We often fail to notice the quotidian
instances of strong discretion, and worry only about the remarkable
ones.

The mundane case, Morrison v. Thoelke,43 is important primarily as a
useful exemplar of the mailbox rule in contract law. It does not have
any major political or doctrinal importance, and is not a literary
masterpiece or a monumental decision by a celebrated judge. It is,
however, a fairly clear example of legal and doctrinal conflict. The
notable case, Argersinger v. Hamlin,44 presents an issue of profound
legal and moral importance: whether there is a right to the assistance of
counsel for indigent defendants charged with petty offenses.

The problem for the judges in each case is that the available legal rules
conflict, and that there is no decisive legal reason for preferring any
among the available legal solutions. Each case presents a problem for a
judge who would simply balance the rules, or rely on some formalistic
type of reasoning that “screen[es] off” consideration of extra-legal
reasons and instead requires the judge to rely upon the extant legal
rules.45

43 155 So. 2d 889 (1963).
45 See, e.g., Frederick Schauer, Formalism 97 YALE L. J. 509, 510 (1988). Schauer
defines formalism thus: “Formalism is the way in which rules achieve their ‘ruleness’
. . . by . . . screening off from a decisionmaker factors that a sensitive decisionmaker
would otherwise take into account. Moreover, it appears that this screening off takes
place largely through the force of the language in which rules are written. Thus the
Weak discretion solves this problem by suggesting that the judge may turn to extra-legal reasons so long as the reasons selected are sufficiently heteronomous and in particular objective, neutral, and predictable to avoid preference-based decision. Though they may disagree about the appropriate source of decision, what the different theories of weak discretion have in common is that they all require the judge to identify some decisive reason to resolve the case. Discretion is weak because the judge acts solely in her applicative or declarative role when the law decisively regulates the outcome. The judge need not choose among conflicting rules or engage in judicial legislation: rather she finds another, heteronomous extra-legal reason that determines the outcome independently of her will.

*Morrison* and *Argersinger* thus illustrate how, when rules conflict, judges may appropriately turn outside the law to determine the outcome. The first point is that, under both weak- and strong-discretion theories, turning to some extra-legal, tie-breaking rule is the appropriate thing to do. Each theory is compatible with the claim that discretion is somewhat bounded. This is not, in other words, an argument that the law is inherently indeterminate, nor that the judges in each case cannot find some legal or doctrinal reason for decision. Even if law is somewhat indeterminate, the range of permissible legal reasons may be limited to those with some legal warrant. Nonetheless, no legal reason determines the outcome: the judge must find some extra-legal reason to decide the case or simply choose from among the undefeated legal alternatives.

The second point, and the one exemplified by *Morrison* and *Argersinger*, is that sometimes the extra-legal reasons will themselves conflict. Where that is the case, where the legal and extra-legal reasons for decision fail to generate a decisive reason, the outcome depends upon the personal preference of the judge choosing among some bounded set of reasons. I shall later defend the claim that the legal system permits such an outcome, and the judge thus has a legal right to decide on the basis of personal preference.

1. Mundane Case: *Morrison v. Thoelke*

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tasks performed by rules are tasks for which the primary tool is the specific linguistic formulation of a rule.” *Id.*

46 See *JOSEPH RAZ, THE AUTHORITY OF LAW* 182 (1979) (“a regulated dispute is one to which the law provides a solution. The judge can be seen here in his classical image: he identifies the law, determines the facts, and applies the law to the facts.”).
Consider, as an example of a conflict among legal reasons, *Morrison v. Thoelke*\(^{47}\) a case of first impression concerning formation of contract. The problem addressed by the court in *Morrison* is that, under the general rules of contract formation, an offer may be revoked at any time before its acceptance is communicated to the offeror, but not after acceptance.\(^{48}\) Communication may, however, be a temporally extended process, and where there is a lapse of time between the sending of a revocation and its receipt, the offeree may accept the offer. That is in fact what happened in *Morrison*.

Using the mails, Morrison sent Thoelke an offer for the sale of property; the latter on receipt of the offer sent his acceptance of the contract back through the mail to Morrison. After mailing the acceptance, but prior to Morrison's receipt thereof, Thoelke attempted to withdraw his acceptance of the offer. The question is whether the acceptance had legal effect once it had been deposited in the post or only upon receipt. The judge was faced with a clear conflict between two legally-supported choices, neither of which was decisive.

*Morrison* is a somewhat humdrum case because, by 1963, the doctrinal issue had been fairly well resolved in other jurisdictions one way or another. So, to the extent the issue implicates which party is to bear the risk of rescinding the contract, that issue is pretty much limited to the parties. It does not implicate the sort of large-scale political, economic, or social outcome that concerns, for example, many in the Critical Legal Studies Movement.\(^{49}\) To the extent that it implicates a moral problem — promise-keeping — the moral obligation tracks the legal one. The issue is, precisely, whether the moral-legal obligation to abide by the terms of the contract has attached yet.

In *Morrison*, there are two conflicting rules, each of which provides persuasive legal authority for the alternative choices. The “deposited acceptance” rule stipulates that depositing the letter in the post signifies acceptance; the “acceptance on receipt” rule conceives of the post as the agent of the sender, and delays acceptance until it is received by the offeror. Whichever rule is selected will fill a gap in the revocation-of-contract rule, in which the term “communicated to the offeror” is vague.

\(^{47}\) 155 So. 2d 889 (1963).


\(^{49}\) See, e.g. Duncan Kennedy, *Freedom And Constraint In Adjudication: A Critical Phenomenology*, 36 J. LEGAL ED. 518 (1986) (pointing out that even if indeterminacy is not universal, its impact is large where the political stakes are high).
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There is, however, no decisive legal answer. This is a case of first impression and other courts are split on the issue, as is the relevant academic literature. Here, the competing reasons for decision are equally weighty: they are not vague, nor are they qualitatively different as to strength or value, but rather in equipoise, with no tie-breaking reason to settle which should win out. Faced with such a gap, the judge has no option but to turn outside the law or rely upon personal preference to resolve the case.

2. Notable Case: *Argersinger v. Hamiln*

In *Argersinger*, the Supreme Court attempted to reconcile two contradictory interpretations of the Sixth Amendment’s application to “criminal prosecution[s].” The Court had previously suggested, in *Duncan v. Louisiana*,50 that, for purposes of the right to jury trial, “criminal prosecution” meant a prosecution for a non-petty offense with a potential sentence of six months or more.51 In separate line of cases, culminating in *Gideon v. Wainwright*, the Court sought to afford indigent defendants in the same access to justice as rich ones, including, in 1965, the right to counsel.

In *Argersinger*, the Court was required to determine whether the right to counsel for indigent defendants applied to petty offenses. While the six-month limitation on the right to jury trial had a common-law history and precedent, no such tradition limited the right to counsel. *Gideon’s* rationale appeared to extend the right to counsel to all criminal cases, no matter the length of potential sentence, and the text of the Sixth Amendment did not (and does not) include the six-month limitation.

The Court thus faced two conflicting reasons for decision, neither of which was determinative. In part, the issue turned on whether the weight of precedent in the context of the right to jury trial was of legal significance in the context of a right to counsel. Resolving that question required the Court to consider two qualitatively different or incommensurable rights, and the manner in which they interact in the structure of the Sixth Amendment’s endorsement of accusatorial adversarialism.

Whichever way the Court resolved the gap would have great significance. The Court could choose to expand *Gideon’s* emphasis on liberty and equality to even petty offenses, at a potentially great cost to the States that would be required to fund counsel for indigent

51 *Id.* at 150.
defendants in misdemeanor cases. Or the Court could reject the right to counsel, and permit the States to employ some form of counsel-free fair process, perhaps at significant cost to individual liberty and equality rights. So the stakes in *Argersinger* were high, the legal rules in conflict, and no decisive reason to settle the issue. Here, again, the decision-maker was faced with two options: turn outside the law, or rely on personal preference.

**C. The Weak Discretion Solution: Dworkin and Raz**

The difficulty faced by the judges in *Morrison* and *Argersinger* is that legal rules conflict, and that such conflicts may be irresolvable through application of legal rules alone. In the following section, I consider two different theories that seek to determine what the judge should do where the law runs out. My claims are: first, that each of them, in their different ways, requires a turn from the law (or the published rules of the legal system) to morality or some other extra-legal set of reasons. Weak discretion thus acknowledges that non-legal or moral reasons may be appropriate grounds of legal decision if they are sufficiently objective and neutral. So long as the extra-legal reasons are heteronomous, that is, independent of the judge’s will or predilections, then they avoid the problems of arbitrariness and bias that worry many legal theorists. Second, they are appropriate because decisive: those reasons provide a unique solution to the legal issue independent of the judge’s personal predilections or preference.

Ronald Dworkin’s account suggests that, properly understood, the law never runs out: there are no legal gaps, only “hard cases.” Adjudication must occur within the context of some interpretive theory of political morality that explains what law is on the basis of more general principles and, because such principles must cohere, generates unique outcomes to any legal problem. According to Dworkin, then, there is no sharp diving line between law and non-law, and the judge is committed, by virtue of her office, to discovering the one correct outcome based upon that political morality.

Joseph Raz’s weak-discretion positivism expressly rejects preference as an appropriate ground of judicial decision. He splits legal decision-making in two, such that, when governed by rules, it is a relatively technical affair of artificial reasoning. When the rules run out, however, the judge is required to identify some underlying moral reasons.

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justification for her decision precisely because morality is neutral, predictable, and apolitical.

I consider both of these theories in turn before: first, linking them to the more general concern with “neutral principles” in law; and second, demonstrating how Morrison and Argersinger undermine the weak discretion thesis.

1. Dworkin and Principled Adjudication

The many-headed Hydra that is Ronald Dworkin’s theory (or theories) of law emphasizes that adjudication is process of principled decision-making, a claim that is at the heart of his most recent accounts of law as integrity.\(^{53}\) He consistently argues that law is a gapless system\(^ {54}\) which presents “one right answer” to every legal problem,\(^ {55}\) and latterly, that the right answer is one that constitutes the “best” reconstruction of the law given the judge’s theory of political morality in light of the case’s “fit” with pre-existing law.\(^ {56}\)

In *Law’s Empire*, Dworkin embraces “constructive interpretation” as a method of identifying and applying the law. Dworkin’s injunction to his Herculean judge — that she must provide the “best” possible account of the law — ties together a number of themes from the various stages of his jurisprudence.\(^ {57}\) In particular, Dworkin believes that interpretation is purposive: the judge must identify some one point or value embodied by the type of thing or genre under consideration (in this case, the law). A jurist can then compare different conceptions or interpretations of the law, and different laws, to determine whether they are better or worse than any alternatives.\(^ {58}\)

Underlying the method of constructive interpretation is the claim that legal values are commensurable and so can be brought under some one unifying principle or purpose.\(^ {59}\) Dworkin’s later discussion of law-as-integrity emphasizes (given commensurability among values and the

\(^{53}\) *See* RONALD DWORKIN, LAW’S EMPIRE 225-75 (1986).

\(^{54}\) *See*, e.g., Dworkin’s metaphor of the “seamless web” in Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1093-96 (1975).


\(^{56}\) *See* RONALD DWORKIN, LAW’S EMPIRE 230-31 (1986).

\(^{57}\) *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 90 (1996); *see also* RONALD DWORKIN, LAW’S EMPIRE 93, 109, 127 (1986).

