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INDECISIVE REASONS FOR ACTION: SOCRATES, NOT HERCULES, AS JUDICIAL IDEAL

Abstract

Ronald Dworkin famously introduces the idealized judge, Hercules, to demonstrate how to identify one right answer for any legal problem. Since judicial disagreement makes sense, according to Dworkin, against the background of plural theories of the good, Hercules solves a particular political problem: how to avoid apathy or indecisiveness in choosing among competing theories. Dworkin's judge is supposed to stand by his or her political convictions in the face of competing, plural points of view. Choosing the one right answer is thus a method of political commitment.

My claim is that Dworkin is caught between a rock and a hard place, not once, but twice. First, the right answer thesis must avoid two sources of indecisiveness. If a legal system is too ontologically simple, then there will be multiple equally good answers, so no unique right answer. If a legal system is too ontologically complex, then incommensurability raises the possibility of no right answer. It is up to Dworkin to provide some basis for thinking that the legal system is neither too simple nor too complex, but (in the words of Goldilocks) "just right." He never does.

Dowrk in cannot identify the just-right answer because incommensurability is an essential part of pluralism. This is his second problem: Dworkin claims that, on the one hand, he thinks that there is one right answer to any given legal question, on the other, that political morality is irreducibly plural. His concept of integrity thus demand from a judge internal coherence and consistency of political and moral justifications, though it also requires external inconsistency of plural points of view. So his theory trades upon the existence of a particular sort of ontological incommensurability, one his theory of judicial choice denies.

The fact that judges can choose among incommensurable points of view is less surprising that Dworkin seems to suppose. But the fact of choice does not generate a right answer, it merely generates a final answer. The fact that a judge is, or can become, convinced that it is the only available answer speaks not to the judge's sense of integrity, but her narrowness of mind. That is not the sort of virtue we should encourage in a plural society.
INTRODUCTION

Judges decide cases. Most often, they do not have the option of declining to decide, but instead must select one or other side in the dispute before them. When the judge chooses, must she be convinced that she has made the right choice? Or can she have no opinion about which option is correct and perhaps even regret picking the winning side or argument? In other words, how do we make sense of the judge’s refrain that she was compelled or constrained to decide in a particular way?

The adequacy of practical justification is taken up by some contemporary philosophers and legal theorists in the context of remorse as an appropriate response to the predicament of moral choice. For example, Martha Nussbaum suggests that sometimes the agent’s “conflicting … desires” can sometimes force choice affecting “ethical goodness itself … not just the loss of something desired but actual blameworthy wrongdoing — and, therefore, [an] occasion not only for regret but for an emotion more like remorse.” See MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 27 (updated ed., 2001). In the legal context, while the judges generally do not believe that their decisions constitute blameworthy wrongdoing, they may believe they act under the sort of constraint or compulsion usually attributed to volitional indecision. Nonetheless, sometimes judges do regret their decisions. For example, Justice Louis Powell publicly regretted two very important decisions: his votes sustaining a 5-4 majorities in Bowers v. Hardwick, 478 U.S. 186 (1986), and in McCleskey v. Kemp, 481 U.S. 279 (1987). See Mark A. Graber, Judicial Recantation, 45 SYRACUSE L. REV. 807 (1994) (citing among other famous recantations, Justice William O. Douglas’ expression of regret for his decision in Korematsu v. United States, 323 U.S. 214 (1944)).

The claim that judges are often not “really” compelled to decide a particular way is made by Robert Cover. See ROBERT COVER, JUSTICE ACCUSED: ANTISLavery AND THE
Though judges must decide, judges may often be indecisive: unconvinced that the option they have chosen is the best resolution of the case. Indecision arises when an agent is faced with a practical choice among conflicting options. One way in which a decision-maker could be indecisive is if she lacks sufficient resolve to decide one way or the other, but is instead flummoxed or “paralyzed” by the options. Here, indecision is a volitional problem: the decision-maker lacks the sort of resolute or unified will necessary to decide the outcome. What she requires is sufficient conviction or commitment to make a decision. A variant of this volitional problem arises when the decision-maker’s lack of resolve is extended over time. Here, she may decide, but hesitantly, or grudgingly or under some external pressure forcing her decision, and so want to take it back or distance herself from it. In this latter case, the language of constraint or compulsion seems appropriate.

Two other circumstances produce indecision; however, these need not
be attributable to judicial will. In each instance, there appears to be no single reason that is better than all the rest and could thus provide a decisive answer by breaking the deadlock among competing reasons for action. In the first type of case, the decision-maker may lack some information necessary to determine which reason is best after all, and so indecision is an epistemic problem about the relation of knowledge to choice. Alternatively, in the second type of case, the agent may know everything there is to know, but the reasons themselves are indecisive, presenting an what Dworkin calls an “ontological question”\(^7\) about the nature of reasons or rationality.\(^8\)

Indecision contradicts Ronald Dworkin’s well-known view that there is one right answer to every legal case.\(^9\) Dworkin believes that, when faced with two options, a judge can always have an “opinion” about which side or argument to prefer.\(^10\) He this regards indecision as, among other things, a volitional problem: a form of moral or political apathy, induced by the fragmentation of our moral or political values.\(^11\) His ideal judge, Hercules, responds to this fragmentation among values by demonstrating the unitary character of our moral, political, and legal convictions in the face of plurality.\(^12\) Dworkin takes Hercules both to undermine the existence of ontological indecision\(^13\) and to show that judges can solve epistemic

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\(^8\) See Christopher W. Morris and Arthur Ripstein, *Practical Reason and Preference*, in *PRACTICAL RATIONALITY AND PREFERENCE: ESSAYS FOR DAVID GAUTHIER* 1 (Morris & Ripstein, eds., 2001) (discussing requirements of completeness and transitivity as essential for preference-based accounts of reason). Reasons are indecisive when reason A renders one or more of the competing options rationally defensible, but does not defeat or outweigh or override competing reasons B and C. In their turn, reasons B and C support one or more of the competing options, but do not defeat reason A. Reasons are indecisive when they are of equal strength or incommensurable as to strength.

\(^9\) See Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. Rev. 1 (1978). The ontological version is completely incompatible with the one-right-answer thesis; on occasion, as I shall demonstrate, epistemic and volitional indecision also undermine one-right-answer.

\(^10\) See Dworkin, supra note 7, at 90 (“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.”).


\(^12\) See DWORKIN, supra note 4, at 239.

\(^13\) See, e.g., Dworkin, supra note 7, at 88-90.
problems sufficiently well to choose among the relevant options.\textsuperscript{14} The judge can reasonably prefer one side in a legal conflict and can know how best, morally or politically, to justify her choice.

Endorsing the practical relevance of judicial indecision requires rejecting either or both aspects of the Herculean theory. Many theorists think that values are equivocal and plural, such that no individual could formulate a sufficiently rankable scheme of value so as to determine what is the right thing to do in every conceivable circumstance.\textsuperscript{15} Accordingly, a proper understanding of the nature of value demonstrates that the Herculean option is wrong, or worse, senseless: the attempt to commensurate values falsifies something about the nature of value and of ethical choice.\textsuperscript{16} The idea of indecisive reasons, which includes both ontological and epistemological moral uncertainty, additionally suggests that any claim to moral or political conviction falsifies the current experience of rational human agents faced with complex ethical questions.\textsuperscript{17} In that case, a more useful and sympathetic idealized judge is Socrates, not Hercules: someone who, most famously perhaps, knows only that he does not know.\textsuperscript{18}

\textsuperscript{14} See Dworkin, supra note 4, at 265 (Hercules uses the same grounds for decision as a normal judge).
\textsuperscript{15} See, e.g., John Finnis, On Reason and Authority in Law’s Empire, 6 L. & Phil. 357, 371-72 (1987) ("no uniquely correct answer could be available in any case where there is identifiable a set of two or more options/answers which do not violate any rule binding on the judge or other chooser or interpreter."). See also Joseph Raz, The Relevance Of Coherence, 72 B.U. L. Rev. 273, 309 n.64 (1992) ("Due to pervasive incommensurabilities among values, many incompatible lines of reasoning are equally coherent with the rest of the law. This makes coherence an unsatisfactory guide to courts if the problem is finding a determinate and value-free guide."). Compare David Wiggins, Incommensurability: Four Proposals in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 52, 60 (Ruth Chang, ed., 1998) ("there is no correct … unitary, projectible, explanatory, and/or potentially predictive account to be had of how A and B trade off against one another in a reasonable agent’s choices or actions, or within the formation of his springs of action.").
\textsuperscript{16} See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS, 113 (1980) (commensuration is “senseless in the way that it is senseless to try to sum together the size of this page, the number six, and the mass of this book.”). See also FINNIS, supra note 15, at 374-75.
\textsuperscript{17} See, e.g., FINNIS, supra note 15, at 372-76 (discussing the “commonsense [judgments] of lawyers and others who think that in some … (not infrequent) cases there is more than one … answer, and reason itself (whether legal or even moral)lacks the resources to identify one as best.").
\textsuperscript{18} A slightly different way of putting this, and one more sympathetic to Dworkin’s Rawlsian inclinations, is to suggest that Dworkin views law as political, not metaphysical and legal reason as public, not private. See Dworkin, supra note 4, at 189-90, 256-57. Socrates, as a private individual, separate from public politics, relying on his own personal attempts to ascertain the truth, is antithetical to Dworkinism.
In selecting Hercules as his model, Dworkin chooses to construct Law’s Empire by might, not right. Where Hercules’ virtues are omniscience and omnipotence, a different account of adjudication might select Socrates as an exemplary judge, given his openness to learning what others claim to know, and his humility about the limits of his own such claims. Faced with difficult epistemic and ontological problems that threaten to reduce his interlocutors to paralysis\(^\text{19}\) in the face of intractable difficulties, Socrates acts the parts of gadfly, prodding them into action.\(^\text{20}\) Where his interlocutors retreat to the certainty of their pre-existing convictions, Socrates distinguishes himself by his willingness to learn about himself and from others in the face of indecisiveness.\(^\text{21}\)

In Section II, I briefly describe Dworkin’s theory of law as integrity as a means of examining one of the most popular accounts of commensurability in the law. In Section III, I suggest that Dworkin’s attempt to explain judicial conflict in terms of competing individual convictions about the best moral and political theory of law fail to avoid indeterminacy. In part, that is because Dworkin himself requires at least moderate complexity among the legal materials in order to avoid one source of indeterminacy: ties among equally compelling legal outcomes. In Section IV, I demonstrate that Dworkin’s theory expressly fudges and implicitly embraces at least one sort of incommensurability. Accordingly, complexity provides yet another reason for rejecting Dworkin’s ontological and epistemical claims in favor of some more sophisticated account of ontological and epistemological indecision.

I. INTERPRETATION, INTEGRITY, AND ONE RIGHT ANSWER

Ronald Dworkin’s well-known theory of law-as-integrity seeks to establish that, while there may be conflicts between jurists, any one jurist must have a

\(^{19}\) Indeed, the eponymous Meno characterizes Socrates himself as inducing such paralysis, like an like a torpedo fish or electric ray. See Plato, *Meno*, in COMPLETE WORKS OF PLATO 870 at 879 (John Madison Cooper & D. S. Hutchinson, eds., 1997). Socrates responds “I myself do not have the answer when I perplex others, but I am more perplexed than anyone when I cause perplexity in others.” *Id.* at [80d]. But, like the torpedo fish, Socrates continues on in the face of perplexity.


\(^{21}\) Euthyphro, for example, abandons the inquiry into the pious and impious to return to his conviction that he should prosecute his father for impiety. See Plato, *Euthyphro* in COMPLETE WORKS OF PLATO 3-4 [3e-4e], 16 [15d-e] (John Madison Cooper & D. S. Hutchinson, eds., 1997).
consistent, coherent theory of law such that she can identify the one right answer to any legal problem. The ordinary meaning of integrity captures both the sort of moral uprightness based on some principled stance that Dworkin demands of his judges and the sort of unity or internal consistency that Dworkin demands of both the legal system and judicial decision-making.