\(^{58}\) *See* RONALD DWORKIN, LAW’S EMPIRE 92-96 (1986).

principled nature of legal decision-making) the importance of reconstructing the law to express a unitary moral vision, one in which the judge seeks “to find, in some coherent set of principles about peoples rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community.” The combination of coherence and political morality thus sets a standard to which a judge should aspire and by which to guide her decision: the outcome a judge selects must be the one that makes best sense of the legal materials consistent with her view of the law and of morality.

Dworkin famously rejects the positivist separation of law and morality. He is concerned to blur or erase the line between “the law” and political morality, arguing that the law is each judge’s ethical reconstruction of the legal materials in light of her attempt to provide the “best” interpretation. Dworkin’s law-as-integrity thus contemplates that judges can disagree, and do so profoundly, over what the best theory of law might be. He suggests that, in criticizing and reconstructing legal doctrine, the judge, lawyer, and legal scholar must adopt, defend and justify a particular picture of the law. They are not free to select just any version of the law, but must find a principled basis for their opinion, one informed by a political morality that explains what rights the law of a particular system protects, justifies the use of the state’s coercive power against citizens, and rationalizes the pre-existing legal materials in a manner that includes as many as possible within its definition of both “law” and “the law” of the legal system under consideration. Though Dworkin emphasizes that judges may disagree with each other over what is the best theory of law, he does not believe that, once a theory of law is selected, it can be ambivalent about the outcome in a given case. Each theory will determine what the one right answer is, though that answer may be different from theory to theory. There is thus, for Dworkin, always some decisive reason which resolves the dispute in a given case.

The one-right-answer imperative is, for Dworkin, essential precisely because it distinguishes courts from legislatures, law from partisan politics. His consistent emphasis upon the priority of principled decision-making, from his early attack on a jurisprudence of rules to his more recent discussions of constructive interpretation, is a moral-

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60 RONALD DWORKIN, LAW’S EMPIRE 225 (1986).
62 See RONALD DWORKIN, LAW’S EMPIRE 93 (1986).
63 See RONALD DWORKIN, LAW’S EMPIRE 254-60 (1986).
political argument that courts must act as if there is one right answer if they are to remain a “forums of principle,” constrained to operate with the extant legal materials than as some quasi-legislative body.  

The demand for decisive reasons generated by principle is thus part and parcel of an argument for weak discretion as the proper posture of the judge: a demand based on a moral-political view of the judicial role as constrained to follow reasons rather than generate them, such that the judge should look primarily towards the legal materials and the principles that organize them for the solution to legal problems rather than, as Bix puts it, “turn too quickly . . . to legislative questions.”

2. Raz’s Weak Discretion

At least one legal positivist agrees with Dworkin that decisive moral reasons provide a determinate answer to problems of legal indeterminacy. Unlike Dworkin, however, Joseph Raz separates legal reasoning into two distinct forms: (1) reasoning about the law, and (2) reasoning according to law. In reasoning about the law, legal rules and standards are sufficient to determine completely the outcome. The case is decisively regulated by the legal norms, which means that the judge need only apply them to generate the outcome. Where, however, the law runs out, judges are required to indulge in something more than technical legal reasoning in deciding what to do, “where [in other words] they have … discretion[,] they ought to resort to moral reasoning to decide whether to use it and how.”

Often, a judge can decide a case without having to consider its moral, social, or political merits. The rules of the legal system fully govern the outcome. The judge need only indulge in a technical form of reasoning that, first, identifies which rules apply to the instant case and, second, how these rules apply. Here, the court is seen in its applicative or declarative role, and its reasoning depends primarily upon determining the respective legal strengths of the legal authorities

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65 RONALD DWORKIN, A MATTER OF PRINCIPLE 33-34, 69-71 (1985)
69 Because a content-independent closure rule determines which legal reason for decision prevails, or identifies a legal permission which the judge can use to close a legal gap.
independent of the moral, social, or political value of their content. Following Raz, we may call this sort of reasoning “reasoning about the law.”

Raz’s goal is to demonstrate that courts can be bound to follow non-legal standards when rendering a decision. Of course, where the law is determinate, the judge should rely upon the available legal reasons to settle the outcome of the case. If, however, there is a gap in the law, then the judge must select among a range of legally sanctioned options, none of which the judge is uniquely required to apply by the operation of some further legal reason. The legal reasons do not of themselves determine which among the reasons ought to win out. In the absence of a decisive reason, Raz contends, there is a legal gap.

The judge may, however, turn to extra-legal reasons to help her determine which legal option ought to be preferred on the balance of reasons; the extra-legal reasons operate to “break the tie” between the competing, undefeated reasons. This reasoning according to law is more limited than fully fledged moral reasoning. Because the law is an exclusionary, institutional system, not just any reason may form the basis of a decision. So the standard of legal decision does not involve considering all the possible reasons (legal and non-legal) which may apply to the instant case, but only those extra-legal reasons which can help the judge decide between the various legally sanctioned options: in more technical terms, those extra-legal reasons which will determine which of the undefeated reasons ought to prevail.

Though the scope of reasoning in such circumstances is different from fully-fledged moral reasoning, nonetheless Raz believes that moral reasons help the judge decide which, among a range of legal reasons, ought to prevail. This he characterizes as a moral decision, one that

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70 It may also include situations in which a global, system-wide closure rule operates, e.g., what is not legally prohibited is legally permitted. See Joseph Raz, The Authority of Law 75-77 (1979).
72 Raz, as a positivist, considers that some are excluded from figuring in the decision process because law is an exclusionary system of practical reasoning. See Joseph Raz, Practical Reason and Norms at 141-46.
74 The correct standard for legal decision is thus not “all things considered” (some reasons are excluded) but rather the balance of reasons.
does not permit strong discretion. Choice is limited to selecting among the valid, but non-decisive (undefeated) legal reasons.

Turning to morality does not, however, mean the judge has the sort of unfettered choice characteristic of strong discretion. First, the range of reasons the judge can consider is narrower than fully-fledged moral reasoning because framed by the legal issues. Whatever decision the judge makes will be some form of “specification” of the law in light of the available moral reasons. Second, those moral reasons are there to “break the tie”; they help decide which, among a range of legal reasons, ought to prevail. Reasoning according to law thus requires the judge to decide on the basis of reason: where no decisive legal reason is available, the strongest moral reason fills the gap.

In reasoning according to law, then, although there is a legal discretion — the law is ambivalent as between the various possible outcomes — there is no moral discretion. The judge’s discretion is weak because, though generated by legal indeterminacy, it is constrained by moral determinacy. Legal discretion thus does not entail the sort of free-flowing choice embodied in strong discretion. Rather, judicial choice is doubly constrained: only some among the available options are legally valid; and morality provides a decisive reason to fix which among the available undefeated legal reasons to select.

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76 H.L.A. Hart acknowledged, too, that, on occasion, judicial discretion may be limited and weak. Where reasons are undefeated, the conflicting reasons for decision do not simply fall away. These reasons limit the grounds of decision: they still operate as reasons justifying decision, but do not provide a “complete” justification requiring a unique outcome. See H.L.A. HART, THE CONCEPT OF LAW 204-05 (2d ed. 1994); see also H.L.A. Hart, Problems in the Philosophy of Law, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 106-07 (1983); H.L.A. Hart, American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream, in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123, 136 (1993). BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY 26-27 (1993).
77 The correct standard for legal decision is thus not 'all things considered' (some reasons are excluded) but rather the balance of reasons.
78 On the process of specification, see JOHN FINNIS NATURAL LAW AND NATURAL RIGHTS 284 (1980); Neil MacCormick, Reconstruction After Deconstruction: A Response To CLS, 10 OXFORD J. LEGAL STUD. 539, 544-48 (1990). They both refer to specification as “determinatio.”
80 Legislators may require a judge to consider extra-legal moral reasons as a means of forcing them to think more deeply about their legal and moral obligations. Frederick Schauer, Commensurability and Its Constitutional Consequences, 45 HASTINGS L.J. 785, 803-809 (1994). Frederick Schauer suggests that the legislature may expressly stipulate that conflicting reasons are to be treated as undefeated vis-à-vis each other as a method of combating more consequentialist modes of reasoning. In that case the
D. Extra-Legal Gaps

So far, I have considered the situation in which legal indeterminacy meets extra-legal determinacy. According to the weak discretion theory, the judge is bound to embrace a range of heteronomous, extra-legal reasons when legal reasons conflict, rather than relying on personal preference. In both *Morrison* and *Argersinger*, however, legal indeterminacy is matched by moral or doctrinal indeterminacy. The issue then becomes: what is the judge to do when there is no heteronomous, decisive extra-legal reason to resolve the conflict?

I shall first consider the situation in *Argersinger*, where the moral reasons applicable to the case are incommensurable. I shall then consider *Morrison*, where doctrinal reasons are similarly unavailing, this time because they are in equipoise. In each situation, the judge must exercise strong discretion to resolve the dispute, relying on personal preference to choose among the available legal reasons.

1. *Argersinger* Revisited

In *Argersinger*, the available moral reasons cannot provide a decisive basis for decision. The distinction between petty and non-petty offenses, which draws a bright line based on the length of the potential sentence, fails to capture aspects of the criminal prosecution not concerned with liberty. For example, the Sixth Amendment is particularly concerned with the adversarial nature of the criminal process.\(^{81}\) Adversarialism, as a means of finding truth and protecting individual rights, may be more or less fair or effective based on the crime charged, the facts of the case, and its complexity rather than the length of the potential sentence imposed; and while the length of prison sentence is a major consideration in the seriousness of the liberty right at stake, it is not the only one.

Fairness considerations may, nonetheless, conflict with other values at stake in the right to counsel. For example, that right is of intrinsic value as one of the constituent rights in the adversary system of justice. A defendant is thus harmed whenever denied the assistance of counsel, not because the underlying procedure is any less accurate or fair, but

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because an essential part of the process, expressive of its seriousness and dignity, has been removed.82

The right is of instrumental value to the extent it secures a number of competing values at stake in the American system of accusatorial adversarialism. The values of liberty, accuracy, fairness, order, and efficiency conflict in ways that do not predetermine the decision to extend or limit the right to counsel. In part, that is because the Sixth Amendment is primarily procedural: it promotes a particularly accusatorial and adversarial model of criminal justice. Were the process afforded defendants charged with petty offenses non-adversarial and inquisitorial, then considerations of justice, accuracy, and efficiency might trump or minimize the liberty interest at stake. Certainly, there is no reason to believe that inquisitorial civilian systems are less just.

In fact, there has recently been a strong and judge-led movement away from accusation and adversarialism for certain petty offenses, particularly those that require “problem-solving” rather than a finding of guilt or innocence. In the criminal context, judges, and latterly the federal government, have identified non-violent drug crime as better dealt with using an investigative and inquisitorial “therapeutic” paradigm rather than the traditional criminal process contemplated in Argersinger. Problem-solving courts often retain the power to impose restrictions on liberty; and while they employ counsel, they do so less as client advocates than as therapeutic guardians. Deprivations of liberty are permissible where not wholly or primarily, punitive. All this is to suggest that the line between petty and non-petty offenses may be sensitive to both the type of system in place and the justifications for restricting liberty.

The liberty interest identified in Argersinger, while profound, is thus not quite decisive; it butts up against the fact that the criminal law imposes a range of sanctions that do not implicate liberty, and that such deprivations may be comparably though incommensurably profound, at least as measured by individual defendants. Furthermore, as Justice Powell observed in dissent, liberty interests may implicate economic considerations as much as incarcerative ones.83

83 Argersinger, 407 U.S. at 48 (Justice Powell, dissenting) (“Serious consequences also may result from convictions not punishable by imprisonment. Stigma may attach to a drunken-driving conviction or a hit-and-run escapade. Losing one's driver's license is more serious for some individuals than a brief stay in jail.”).
It is this incommensurability among modes of punishment that makes it difficult to say, *ab initio*, that minor deprivations of liberty are always worse than fines. In particular, the stigmatic effect of certain sanctions, such as public registries for sex offenders, may be in some sense “worse” than a short prison sentence with no such reporting requirement. Or a short prison sentence may be “better” than an eighteen month period of supervised probation in drug court. This, of course may simply point to a difference between positive and negative notions of liberty; if so, the issue then becomes one of justifying one conception over another.

As the justices in *Argersinger* discovered, turning to morality does not always resolve the decision in a determinate manner. Although moral reasons sometimes operate to fill the legal gaps, they are not always available in this way. Problems arise if extra-legal reasons for decision are themselves gappy. The relevant moral reasons may themselves be vague and ambiguous, or conflicting and incommensurate. That is, moral indeterminacy may match legal indeterminacy, and the weak discretion solution to legal gaps has proved unavailing.

2. Incommensurability and Coherence

So far, I have suggested that strong discretion arises where legal gaps are matched by extra-legal gaps. Where extra-legal reasons prove indeterminate, there is no decisive reason to recommend one among the competing legal options. Reason has no more work to do here. The judge may choose as she wishes among the available legal options, based on nothing more than preference alone. Does this mean that the weak-discretion thesis must fail?

Not quite. Raz has repeatedly rejected preference as a basis for public decision. He suggests, “it may be unacceptable that [the judge's] private tastes should determine rules about duties of disclosure of information in contract formation, or standards of care in negligence. If so, we need an artificial system of reasoning which could help determine cases where natural reason runs out, thus assuring the public that decisions are no mere expression of personal preference on the part of judges.”

Legal decision is, if nothing else, the exercise of a normative power giving the judge authority to determine the normative status of the parties to the case. Raz suggests that legal authority is legitimate only if based upon reasons which attend to individual subjects of authority and the institution is more knowledgeable or has more expertise in resolving the relevant issues than the subjects of regulation. Under this “service conception” of authority, individuals are, in the circumstances, better off following the law rather than determining how to act for themselves.

Two specific types of indeterminacy in particular, Raz believes, are likely to render law and morality gappy. They are social and moral pluralism: “inconsistent views on moral, religious, social and political issues in democratic (and in many other) societies.”

Social and moral pluralism, what he elsewhere calls “pragmatic conflict” in the law, threatens to undermine the legal values of predictability and stability, and has serious consequences under Raz’s service conception of authority. In acting without some decisive reason for an outcome, legislatures and courts simply pick an option, and do so without any better reason than the individuals they seek to regulate. Furthermore, by choosing on the basis of personal predilection, courts

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86 Where the law is concerned, Raz believes, “it may be unacceptable that people when acting as judges should simply express their will, their inclination or taste in favoring one solution over another.” Joseph Raz, On the Autonomy of Legal Reasoning, 6 RATIO JURIS, 1, 14 (1993).
90 Joseph Raz, Authority, Law and Morality, in JOSEPH RAZ, ETHICS AND THE PUBLIC DOMAIN 214 (1994). Legal authorities, Raz suggests, “are not there to introduce new and independent considerations. … They are meant to reflect dependent reasons in situation where they are better placed to do so. They mediate between ultimate reasons and the people to whom they apply.” Id. at 215.
91 A third situation in which considerations of local coherence have value for judicial decision-making exists when some distinct and determinate moral value is enshrined as a legal value. Because the value is itself coherent, judges should apply it consistently and coherently when working out its ramifications in the law. When institutionalizing this type of moral value, anything other than local coherence would be morally sub-optimal. Joseph Raz, The Relevance Of Coherence, 72 B.U. L. REV. 273, 309-14 (1992), reprinted in JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).
act on their own, rather than the regulated individual’s, reason for action.

This type of choice might be justifiable as an exercise of authority when preference-based decisions seek to guide the behavior of small numbers of people in direct contact with the norm-setting authority. In a modern, municipal legal system, however, the law seeks to govern large numbers of people through shared standards of conduct applicable without further direction. Accordingly, some institutional, shared, and predictable standard of decision is required. Preference-based decision risks being sufficiently random to undermine this feature of law. In such circumstances, Raz appears to believe that, if the judge cannot be right, she might at least be orderly.

Raz’s solution is to steak a trick from Dworkin: while Raz does not endorse Dworkin’s globalizing use of principles to reconstitute the legal system in the image of some political morality, Raz does believe, when faced with an intractably hard case, that coherence has a part to play. Local coherence enables the judge to order decisions based upon heteronomous institutional legal values rather than moral values or personal preference. The judge looks backwards to statutes, decided cases, and the legal doctrines that organize them, to use doctrine as a source of legal decision. Local coherence prevents too much unpredictability or change among the governing legal values destabilizing the legal system by organizing apparently conflicting doctrine under some governing value or set of values. When selecting some extra-legal organizing principle threatens too radical a change in legal doctrine, the judge should generally resist the temptation to engage in a broad-ranging reconstruction of the law rather than a local reform of legal doctrine. Local coherence thus has institutional value, even if the result is morally inferior than broad reform.

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Social and moral pluralism place the judge in a predicament. In either circumstance, the available legal and moral values are conflicting and incommensurable and cannot provide a decisive reason for decision. The only option, Raz suggests, is to turn back to the law to seek some form of determinate outcome. Doctrinal or formalist legal values provide the only remaining legitimate source of decisive reasons upon which to base institutional choice.

The problem for Raz’s return to doctrine is that, as with morality, doctrine itself may prove indeterminate. This is the case in *Morrison*. Indeed, the *Morrison* court considered the persuasive academic literature surrounding the various justifications for the different versions of the postal rule. After elaborating the academic and legal doctrinal debate, however, the judge discovered that the weight of argument and authority was evenly split. Neither the deposited acceptance nor the acceptance on receipt rule had greater doctrinal heft than the other.

In *Morrison*, remember, moral reasons had not yet attached. All that was left to break the tie were doctrinal reasons. Both the doctrine and the rule proved to be in equipoise. The moral and legal issues awaited the judge’s choice, rather than directed it. Accordingly, the judge faced a choice without some decisive reason recommending any particular option. Future cases what is required predictability: the current case required a decision. Whichever reason the judge chose would do, but she must choose one. Her choice was not, however, determined by any chosen doctrine, but endorsed it.

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100 “[T]he return from morality, when asked for its contribution to the issue at hand, is that it has no guidance to give.” All we have left is judicial preference; it seems like “the return from morality is that whatever we decide to do becomes the right thing to do.” Joseph Raz, *Ethics in the Public Domain* 335 (1995). Where the law is concerned, Raz believes, “it may be unacceptable that people when acting as judges should simply express their will, their inclination or taste in favoring one solution over another.” Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 Ratio Juris 1, 14 (1993).

101 “Doctrinal reasons, reasons of system, local simplicity and local coherence, should always give way to moral considerations when they conflict with them. But the doctrinal reasons have a role to play when natural reason runs out.” Joseph Raz, *Ethics in the Public Domain* 335 (1995). That role is to take the place of personal preference and to provide an institutional reason for decision when both legal and moral reasons are incommensurable.

102 *Morrison* at 155 So.2d at 904.

103 *See* *Morrison*, 155 So. 2d at 904.

104 This seems to be the way things appeared to the court. The judge first justified his decision first on the need to decide the case one way or the other. “We can choose either rule; but we must choose one. We can put the risk on either party; but we must not leave it in doubt.” *Morrison*, 155 So.2d at 903. The court next considered that its
Dworkin appears to propose that the conflict of reasons identified in *Aregersinger* is chimerical, and the one in *Morrison* is unimportant. He is committed to a robust form of commensurability, and appears to reject incommensurability as a form of moral apathy or indolence on the part of the decision-maker. He considers that, when faced with two options, we can always have an “opinion” about which to prefer. In fact, his one-right-answer thesis makes it imperative that a judge be an opinionated, committed legal actor. Our ability to form an opinion refutes incomparability by demonstrating that apathy may be overcome and decisions made. For Dworkin, commensurability, like incommensurability, is a choice, and a political one at that. As an incommensurability skeptic, he believes that the decision to compare or not to compare expresses one’s social or political commitments rather than some fact about the structure of value. If he is correct,

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105 The incommensurabilist claim is that, on the contrary, reason has no more work to do here (or at least, not the sort of work Dworkin envisages). Once we know that the reasons conflict in an incommensurable manner, searching for some further decisive reason is futile. It is worth noting that the insistence that there may be a right answer, when there is none, requiring a jurist to waste much time looking for non-existent justifications is itself a vice.

106 Ronald Dworkin, *On Gaps in the Law*, in *CONTROVERSIES ABOUT LAW’S ONTOLOGY*, 89, 90 (Paul Amselek and Neil MacCormick, eds, 1991) (“My view just comes to this: within the very limited terrain on which we can compare different interpretations of a particular statute against the general background of political culture in which that statute was enacted, on the very limited terrain of that comparison, experience shows that we almost always can have an opinion.”).


108 Compare Dworkin’s comments to Brian Bix’s claim that “after long consideration of the options...the decision-maker slowly begins to identify with one alternative rather than the others,” *BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY* 105 (1993), and Jeremy Waldron’s description of choice among incommensurables as necessitating some calamity to force decision. Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L.J. 813, 815-16 (1994).


110 For a discussion of such skepticism, see *JOSEPH RAZ, ENGAGING REASON 50-54* (1999).

111 Dworkin, for example, points out that the various features of incommensurability — intransitivity, undefeatedness, and change in value — may be explained, individually or in conjunction, by other features of practical reasoning. Exclusion, for example, explains how reasons may be both intransitive and incomparable. Other explanations for the inability to compare reasons may include the operation of a canceling condition, which knocks one or more competing options out of
then once a theory is selected preference-based decision is never an option.112 Things are different, however, at the level of picking an underlying “theory” by means of which to organize the law.113

While I do not have space to engage in a comprehensive discussion of Dworkin’s arguments in favor of commensurability, perhaps two points are worth making here. First is to engage with his repeated challenge to produce some positive justification for endorsing incommensurability over commensurability as an explanation of moral or ethical conflict.114 The second is that his theory of internal skepticism and political judging is one that in seems to support and repress, rather than undermine, incommensurability.

To take up the challenge first: one common example of incommensurability requires an individual, call her Jane, to choose between two life-changing opportunities;115 Dworkin suggests between “pursu[ing] a promising career as a public-interest lawyer in Los Angeles or to emigrate to a kibbutz in Israel.”116 These are, we should suppose, major life decisions, and decisions, moreover, about what sort of life Jane should live, what sort of person Jane should be. “Now suppose,” Dworkin proposes, “someone says that she is silly to worry about any of this, because, since both of these lives are valuable, there is no right answer to the question which is, all things considered, the best. That surprising view . . . needs as much positive argument or consideration; the requirement that reasons operate in a particular order; or that competing values may be vague or open-textured. See, e.g., Ronald Dworkin, On Gaps in the Law, in CONTROVERSIES ABOUT LAW’S ONTOLOGY, 89, 90 (Paul Amselek and Neil MacCormick, eds, 1991).