Integrity precludes the sort of internal division that could engender feelings of conflict or divided loyalties that give rise to further feelings of constraint and compulsion. Dworkin recognizes that the central cases of a given practice may constrain and so modify our convictions about the sorts of moral and political justifications compatible with a given legal system. He further realizes that our own convictions may pull us in multiple directions, and so check or modify our intuitions. However, integrity presumes that a judge can produce a comprehensive theory that justifies her decision in a particular case free of inconsistencies and incoherences. His theory of constructive interpretation proposes that a judge actively work on the law of a particular legal system in a way that presumes that there is only one right answer to any legal outcome. Since integrity requires the judge to provide her own best interpretation of the law, the judge inevitably renders both the law and the resulting decision the unitary product of her own undivided will.

Dworkin’s central claim is that there may be different domains or disciplines or practices, each of which has its own criteria for what counts as a successful explanation or “interpretation” of the value of that practice. Each domain covers a different subject matter — the good, the beautiful, the just, and so on. Accordingly, there must be a different range of judgements about what act or item, all things considered, an agent should judge as best within a particular domain (or within a genre within that

22 See DWORKIN, supra note 4, at 3-6, 37-43, 87-88.
23 See DWORKIN, supra note 4, at 183-84, 188-90, 243, 245.
24 See DWORKIN, supra note 4, at 41, 62-63, 71 (discussing relevance of paradigm cases); see id. at 215, 236 (discussing ways in which practice can constrain interpretation and force compromises between fit and justice).
25 See DWORKIN, supra note 4, at 237.
26 See DWORKIN, supra note 4, at 76-77 (discussing the way in which his theory of interpretation fits with the one right answer thesis); id. at 233, 240 (discussing constructive interpretation and what constitutes a best answer). Compare John Finnis’s discussion of constructive interpretation and best answers in FINNIS, supra note 15, at 360-363, 370-73.
27 See DWORKIN, supra note 4, at 242-43, 254-56.
29 Dworkin, supra note 28, at 132-38.
domain).\textsuperscript{30} For Dworkin, legal and moral judgment like aesthetic judgment comes down to our rationally tested convictions about what explanation or interpretation is the best, all things considered. Each domain provides a check upon which convictions have, depending upon the relevant domain, plausible political, moral, or aesthetic value.

Here Dworkin helps himself to the Rawlsian moral methodologies of constructivism\textsuperscript{31} and “reflective equilibrium,” while adding significant twists to each. Rawls’s reflective equilibrium,\textsuperscript{32} is the process by which individuals decide which among different competing particular conceptions of justice is best. Rawls requires individuals to modulate between their intuitions about justice and the different particular versions of justice they might endorse to arrive at a considered judgment about which conception of justice is best.\textsuperscript{33} Rawls’s “Kantian constructivism”\textsuperscript{34} relies both on a particular understanding of the equal moral worth of persons, as well as a view of the role of justice as providing a justification for the acts of public institutions based on a common point of view or public reason.\textsuperscript{35}

As Arthur Ripstein notes:

Dworkin’s approach to justification is continuous with the Rawlsian account, but it is more ambitious in two ways. First … Dworkin argues that a careful interpretation of ordinary practices of moral argument reveals a much greater continuity between personal and public morality. … Second, Dworkin broadens the idea of reflective equilibrium to a more general account of interpretation, which is concerned with explaining how

\textsuperscript{30} See Dworkin, supra note 28, at 90, 129, 133-24 (discussing the subject-matter of morality; the existence of morality as a separate domain, and judgments across genres within a particular domain).
\textsuperscript{32} Which Onora O’Neill identifies as part of his earliest version of the Kantian constructivist procedure, see Onora O’Neill, Constructivism in Rawls and Kant in THE CAMBRIDGE COMPANION TO RAWLS, 347, 354 (Samuel Richard Freeman, ed., 2003).
\textsuperscript{33} See Rawls, Justice, supra note 31, at 121.
\textsuperscript{35} See Rawls, Kantian, supra note 31, at 537.
our judgments about various domains of value can be correct.\textsuperscript{36}

Dworkin’s version of reflective equilibrium thus depends identifying the set of materials that any informed member of society would regard as legally significant, and comparing them against the principles of political morality, so as to find the set of principles that best justify the materials.\textsuperscript{37} His version of constructivism, likes Rawls’, draws upon the methodology of equilibrium: “they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice.”\textsuperscript{38}

Dworkin provides a relatively consistent account of the process of judgment across the various disciplines he has considered. In each case, judgment has both a backward- and a forward-looking aspect.\textsuperscript{39} The backward-looking aspect takes into account the range of relevant pre-existing decisions that any plausible theory must seek to incorporate or provide some reason for excluding. Dworkin generally calls this the dimension of “fit.”\textsuperscript{40} In the law, the extant legal materials provide a limit upon and a ranking of the relevant political or moral theories that seek to explain and justify the law’s authority to determine the result in a particular case.

This first dimension seeks to incorporate our intuitions or understandings about what range of examples any theory of the relevant type must cover. It picks out those candidates that we “pre-interpretive[ly]”\textsuperscript{41} recognize that any theory must account for. The idea is that, for there to be a social practice to understand and theorize, the participants in that practice, be it law, morality, or aesthetics:

\textsuperscript{36} Arthur Ripstein, \textit{Introduction: Anti-Archimedeanism}, in \textsc{Ronald Dworkin} \textsc{1, 8} (Arthur Ripstein, ed., 2007).
\textsuperscript{38} \textsc{Dworkin}, supra note 4, at 90. \textit{See also id.} at 52 (“constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong”).
\textsuperscript{39} \textit{See} \textsc{Dworkin}, supra note 4, at 225; he also calls it a descriptive and normative aspect. \textit{See} Ronald Dworkin, \textit{Hard Cases} in \textsc{Ronald Dworkin}, \textsc{Taking Rights Seriously} 81, 123 (1978).
\textsuperscript{40} \textit{See, e.g.}, Ronald Dworkin, \textit{Hard Cases}, 88 \textsc{Harv. L. Rev.}1057 at 1083, 1094-95 (discussing dimension of fit with constitutional, case, and statutory law as part of the process for deriving the best answer to a legal problem); \textsc{Dworkin}, supra note 4, at 66-68; \textit{id.} at 246-56 (discussing aesthetic and moral applications of fit).
\textsuperscript{41} \textsc{Dworkin}, supra note 4, at 91.
must . . . agree about a great deal in order to share a social practice. They must share a vocabulary: they must have in mind much the same thing when they mention hats or requirements. They must understand the world in sufficiently similar ways and have interests and convictions sufficiently similar to recognize the sense in each other's claims, to treat these as claims rather than just noises.42

Relevant theories are thus assessed, in the first instance, by the degree to which they can incorporate our pre-theoretical agreement as to which cases any account of the relevant discipline or practice must cover.43

In morality, for example, the relevant decisions are our pre-existing convictions about what it is right or good to do. Thus, Dworkin suggests, any acceptable moral theory must explain why, among other things, “exterminating an ethnic group or enslaving a race or torturing a young child, just for fun, in front of its captive mother” is morally wrong or provide a plausible account showing why these acts are morally permissible.44 It must, in other words, fit with our generally held moral intuitions, or provide some plausible explanation for rejecting them. So doing, Dworkin believes, permits us to place a limit on and engage in an initial ranking of the competing moral theories so as to winnow down the range of acceptable candidates. The more complex the set of moral intuitions any theory must cover, the smaller the range of acceptable moral theories.45

The same process of fitting theories to intuitions occurs in the law.46 Legal theories must justify legal authority: what Dworkin calls state-

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42 DWORKIN, supra note 4, at 63-64.
43 Dworkin then argues that there is no way, external to the discipline or practice, of determining what will count as the sort of judgment that we must incorporate within or exclude from our analysis. One goal of interpretation is to re-evaluate the materials — the cases, judgments, or items — that we intuitively or pre-theoretically consider part of or relevant to the discipline or practice, so as determine whether they should count as legal, moral, or aesthetic, or not. See, e.g., DWORKIN, supra note 4, at 227-28.
44 Dworkin, supra note 28, at 117-118.
45 See, e.g., Ronald Dworkin, Rawls And The Law, 72 FORDHAM L. REV. 1387, 1391-92 (2004) (hereinafter Dworkin, Rawls); see also DWORKIN, supra note 4, at 245-258 (discussing process by which convictions of justice are tested against legal and community norms).
46 DWORKIN, supra note 4, at 227.
sponsored uses of force. These theories must make sense of our pretheoretical understandings of the sorts of thing any account of law must explain. The range of legal materials a judge must consider is quite large: not only legal cases, statutes, and constitutions, but “the great network of political structures and decisions of his community.”

In law, as in literature or morality, the process of winnowing is unlikely to exclude every competing political or moral theory. There will thus likely remain multiple schemes which fit equally well, even if in different ways, with the legal cases (or moral or aesthetic intuitions). Accordingly, Dworkin suggests, we then need a forward-looking dimension to evaluate the nature of the enterprise in which we are engaged — adjudicating legal, moral, or aesthetic questions, for example — to determine which among the remaining theories makes best sense of our practice of law, morality, or literature.

At this second, forward-looking stage we must evaluate both what the point or purpose of the practice is, whether it be law, courtesy, or novel-writing, by placing it in the best light possible. Accordingly, he suggests that a judge wishing to participate in the practice of judging, “must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.” He must, in other words, interpret the practice in such a way that his

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47 DWORKIN, supra note 4, at 93, 190 (the central question of political morality is the justification of state-sponsored uses of force).
48 DWORKIN, supra note 4, at 245.
See DWORKIN, supra note 4, at 248 (“Now suppose … [that] Hercules finds that [a particular legal doctrine] has been enforced against a number of professions but has not been enforced against a roughly equal number of others, that no principle can explain the distinction, that judicial rhetoric is as split as the actual decisions, and that this split extends into other kinds of actions [analogous to those covered by the doctrine]. He might expand his field of survey still further, and the picture might change if he does. But let us suppose he is satisfied that it will not. He will then decide that the question of fit can play no more useful role in his deliberations, even on the second dimension.”). See also id. at 237 (“You might not find any interpretation that … fits everything the material you have been given treats as important. You must lower your sights … by trying to construct an interpretation that fits the bulk of what you take to be … most fundamental [given the practice you seek to interpret]. More than one interpretation may survive this relaxed test. To choose among these, you must turn to your background [domain-relevant] convictions”).
50 See, e.g., DWORKIN, supra note 4, at 250 (discussing persistance of judicial conflict after work of interpretation is done).
51 See, e.g., DWORKIN, supra note 4, at 233, 254-58 (discussing constructive interpretation in literature and law).
52 Ronald Dworkin, How Law is Like Literature, in RONALD DWORKIN, A MATTER OF PRINCIPLE 146, 159 (1986) [hereinafter Dworkin, Literature]; see also Dworkin, Law as
account “both fit[s] that practice and show[s] its point or value … by demonstrating the best principle or policy it can be taken to serve.”

Again, the notion of a social practice or domain of evaluation is crucial. Not every theory that fits the complex nature of the practice can explain the point or purpose of the practice. For example, an explanation of the practice of taking one’s hat off on entering a church based on the phases of the moon might fit the practice quite well. Nonetheless, it would fail to explain its point. The best explanation the practices of hat-doffing must respond to and explain these public, social aspects of the practice. They must include in the explanation what the practice of hat-doffing is in a given community, rather than simply comprise the theorist’s private beliefs about what the practice of hat-doffing ought to be.

One feature distinguishing hat-doffing from law is, Dworkin suggests, that the point and purpose of law is to promote a community’s conceptions of justice and fairness. As in hat-doffing, the judge does not simply express her own view or concept of politics and morality. Rather, she presents her best explanation of the community’s morality. She is set the task of explaining a public morality rather than her private one. She does so by considering the point and purpose of the social practice of law. To do so:

Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in fresh cases that come before them, so that each person’s situation is fair and just according to the same standards.

Here, the task for the judge is to determine which, among the competing theories, represents the best possible accommodation of the “two constituent virtues of political morality … justice and fairness.” Thus, any

Interpretation, 60 TEX. L. REV., 527, 543 [hereinafter, Dworkin, Interpretation] (discussing different art as a practice of interpretation). According to Dworkin’s interpretive account, not only courtesy, but also and surprisingly, justice becomes a practice.

Dworkin, Interpretation, supra note 52, at 543-44.

DWORKIN, supra note 4, at 58.

DWORKIN, supra note 4, at 225 (“The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author — the community personified — expressing a coherent concept of justice and fairness.”).

DWORKIN, supra note 4, at 243.

DWORKIN, supra note 4, at 249.
theory purporting to account for the relevant legal materials and moral intuitions must do so, not in a piecemeal manner, but by forming “a coherent theory justifying the network as a whole.” 58 The forward-looking aspect is thus quite stringent: the description of law it requires must be sufficiently complex to provide a unifying theory of as much of the legal tradition of a particular community as possible. 59

Dworkin’s idea is that, to provide some justification for (or account of) their legal authority, a judge (or legal theorist) must identify the political or moral theory that makes the best sense of the law: the one that is “decisive.” 60 Not any moral theory will do: to be a theory about law, any claim about the best political and moral theory of law must incorporate as many of the uncontroversial legal cases as possible, explain why the controversial ones are controversial, and provide some way of resolving them. 61 Some theories will be better at doing this than others, and so give a more coherent and comprehensive account of law. But, Dworkin believes, no single comprehensive theory will win out. Instead, each judge will advance her own comprehensive justification of the law (her own point of view). 62 The surviving theories will advance competing claims about how to evaluate the soundness of political and moral claims. These comprehensive evaluative commitments preclude there being some independent way to compare the theories: each theory (each point of view) is only better or worse given its presuppositions about the standards of evaluation.

II. CONVICTIONS, CONFLICT, COMPLEXITY

Dworkin thinks his theory of law as integrity has the virtue of preserving, even sharpening, the description of judicial disagreement as a form of interpersonal conflict, while removing intra-personal conflict — judicial indecision — as an impediment to determining the one right answer to any legal case. 63 For Dworkin, judges are supposed to develop

58 DWORKIN, supra note 4, at 245.
59 Given the magnitude of this task were any single person to undertake it, Dworkin acknowledges that “no actual judges could compose anything approaching a full interpretation of his community’s law at once. That is why we are imagining a Herculean judge of superhuman talents and endless time. But an actual judge can imitate Hercules in a limited way.” DWORKIN, supra note 4, at 245.
60 DWORKIN, supra note 4, at 260.
61 See DWORKIN, supra note 4, at 255; see also id. at 235-37, 244-45, 250.
62 DWORKIN, supra note 4, at 120.
63 See DWORKIN, supra note 4, at 41-43, 87-88, 250, 264, 404-05.
convictions about what to do in particular cases\textsuperscript{64} that arise from their commitment to a single, coherent account of the best moral and political justifications for the norms of a specific community’s “political history.”\textsuperscript{65} Because he thinks that the epistemic hurdle to forming such convictions is surmountable, and the ontological one non-existent, the major obstacle is volitional. Indecision, and in particular incommensurability, “becomes, not an ontological question, but a question of political philosophy, because the question in any particular case, [e.g.,] whether you can compare two different readings of a statute and its history to see which is better … is also a question of political morality.”\textsuperscript{66} Since judges can compare the various competing legal claims that must be adjudicated “against the general background political culture in which that statute was enacted … experience shows \textit{we can always have an opinion}}.”\textsuperscript{67}

\textbf{A. Convictions and Complexity}

Dworkin’s account of conviction, or integrity, ensures that, even if the decision-maker cannot persuade others that her point of view is the best interpretation, she must be convinced that her point of view provides the single best answer to the case at hand, or revise her doctrine accordingly. The decision-maker thus experiences legal decision-making as a process of reflective equilibrium,\textsuperscript{68} reinforcing or moving towards a unitary account of law and morality as she oscillates between evaluating, explaining, and modifying either or both of the law and the comprehensive doctrine of political morality she uses to identify and interpret the law.\textsuperscript{69}

Dworkin regards the process of judicial decision-making as proceeding from and moving towards conviction and decisiveness. However, there are at least three ontological explanations of indecisiveness among values, reasons, or options that he must confront: incommensurability, incomparability, and equality.\textsuperscript{70} Briefly, reasons are incommensurable if there is no way to suggest one is better than the others and they are not equal.\textsuperscript{71} Reasons are incomparable if there is some reason for refusing to

\textsuperscript{64} See, e.g., \textsc{Dworkin, supra} note 4, at 120 (“The judge decides [the case] by employing his own moral convictions”). Judges develop and refine their convictions through the process of constructive interpretation. \textit{See id.} at 51-52, 87-90, 248-50, 259.

\textsuperscript{65} \textsc{Dworkin, supra} note 7, at 85.

\textsuperscript{66} \textsc{Dworkin, supra} note 7, at 89.

\textsuperscript{67} \textsc{Dworkin, supra} note 7, at 89 (emphasis added).

\textsuperscript{68} \textsc{Dworkin, supra} note 4, at 90.

\textsuperscript{69} \textsc{Dworkin, supra} note 4, at 90; \textsc{Dworkin, Rawls, supra} note 45 at 1392, 1396.

\textsuperscript{70} \textit{See, e.g., Ruth Chang, Making Comparisons Count} (2002).

\textsuperscript{71} \textit{See, e.g., Joseph Raz, Morality of Freedom} 329 (1986).
weigh them against each other, perhaps because some second-order reason excludes first-order comparisons of this sort. Reasons are equal if they are of the same weight or strength. Incomparability and equality undermine the coherence thesis. They suggest, in their different ways, that there is no right answer to a particular legal problem, either because there are multiple, equally attractive options, or there are multiple options with no determinative way of ranking them. This is, again, to emphasize that a “one right answer” theory need not preclude ethical uncertainty as to the right answer or course of action.

Dworkin recognizes, first, that his one-right-answer thesis stands or falls on with his theory of coherence, and second, that incommensurability and equality are central threats to the coherence theory. In what follows, I am not concerned to mount a direct attack on his theory of coherence, and so will not spend much time expounding it. Rather, I shall consider his powerful challenge to incommensurability and equality: that incommensurability cannot be assumed but must be justified because incommensurability is an ontologically more complex position than coherence or commensurability. Dworkin places the onus on the incommensurabilist to advance some justification for embracing incommensurability: in the absence of some such justification, the ontologically more simple coherence account of rationality is more plausible.

Dworkin regards conflicts among incommensurable (and, to a lesser extent, equal) reasons as a simple problem of choice: his theory of law-as-interpretation thus operates to preclude volitional indecision. Indecision, for Dworkin, is simply a moral or political posture expressing a discrete set of commitments and a specific interpretation of our moral and political history. If, as Dworkin suggests, the problem of indecision is fundamentally a volitional one, then it can be solved if only the judge commits herself to picking among the available theories justifying a particular legal outcome. Since the ontological and epistemic obstacles are, he thinks, resolvable, his volitional account precludes moral fence-sitting.

Hercules’ purpose, in the theory of law as integrity, is to demonstrate

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72 Cite to Raz on Exclusion
73 See Ronald Dworkin, Can Rights Be Controversial?, in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 279, 284-86 (1978) [hereinafter Dworkin, Rights].
74 See, e.g., DWORIN, supra note 4, at 120; Dworkin, Literature, supra note 52, at 159.
how committed moral and political agents\footnote{Dworkin, supra note 10, at 273.} can generate a personal conviction about what is the uniquely best solution to any legal problem.\footnote{Dworkin, supra note 4, at 249 (“Hercules’ [decisions] will depend upon his convictions about the two constituent virtues of political morality … justice and fairness. It will depend, that is, not only on his beliefs about which of these principles is superior as a matter of political fairness, in a community whose members have the moral convictions his fellow citizens have.”). See also Dworkin, supra note 28, at 135 (suggesting that “conviction is inescapable”).} Conviction precludes indecision about the value of the decision. It thus precludes the sort of intra-personal conflict and works itself pure of the attendant feelings of coercion or compulsion characteristic of incommensurability. The central justificatory problem judges face is choice among different types of theory: deontological, utilitarian, and so on. Some of these problems are irresolvable: Dworkin considers that there will be inter-personal judicial disagreement. His theory purports to explain how judges retain their own, discrete convictions about how their legal theory fits with the legal materials,\footnote{See Dworkin, supra note 4, at 246-57. The evaluation of fit includes determining what legal materials to include or exclude. See id. at 239, 245-50.} as well as about the point and purpose of the practice.\footnote{Dworkin, supra note 4, at 250 (“Judges will have different ideas of fairness, about the role each citizen’s opinion should ideally play in the state’s decision about which principles of justice to enforce through its central police power. They will have different higher-level opinions about the best resolution of conflicts between these two political ideals.”).} Accordingly, there is room for considerable disagreement among judges along both these dimensions.

Integrating the mass of legal materials into a coherent whole rules out, for any one decision-maker, multiple explanations; nonetheless, given the variety of possible ways of organizing the materials, different decision-makers can have different convictions about which explanation is best.\footnote{Dworkin, supra note 4, at 237; Dworkin, supra note 10, at 272.} Put differently, Dworkin appears to posit that increased complexity reduces intra-personal conflict while preserving, or increasing, inter-personal conflict.\footnote{Dworkin, supra note 10, at 271.} Complexity strikes a balance between maintaining a plurality of competing “best answers” while at the same excluding many of the contenders, providing both a range of ways to parse out the legal system yet permitting individuals to come to some conviction about which of the possible positions is, indeed, the best.\footnote{Dworkin, supra note 10, at 272.}
would seem similarly capable of generating the sort of intra-personal uncertainty characteristic of volitional indecision. After all, a decision-maker may have formed an opinion about the correct interpretation of a community’s political history, but nonetheless be persuaded that there are other, compelling interpretations that conflict with her’s at significant points. Dworkin believes that any individual judge can quieten conflict by developing her own convictions about the appropriate ranking of theories about justice and fairness with reference to a particular political and set of legal materials.

B. Convictions and Constructivism

The Hercules thought-experiment — supposing a judge could be both omniscient and omnipotent — thus solves two of the problems raised by indecision: lack of knowledge and weakness of will. Hercules possesses both the wisdom and time to determine what is the one right answer to any legal conundrum, and the courage to act upon his convictions. For Dworkin, the third problem, incommensurability, collapses into that of weakness of will. Since the nature of legal adjudication forces judges to choose among the parties, they can always choose to form some opinion or “conviction” as to which justification is best. Each judge must, according to Dworkin, eschew the various forms of indecision and fix upon the “one right answer” in the case before her. Here, judicial worries resulting in regret, or internal conflict, or feelings of constraint, frustration, or cognitive dissonance should not arise: the judge always does what is, according to her, morally best because morality and law are always in alignment. The Dworkinian judge does not experience the sort of internal conflict requiring her to choose between, for example, legal and non-legal reasons for decision.

Integrity thus demands that, for any one person, their convictions about which legal outcome is best are homogenous not heterogenous. There are two dimensions to Dworkin’s homogeneity. First, the claim that the judicial will is unified or integrated demands that the reasons that personally or privately motivate the judge to decide the case are the same as those she

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82 On political and moral convictions, see DWORKIN, supra note 4, at 90-100, 135-45 (1986).
85 See, e.g., DWORKIN, supra note 4, at 178-80; see also id. at 184-90, 219-20.
publicly announces. There is no private judicial reason for decision — no private conviction about the best moral or political theory — that is not also a public reason for decision.\textsuperscript{86} Dworkin’s judge’s reasons for decision are transparent.\textsuperscript{87}

Second, there is, for Hercules, only ever one correct outcome for any legal problem given the nature of legal and moral justification. What is morally best lines up with what is legally best. Hercules is a superhuman being capable of comprehending and acting upon whatever reasons there are, and so determining what is the solution to the legal or moral dilemma.\textsuperscript{88} Accordingly, whatever option Hercules chooses will be the right one from his perspective: as such, there seems to be no room for regret;\textsuperscript{89} rather, the judge refines and reinforces her own convictions about law and justice.

Dworkin’s Hercluean imperative thus requires an agent to act as if both (1) there is in principle a single best solution to every ethical problem (his ontological claim) and (2) she could know with sufficient certainty what it

\textsuperscript{86} Because, as we shall see, such reasons depend upon the judge articulating in each case the elements of a theory of political morality that make best sense of the community’s political history.