112 See, e.g., Ronald Dworkin, The Judge’s New Role: Should Personal Convictions Count?, 1 J. INT’L CRIM. JUST. 4, 8-9 (2003) (claiming that judge’s decisions are almost always political, but in the sense of political morality); Ronald A. Dworkin, “Natural Law” Revisited, 34 U. FLA. L. REV. 165, 166 (1982) (“each judge’s decision about the burden of past law depend[s] on his judgment about the best political justification of that law, and this is of course a matter of political morality.”).

113 See, e.g., RONALD DWORIN, LAW’S EMPIRE 45-46 (1986) (arguing that legal disagreements are genuine because they are disagreements over theories of law).


115 This is an issue that Joseph Raz raises in his Morality of Freedom, and one that Dworkin appears to implicitly take issue with in choosing his example. JOSEPH RAZ, MORALITY OF FREEDOM, 340-45 (1986) (career in law and in teaching of incommensurability value).

instinct or conviction as the contrary claim,” that is, Dworkin’s claim that there is one best answer.\(^{117}\)

The idea that “someone [would] say[ that] it is silly to worry about any of this” is indeed a surprise, not just to Dworkin or Jane, his hypothetical lawyer-kibbutzer, but to someone like me who believes values are incommensurable. The incommensurabilist’s claim is not that the worry is, on significant occasions, silly or pointless.\(^{118}\) The claim is simply that there is no decisive reason that can settle the fact of the matter. The only thing to do is choose, and the incommensurabilist’s point is that this choice is an autonomous rather than a heteronomous one, a choice that says something about the chooser rather than (just something about) the structure of ethical or moral reasons pertaining to the choice at hand.

Choice among undefeated reasons is what it means to live an autonomous (as opposed to merely rational) life, one that the agent can make her own and take responsibility for. Worrying over choice is not silly, certainly in this situation, precisely because of its moral and ethical consequences. Once chosen, that life must be lived, and it should be a life that embraces ethical concerns about authenticity, identity, and integrity that are significant independent of “the obvious fact that there are many values, and that they cannot all be realized in a single life.”\(^{119}\)

For commensurabilists who believe that there is some decisive fact of the matter, the choice here is not properly between different versions of how to live, but about what reason requires. The choice is about being (more or less) rational; between being right and being wrong (or more right and more wrong). The incommensurabilist’s rejoinder is that this type of choice presents what Bernard Williams calls a “rationalistic


\(^{118}\) Although I would insist that the bare fact of incommensurability does not make the choice significant. Whether to prefer apples or oranges for lunch is not, in the usual run of things, a life-altering decision.

\(^{119}\) Ronald Dworkin: Objectivity and Truth: You’d Better Believe It, 25 PHIL. & PUB. AFFAIRS 87, 136 (1996). As an ethical matter, the agent would be a different type of person if she was immortal. In such a case, she could, perhaps, live out as many different experiences as she wanted. Choosing all the options, however, says as much about who she is as choosing one option — it too is an autonomous, ethical choice, one perhaps of indecision, or dilettantism, or extreme self-sacrifice, depending upon the reasons for the choice and the manner in which she inhabits her choice. Raz raises the issue of habituation in The Morality of Freedom, JOSEPH RAZ, MORALITY OF FREEDOM, 308 (1986).
conception of rationality."\(^{120}\) The commensurabilist makes no room for autonomy in his calculus over choice, because the decision-maker does not choose how to live her life, but merely finds it in the structure of (heteronomous) reasons.

The point can perhaps be made by introducing Minerva, a scientist with similar talents and endowments as his omniscient, omnipotent, judge Hercules.\(^{121}\) Imagine for a moment that Minerva and Hercules are omniscient, omnipotent, and immortal (characteristics that are not too dissimilar to those already attributed to them) \(^{and}\) that they are identical twins.\(^{122}\) They are born at sufficiently identical times and are so close as to experience things from sufficiently identical perspectives that they always face the same range of choices over how best to live. A theory of morality or ethics based on the heteronomous role of reason would suggest that they should both (because sharing the same experiences) do the same thing. There would be no “Minerva’s life” or “Hercules’s life,” because for each of them, the only choice would be between a right or wrong life, not a differentiated one.\(^{123}\)

What is ethically important, however, is not only that a life is well-lived, but that it is authentic.\(^{124}\) Dworkin sometimes writes as if what differentiates individuals ethically, morally, or politically is their upbringing and acculturation. But equally plausibly, it is their tastes and inclinations. There is no place in his ethical theory for such non-rational differences to flourish, except perhaps at the pre-interpretive level.\(^{125}\) Instead, he appears to believe that identical twins Hercules

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\(^{120}\) Bernard Williams, Ethics and the Limits of Philosophy 18 (1993); see also id. at 100-101.


\(^{122}\) For the thought experiment to have more bite, they would have to both share the same gender.

\(^{123}\) The problem would be more acute if they were conjoined. Supposing both were healthy, then there could never be conflicts over the choice of life and, because both are omnisciently rational, they would, as one, arrive at the same conclusions about what to do. The separate (moral, political, ethical) identity of each twin (perhaps a problem anyway, to some extent) would thus disappear, or at least muddy, if there is one right answer to every (moral, political, ethical) problem.


\(^{125}\) Agreement over the criteria that constitute the basis of judgment can be rephrased in terms acceptable to Dworkin as the sort of pre-theoretical or “pre-interpretive” understanding we share when applying a concept. Ronald Dworkin, Law’s Empire 91 (1986). The relevant point here is that we share a certain community, with all that that implies. See Ronald Dworkin, Law’s Empire 63-64, 90 (1987). This relation to community requires that we share a certain commitment — we are participating in a particular point of view towards the community. That point of view is not itself theorized. In developing the individual’s point of view into a theory of political morality, however, Hercules and Minerva may subject it to the sort of
and Minerva can live ethically individuated lives only if one decides to live an ethically sub-optimal one. Yet his theory elsewhere emphasizes the (bounded) value of individualistic liberalism. The incommensurabilist’s point is, then, that he (and pluralism-supporting commensurabilists generally) cannot have their cake and eat it.

A theory of autonomy insists that what makes Hercules and Minerva different is their choices; that because, over a range of choices, reason is indecisive and has no direction to give, they may rationally choose among the options without risking mistake. Deliberation is important, in part because the consequences of their choices, for them and for the world, matter (though they may not be decisive). What matters most, however, is what happens after they choose: how well they inhabit their choice. To reiterate, the task is not just to choose, but having chosen, to live well.

The argument against thoroughgoing heteronomy is also relevant for my second point: Dworkin’s explanation of moral and political conflict. Dworkin accepts that disagreement, certainly at the theoretical level, where jurists are generating some claim about the (“best”) political-moral justification of law, can be genuine. If disagreement was not real or genuine, but rather rested on some mistake about political morality, then disagreement would simply entail that someone was both wrong and ignorant. While that would be a statement about the fallibility of human knowledge, and perhaps an important point against utilitarians, it would render his account of disagreement somewhat less interesting.

Assuming values are commensurable, however, if Hercules and Minerva sat down to discuss the best interpretation of American law, then both would agree over the correct interpretation of law. Given a determinate ranking of values — which is what commensurability

reflective testing championed by Rawls. See Ronald Dworkin, *Rawls and the Law*, 72 FORDHAM L. REV. 1387, 1391-92 (2004). The problem of ethically individuating Hercules and Minerva is precisely that, as I have put the issues, each of them share the same pre-theoretical experiences. If there is one right answer, reflective reconstruction fails to different their ethical lives.

130 My argument holds true even for the sort of internal skepticism that Dworkin proposes, whereby there is no external “Archimedian point” from which to assess the worth of someone else’s theory of law.
proposes — and the same “pre-interpretive” understanding of what counts as the relevant set of materials for elaborating a theory of law, then disagreement becomes unlikely, if not impossible. Put differently, there will be one right answer, not just within the theories, but as between theories. Agreement is generated, not by reference to some external, “Archimedian” point of view, but by the gradual refinement of every possible theory towards the truth.

Hercules and Minerva, upon agreeing, could believe that their project is to convince the ignorant about the content of legal-political-morality, and its application to the American legal system. This is a noble, liberal tradition, one grounded in the possibility of enlightened conversation as the means for generating insight, and may indeed be one Dworkin endorses. It has much resonance in American law. But it comes at the price of suggesting that judicial disagreement is equivalent to judicial ignorance. That seems to run counter to Dworkin’s claim in *Law’s Empire* — a claim that is the major part of his indictment of positivism — that disagreements are genuine.

Dworkin might be understood more recently as having rejected the distinction between incommensurability and commensurability-as-ranking to embrace the metaphor of commensurability-as-mutual-support. Under his new conception, values are horizontally integrated rather than vertically ranked, and so limit and reinforce each other as in the manner of a geodetic dome rather than lining up on some hierarchical scale. The challenge for the judge then becomes one of line-drawing rather than ranking: determining where each value abuts against the other.

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131 RONALD DWORKIN, LAW’S EMPIRE 91 (1986).
132 Dworkin at times appears to suppose moral and political differences, rooted in upbringing, are pre-interpretive and so not a matter of agreement.
133 See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. concurring) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).
134 See RONALD DWORKIN, LAW’S EMPIRE 4-5, 43-44 (1987) (discussing semantic sting argument).
The horizontal-ordering-of-values thesis is an attempt to embrace pluralism while retaining the (instrumental) value of coherence. Dworkin’s argument is that, if we interpret values correctly, in a manner that is “dynamic” or “normative” rather than “descriptive” or “flat,” then we can avoid conflict altogether. By properly interpreting the various other values (Dworkin particularly emphasizes liberty, but also authenticity and independence) as consistent with the underlying theory of equality, they need never conflict and so need never present an incommensurable conflict among values. Each value would rather interact with others in a manner that helps define and reinforce others. Nonetheless, Dworkin still selects one “sovereign virtue,” that of equality (or rather a particular “conception” of that “concept” of equality) to which all other values are subsidiary.

The fact that values can be compared such that they are mutually limiting rather than conflicting does not disprove incommensurability but represses it. Incommensurability does not entail incomparability:

137 See Ronald Dworkin, Hart’s Postscript and the Character of Political Philosophy, OXFORD J. LEGAL STUD. 1, 18 (2004) (“the preposterous premise that truth in political philosophy, or in the theory of value more generally, is a matter of coherence. Elegant and exquisitely coherent theories of political morality may be false, even repulsive. We aim, not at coherence for its own sake, but at both conviction and as much coherence as we can command.”).

138 Dworkin’s opposition of flat with dynamic or normative values appears to be a variant upon or updating of his “semantic sting” argument. Whereas the semantic sting argument sought to undermine “descriptive” or “conventionalist” theories of law by suggesting that only some politically committed theories explain disagreement, so his new argument suggests that descriptive theories of value entail disagreement where normative or dynamic theories do not. Compare RONALD DWOR IN, LAW’S EMPIRE ___ (1986) with Ronald Dworkin, Do Values Conflict? A Hedgehog’s Approach, 43 ARIZ. L. REV. 251, 254 (2001); RONALD DWOR IN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 125-133 (2000).