\textsuperscript{87} Dworkin thus thinks that judges must act sincerely in deciding cases. See e.g., Ronald Dworkin, Justice and Rights, in RONALD DWORIN, TAKING RIGHTS SERIOUSLY 150, 162-63 (1994) (“it is unfair for officials to act except on the basis of a general public interest theory that will constrain them to consistency, provide a public standard for testing or debating or predicting what they do, and not allow appeals to unique intuitions that might makes prejudice or self-interest in particular cases. The constructive modeltakes convictions held with the requisite sincerity as given, and seeks to impose conditions on the acts that these intuitions seeks to warrant.”) (emphasis added). While Dworkin initially discusses sincerity explicitly and in the context of a discussion of Rawlsian theories of justice, he incorporates a similar requirement into his own constructive theory of interpretation. See DWORIN, supra note 4, at 188-90 (“Integrity provides protection against partiality or deceit or other forms of official corruption … Integrity … insists that each citizen must accepts demands on him and may make demands on others, that share and extend the moral dimension of any explicit political decisions. Integrity therefore fuses citizens moral and political lives”). See also id. at 255 (“if [a judge’s] threshold of fit is wholly derivative from and adjustable to his convictions of justice so that the latter automatically provide an eligible interpretation — then he cannot in good faith claim to be interpreting his legal practice at all … he is acting from bad faith or self-deception.”) See also id. at 214-15, 237, 258 (discussing bad faith and self-deception).

\textsuperscript{88} So, for the most part, are we. See DWORIN, supra note 4, at 265 (Hercules “can aim at a comprehensive theory while [judges] must be [a] partial [one]. But he has no vision into transcendental mysteries opaque to them. His judgements of fit and political morality are made on the same material and have the same character as theirs.”).

is (his epistemological claim). Dworkin represents failures to accept the ontological claim or engage in the epistemological enterprise as volitional in nature: a failure of moral and political will. Hercule must not only choose, but choose the theory that avoids ontological and epistemological uncertainty or indecision.

Underlying Dworkin’s model of judicial decision, then, is a theory of decision that represents moral and political conviction as the product of a unified will. Dworkin’s approach to indecision is primarily volitional: he argues that, based on the fact that judges do choose and in certain circumstances must choose some option, they can choose the best option all things considered. To do so, they must commit themselves to some one political or moral position that best explains their authority to decide and the correctness of their decision. Anyone with enough knowledge, time, and energy can develop a conviction about what is the single, unique solution to every moral or ethical (which for Dworkin includes every legal) problem: having found the right answer, the judge conforms her will to act upon this knowledge.

Choosing the best outcome suggests freedom rather than constraint: not the freedom to choose just any option, but the freedom from volitional conflicts and rational frustration. Hercules demonstrates how moral dilemmas are, in principle, to be brought under a coherent scheme of value. Dworkin uses Hercules to solve the ontological problem by suggesting that an agent can opt for a moral or political theory that ranks the available reasons or represent them as mutually supporting each other. He solves the epistemic problem by suggesting that, given ontological ranking or mutual support, with enough work the judge can know how to rank or arrange the reasons as inter-supporting. For Hercules, all the reasons for decision are aligned: there is no conflict between law and morality, or even between what the judge might privately think ought to be the outcome of

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90 See, e.g., Dworkin, supra note 40, at 1083.
91 Dworkin, supra note 7, at 90; DWORKIN, supra note 11, at 272-75; Dworkin, supra note 28, at 134-38.
92 Dworkin, Rights, supra note 73, at 280.
93 DWORKIN, supra note 4, at 245-50, 404-05. For Dworkin, coherence means a non-conflicting, mutually supporting scheme of value. Such a position may make room for different types of value. Accordingly, conflicts among valuates are solved by delimiting their proper scope. Indecision is avoided by ensuring that only one value operates upon a particular problem; or if more than one, that they are mutually supportive. A different means of avoiding indecisive outcomes is to assert that the scheme of value is univocal, such that if there is a conflict, there is some meta-value that can help us rank the values as to importance or strength.
the case and his public pronouncement. The characteristic judicial expressions of constraint, indecision and frustration are no more than an effect of political and moral apathy.

Indecision, however, proposes to capture a real experience faced at one time or another by any but the most confident decision-makers. Many of the most interesting moral and legal problems do not produce the type of result the agent can acknowledge with confidence as the one right answer: they are, in Dworkin’s terms, “hard cases." Because Dworkin thinks that we can, with sufficient effort, rank the various options as better or worse interpretations of law and morality, he thinks we can determine which outcome is best, all things considered. In other words, Dworkin thinks we can always, in principle, have an opinion about what is best to do.

The emphasis on personal conviction in the face of conflicting arguments risks ceding the value of rational debate and supplanting it with an emphasis upon moral certainty (as a volitional, rather than epistemic, conviction), thereby turning (legal, moral, aesthetic, and so on) decision-makers into fundamentalists. Just because experience dictates that we can have a opinion about which is the correct interpretation of a political culture does not necessarily make it rational to develop one. Dworkin can avoid this risk only by accepting a particular form of ontological complexity that permits conflict between individuals while ruling it out as a source of personal indecision.

Perhaps a non-legal example is in order. Imagine a diner is faced with a menu at a restaurant that has four options, each of which she would like. She may think that the options are not rankable, either because (1) they involve qualitative differences in tastiness, or because (2) she lacks some information about how they would taste. But everyone else is ready and

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94 Dworkin, supra note 4, at 189-90, 248-50, 255.
95 Dworkin, supra note 39, at 83.
96 In part, his theory depends upon there being few or no equally good options. See Dworkin, Rights, supra note 73, at 286-87; Dworkin, supra note 9, at 31.
97 Or it could be that tastiness is complex value, including the tastiness of all the different ingredients in the various dishes, that precludes simple rankings. See Joseph Raz, Engaging Reason: On the Theory of Value and Action, at 2-3, 185-190, 212 (2002).
98 She may think they are rankable as equal. And note that equality here may be more or less fine grained. She may think that the options are only equal, such that small differences in tastiness would not affect her ranking. On rough equality, see Raz, supra, note 71, at 330-32. Raz thinks that options are rankable as roughly equal based on the importance of the values at stake. I would suggest [will suggest later] that Raz’s definition of rough equality as concerned with the intrinsic strength of the reasons at stake, id. at 332, is bound up with his conflation of incommensurability and incomparability. Roughly equaly options
the waiter has returned for the third time to see if she is ready to choose. Here, she just has to pick one among the options. To fail to choose would be an odd volitional failure worthy of remark. Choosing all the options would be as odd as choosing none. Choosing one, however, says nothing about which option she thinks is best, all things considered: it is just the one she opts for under pressure to choose. She may rationally covet her neighbor’s meal if it was one of the options she failed to choose (and so she may be one of those people who ask for a taste out of regret for the meal not taken). She may even feel constrained, conflicted, and a little frustrated by whatever choice she makes. My claim is that the menu of moral choices may be much like this.

The imaginary diner faces a similar problem to Buridan’s ass: which of two equally appealing, but equally distant options to choose. In the usual version of the problem, the ass is stuck between two equally appetizing bales of hay; in another version, the ass must choose, not between apparently identical options (equal sized bales of hay), but between different options, hay and water. Dworkin’s volitional conclusion, that paralysis is not a necessary outcome when faced with indecisive options, is clearly correct. Nonetheless, it does not follow from the fact that an agent can pick among the options that she must pick without frustration or regret that circumstances have so conspired as to produce equally appealing incompatible options. Put differently, picking need neither produce nor proceed from some conviction that the decision is the best one (or even better than the other options).

may not be comparable in a manner that admits of a decisive outcome, but that need not render them incommensurable. Indecision does not preclude comparison; it simply precludes some ranking as better or worse.

99 And note, just as paralysis would be strange, so would continually changing her mind and sending one, then the other dish back in favor of another. Though indecisive, she is not incontinent in that way.

100 On Buridan’s ass and similar problems, see Nicholas Rescher, Choice without Preference, 51 KANT-STUDIEN 142 (1959/1960).

101 While Dworkin does not consider the Buridan problem, he does argue that minimal differences among precedents do not make a sufficient different to distinguish among competing candidates for the right answer. Dworkin, supra note 11 at 272-75. For a utilitarian account of why Buridan’s ass would choose one or other bale of hay, see Richard Craswell, Incommensurability, Welfare Economics, and the Law, 146 U. PA. L. REV. 1419, 1424 (1998) (citing Buridan’s ass). Others, however, have found that incommensurability entails paralysis. See, e.g., Jeremy Waldron, Fake Incommensurability: A Response to Professor Schauer, 45 HASTINGS L.J. 813, 815-16 (1994) (suggesting that incommensurability results in paralysis).

Having an opinion about or picking an option, in other words, need not dissolve the underlying ontological or epistemological problems of indecision. These remain despite the agent having committed herself to a particular choice. The ontological and epistemic forms of indecision suggest that sometimes reason, or at least the reasons we have, are insufficient to preclude compulsion as a ground of choice. The judge experiences the law as in conflict with her other, non-legal options. Legal reasons either rule out the non-legal ones or fail to count alongside them as eligible reasons for decision. Indecision thus raises a further question about the nature of practical justification: what constitutes a rationally adequate justification of any decision to act? Some people think that indecisive reasons are sufficient to justify choices among competing practical options. Others believe that such choices are only justified if the decision-maker can explain why the losing options are ineligible candidates for decision. Yet others think that for an option to be completely justified it must be unique.

Dworkin accepts practical decision is sufficiently rational if based on an indecisive reason for action even though there are other, undefeated indecisive reasons and the decision-maker has not considered and rejected them. For Dworkin, then, the point of legal and moral theorizing is not only to come up with an explanation of the legal cases, or the community’s moral intuitions. In addition, that explanation (Dworkin calls it an interpretation) must be sufficiently convincing to the decision-maker that she is willing to defend it against challenges from others who are similarly convinced about their explanations of the legal cases or moral intuitions. These convictions may persist even in the face of what appears to be a stronger argument. For example, a decision-maker may have a moral conviction that arguments from duty are morally better than utilitarian

103 See, e.g., JOSEPH RAZ, PRACTICAL REASON AND NORMS 25-28 (1990) (who calls such rationally adequate answers “complete.”).
105 This stems from Dworkin’s account of conviction, which appears to permit a judge or other interpreter to fix upon a best interpretation without necessarily considering all the competing ones. Hercules’s omniscience and omnipotence permits Dworkin to adopt, should he so choose, the weaker position that a decision-maker must have considered the conflicting options before picking one. It is unlikely that a less divine decision-maker could do so, and give Dworkin’s account of the comprehensive points of view generating conviction, it is not clear that a normal decision-maker need do so. The sort of reflective equilibrium contemplated in Law’s Empire only requires a decision-maker to test the moral and political convictions she has against the moral, political, and legal materials of her community, not against every possible conflicting point of view. See DWORKIN, supra note 4, at 245-50.
arguments from consequences. In that case, the decision-maker will have a conviction about the proper grounds of moral justification that she will be willing to defend against consequentialist challenges.

She may do so, Dworkin thinks, even if “[s]he may not be able to say very much to the utilitarian in defense of [her] moral attitude; perhaps [s]he cannot say even as much to him as he can to [her]. That does not mean that [she is] wrong — or right. Here too, conviction is inescapable.”

These convictions persist in the face of competing accounts of morality or law because, Dworkin thinks, there is no point external to the competing theories from which to adjudicate the conflict. A deontological theory expresses one decision-makers best interpretation political morality; it cannot be compared against the utilitarian theory in a manner that permits judgments that one is better or worse or equal. Deontological theories evaluate what counts as a persuasive argument in one way; utilitarian theories do it in another. We must simply pick our preferred means of evaluation: the one that best fits us, given our political and moral views.

The Dworkinian judge thus starts with her own moral and legal intuitions, “h[er] own convictions and preferences,” and proceeds to “inspect and reform [h]er settled views in the way sailors repair a boat at sea one plank at a time.” Inter-personal conflict with other judges may force her to defend her position: nonetheless, “Hercules’ technique encourages a judge to make h[er] own judgments about institutional rights.” The judge need only have determined that her point of view is the best she can make it. Once convinced, she need not be moved from her point of view or comprehensive doctrine, because there is no better interpretation outside a her particular moral or political point of view. “Each can have only his own opinion.” Testing her own opinion against some third-party neutral umpire is “pointless” because “[s]he can offer no more than a third personal opinion, and the fact of that opinion would not (at least should not) convince … [her] that [she] w[as] wrong.” Accordingly, Dworkin thinks there can be only internal critiques from within a comprehensive moral or political point of view.

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106 Dworkin, supra note 28, at 135.
107 Dworkin, supra note 7, at 88-89.
108 Dworkin, supra note 39, at 123.
109 DWORKIN, supra note 4, at 111.
110 Dworkin, supra note 39, at 130.
111 See DWORKIN, supra note 4, at 78-85.
112 Dworkin, Rights, supra note 73, at 280.
113 Dworkin, Rights, supra note 73, at 280.
114 See DWORKIN, supra note 4, at 78-85.
At least two types of choice are relevant to Dworkin’s account of intra-personal conviction in the face of inter-personal conflict: first-order choice among competing reasons for action, and second-order choice among the best interpretations — what Rawls calls “comprehensive domains” and what I call points of view — that explain and (perhaps) resolve such conflicts. I shall claim that Dworkin cannot maintain his account of intra-personal moral or political conviction and inter-personal judicial disagreement without separating out these two orders of reason. His theory depends upon the idea that we must pick or develop some interpretation or point of view as best explaining our moral convictions; but that the point of view we choose ought to be internally consistent and coherent — it ought to be the point of view that demonstrates that the outcome we select is better than any competing outcome.

Unfortunately for Dworkin, his argument from simplicity, which targets incommensurability as ontologically too complex, conflicts with his rejection, based on ontological complexity, of equality as commonplace. In other words, Dworkin himself adopts an ontologically complex account of law and morality to stave off precisely the sort of indeterminacy that would arise from commensurability: the possibility that values are comprehensively equal. Dworkin cannot have his cake and eat it; or, to switch metaphors, he must bite either the commensurabilist or the incommensurabilist bullet, but he cannot dodge both.

C. Complexity and Commensurability

Dworkin’s theory of justice can be relatively neatly separated into (at least) two phases, early and late, distinguished by, among other things, his attitude to commensurability.115 The early Dworkin’s one-right-answer theory required the decision-maker to decide what it is best to do, all things considered.116 Deciding what is best mandated some form of comparison or commensuration along each of the dimensions of fit and political

115 Compare Ronald Dworkin, Can Rights Be Controversial?, in RONALD DWORIN, TAKING RIGHTS SERIOUSLY 279, 286-87 (1978); Ronald Dworkin, No Right Answer, 53 N.Y.U. L. REV. 1, 30-31 (1978); reprinted in RONALD DWORIN, A MATTER OF PRINCIPLE (1986) with Dworkin, supra note 4. For a different discussion of the distinction between the earlier and later Dworkin, see Finnis, supra note 15, at 373-74 (discussing Dworkin’s earlier works as “trying] to head off the problem of incommensurability of criteria by proposing a kind of lexical ordering” and his later approach as balancing competing interpretations against each other).

116 Dworkin, Rights, supra note 73, at 285-87.
morality. The judge was to determine how convincing she found the different possible interpretations of a legal system that would justify a particular decision. Judgments of fit were presented, in John Finnis’s terms, as “lexically prior” to judgments of political morality, and required the judgement to establish how much legal material was covered by any proposed political theory. Judgments of fit were thus envisaged as comparative, but insufficient to weed out every possible political theory. Accordingly, “if two justifications provide equally good fit with the legal materials, one nevertheless provides a better justification than the other if it is superior as a matter of political or moral theory; if, that is, it comes closer to capturing the rights that people in fact have.”

Dworkin’s early theory was concerned to deny the claim that, in “hard cases,” judges have “strong discretion”: that it is neither true nor false that there is a single right answer. Judges may disagree, according to Dworkin, but when they do, each judge believes that her assessment of the case is right: “each ... thinks that his answer is a superior answer to the question that divides them.” Conflict occurs between the judges but not within a judge’s understanding of the law. Her decision “represents a choice” among conflicting judgments of fit and political morality no matter whether the case is easy or hard, determined by reason or indeterminate. Either way, the ultimate criterion for decision was the

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117 See, e.g., Dworkin, Rights, supra note 73, at 285 (the commensurating value is convincingness). For a critique of this account of decision as insufficiently complex, see, e.g., John Mackie, The Third Theory of Law, 7 PHIL. & PUB. AFFS. 3, 9(1977).
118 See, e.g., Dworkin, supra note 9, at 30-31 (discussing dimensions of fit and morality).
119 See also DWORKIN, supra note 87, at 340-42 (discussing fit and morality).
120 FINNIS, supra note 15, at 373-74 (discussing Dworkin’s early work as two-stage process).
121 “The dimension of fit supposes that one political theory is pro tanto a better justification than another if, roughly speaking, someone who held that theory would, in its service, enact more of what is settled than would someone who held the other.” Dworkin, supra note 9, at 30.
122 Dworkin, supra note 9, at 30-31.
123 See Dworkin, supra note 39, at 81-130 (1978).
125 Dworkin, Rights, supra note 73, at 282.
126 Dworkin, Rights, supra note 73, at 282.
judge’s confidence in the soundness of her legal and political judgments.\textsuperscript{127}

Dworkin initially acknowledged that hard cases may perhaps represent a “‘tie’ judgement.”\textsuperscript{128}

We may conceive of a hard case as presenting, for each judge, a scale of confidence running from the left-hand point at which the judge is confident that the judgment favoring the plaintiff is true, through points at which he believes that proposition is true, but with progressively less confidence, to a right-hand side with points representing progressively more confidence that the proposition favoring the defendant is true. Then the tie point is the single point at the center of this scale.\textsuperscript{129}

Dworkin thus represented the choice facing a judge as similar to that facing Buridan’s ass\textsuperscript{130}, which of two equally appetizing, but equally distant bales of hay to choose.\textsuperscript{131} The simplest way to conceive of Buridan’s problem is as a problem of rational choice where rationality is measured in terms of maximizing its expected satisfaction given its feeling of hunger.\textsuperscript{132}

If the bale of hay on the left is slightly larger or (if the same size) slightly closer than the one on the right, the ass has a reason to choose the one on the left. Contrariwise, if the bale on the right is larger or closer, then the ass has reason to choose that one. Where the bales of hay are equidistant and of equal size, then there is a tie and the ass cannot rationally choose either as more likely to satisfy its hunger. In usual telling of Buridan’s tale, the ass, unable to choose, dies.

Dworkin presents a different solution He believes that modern legal

\textsuperscript{127} Dworkin, \textit{Rights, supra} note 73, at 285.
\textsuperscript{128} Dworkin, \textit{Rights, supra} note 73, at 285. \textit{See also TRS} at 81.
\textsuperscript{129} Dworkin, \textit{Rights, supra} note 73, at 285.
\textsuperscript{130} On Buridan’s ass and similar problems, \textit{see} Nicholas Rescher, \textit{Choice without Preference}, 51 KANT-STUDIEN 142 (1959/1960).
\textsuperscript{131} \textit{See}, e.g., Edna Ullmann-Margalit & Sidney Morgenbesser, \textit{Picking and Choosing}, 44 SOC. RESEARCH 757, 758-59 (1977) (discussing the Buridan’s ass example); MICHAEL BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON 11-12 (1987) (same).
\textsuperscript{132} On maximization and rational choice, \textit{see}, e.g., Christopher W. Morris & Arthur Ripstein, \textit{Practical Reason and Preference}, 1, 4 in \textit{PRACTICAL RATIONALITY AND PREFERENCE: ESSAYS FOR DAVID GAUTHIER} (Christopher W. Morris & Arthur Ripstein, eds., 2001); MARTIN HOLLIS, \textit{TRUST WITHIN REASON} 45-46 (1998) (defining the ideally rational agent of social choice theory as someone who has “three basic attributes: perfect information, fully ordered preferences and faultless computing.”).
systems are “complex,” that is, they are:

- thick with constitutional rules and practices, and dense with precedents and statutes
- the antecedent probability of a tie is so low as to justify a further ground rule instructing judges to eliminate ties from the range of answers they might give
- This further instruction will be rational if the antecedent probability of error in a judicial decision seems to be greater than the antecedent probability that some case will indeed be a tie.

Dworkin’s anti-tie argument that modern legal systems are sufficiently complex to rule out ties (which are likely only in “primitive” legal systems). The idea is that modern legal systems are such a complex beast that they will only throw up a single solution to any problem. For Dworkin, complexity ensures that there will not, or will only exceptionally, be two equally good answers. He thus adopts a variety of the Leibnitzian “petites perceptions” solution to the Buridan’s ass problem: the claim that “there is never any indifference of equipoise, that is [situations of choice] where all is completely even on both sides, without any inclination

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133 Dworkin, Rights, supra note 73, at 287. For further comments on complexity, see e.g., Dworkin, supra note 39, at 117 (“a constitutional theory requires judgments about complex issues of institutional fit, as well as judgments about political and moral philosophy …”); 139 (“the idea that moral judgements about what it is right or wrong to do are complex and are affected by considerations that are relative and that change …”); 166 (“principles otherwise appealing are to be rejected or adjusted because they are too complex”); 185 (“The Constitution fuses legal and moral issues, by making the validity of law depend on the answer to complex moral problems”); 279 (“My arguments suppose that there is often a single right answer to complex questions of law and political morality.”); 336 (“the question of whether someone has a particular right may be complex, and any answer may be controversial. But the question of what political …”); 352 (“I appeal to complex, modern legal systems to show that since, in these systems, the truth of a proposition about legal rights may consist …”).

134 Dworkin, Rights, supra note 73, at 286.

135 Dworkin, Rights, supra note 73, 286 (emphasis added).

136 There are potentially two forms of complexity: epistemic and ontological. Ontological complexity generally rejects commensurability in favor of some plural scheme of value. Epistemic complexity entails that the legal materials are sufficiently difficult comprehend. This epistemic form of complexity might be what Dworkin has in mind when he states that the law is “thick with constitutional rules and practices, and dense with precedents and statutes” Dworkin, Rights, supra note 73, at 285.; or when he suggests that, “if the history of his court is at all complex, [a judge] will find, in practice, that the requirement of total consistency [s]he has accepted will prove too strong” Dworkin, supra note 39, at 119; or when he discusses the “complex matters of political administration.” Dworkin, TRS, at 133.

137 Rescher, supra note 130, at 161.
towards either.”\textsuperscript{138} Given moral complexity, Leibnitz thinks, there are likely to be “unperceived impressions, which are capable of inclining the balance.”\textsuperscript{139} Similarly, in \textit{Taking Right Seriously} at any rate, Dworkin thinks that epistemic worries about whether judges could know that the competing choices are finely balanced are quietened by an ontological presupposition of complexity.\textsuperscript{140}

Epistemological complexity poses a problem for the one-right-answer thesis: a more epistemologically complex world has more stuff to understand, and so makes it harder for any judge to have confidence that her chosen answer is the right one. That should mean that the likelihood of intra-personal indecision increases, rather than decreases for all but those with the strongest convictions as to the outcome. Thus, even presupposing the ontological existence of one right answer, increased epistemic complexity would, one thinks, make it harder for any person to be sure that they had found it, rather than easier.

Dworkin reduces the implications of epistemic complexity by suggesting that judges can reduce the amount of material they must consider by evaluating only limited areas of law at any one time. Nonetheless, the challenge of understanding the law is nominally one that requires “a lawyer of superhuman skill, learning, patience and acumen … Hercules.”\textsuperscript{141} Accordingly, Dworkin’s counsel of “humility,”\textsuperscript{142} appears to conflict with his demand for confidence, and provide a recipe for indecision. If Hercules is necessary to demonstrate how, in theory we can solve epistemic uncertainty, then epistemic indecision is a feature of ordinary judicial decision-making. Socrates, not Hercules, is the answer to epistemic uncertainty.

Dworkin solution is to point out that epistemic indecisiveness in the

\textsuperscript{138} Rescher, supra note 130, at 161 (his italics).
\textsuperscript{139} Rescher, supra note 130 at 161.
\textsuperscript{140} Dworkin gives the example of a horse race in which the management of the track has purchased equipment for deciding among apparent ties that is somewhat imprecise. Though the equipment will narrow the cases in which a tie is a possible outcome, nonetheless on some occasions “it cannot be clearly established which horse has won, [and] they shall be deemed to have tied, in spite of the fact that superior equipment might have shown a winner.” Dworkin, Rights, supra note 73, at 286. Dworkin thus collapses one sort of problem — whether this is the sort of thing that can be finely measured — into a another — whether our knowledge of the thing can be improved upon by better measuring devices. This is a feature of his constructivist approach: if the point of view does is not sufficiently precise, that may count as a reason for switching points of view.
\textsuperscript{141} Dworkin, supra note 40, at 1083.
\textsuperscript{142} Dworkin, supra note 40, at 1109.
judges’ knowledge or ranking of reasons does not preclude the act of picking. What matters is not one right justification, but commitment to the decision as the best the judge can do. Having chosen, the judge must make the best of her choice, and act as if she thought it was the only one required by political morality. For Dworkin’s early version of one-right-answer, the “instruction [to eliminate ties] does not deny the theoretical possibility of a tie, but it does suppose that, given the complexity of the legal materials at hand, judge will, if they think long and hard enough, come to think that one side or the other has, all things considered and marginally, the better of the case.”