139 See RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 120-33, 147-52, 158-62, 180-83 (2000). Aaron Rappaport suggests that Dworkin’s theory embodies principles of rational reconstruction, which he takes to “possess a distinct architecture. First, it means that each individual normative claim must rest on a single moral principle, which provides the ultimate grounds of justification … this is the requirement of ‘vertical consistency.’ Second, the analysis suggests that conflicts among mid-level, instrumental norms must be reconcilable in terms of the higher principle, and ultimately in terms of a single moral norm. This might be called the requirement of ‘horizontal consistency.’” Aaron Rappaport, The Logic of Legal Theory: Reflections on the Purpose and Methodology of Jurisprudence, 73 MISS. L.J. 559, 598, 625 n.151 (2004).

140 His theory is thus still robustly commensurabilist, requiring all values to be seen through the lens of equality, or having equality as their common denominator.

141 See, e.g. Frederick Schauer, Commensurability and its Constitutional Consequences, 45 HASTINGS L.J. 785, 796 n.32 (1994) (noting that Dworkin presupposes purposive comparability of incommensurable reasons). The converse is also true. Incommensurability does not entail disagreement. Given incommensurability,
lines can always be drawn, values can always be ranked. The incommensurabilist’s claim need only be that commensurating incommensurable options entails a change in the values upon comparison.\textsuperscript{142} Accordingly, the issue raised by Dworkin’s dynamic argument for redefinitions of value to avoid conflict is not whether it can be done, nor whether it makes sense of certain values, but on whose terms. So, while Dworkin may suggest equality as the denominator in all moral or ethical calculations, a skeptic holding a different conception of equality or identifying a different value as primary may insist that Dworkin’s choice is an imperial one; an exercise of sovereign fiat, dependant not on some moral or political value, but internal preference or predilection.

Prioritizing commensurability and coherence as heuristic devices for resolving difficult cases does have the advantage of insisting that the judge maintain the posture of weak discretion and responsiveness to heteronomous values. It does not, however, settle the question of incommensurability, but stifles it. This is a problem for Dworkin because the decision over which theory to pick becomes itself a matter of performance or predilection — or perhaps acculturation. So, while the decision in any case may be “weak”, that is, based on principles, the decision about which theoretical argument to pick is not.\textsuperscript{143} And because the choice of theories may be necessary at any time, given the difficulty of the case, incommensurability always, potentially present when deciding a hard case.

One solution might be to claim that incommensurability is localized, appearing only between theories. The failure to agree is then based on genuinely different concepts of law. Dworkin’s problem would then become: why accept incommensurability only here?

The problems would not end for Dworkin by accepting some form of localized, inter-theoretical incommensurability. Equally troubling

\textsuperscript{142} JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS, 115 (1980). See also JOHN FINNIS, FUNDAMENTALS OF ETHICS, 87-88 (1983); JOSEPH RAZ, MORALITY OF FREEDOM, 339 (1986); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 146 (1996). (“Human goods cannot without significant loss be reduced to a single “superconcept” . . . Any such reduction produces significant loss because it yields an inadequate description of our actual valuations when things are going well . . . If we devise a scale, we will have to recharacterize the relevant goods in a way that changes their character and effaces qualitative differences.”).

\textsuperscript{143} Supposing disagreement is genuine and judges disagree over the appropriate grounds for a concept or theory of law.
would be the suggestion that a significant number of legal conflicts result in equipoise, rather than incommensurability. Dworkin does not bother to deny the possibility that sometimes conflicting reasons are equally strong: as a commensurabilist, he has to allow for that possibility.\footnote{See Ronald Dworkin, \textit{Can Rights Be Controversial?}, in \textsc{Ronald Dworkin, Taking Rights Seriously} 279, 286-87 (1978).} He simply argues that, in a complex legal system, such conflicts are likely to be rare. I have already suggested that \textit{Morrison} provides one example of equipoise among conflicting reasons. It is a case of first impression, where the judge turned to other jurisdictions, and to legal doctrine, for a solution to the legal conflict.

In the following section, I shall show that there are circumstances in which reasons may be equally weighty, precisely as a means of providing the judge with strong discretion, or encouraging her to experiment with different options. It is thus not clear, on its face, why complexity would favor ranking reasons as having a different value than having the same value. Dworkin’s challenge to incommensurabilists is appropriate here: he needs to produce some reason, rather than half-hearted intuition, to exclude the possibility of widespread conflicts among reasons of equal strength or value. Conflicts among doctrinal reasons presents a problem for Raz as well: developing doctrinal arguments, as a form of local coherence, is supposed to provide a determinate solution to the legal problem. If doctrinal reasons are indecisive, then the weak discretion thesis fails.

\section*{III. Complexity and Commensurability}

So far, I have suggested that both Dworkin and Raz believe that a decisive reason can ensure that judicial decisions are free from the personal preference of the judge, or what Oliver Wendell Holmes called “the sovereign prerogative of choice.”\footnote{Oliver Wendell Holmes, \textit{Law in Science and Science in Law}, in O.W. Holmes, \textsc{Collected Legal Papers} 239 (1920) (cited in H.L.A. Hart, \textit{American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream}, in H.L.A. Hart, \textsc{Essays in Jurisprudence and Philosophy} 123, 136 (1993)).} For Raz, as for Dworkin, personal preference undermines the judge’s institutional role and militates against predictable, neutral, transparent decision-making. Accordingly, if the judge is to remain within her proper role and simply declare the law,\footnote{I do not deny that Raz recognizes that judges, on occasion, have a legislative role. My claim is that he seeks to constrain the legislative role by requiring the judge to rely upon decisive moral or doctrinal reasons where legal reasons runs out.} she must identify some decisive reason, whether legal, moral, or doctrinal, that resolves the case.

\begin{footnotesize}
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\item \footnote{See Ronald Dworkin, \textit{Can Rights Be Controversial?}, in \textsc{Ronald Dworkin, Taking Rights Seriously} 279, 286-87 (1978).}
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Conflicts among sources equal in strength are more common that Dworkin supposes. For example, John Gardner’s discussion of conflicts among legal sources may be reformulated to suggest: first, that there are express (and implied) conflicts among both incommensurable and commensurable-but-equal sources of law; and second, that the point of generating such conflicts is to provide a means of experimenting with different (but not better or worse) solutions to legal and social problems. The point of such experimentation is to encourage a diversity of equally or incommensurably good solutions. In such circumstances, the fact than someone else has fixed upon a solution may be a reason for following them or may not, depending upon the judge’s predilections. Again, complexity generates such conflicts, rather than minimizing them.

A. Legislating Conflicts in Complex Systems

In the Anglo-American legal system, courts generally treat their own precedents as mandatory sources of law. On occasion, however, a legal system may expressly allow a court of one jurisdiction to use the precedents of another. In such circumstances, there is a conflict between the intra-jurisdictional and extra-jurisdictional sources. These different sources of law may conflict with each other in at least two ways. Where the conflict is among hierarchically differentiated sources, the hierarchically superior source will win out. Where, however, the conflict is among hierarchically undifferentiated sources — Gardner considers only incommensurable sources — then none wins out.

I shall supplement Gardner’s account by suggesting that the conflicting sources may be either commensurable, because they are of comparable law-generating authority, or incommensurable, such that comparison between the two presents significant problems. I shall then argue that experimentation leads complex legal systems to generating this type of conflict.

149 Gardner attributes the inability to differentiate among sources to the “fragmentation of value” characteristic of incommensurable conflicts. John Gardner Concerning Permissive Sources and Gaps, 8 OXFORD J. LEG. STUD. 457, 459-60 (1988).
150 Permissive sources may also be express or implied. An express permission exists where the jurisdiction has enacted a norm allowing the court to rely upon either type of source. An implied permission exists where two commensurable and equally authoritative sources conflict.
1. Conflicting Sources

To suggest that sources are incommensurable is to suggest that two or more socially identifiable entities make incompatible claims to authority upon our practical deliberations. Gardner believes he has identified the following example in the English legal system.151 The English Court of Appeal is usually bound by its own previous decisions. However, where such a decision conflicts with a decision of the Privy Council, the Court of Appeal may follow a Privy Council decision. Here there are multiple sources for decision (the different courts, with their ability to generate binding legal norms) and on occasion those sources may conflict over what counts as the correct reason for decision (they establish different precedents). Gardner treats such sources as incomparable.”152

Gardner’s claim that these sources — the Court of Appeals as compared to the Privy Council — are incommensurable seems, without more, odd on its face. Incommensurability consists in the inability to weigh and rank the competing options.153 To commensurate the options would transform the nature of the source to be commensurated. But there is no evidence that the Court of Appeals regards its own precedent-setting authority and that of the Privy counsel in this way.154 Instead, these sources are not differently (incommensurably) authoritative, but rather of equal authority.

Consider another example of equally ranked sources, this time from the American legal system: the doctrine of intra-court comity, “a rule that generally dictates that judges of coordinate jurisdiction should follow brethren judges' rulings on identical issues.”155 The doctrine applies at the federal trial-court level, such that a district court judge may consider the decisions of her trial-court colleagues in a particular

153 “A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value.” JOSEPH RAZ, THE MORALITY OF FREEDOM 322 (1986). This statement concerns incommensurability as to value, but could easily be reformulated to provide a definition of incommensurability as to strength.
155 American Silicon Technologies v. United States, 261 F.3d 1371, 1381 (Fed Cir. 2001).
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district or circuit, but is not bound by them.\(^{156}\) This type of conflict appears identical to the sort contemplated by Gardner, represents a conflict between sources that the doctrine of intra-court comity identifies as equally authoritative and commensurable.

Another example is the United States federal court system, which is divided into geographically differentiated inferior appellate courts.\(^{157}\) In this system, each federal circuit court of appeals is equally authoritative as any other, and able to create binding precedent only in its own jurisdiction.\(^{158}\)

In any given circuit, where no panel of the circuit appellate court has decided the issue, each of the other federal courts of appeal is an equally authoritative source of law. Where the sister court precedents conflict, choice among them depends upon an undefeated reason: each source is of equal strength, and none overrules the other. Accordingly, each federal court of appeals may use its sister-courts’ precedents where its own precedents fail to determine the outcome of a case and the sister courts’ precedents conflict.

It is certainly possible that sources of law may be incommensurably, rather than equally, authoritative. Consider, for example, the situation where a Scottish judge faces a case of first impression that has been differently decided in both the Dutch and the English legal systems.\(^{159}\) The Scottish judge might first note that Scot’s law is a “mixed” system, containing elements of both the continental civilian tradition and the English common law tradition, before next acknowledging the influence of Dutch and English legal thought on Scots law. Finally, the judge might attempt to discern whether the civilian system, concerned as it is with broad principles of law would apply in the Scots context, as compared with the common law’s incrementalist approach. Each style presents a different, and arguably incommensurably authoritative source of law. Picking between them appears a matter of judicial predilection rather than the application of some decisive reason.

In all these cases, whether the available sources are commensurable or incommensurable, the judge could, of course, turn to morality as easily as turning to the other courts’ precedents. Nonetheless, the major

\(^{156}\) Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co., Ltd., 240 F.3d 956, 965 (11th Cir. 2001) (“While the decisions of their fellow judges are persuasive, they are not binding authority.”).

\(^{157}\) Justice Frankfurter called this the “transcendent achievement” of the Act.

\(^{158}\) See Judicial Code of 1948, Chapter 3; see also Supreme Court Rule 10 (reason for granting certiorari is splits among circuit courts.)

\(^{159}\) My thanks to Professor Neil MacCormick for this example.
difference between the precedents (which may contain moral reasoning) and straightforward moral considerations is that extra-jurisdictional law identifies those solutions that have been reached in other relevant jurisdictions.