One problem with his epistemic argument is that, so long as the underlying political, moral, and legal reasons are commensurable, but their relative strength is just too hard for the ordinary person to discern. In that case, there is no reason why Hercules could not eventually discover, not only the right answer given his convictions about the best theory there is, but what the one best theory of law and morality in fact is. If the problem is simply limited knowledge of the right answer, then Hercules is the heuristic device best placed to overcome it. Commensurability entails that 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 one that makes best political and moral sense.

The reverse is also true: the inter-personal conflict characteristic of judicial disagreement seems consistent with the sort of intra-personal conflict characteristic of indecision. That is, if the sort of conflict that produces inter-personal judicial disagreement is not epistemic but ontological — if, that is, the competing options are different in kind and incommensurable — then Hercules would be unable to arrive at a right answer because, in fact, there is no unique outcome to choose.

Dworkin thus cannot successfully endorse widespread commensurability: a claim that the right answer or best interpretation demands some reason for choosing one option over the others. His pluralistic account of value, such that there are multiple plausible

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143 Dworkin, Rights, supra note 73, at 285. This injunction to think long and hard is strikingly similar to Brian Bix’s antidote to the sort of paralysis presented by incommensurability. See BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY 105 (1993) (“after long consideration of the options…the decision-maker slowly begins to identify with one alternative rather than the others”). This after-the-fact form of identification does not deny incommensurability, but is consistent with it.
comprehensive political or moral points of view from which to assess fit and justice is incompatible with global commensuration of values. If values across points of view are commensurable — if there is some determinate and unitary, global scale of value — then one right answer should emerge, not just within a point of view, but across points of view. Such a scale of value would undermine his constructivism and his pluralism: it would undermine the idea that there is a genuine conflict among the judges.

Dworkin already began to refine the idea of ties within a year of the publication of *Taking Rights Seriously*. In *No Right Answer?*, Dworkin argues that, while it is possible to conceive of ties along the dimension of fit, it is difficult to conceive of ties along the dimension of political justification. He thinks that the likelihood of fit-based ties “in a modern, developed, and complex system … is very small. The tie result is possible in any system, but it will be so rare as to be exotic in these [complex cases],”  

He subsequently moves away from this position, rejecting the Liebnizian petites perceptions solution — that some historically remote case might tip the balance one way or another.  

In the case of the dimension of political morality, he suggests, “it is not so easy to see how someone could accept the general idea of [a comprehensive political] theory and still maintain, not that he is uncertain which conception is superior, but that neither is. There seems to be no room here for the ordinary idea of a tie.”  

This is the more developed view that he holds in *Law’s Empire* and subsequent works: the idea that there “could be an equal tie between two interpretations [that is, theoretical explanations] … makes no sense,” and so is impossible.

Complexity is necessary for the one-right-answer thesis so as to preclude extensive equipoise between competing outcomes or values within a particular point of view. The sort of commensurability that produces too many equally balanced cases undermines the possibility of one right answer to, or one best interpretation of legal problems, and so increases the possibility of indecision. Too much complexity raises the specter of ontological or epistemic indecision. Dworkin thus requires a “Goldilocks” solution to the complexity problem: not too ontologically simple, otherwise ties are a live possibility, but not too ontologically complex, otherwise incommensurability enters the picture, but just right. However, for Dworkin, “just right” excludes both commensurability and

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144 Dworkin, supra note 9, at 30.
145 DWORKIN, supra note 10, at 272.
146 Dworkin, supra note 9, at 31.
147 Dworkin, supra note 7, at 89.
incommensurability. His problem is to identify some third position between these two.

Accordingly, Dworkin’s complexity argument must preclude what Michael Stocker calls “value monism”\(^{148}\): a relatively simplistic account of commensurability that entails a system of valuation whereby there is only one value, and every “other” value is an instance of that value. According to Stocker, value monists cannot complain when one a particular version of that value is not satisfied so long as another is. To slightly amend his example, imagine that Amani, a value monist, goes to the beach with Ailsa to discuss philosophy and pursue the good of knowledge. Unfortunately, Amani and Ailsa get side-tracked into a game of beach volleyball, thus participating in the good of play. Whether she studies philosophy or plays volleyball, Amani cannot complain about not participating in the other value. That is, because, for monists, all values are of the same sort: so long as she participates in any value she participates in the ultimate value. As far as our value monist is concerned, whatever her choice, Amani “has in no way failed to get the good [she] was really aiming at.”\(^{149}\)

There reasons for doubting whether Stocker’s version of value monism requires the sort of simple comparisons of value he projects.\(^{150}\) The idea that there is only one ultimate value, and all other values are instrumental to achieving that ultimate value, does not preclude a judgment that there are better and worse ways about achieving the ultimate value, such that pursuing some instrumental at an inappropriate time or in an inappropriate manner undermines achieving the intrinsic value.\(^{151}\) If the ultimate value is some complex version of happiness that is irreducible to pleasure, then short-term pleasure — the good of playing volleyball — may undermine my long-term happiness, whereas short-term hardships — studying — may promote long term happiness.\(^{152}\)


\(^{149}\) Stocker, supra note 148, at 169.

\(^{150}\) An epistemic objection is: I may or may not know what makes me happy. Measuring pleasure makes it seem that happiness is transparent; but it may be difficult to work out how my various options contribute to the ultimate value. Accordingly, if values are related not as parts to a whole, but instrumentally, so that they are tools for getting the ultimate value that may be used in better or worse ways, then we may not know how best to use them (how best to participate in the ultimate good through the intermediate values).


\(^{152}\) The account of value endorsed by J.S. Mill or Aristotle was both monistic and complex. Even if there is only one value (pleasure; happiness), that value is sufficiently complex that there are different orders of value. As Mill famously states, “It is better to be a human being satisfied than a pig dissatisfied; better to be Socrates dissatisfied than a fool satisfied. And if the fool, or the pig, are of a different opinion, it is because they only know their own
Even if some more complex version of value monism might work as a first-order solution to the one-right-answer problem, it cannot explain conflicts among second-order points of view. Monism, as a second-order point of view, denies that there are other second-order points of view: it suggests that all apparent conflicts of value are really about determining how best to pursue one value. Some plural competition between points of view is essential, Dworkin thinks, to his repudiation of any Archimedean “view from nowhere,” and so to his emphasis on judicial convictions as irreducible to one comprehensive scheme of value, or one moral or political point of view.

Dworkin might think that confidence is a sufficiently personal value such that it produces intra-personal convictions while preserving inter-personal conflicts. Confidence is related to conviction: only if a decision-maker is sufficiently confident in the result can she determine, either before or after the fact that there is one right answer or one best interpretation. Individual confidence removes intra-personal indecision; it appears compatible with inter-personal conflicts. So long as I can adopt a different point of view, I need not share your confidence, even if I accept your reasons are, from your perspective, fully justified. Confidence thus preserves first-order intra-personal certainty while undermining second-order interpersonal comparisons.

The commensurabilist ontology is simpler than both first- and second-order versions of incommensurability. The commensurabilist does not need different sorts of value; there is just one sort of value, so there can be no conflict among values. Any prima facie conflict among “values” can be eliminated by reducing the “values” to some ranking on a single scale of value.

Since any form of the incommensurabilist ontology is more complex, Dworkin, is right to point out that incommensurability bears the

\[\text{side of the equation. The other party to the comparison knows both sides.} \] John Stuart Mill, Utilitarianism 10 (1863). Since the higher-order values are not only more complex, but more enjoyable, than the lower-order ones, Mill suggests no tribunal of competent judges would give up rational pleasures for complete fill of non-rational pleasures, even though not getting complete fill of mental pleasures. \textit{Id.} at 11. \textit{See also id.} at 9 (“it is an unquestionable fact that those who are equally acquainted with, and equally capable of appreciating and enjoying, both, do give a most marked preference to the manner of existence which employs their higher faculties.”).

\[\text{153 There is, however, a different way of eliminating conflict among values, and that is to stipulate that values do not conflict, but instead mutually support each other. That move concedes the incommensurabilists ontological point.}\]
A not-proven verdict, such that we do not know or cannot say whether an incommensurability exists between two values or points of view, is really a loss for the incommensurabilist. If incommensurability is to win the day, it must come up with some positive reason for thinking incommensurability has more or better explanatory value.

The problem with Dworkin’s argument from complexity is that it catches him, too. Either he must maintain that conflicting reasons for decision are sufficiently complex to preclude first-order equality, but sufficiently simple to avoid first-order incommensurability. Yet his second-order world view admits of something that looks very like incommensurability among points of view. Put simply, once Dworkin proceeds down the complexity road, he is caught on the horns of a dilemma. Too little complexity, and value monism suggest that there is one comprehensive point of view that is best all things considered and discoverable by a Hercules. Too much complexity, and first-order incommensurability opens up the possibility of strong discretion. Since there seems to be no obvious alternative to either commensurability or incommensurability, and since adopting either commits Dworkin to conclusions he regards as untenable, the onus is on Dworkin to explain the way in which he manages to avoid both commensurability and incommensurability. The problem is that it is a just this point that Dworkin becomes repeatedly inscrutable.155

III. INCOMMENSURABILITY

A variety of theorists, including Mackie,156 Raz,157 Finnis,158 and in a different way, Duncan Kennedy,159 pointed out that, on occasion, a given jurist may be personally conflicted because there are multiple

154 Dworkin made a version of this argument as early as the 1970s. See Ronald Dworkin, The Model of Rules II in RONALD DWORON, TAKING RIGHTS SERIOUSLY 46, 71 (1994) (1977); see also NRA, supra note 9, at 31-32. For a later version of the argument that more directly addresses the incommensurability problem, see Dworkin, supra note 7, at 88-90.

155 See Dworkin, supra note 7, at 88-90; DWORKIN, supra note 10, at 271-73; NRA, supra note 9, at 31-32.


157 See e.g. RAZ, supra note 15, at 309 n.64 (providing an incommensurability response to Dworkin’s theory of coherence).

158 FINNIS, supra note 16; Finnis, supra note 15, at 357.

incommensurable answers, each of which is justifiable as a correct legal outcome, and none of which takes precedence over any of the others.

While Dworkin initially ducked the incommensurability challenge, he has now developed a powerful response. Dworkin insists that, despite his advocacy of complexity, his is an ontologically simple position: certainly more simply than incommensurability. One way of reconstructing this claim is that integrity or law as interpretation requires only that the decision-maker make some quantitative judgment of success — what is the best interpretation — given the different options. The incommensurabilist insists, in addition, that values may be qualitatively, not just quantitatively, different and so not able to be ranked in this way. Decision may thus necessitate open choices among conflicting values because there is no set of scales upon which to compare the relative values of the competing reasons or points of view.

A. Incommensurability, Incomparability, Exclusion

In his later work, Dworkin addresses the incommensurabilist’s challenge. On the one hand, he retreats from the commensurabilist account of moral, political, and legal judgment: no longer is the judgment of fit lexically prior to the judgment of political morality. In *Law’s Empire*, coherence replaces commensurability in the first stage, second-stage judgments of political morality incorporate first-stage judgments of fit. So, while the process of ranking options is retained, it is given a distinctively different twist.

On the other hand, Dworkin argues that categorical disagreements among different points of view or comprehensive theories of value such as deontology and consequentialism are not “conceptually incommensurable.” Conceptual incommensurability entails that, for any

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160 See DWORKIN, supra note 10, at 73; see also BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 96 (1993) (“Dworkin did not offer a substantive reply to [Makie’s] formulation of the problem”).

161 See DWORKIN, supra note 4, at 165 (“requir[ing] government to speak with one voice, to act in a principled and coherent manner towards all its citizens’); see id. at 184 (“Integrity is flouted … whenever a community enacts and enforces different laws, each of which is coherent in itself, but which cannot be defended together as expressing a coherent ranking of different principles of justice or fairness or procedural due process.”).

162 See DWORKIN, supra note 4, at 248.

163 For a similar account of the differences between Law’s Empire and the works that precede it, see FINNIS, supra note 15, at 373-75.