Considering rival solutions is thus focused on consequences rather than deduction from pre-existing principles or sources. Neil MacCormick, for example, stresses the importance of consequential reasoning for those sorts of decision-makers, including judges, whose decision may have a profound impact upon society. Holding judges responsible for those consequences is, he suggests, an important political activity. Experimentation both endorses and mitigates this emphasis on consequences for legal decisions.

In the United States federal system, for example, the sister circuits’ resolution of similar issues provides a concrete example of hypothetical testing of a proposed resolution, sharing the same sort of subject matter and standards of reasoning, and showing the consequences for doctrine in a more-or-less similar legal regime and consequences “in the world” in a more-or-less similar society. The judge may then compare such consequences to the hypothetical impact of other, non-legal reasons on the balance of reasons.

Two lessons may be drawn from these examples. First, conflicts among incommensurable or equal-and-commensurable sources can operate as a fragmentation-avoiding device. Where the judge can resolve intra-jurisdiction indeterminacy by considering equally or incommensurably authoritative sources, the judge can evaluate what is going on around her and rely upon her fellow judges’ decisions, insofar as is appropriate. The advantage of this way of proceeding is that it permits uniformity or comity in the substantive law of related or abutting (but nonetheless distinct) jurisdictions. Second, having considered the way in which different jurisdictions have attempted to resolve things, the judge may decide to try some as-yet-untested option.

Here, the judge is promoting rupture, at least as between jurisdictions. In either circumstance, the judge may choose, not because one solution is the best or is correct, but to avoid or engage in experimentation. Such a choice may express no more than the judge’s preference or predilection: as having a more conciliatory or conservative disposition on the one hand, or a more contrarian or activist disposition on the other. Complex legal systems may, on certain occasions, wish to leave it up to judges to determine where and when to engage in experimentation, or refrain from so doing, and incommensurability and equipoise provide the opportunity to do just that.

2. Nesting

Conflicts between sources equal in strength manifest none of the fragmentation of value that Gardner is concerned about, though they might, as I have just suggested, promote fragmentation of outcomes. Nonetheless, because the conflicting reasons are commensurable, the outcome is “on the same plane” whichever reason is preferred. Here there is no change in the mode of evaluation after a decision rendered. The scope of the permission is limited to relying on one or other of the legal sources as a ground of decision.

There are, however, other features of the conflict between the Court of Appeal and Privy Counsel that do appear to mimic conflicts between incommensurable reasons. In particular, the resolution of any one conflict does not establish that one source is more authoritative than the other for future conflicts: the conflict remains “nested.”

Nesting generally describes the ability of reasons to retain their strength even though defeated in particular circumstances. Thus, although in one situation reason A may have defeated reason B, if the conflict between those reasons is nested, the relative strength of the reasons must be re-decided whenever that conflict arises again. Thus, where conflict is nested, a particular resolution in one part of the system may always be reviewed and changed when it re-appears in another part of the system.

Parity between the sources, however, explains the reason why: choice between the sources fails to establish a hierarchy for subsequent cases.

163 “[N]esting’ [is] . . . the reproduction of the of particular argumentative oppositions within the doctrinal structures that apparently resolve them.” Duncan Kennedy, A Semiotics Of Legal Argument, 42 SYRACUSE L. REV. 75, 112 (1991); see also id. at 112-116; J.M. Balkin, Nested Oppositions, 99 YALE L.J. 1669 (1990) (book review).
Establishing such a hierarchy would remove discretion because the superior source would defeat the inferior. Maintaining the sources in equipoise without resolving their conflict retains the discretion to use one or other source. Thus, despite the availability of the Privy Council’s decisions, in a case of first impression, to fill a gap or, where its decision conflicts with a pre-existing precedent of the Court of Appeal, change the law, we learn nothing new about the system’s structure, because the competing sources continue to operate as available alternatives.

Resolving the conflict among permissive sources does render more determinate the substantive law. Once the outcome is settled, then the doctrinal issue is determined for the future because the Court of Appeals has chosen which rule to follow in these circumstances. The Court has not, however, settled which is the more authoritative source. The sources remain in equipoise should their precedents diverge on other issues.

Such an option is important for the English legal system as a pressure valve, permitting the Court of Appeals to reconsider its past decisions. The case is regulated if it conforms to past precedent, but precedent is defeasible dependant upon the available permissive sources. The ability to choose among sources enables the Court of Appeal to change tack without having to overrule itself or await overruling from a higher court. The rule of intra-court comity also functions as an express permission, allowing a judge to conform her decisions to those of her colleagues.

This, incidentally, is at odds with one way of interpreting H.L.A. Hart’s account of the consequences of judicial decision in penumbral cases. Hart suggests that:

> When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purposes of this rule, of a general word.164

Here, Hart appears to indicate that the core is essentially expanding, reaching out to provide determinate guidance because the court’s decision resolves the legislative indeterminacy. Of course, legislation

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may introduce new indeterminacies, and this is as true for judicial as for Congressional or Parliamentary legislation. Where courts confront some indeterminacy, however, Hart suggests that their decision resolves it. My account of nested conflicts suggest, however, that although the court’s decision achieves some local determinacy, that is, in the instant case, which source will win out in the future cases remains to be re-litigated when the sources next conflict.

Nesting enables or encourages reconsideration of the underlying justifications of past decisions in different, but perhaps not dissimilar, circumstances. It provides a safety valve for experiments gone wrong: because the nested nature of undefeated reasons preserves them as grounds for future decisions, the judge can reconsider her, or other judges’, prior decisions. Judicial reconsideration may acknowledge those decisions were better or worse than the proposed solution, or simply that there can and should be different approaches to current issue.

Nesting, I suggest, operates with our limited ability to predict consequences as a safety valve, enabling experimentation. Where the consequences of a decision are obscure, nesting provides a method for reconsidering decisions should they turn out badly. Since real judges, unlike Hercules, have a limited ability to see too far into the future, their responsibility for consequences should not be absolute, but should, on occasion, especially where the law is in flux, be partial and able to be rethought. Complex legal systems recognize this need, and so nest reasons of equal or incommensurable strength to permit legal experimentation.

IV. POWERS AND PERMISSIONS

So far, I have suggested that there is a distinction between decisively regulated cases, where the law resolves the conflict among reasons to provide a uniquely required outcome, and completely-but-indecisively regulated cases, where there are multiple legally acceptable outcomes, but no single outcome is required. Here the scope of the legal decision may be limited to selecting among the available outcomes. At a minimum, the distinction between decisively and indecisively regulated cases indicates the possibility that the only basis for judicial decision is judicial preference. Where there is thoroughgoing

165 JOSEPH RAZ, THE AUTHORITY OF LAW 75 (1979) (where . . . two [conflicting reasons] are equally balanced [t]hey cancel each other and it is false that there is a conclusive reason for the act and false that there is a conclusive reason for its omission.”).
incommensurability, that is, where legal incommensurability is matched by both moral and doctrinal incommensurability, there is no decisive reason to dictate the outcome. The judge must exercise strong discretion, using her personal choice to select one among the legally valid alternatives.

In this section, I demonstrate that there is a legal power to choose based on personal preference alone is matched by the legal right to do so. That right is generated by an implied legal permission just to pick one of the competing options — an implication that arises from the undefeated nature of the competing reasons. When reasons are undefeated they are converted into what I call pragmatic permissions. The presence of pragmatic permissions operates as an important safety-valve in the legal system, enabling the judge to exercise bounded strong discretion when undefeated reasons conflict.

I begin my discussion of the legal right to engage in preference-based decision by introducing Hohfeld’s famous account of legal rights. Under Hohfeld’s scheme, neither powers nor permissions — what he calls privileges — are properly equivalent to legal rights. Preferences entail that the holder of the preference has no duty to refrain from the act, and others have no right (or more accurately, a no-right not to) preclude the act. A power entails that the holder has no disability to perform the act, and imposes a liability on another who tries to interfere with the act.

My claim is that a judge has both a power and a permission to engage in preference based choice. While not precisely a right under a Hofeldian analysis, it is certainly sufficiently analogous to an Hofeldian right for my purposes, what might be called the colloquial understanding of rights. The major part of my analysis in this section attempts to establish that the judge has not only the legal power, but also the legal permission, to engage in preference-based decision. Then, based on the existence of both permission and power, I make the rights analogy.

A. Powers: Normative and Legal

My purpose in this section is simply to demonstrate that under one definition of the concept of having a right, an individual has a right to do a particular act where she has both a privilege or permission to do it, and has the power or “ability to change the normative relations between the person and the right-holder with respect to that act.”170 I then argue that judges have both a legal power and a legal permission to decide cases on the basis of preference or predilection. Put differently, they have legitimate authority to exercise strong discretion when legal indeterminacy is matched by extra-legal indeterminacy.

Hohfeld’s discussion of a right is primarily concerned to distinguish legal rights from liberties (Hohfeld calls them “privileges”).171 He famously distinguishes between different colloquial uses of “rights” and their opposites, and claims that all legal relations may be characterized in terms of them.172 The important relations for my purposes are those generated by powers and privileges. A power, according to Hohfeld, is an ability173 and correlates with (or enables) the power-holder to alter power-subject’s entitlements.174 A permission or “privilege” is a freedom from obligation (or “duty”)175 and precludes permission-subjects from subjecting the permission holder to normative coercion.176

170 Scott Shapiro, Authority in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules Coleman & Scott Shapiro, eds., 2002).
172 “‘Rights’ are claims, enforceable by state power, that others act in a certain manner in relation to the rightholder. ‘Privileges’ are permissions to act in a certain manner without being liable for damages to others and without others being able to summon state power to prevent those acts. ‘Powers’ are state-enforced abilities to change legal entitlements held by oneself or others, and ‘immunities’ are security from having one’s own entitlements changed by others.” Joseph William Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 WIS. L. REV. 975, 986 (1982).
Scott Shapiro provides a more modern take on Hohfeld’s discussion of powers, privileges, and rights. Shapiro utilizes a more Razian conception of rights, privileges, and powers to claim that

A right-holder has a privilege against another to perform an act when the right-holder is not under a duty to that person not to perform that act. For example, I have the privilege against you to enter my home in that I am not under a duty to you not to enter my home. . . . Alternatively, one might mean by the right-ascription that the right-holder has the power over the other person with respect to a certain set of acts. A right-holder has a power over another to perform a certain act when the right-holder has the ability to change the normative relations between the person and the right-holder with respect to that act.177

Hohfeld, Shapiro, and Raz thus all agree that a normative power is the ability to alter another’s normative status.178 The classic case is the ability of a superior to promulgate orders that an inferior is bound to obey. Issuing an order thus changes the normative situation of the inferior: she is now under a duty to act as directed and should she disobey, she is now liable to sanction for disobeying. In such a circumstance, the inferior obeys, not because she agrees with the order, but because (given her relation to the superior) she is not free to disregard the order. The fact that an order has been issued by an authority empowered to issue commands is the ground for obedience. It does not matter what the content of the order is, nor whether the inferior agrees or disagrees with the content of the order.179

Power and authority are, on this understanding, interlinked: “a normative power is tantamount to having an authority when it is a power over others.”180 Joseph Raz’s influential framing of this issue defines a normative power as the ability to alter exclusionary reasons.181 He defines exclusionary reasons as reasons that are both

177 Scott Shapiro, Authority in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules Coleman & Scott Shapiro, eds., 2002).
180 JOSEPH RAZ, PRACTICAL REASON AND NORMS 101 (1990).
181 For discussions of powers and authority that endorse Raz’s exclusionary reasons, see, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 233-34(1980); Scott Shapiro, Authority in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules Coleman & Scott Shapiro, eds., 2002).
first-order reasons for action and second-order reasons that preclude decision-makers from relying on conflicting reasons in determining how to act.\textsuperscript{182}

For example, consider the activity of promising in terms of exclusionary reasons.\textsuperscript{183} If Jack promises to lend his car to Jill on Tuesday, he has changed his normative status with regard to Jill. He now has an obligation, albeit a voluntary one, to deliver his car to Jill on the appointed day. The promise is an exclusionary reason: it is a first-order reason to deliver the car to Jill, and a second-order reason for Jack to disregard competing claims on his car on Tuesday. Jill has a power over Jack: she can hold him to his promise or release him from it. She thus has the authority to determine what to do with his car on Tuesday. Jack, of course, could welsh on his agreement; but if he did so, Jill would be justified in engaging in the “normative act[ity]”\textsuperscript{184} of criticizing him for doing so.\textsuperscript{185} So too in the case of ordering, the superior’s order constitutes both a reason for the inferior to act as commanded and a reason for her to disregard any conflicting reasons for action.

Exclusionary reasons also play an important role in Raz’s positivist, “source-baed” account of law. He believes that law is an “exclusionary system” that “exclude[s the] application of rules, standards and norms which do not belong to the system or are not recognized by it.”\textsuperscript{186} The judge’s role in that system is to authoritatively determine the normative situation of legal subjects. Judges are thus granted a power, to determine what these subjects ought, or ought not, to do according to the law,\textsuperscript{187} that power is a limited one, confined to the application of

\textsuperscript{182} JOSEPH RAZ, PRACTICAL REASON AND NORMS 101 (1990). Raz later modified his position to suggest that a normative power is the power to change, not only exclusionary reasons for action, but also exclusionary permissions. He calls these “protected” reasons for action. Joseph Raz, Legitimate Authority, in JOSEPH RAZ, AUTHORITY OF LAW 3, 18 (1979).

\textsuperscript{183} See, e.g., JOSEPH RAZ, THE MORALITY OF FREEDOM 173-76 (1986).

\textsuperscript{184} G.P. BAKER & P.M.S. HACKER, WITTGENSTEIN: RULES GRAMMAR, AND NECESSITY 45 (1985).

\textsuperscript{185} See JOSEPH RAZ, THE MORALITY OF FREEDOM 174 (1986) (power and right to promise interlinked).

\textsuperscript{186} JOSEPH RAZ, PRACTICAL REASON AND NORMS 145

\textsuperscript{187} According to H.L.A. Hart, this power is granted through the existence of “rules of adjudication”: those “secondary rules empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken…[such rules] confer judicial powers and a special status on judicial declarations about the breach of obligations.” H.L.A. HART, THE CONCEPT OF LAW 96-97 (2d ed. 1994).
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legal rules;\textsuperscript{188} and the judge’s application of the rules is authoritative and final.\textsuperscript{189} The judge’s institutional competence is thus limited to applying the enacted norms, unless they prove gappy.\textsuperscript{190}

The power to change an individual’s normative status need not entail the right to do so. For example, the doctrine of double jeopardy confers a power upon a criminal jury: to disregard the law and reject conviction.\textsuperscript{191} It is generally conceded, however, that the jury currently has no legal right to nullify — no law permits nullification, and the court’s instruction to follow the law appears to preclude it — and so no right to be informed of its power.\textsuperscript{192} Hence one source of discomfort with jury nullification: the jury appears to disregard its oath to follow the law and illegitimately invades the authority rightfully exercised by the judge, legislature, and prosecutor.

The judicial power to authoritatively determine the normative situation of legal subjects entails that a court's determination of that situation is binding on those subjects once reached. To this extent, the court is like the jury: the power exists even if the court makes a mistake about the law or intentionally (that is, without mistake) decides to render a decision contrary to that stipulated by the law. The power and authority to make binding determinations does not make a court's decision correct. As Justice Jackson famously pointed out, “We are not final because we are infallible, but we are infallible only because we are final.”\textsuperscript{193} So how a judge ought to apply the legal rules in a given instance remains independent from the manner in which she does in fact apply them in a particular case. That her decision is legally authoritative does not render it legally justified; just because she had the power to decide the case does not mean she had the right to decide

\textsuperscript{188} See JOSEPH RAZ, PRACTICAL REASON AND NORMS 132-3.

\textsuperscript{189} Raz believes these features are essential to all primary norm-applying organs of institutionalised normative systems. See JOSEPH RAZ, PRACTICAL REASON AND NORMS ch. 4.

\textsuperscript{190} This view of the judge’s role is, in part, a feature of the service conception of legitimate legal authority.

\textsuperscript{191} See United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (“Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal... could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.”” (alterations and omission in original) (quoting United States v. Ball, 163 U.S. 662, 671 (1896)).

\textsuperscript{192} Compare People v. Dillon, 668 P. 2d 697, 726 n. 39 (Cal. 1983) (right to be informed of power to nullify would lead to anarchy) with United States v. Datcher, 830 F. Supp. 411, 415-18 (M.D. Tenn. 1993) (power to nullify of constitutional magnitude, though jury has no right to be informed of power).

as she did.\textsuperscript{194} To possess the right, in addition to the power, to decide, the judge must have a permission to decide.

B. Permissions: Express and Implied

Permissions confer the right to act, not only the ability to do so.\textsuperscript{195} They indicate a legally-conferred right to act in a particular manner. Express permissions are exclusionary, precluding the operation of reasons that conflict with the permitted action, as well as providing a permission to act or not, as the agent so chooses.\textsuperscript{196} The agent is not required to perform the act stipulated, but rather \textit{may} (or may not) perform it. So if, for example, the rules of a particular golf course stipulate that: “If a player's golf ball lies on a path on the course, then the player is permitted to drop the ball within one club's length of the path,” there is then an express permission to move the ball if it lies on the path. The player may equally well elect not to move the ball, instead playing it from where it lies, and still conform to the rules of the course.

Express permissions depend upon a source stating that such a permission exists. Such permissions are not to be inferred from the absence of reasons for action (the absence of constraint), nor are they tied to any reason for action.\textsuperscript{197} Express reasons thus only exist in source-based systems of reasoning.

Implied permissions exist when there are no reasons imposing practical constraints upon action, that is, when there are undefeated reasons to the contrary. Raz calls these “weak” or “conclusive” permissions,\textsuperscript{198} and they exist in the absence of a clear reason for action—in law, a clear or determinate source. They are “conclusive” (I prefer “decisive”) because they form the conclusion of an argument over what sorts of reasons there are for doing a particular act. Where there are no reasons that clinch the argument either way then there is a permission. Raz considers that there is an implied permission where reasons of equal strength conflict.\textsuperscript{199} Each cancels the other, transforming the conflict from one regulated by reasons into one in which neither of the

\textsuperscript{194} If she is wrong, and there is a superior court, her decision will be vacated.

\textsuperscript{195} “Permissions indicate the absence of constraints. To state that one is permitted to act in a certain way is to say that one will not be acting contrary to [a] reason in doing so.” JOSEPH RAZ, PRACTICAL REASON AND NORMS 89 (1990).

\textsuperscript{196} JOSEPH RAZ, PRACTICAL REASON AND NORMS 89-91 (1990).

\textsuperscript{197} JOSEPH RAZ, PRACTICAL REASON AND NORMS 89-91 (1990).

\textsuperscript{198} JOSEPH RAZ, PRACTICAL REASON AND NORMS 89 (1990); JOSEPH RAZ, THE AUTHORITY OF LAW 64 (1979).

\textsuperscript{199} See JOSEPH RAZ, THE AUTHORITY OF LAW 75 (1979).
conflicting reasons operate — a position that, it turns out, is only partly correct.

It is worth considering in some detail the nature of implied permissions. We have already encountered them in Morrison and Worcester Works Finance Ltd. v. Cooden Eng. Co. Ltd.,\(^{200}\) the English appellate decision establishing that the Privy Counsel constitutes an equally authoritative “permissive source” of law.\(^{201}\) Raz believes that conflicting reasons or equal strength cancel each other out, so that these reasons disappear from our calculus over how to decide.\(^{202}\) In such circumstances, the scope of an implied permission is constrained only by the other norms of the system. The judge can rely on any non-excluded reason to decide the outcome — what John Finnis would call “‘open-ended’ practical reasoning,”\(^{203}\) and what Hart would call an open choice.\(^{204}\) I believe that, where reasons or equal strength or reasons incommensurable as to strength conflict, they are not canceled in this way. They remain to operate as undefeated grounds for decision, and the scope of the permission is limited to choosing among the conflicting undefeated reasons.

1. Conflicts, Gaps, Permissions

Raz’s discussion of implied permissions depends upon the concept of “canceling.” \(^{205}\) Canceling is familiar to lawyers. The classic example of canceling is frustration of contract, and the classic case on frustration is Krell v. Henry.\(^{206}\) Krell resulted from the postponement of Edward VII’s coronation due to the King’s appendicitis. Henry had paid Krell a deposit to hire an apartment overlooking the route of the coronation procession; after the procession was cancelled Henry refused to pay the balance. Krell sued. The Court of Appeals sided with Henry, asserting that there was no breach of contract because the contract was frustrated by “the non-existence” of the foundation of the contract, namely the procession.\(^{207}\)

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\(^{200}\) [1972] 1 Q.B. 210, 217.
\(^{201}\) See John Gardner, Concerning Permissive Sources and Gaps, 8 OXFORD J.L. STUD. 457-58 (1988).
\(^{205}\) See JOSEPH RAZ, PRACTICAL REASON AND NORMS at 27.
\(^{206}\) [1903] 2 K.B. 740 (C.A.), aff’g in part 18 T.L.R. 823 (K.B. 1902).
As the frustration analogy makes apparent, canceling conditions do not outweigh the other reasons for choice, nor do they exclude one reason for decision. They are simply facts that make a reason disappear from our calculus over what to do. Given that the purpose of the contract was to rent a room from which to watch the coronation, once the coronation was canceled the reason for engaging in the contract vanished. Either Henry or Krell could decide to honor the contract or not, for any reason or no reason. Put differently, they had a (very) strong discretion: no decisive reason dictated that they honor the contract (nor that they break it, either individually or together) and so they each had a choice not among bounded reasons, but among open alternatives, with the scope of each of their decisions unconstrained by law.

Raz considers that conflict among reasons of equal strength work in the same way as frustration of contract. The conflicting reasons cancel each other out; they not only block each other’s operation but disappear as reasons for action. There are no longer any reasons requiring a particular decision, only an implied permission to exercise unconstrained practical reason. The judge’s discretion is not limited to choice between the competing reasons when deciding what to do. It is not only the conflicting outcomes that are permitted: the scope of the legal permission is larger than that, because the conflicting reasons are cancelled — gone — and no longer operate to constrain choice. In the absence of regulation, anything not precluded by law is permitted.

I propose a modification of Raz’s account of conflicts of reasons of equal strength. I suggest that where reasons of equal strength conflict, they do not disappear (as in the case of frustration) but continue to operate as reasons for decision, though not decisively.

To see why, consider the game of basketball. By the rules of basketball, only one personal foul can be called on a given play. Nonetheless, on any given play, multiple players could impede their opponent. Whichever happens first blocks (Raz would say “cancels”)
the later fouls from operating as a reason for assessing a foul. But what happens if both events occur simultaneously, that is, if two players foul an opponent at the same time? In such circumstances, there are two equally strong reasons that conflict, one for assessing a foul on Player 1, and another for assessing a foul on Player 2. Who is to be called for the foul?