164 Dworkin, supra note 7, at 89.
two concepts, “there is no way of comparing the two.” His example of conceptual incommensurability to ask: “Which is more clear, an argument by Descartes or the Greek sky?” Since there is, a priori, no way to compare the two concepts of clarity, the comparison is senseless or meaningless.

To the extent that Dworkin is not simply discussing problems of translation, but rather conflicts among values or options, I shall suggest that his real target is not incommensurability but incomparability. Discussions of incommensurability tend to conflate intransitivity, incomparability, and incommensurability. For example, Raz often uses the terms incomparability and incommensurability interchangeably. Raz’s influential statement that intransitivity is the mark of incommensurability has encouraged this double confusion of intransitivity and incomparability with incommensurability, with pernicious results.

Transitivity entails that if a person chooses A over B, and B over C, then she will choose A over C. Intransitivity operates where a person chooses A over B, and B over C, but nonetheless chooses C over A. In the Morality of Freedom, Raz points out that “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.” Incommensurability entails intransitivity: “(1) neither [option] is better than the other, and (2) there is (or could be) another option which is better than one but is not better than the other.”

165 Id.
166 Id.
167 Raz, supra, note 71, at 322-43.
169 Raz, supra, note 71, at 325-26.
171 Raz, supra, note 71, at 322.
172 RAZ, supra, note 71, at 325.
Intransitivity does not, however, uniquely identify incommensurability: exclusionary reason can also generate intransitivities. According to Raz, reasons may conflict in a variety of ways. In cases of conflict between reasons for action, we can say that each reason has a dimension of strength vis à vis other reasons depending upon which, if any, proposition prevails in a conflict situation. A decisive (Raz calls it “conclusionary”) reason is a reason that overrides all conflicting reasons.

Reasons may, however, be of different orders. A first-order reason provides a reason for or against performing an act; for example, my being hungry is a first-order reason for me to eat chocolate. A second-order reason is a reason to act or refrain from acting upon first-order reasons. For Raz, the most important type of second-order reason is a reason to exclude deliberation on the balance of (first-order) reasons: it is a pre-emptive reason for action one that, in combination with the first-order reason forms Raz elsewhere calls an exclusionary reason. For example, in certain cases, my being on a chocolate-free diet is a second-order exclusionary reason not to act on my first-order reason (I’m hungry). In a conflict of first-and second-order reasons an exclusionary reason is not a decisive first-order reason. It is a second-order reason to refrain form acting for a reason. It operates to exclude consideration of first-order reasons for or against a particular action, and replaces them.

For example, consider the activity of promising in terms of exclusionary reasons. 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 contains an exclusionary reason: it is a first-order reason to deliver

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173 Raz, supra note 103, at 28. The discussion of conflicts of reasons in the following paragraphs depends upon this account of conflicts, see Raz, Reasons Requirements and Practical Conflicts in Practical Reason 22 (S. Korner, ed., 1974).

174 Raz, supra, note 71, at 46 (“the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.”).


176 Raz believes exclusion accounts for important aspects of the nature of a rule and of authority, and exclusion plays a central, though contentious part in many modern theories of law.

the car to Jill, and a second-order reason for Jack to disregard competing claims on his car on Tuesday. By virtue of the promise Jill now has a normative power over Jack; she can hold him to his promise or release him from it. Jack, of course, could renege on his agreement; but if he did so, Jill would be justified in criticizing him for doing so. 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.

To see how exclusionary reasons generate intransitivities, suppose, Jack regularly lends his car to Jill, Jane, and John. When a conflict arises, Jack prefers to lend to Jill over Jane, and Jane over John. If Jack’s preferences are transitive, then Jack should prefer Jill over John. Suppose, however, John is jealous of Jill, and has made Jack promise that whenever there is a conflict between Jill and him, John will get the car. Jack’s promise operates as an exclusionary reason for action and renders Jack’s preferences intransitive. He will prefer Jill over Jane, and Jane over John, but John over Jill. Intransitivity thus fails to distinguish exclusion from incommensurability.

Furthermore, incommensurability cannot explain some features of incomparability. Across a range of cases, exclusion better explains incomparability than incommensurability does. Incomparability is a somewhat vague term: it includes both the inability and the refusal to compare one reason or value against another. Since incommensurability entails that competing values cannot be reduced to each other or measured in terms of some independent value, the incommensurabilist’s claims must be that comparisons are nonsensical or arbitrary.

Comparison misrepresents the reasons (or better, falsely claims that

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178 RAZ, supra, note 71, at 174.
179 Chang thinks it is to take sides. See Ruth Chang, Introduction, in INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON, 1 (Ruth Chang, ed., 1997).
180 Exclusionary reasons and incommensurable reasons are not mutually exclusive categories. Conflicts may occur in which some or all of the incommensurable reasons are also exclusionary reasons and vice versa. See Cass R. Sunstein, INCOMMENSURABILITY and Valuation in Law, 92 Mich. L. Rev. 779, 801-802 (1994).
182 See, e.g., FINNIS, supra note 16. Does nonsensical nature of comparison remove Finnis from first-order incommensurability?
there could be a decisive reason) for choosing one value over others.\textsuperscript{183} Comparing values, reasons, options, and so on, either one in terms of the other or using some third metric, fails to capture an essential fact about the nature of the values.\textsuperscript{184} If, for example, love and money are really incommensurable, then commensuration mistakes the nature of both. Someone who tried to value love in money terms, or vice versa, would end up with, not love nor money, but something else. It would be inaccurate to say that the “something else” would be either the value “love” or the value “money.” If law and morality are incommensurable, then in purporting to commensurate them the valuer has invented or discovered some new value (call it “lovney”) that is distinct from each, and the valuer has made a mistake about the comparative value of love or money.

Dworkin implies that the sort of incommensurability — he calls it “conceptual incommensurability”\textsuperscript{185} that renders comparisons as senseless “just by understanding the concepts involved”\textsuperscript{186} — is irrelevant in the political sphere.\textsuperscript{187} In other words, he rejects the sort of claim made by those like Finnis who claim that commensurating incommensurables like love and money does not make sense, i.e., is meaningless. Finnis’ example is “sum[ming] up the quantity of the size of this page, the quantity of the number six, and the quantity of the mass of this book.”\textsuperscript{188} Finnis’ point counts at most against the ability to engage in a cardinal ranking (some single unit such as quantity); accordingly even when cardinal rankings are unavailable, ordinal rankings of the various options (clearest, clearer, clear) are possible.\textsuperscript{189} The cardinal version of incommensurability precludes monism but not complex commensurability.

\textsuperscript{183} For example, John Finnis observes that, “prior to the adoption [of some common metric], an instruction to compute is not merely impracticable; it is senseless.”\textsuperscript{FINNIS, FUNDAMENTALS OF ETHICS, 87-88 (1983). See also FINNIS, supra note 15, at 115.\textsuperscript{184} Such a change in meaning or nature is less of a problem for someone who believes that values can be socially constructed or existentially legislated.\textsuperscript{Dworkin, supra note 7, at 89.\textsuperscript{185} Dworkin, supra note 7, at 89.\textsuperscript{186} Dworkin, supra note 7, at 89.\textsuperscript{187} Dworkin’s example of conceptual incommensurability is a question such as: “Which is more clear, an argument by Descartes or the Greek sky?”; Dworkin, supra note 7, at 89.\textsuperscript{FINNIS, supra note 16, at 115.\textsuperscript{188} It might be worth making a three-fold distinction between incompatibility, incomparability, and incommensurability. Incompatibility is the sort of strong, semantic version of incommensurability popularized by Thomas Kuhn that Dworkin seems to have in mind, and Finnis seems to tacitly embrace with his claims that certain cardinal comparisons are senseless. See THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d. ed., 1970). Neither incommensurability nor incomparability presupposes this “semantic” (Kuhn) or “categorical” (Dworkin) incompatibility.
Dworkin is right to assert that the problem of choice among incommensurables may be relatively easily solved. Rather than comparing the values, \( V_1 \) and \( V_2 \), or the options \( O_1 \) and \( O_2 \), and so on, I could consistently prefer one over the other — that is, after all, what choice in the absence of a decisive reason is all about. The fact that such a choice is, in a certain sense, arbitrary is not a criticism open to the incommensurabilist. It is worth getting clear about what it would mean to claim that the choice is arbitrary here.

The claim that a consistent preference of \( V_1 \) over \( V_2 \) is *arbitrary* makes a statement about the nature of justified choice. Three positions on the nature of justified choice are that choice is only fully justified if it is made, first, on the basis of a decisive reason or, second, on the basis of an undefeated reason only after considering all the competing reasons or, third, on the basis of some undefeated reason, without any more. The first position considers choice is *always* arbitrary when deciding among incommensurable values; the second position would regard choice as arbitrary only so long as the decision consistently to pick \( V_1 \) was reached without considering the reasons for \( V_2 \). Under the first position, if arbitrariness cannot preclude a decision-maker from making a one-off choice among values, there is no reason why the decision-maker cannot engage in a *consistently* arbitrary preference of one value over the others. And under the second position (which may be Finnis’s position on practical reasonableness),\(^\text{190}\) so long as the decision-maker considers the consistently-rejected value as well as the undefeated one, the decision is fully justified and so non-arbitrary. Consistent choice after considering an undefeated reason is never arbitrary under position three.\(^\text{191}\)

Accordingly, an incommensurabilist could flip John Stuart Mill’s critique of rights on its head. In *Utilitarianism*, Mill suggested that rights are really just customary short-hand for happiness.\(^\text{192}\) We have simply become accustomed to treating certain preference-orderings as intrinsically valuable when they are in fact only instrumentally so.\(^\text{193}\) If we were to reflect upon the nature of rights or another seemingly intrinsically worthwhile good other than happiness, we would recognize that we value

\(^{190}\) Chang, *supra* note 181, at 1; (Ruth Chang, ed., 1997); CHANG, *supra* note 70.

\(^{191}\) Dworkin entertains either position two or three; his view on commensurability and complexity rules out position one as governing choice between comprehensive points of view.

\(^{192}\) Mill, *supra* note 151.

\(^{193}\) Mill, *supra* note 151.
the goods only to the extent that they conduce towards our happiness.\textsuperscript{194}

The incommensurabilist revision of Mill is to suggest that certain \textit{rankings} only appear commensurable because we have become accustomed to these arbitrary orderings of goods. What looks like or has come to be accepted as a rationally ordered set of preferences is not really so. It is instead an arbitrary choice to attend to the goods in a fixed order or as representing some unitary scheme of value simply because that order or scheme has achieved customary status and has some independent justification for its continued existence (e.g., predictability or stability). Before the choice was made, however, we could have chosen to rank differently.\textsuperscript{195}

Consistency is no less rational than any other method of choosing, because there is no decisive reason to settle the matter here. In certain circumstances, where predictability is at a premium, consistency may turn out to be more rational than continually switching among values. So, despite incommensurability and without comparison, we could come up with a consistent ranking of values: something that looks very much like a scale of value even though it is not. Accordingly, we preserve the values from the realists change-in-nature objection, while producing a ranking: the same outcome sought by the commensurabilist, just differently motivated.\textsuperscript{196}

We make arbitrary comparisons all the time. A simple example is the decathlon, a track-and-field event combining ten different athletic disciplines. Within the decathlon there may be some more-or-less comparable disciplines: the hundred meter sprint; the one-hundred-and-ten meter hurdles, and the four-hundred meters sprint; or the high jump and the pole vault; or the discus, shot put, and javelin. But across disciplines (and perhaps even within them) there are significant obstacles to comparison. Furthermore, ranking the disciplines in order of importance is likely to prove intransitive. Nonetheless, the decathlon adopts a complex system of

\textsuperscript{194} Mill, \textit{supra} note 151.