There is no decisive reason that mandates calling the foul on one player over the other. Either decision is permitted; neither is uniquely required. The rules are indeterminate as to what is to be done, and they permit the referee to make a choice between the conflicting options. In other words, she has a discretion.

The referee’s discretion is, however, constrained to the available options. It is not the case that the reason for calling the foul is frustrated. The reasons for calling the foul — Players 1 and 2 each illegally impeded their opponent — do not disappear. The players and referee cannot simply decide there was no foul, nor that, if there was a foul, it should not be assessed on one of the players. The reason for calling the foul on the player is thus not canceled. Instead, the competing reasons are transformed from decisive to undefeated reasons for decision. That is, the fact that Player 1 fouled the opponent does not override the competing reason for calling the foul on Player 2, but is not overridden in its turn, and vice versa.

Furthermore, the scope of the permission is limited to the competing reasons. There are a range of other non-excluded reasons she could point to, that yet another person, Player 3, subsequently fouled the opponent; or that, in the absence of a reason for calling a foul she could just let play continue. Because the reasons do not disappear, however, she is limited to relying on the fact that each player fouled the opponent, but has no decisive reason for picking a particular player. She ought just to “judge” between the two options in order to render her decision. But how? She is beyond judgment here: judgment was

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212 This is a somewhat simplified version of the rules, see See NBA Rule 12: Fouls and Penalties at [http://www.nba.com/analysis/rules_12.html?nav=ArticleList](http://www.nba.com/analysis/rules_12.html?nav=ArticleList) (last checked August 30, 2006), but it will do for present purposes.

213 Excluded reasons include moral or social reasons to decide who gets the foul, such as one of the players is a noted philanthropist, or comes from a disadvantaged background. Furthermore, they include some gamer-related reasons, such as one player has had a better game and should be awarded accordingly.

214 In basketball, it sometimes appears that there is a customary rule that fouls are not called on the last few plays of a game, especially in the playoffs. That rule has not been expressly endorsed by the National Basketball Association.

what established the parity of the conflicting reasons for calling simultaneous fouls. All she can do is pick one or other of the players. Her choice of player will be preference-based, and permissibly so.

The analysis of conflicts of reasons of equal strength applies to undefeated reasons more generally. Where reasons conflict, such that there is no decisive reason for decision, then there is a permission to rely on any of the available options.

C. Pragmatic Permissions?

It should now be clear that this is the sort of situation described in *Morrison*. The legal and extra-legal reasons were in equipoise and there was a legal and extra-legal gap. The judge, by virtue of his role, had the legal authority to decide the case. The conflict of reasons of equal strength also generated a legal permission to decide the case.

Under my proto-Hohfeldian definition of a legal right as combination of power and permission, the judge had a legal right (or something closely analogous thereto) to decide the case by just picking among the conflicting reasons. The judge had the right to exercise strong, preference-based discretion.

All that is left is to demonstrate that a similar right existed in *Argersinger*, where the reasons were not in parity, but incommensurable. Raz considers that, where reasons of equal strength conflict, both reasons disappear because they are mutually canceling. In that case there is a permission to rely on any reason because there is no reason to limit the range of permissible reasons for decision. Raz further claims that incommensurable reasons do not conflict in this way. They do not cancel each other and so, logically, do not entail the existence of an implied permission. I suggest a modification of this theory based on the basketball analogy.

If there is a permission where reasons conflict, it is not due to the absence of any constraint, but due to the undefeated nature of the conflicting reasons. So far, the discussion has been limited to conflicts

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216 A further point: decision here is does not match Dworkin’s second category of weak discretion, i.e., that the decision is simply unreviewable. In other sports, this type of decision may be reviewed by a third umpire on television. However, because the reasons for canceling the foul are in equipoise, further review will not remove discretion.


among commensurable reasons of equal strength. But if, as I claim, the distinctive feature of an implied legal permission depends upon the undefeated nature of the competing reasons, then undefeated-ness, rather than equality, generates to implied permissions where reasons conflict.

Conflicts between undefeated reasons, whether equal in strength or incommensurable, need not logically imply a permission; rather, they are perhaps better understood as generating what I shall call a pragmatic permission. Of the conflicting options, none is weightier than the other, and there is no external reason that can break the tie. The reasons are thus undefeated and blocked from operating as a decisive reason. They each operate as a permissible basis for decision and the judge must choose among them. Furthermore, choice does not definitively settle the relative strength of the conflicting reasons for the legal system: the issue of their relative strength is nested so that the outcome of the conflict remains unresolved for future cases in different circumstances.

The concept of pragmatic permissions, unlike that of logically implied permissions, does not distinguish between commensurable and incommensurable reasons. Both types of reasons generate undefeated conflicts: incommensurable reasons are undefeated by definition; commensurable reasons where they are equal in strength. What matters is the absence of a decisive reason combined with the need to decide. If this is correct, conflicts among incommensurable reasons result in a pragmatic permission: to pick among the reasons without having to adduce a tie-breaking reason. The judge may simply prefer one reason to the other.

Where there is a pragmatic conflict among the available legal reasons, courts cannot always wait upon the legislature to settle the issue, but generally must decide as which party is to prevail. That decision cannot always rest upon some decisive legal, moral, or doctrinal reason. In such circumstances, there is a legally implied pragmatic permission to pick among the conflicting reasons. Whatever result is selected will be legally justified. Each reason will be an equally appropriate legal basis for decision: that is the bounded nature of this type of strong discretion. The “real” basis for picking among the reasons, however — the judicial hunch, what the judge had for breakfast, or political preference — need not be completely justified, whether legally, morally, or politically. To that extent, the judge’s choice is preference-based, and expresses (bounded) strong discretion.

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One last point is that bounded strong discretion permits the judge to rely upon the morally best justifications in a manner that Raz’s doctrinal reasons do not. Raz’s belief that doctrinal reasons operate to close legal-moral gaps appears to conflict with his claim that moral reasons generally defeat doctrinal (formalist) ones.219

Raz makes it clear that “[d]octrinal reasons, reasons of system, local simplicity and local coherence, should always give way to moral considerations when they conflict with them. But they have a role to play when natural reason runs out.”220 That role is to take the place of personal preference and to provide an institutional reason for decision in the absence of a legally or morally decisive reason.

Raz appears to believe that, where morality is indecisive, the turn to morality has sent us down a blind alley and so we must make do with the law. “[T]he return from morality, when asked for its contribution to the issue at hand, is that it has no guidance to give.”221 All we have left is judicial personal preference; it seems like “whatever we decide to do becomes the right thing to do.”222

My basketball analogy makes clear, however, the return from morality is not negligible: it is only indecisive. Moral reasons have overridden or excluded legal reasons: the legal reasons do not suddenly become morally decisive just because morality is indecisive. Morality has not exhausted itself in this way.223

Doctrinal reasons do not occupy the field, nor change their relative strength and character, just because moral reasons fail to resolve the

219 Formalism, as a theory of adjudication, is an attempt to prescribe how judges ought to decide gappy cases: it holds that, even although the legal reasons underdetermine the result of a case, nonetheless the judge ought not to turn outside the law to extra-legal reasons. Instead, the judge should rely upon some legal principle or wait for the legislature to resolve the issue. See, e.g., Frederick Schauer, Formalism 97 YALE L. J. 509 (1988). Schauer defines formalism thus: “Formalism is the way in which rules achieve their ‘ruleness’ . . . by . . . screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account. Moreover, it appears that this screening off takes place largely through the force of the language in which rules are written. Thus the tasks performed by rules are tasks for which the primary tool is the specific linguistic formulation of a rule.” Id. at 510.

220 JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN at 340.

221 JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 335 (1995).


223 Put differently, the conflict among equal or incommensurable moral reasons does not result in them canceling each other out.
case. Undefeated but indecisive moral reasons for decision may still be stronger than the doctrinal alternatives. In other words, the fact that a reason does not outweigh every other reason is not a barrier to it being weightier than some other reasons. According to Raz’s own theory, non-excluded moral reasons outweigh doctrinal reasons when they conflict. That does not change simply because those moral reasons in turn conflict with other moral reasons and are incommensurable with them.

Once the judge has started to consider moral reasons, then simply to argue that these reasons no longer apply and that technical legal considerations ought to decide the issue is an evasion of the issues.224 Deciding on the basis of technical reasons may itself be considered a partial and prejudiced manner of deciding the case, especially as such considerations are innately conservative, favoring the status quo.

The structure of legal reasons here offers no further guidance to the judge. Neither do extra-legal reasons. The options may be to choose among a range of reasons, some of which may be deeply theorized, some shallow; some with broad implications, some narrow. No theory mandates a choice among them. In such circumstances, the judge must just decide, and she — and we — must work at living with her decision.

In *Argersinger*, that decision was momentous, and required much work. In *Morrison*, the decision was less significant and easier to accommodate. In other cases, the consequences may be less clear. Nonetheless, in all these cases, the judge has a strong discretion and the legal right to decide based upon her personal preference or predilection.

V. CONCLUSION

I have suggested that a judge has both a legal power and a legal permission to simply pick an outcome from among multiple available options where legal incommensurability is matched by moral and doctrinal incommensurability. Accordingly, the ideal of will-less decision, which holds that the judge’s personal preference never operates — or should never operate — to determine the result of a case, is unattainable in legal systems where some of the reasons are in equipoise or incommensurable. Preference-based decision is a necessary feature of such systems.

224 Perhaps because the parties have alerted the judge to the moral arguments, perhaps because morality is unavoidable, given the circumstances. See e.g., ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975)
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Where there is no decisive legal or extra-legal reason for decision, the court has both a power and a permission to choose which of the conflicting reasons it wishes to apply. The combination of power and permission is tantamount to a legal right to exercise strong discretion, at least in choosing among the available legal options. I have defined strong discretion as any decision made in the absence of a decisive reason; weak discretion, by contrast, is discretion on the basis of some decisive, or tie-breaking reason. Given my reading of *Morrison* and *Argersinger*, it should be clear why I reject any version of adjudication — at least in complex legal systems — that suggests that judges do, or should, exercise only weak discretion.

These exemplary cases, one mundane, one notable, make clear the stakes of the argument. Where legal rules conflict, it is sometimes the case that no tie-breaking rule resolves that conflict. In such circumstances, the judge must rely upon personal preference to choose among the available outcome. Sometimes, choice will have a limited impact; sometimes a profound one. Whether or not the profound choice implicates something along the lines of Duncan Kennedy's "fundamental contradiction," in which liberal law contains conflicting, nested, and irresolvable, values, or a more local and pragmatic political or moral conflict, is immaterial. So long as there are legal gaps caused by conflict, and the legal gap is matched by extra-legal conflict, then whether those gaps are accidental or necessary is beside my point. My point is simply that, on occasion, there is no legal or extra-legal tie-breaking standard to close the gap. There, judicial preference comes into play.

The right to engage in preference-based decision is, contrary to Dworkin and Raz’s theories, a feature of complex legal systems. Modern municipal systems, it turns out, sometimes choose to generate the very types of conflicts they believe judges should avoid. These may be either conflicts between commensurable or incommensurable reasons. The right to exercise strong discretion is important in complex legal systems that value experimentation among diverse solutions to legal and social problems. Different solutions may not, at the time of decision, be better or worse. Living with the consequences of a decision in a changing world may make them so.

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