\textsuperscript{196} My view here is somewhat different from Elizabeth Anderson’s, who regards commensuration justified where “evaluation [is] essentially … a matter of calculation, with the aim of making the [decision] process precise and decisive.” ELIZABETH ANDERSON, \textit{VALUE IN ETHICS AND ECONOMICS}, 49 (1995). I do not think we need to commensurate to avoid the incommensurability realist’s objection.
points-allocation to measure success across disciplines.\textsuperscript{197}

The decathlon does not, in fact, provide a means of inter-discipline comparison. So we cannot tell from the decathlon points system whether the world’s best sprinter is better at her discipline than the world’s best shot-putter. Nonetheless, we can create a scale for comparison, however arbitrary, irrational, or nonsensical it may be outside the context of the decathlon.\textsuperscript{198} That is, having fixed upon a consistent ordering of incommensurables, we can then seek to represent that ordering using some cross-discipline metric. Even Finnis concedes that “we can adopt a system of weights and measures that will bring the [different] kinds of quantity into a relation with each other.”\textsuperscript{199}

Such a system is, however, of limited use. It expresses, not the relative worth of the different values, but rather our choice about the manner in which we have decided to order them. Here, the assignment of a relative worth (the ranking of sports by points allocation) is arbitrary: it does not express anything about the relative importance of the values. It simply constitutes a points system so that participants can know how to play the game effectively. Having generated this new sport an athlete can determine whether or not to participate and what counts as success, based on the measurement system used.

The decathlon example suggests that, if consistency of ordering is necessary or useful, then having generated a metric, we can proceed to make it meaningful in our practical endeavors. In the decathlon, a set of athletes and competition organizers decided that excelling at an arbitrarily selected and ranked group of events is a worthwhile practical endeavor. So long as the system of points-allocation remains constant, then the athletes can rationally and practically determine how to pursue excellence in this new sport. The decathlon is not, however, simply the sum of its constituent sports. We could intelligibly determine that the best decathlete is not as

\textsuperscript{197} Elizabeth Anderson uses the decathlon example to explain why commensurating incommensurables may be justified in order to make the decision process “more decisive.” See ANDERSON, supra note 196, at 49-50 (1995).

\textsuperscript{198} Anderson rejects the claim that a usable scale would be nonsensical: she believes that only those scales that are “authentic” could gain traction. See ANDERSON, supra note 196, at 50. I am not convinced: authenticity seems like a post-hoc rationalization to me. For example, the Olympic Committee in 1934 adopted a new points system to compare the various disciplines. Under the new points system, former winners could not come close to a medal, and former also-rans became medal winners. It does not seem to me that there is anything particularly authentic about either points system.

\textsuperscript{199} FINNIS, supra note 183, 87-88. See also FINNIS, supra note 16, at 115.
good an athlete as the best sprinter or shot-putter, just as we could intelligibly doubt that the scale of measurement really determines that comparing an intermediate score for sprinting with a high for the shot put scale identifies the better all-round athlete.  

A first-order ranking of incomparable reasons is rationally defensible on grounds of certainty, predictability, and so on. However, the decathlon example suggests such rankings do not remove arbitrariness, but conceal it. The claim that our settled values reflect the arbitrary political claims of political liberalism is one that is advanced, in the legal world, by Critical Legal Studies. More recently, religious critics of political liberalism have advanced a similar claim. It seems that Dworkin’s constructivism not only invites, but demands this sort of arbitrariness.

Altogether different is incomparability, which seems to be Dworkin’s real target. Incomparability, however, seeks to preclude comparison altogether, whether that comparison is arbitrary or not. Incomparability is thus better thought of as secured by exclusion rather than incommensurability. Much confusion results from conflating the two. For example, Richard Warner equates incommensurability with incomparability, and so suggests that incommensurability is defined by a refusal to count one thing as an instance of something else. He claims that “the nature and extent of the value one places on something is in part defined by what reasons one’s evaluative attitude allows and disallows…. I do not, for example, count as loving my daughter unless I refuse to count the financial considerations as a reason to sell her.” A refusal to count one value as a reason for action, to exclude it from the balance of reasons when deciding what to do is not the mark of first-order incommensurability, but of the operation of an exclusionary reason.  

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200 I recognize that there is a whole set of problems here if one is a realist versus a constructivist. The decathlon example seems pretty constructivist to me.  
201 See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987). For a skeptical discussion of incomparability, see CHANG, supra note 70 at 70-73.  
202 See, e.g., Warner, supra note 3, at 157.  
203 Warner, supra note 3, at 157.  
204 Cass Sunstein is another who conflates exclusion and incommensurability, regarding them as existing on a continuum. Sunstein claims that exclusionary reasons may be “a form of incommensurability.” Cass R. Sunstein, Incommensurability and Valuation in Law, 92 MICH. L. REV. 779, 802 (1994). He suggests that “[t]he exclusion of certain reasons for action is an extreme case of the more conventional and modest sort of incommensurability.” Id. at 803. If Sunstein’s point was limited to the claim that there can be conflicts of incommensurable reasons, one or more of which is, in addition, an exclusionary reason, then he would be correct. Instead, he suggests that exclusionary reasons are a subset of incommensurable reasons and he is wrong about that.
Warner’s problem in the love-or-money example is that he thinks that measuring the daughter in monetary terms precludes loving her, not that the comparison is unintelligible. The comparison is not only intelligible: making the comparison is wrong. For the incomparabilist, “counting the financial considerations” transforms the child into a commodity (a means) rather than a human object of affection (an end).

Richard Pildes and Elizabeth Anderson also endorse an hierarchical distinction between love and money. They propose that where sets of values are juxtaposed (one hesitates to say “compared”) one against the other, one set of values may be “incomparably higher in worth” than another set of goods. Comparison is precluded because “[n]o consistent, categorical set of trade-offs between the higher and the lower values will be available that can be applied to all choices.”

The concept of “incomparably higher” values appears, on its face, oxymoronic. After all, denoting one set of values “higher” than the other suggests some comparison and ranking has occurred. What Anderson and Pildes mean to suggest, perhaps, is that while values in the inferior set do not always stack up the same way against values in the superior set (their relative intra-set rankings may vary), nonetheless the values in the superior set always beat out the values in the inferior set. There is no once-and-for-all, one-time, “categorical” or canonical list or ordering of the goods along a continuum or ordinal scale. Pildes and Anderson think that the problem of ranking justifies asserting that the values are incomparable, and assume that incommensurability best

and incommensurability are independent of each other. All that has happened in Sunstein’s extreme case is that an incommensurable reason is also protected by an exclusionary reason.

206 “[H]uman life, friendship, freedom, and human rights.” ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 66 (1995); Compare Raz, supra, note 71, at 345-53 rejecting the idea that incommensurability is just a claim that friendship is priceless.


208 See ANDERSON, supra note 196, at 68 (1995) (“There seems to be no way to capture any rationally supportable claims about a hierarchy of values in terms of preferences. … If a claim to hierarchical incommensurability is supposed to support a norm prohibiting all tradeoffs between a higher and a lower good, the results are absurd or catastrophic. If a claim is supposed to support a norm sometimes prohibiting and sometimes permitting such tradeoffs, it is inconsistent.”).
explains incomparability.  

As the examples drawn from Warner, Pildes, and Anderson suggest, the incomparabilist wants to go further than simple incommensurability. They all think that, when faced with a choice of loving the daughter or choosing the money, tossing a coin would be wrong. That is not the case if the values of love and money are simply incommensurable. Incommensurability simply entails that there is no decisive reason to prefer love over money, or vice versa. The two exist on separate scales, and an agent may just pick which to prefer. It makes no rational difference to her choice whether there is a small or large amount of money on the table, or someone she loves a lot or only a little, since there is no decisive reason to guide her choice between values. So long as the values are incommensurable, the decision-maker can prefer one penny to her daughter.

The standard claim that there is something wrong with valuing love in monetary terms or choosing money over love thus cannot be just because they are incommensurable. Rather (as talk of higher and lower values suggests), there must be some additional reason precluding comparison (either of the options themselves or of the points of view from which they gain their value), rather than the absence of some reason to decide which between the two to pick. Instead, the claim must be that, whether commensurable or incommensurable, valuing love in monetary terms should be precluded, and so some combination of an exclusionary reason and first-order incommensurability are necessary to explain both the nature of the difference between the values and the reason why picking is impermissible.

Reasons for action are incommensurable if there is some qualitative difference between the reasons that creates evaluative problems when comparing one against the other. The operation of an exclusionary reason, on the other hand, is determined not by a qualitative difference between the reasons, but by the refusal to act on the basis of one set of reasons (whether qualitatively similar or different) when deciding how to act. The exclusionary reason operates as a second-order reason for not acting upon first-order reasons for action.

Conflicts among same-order incommensurable reasons are qualitatively

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209 Other candidates include such devices as “lexical orderings” or “discontinuous preferences.” ANDERSON, supra note 196, at 67. See also Richard H. Pildes & Elizabeth Anderson, Slinging Arrows at Democracy; Social Choice Theory, Value Pluralism, and Democratic Politics, 90 Colum. L. Rev. 2121, 2151 (1990).
different from conflicts of exclusionary with first-order reasons. One of the major differences is that, so long as the incommensurable reasons are not also exclusionary reasons, all the reasons which conflict may be factored directly into the balance of reasons. This is not true of exclusionary reasons, which by their nature exclude conflicting first-order reasons from so figuring. To put it another way, just because one reason is incommensurable with another does not prevent that reason counting when deciding what to do; however just because one reason excludes another does prevent that other reason counting. This has ramifications given the sloppy propensity for talking about weighing and balancing incommensurable reasons, for we neither weigh nor balance exclusionary reasons against the first-order reasons they exclude. This is part of the definition of an exclusionary reason.

Accordingly, the incomparabilist’s claim is that some combination of exclusionary and incommensurable reasons operates to preclude comparison. This claim has equal force against both the commensurabilist as the incommensurabilist. For example, a commensurabilist like J.S. Mill might argue that the reason we refuse to sell the daughter that she is worth so much: if someone offered us enough money we would sell her. The incomparabilist’s point still stands: we should refuse to measure her in monetary terms because to compare — even if love and money are on the same metric — is wrong.\(^\text{210}\) The argument is the same if the difficulty in comparative valuation results from incommensurability.

The incomparabilist requires, however, some argument that incomparability is a valid stance in considering measuring love in money terms — that there is some exclusionary justification for precluding trade-offs between love and money. One option is what I shall call constitutive incomparability, a modification of Raz’s concept of “constitutive incommensurability.”\(^\text{211}\) Constitutive incomparability suggests that some types of comparison profoundly undermines the nature of a value. Thus, to

\(^\text{210}\) Notice that this formulation avoids problems caused by definitions of incomparability that specify as a necessary condition the refusal to even consider comparison. This strong version of incomparability may require more than just exclusion, which is plausibly simply the refusal to act on competing first-order reasons within the scope of the exclusionary reason. We might call excluding considering conflicting reasons volitional exclusion, to contrast it with excluding acting on conflicting reasons, which we could call operational exclusion. Something more would be needed for the refusal to consider conflicting reasons; nonetheless, operational exclusion, a refusal to act on conflicting reasons, would still be one of the necessary conditions of strong incomparability.

\(^\text{211}\) This is precisely how Raz characterizes the distinction between love and money as a “constitutive incommensurability.” See Raz, supra, note 71, at 345-46.
take an example from melodrama or comedy, I may renounce my wish to elope with my lover for a payment from her father simply because I am so poor I need the money. But in exchanging my love for cash (or personal advancement, or some such bribe) I can no longer measure my affection in terms of love.\footnote{However, not every incomparability among competing values is constitutive. We could embrace incomparability for prudential as well as constitutive reasons. That is, we could refuse to compare love and money, not because to measure my daughter in money terms is to forgo love, but because the risk of getting the comparison wrong is great. In other words, the more money I am offered, the more likely I am to engage in a selfish rather than impartial assessment of my daughter’s worth. Because I am more likely to get the comparison wrong, and assuming I do not want to risk undervaluing my daughter, it could make sense to refuse to compare even if the values are comparable and comparing would express nothing about either value or my love for my daughter.}

However, not every incomparability among competing values is constitutive. We could embrace incomparability for prudential as well as constitutive reasons. That is, we could refuse to compare love and money, not because to measure my daughter in money terms is to forgo love, but because the risk of getting the comparison wrong is great. In other words, the more money I am offered, the more likely I am to engage in a selfish rather than impartial assessment of my daughter’s worth. Because I am more likely to get the comparison wrong, and assuming I do not want to risk undervaluing my daughter, it could make sense to refuse to compare even if the values are comparable and comparing would express nothing about either value or my love for my daughter.

All of this is to suggest that Dworkin may be correct about the volitional nature of normative schemes and wrong about their ontological status. That we can choose to rank and exclude — that there may be a reason, such as predictability or consistency, for preferring ordering over not-ordering — does not render the chosen ordering any less arbitrary. That we can retrospectively come to embrace it does not make it any more authentic or stable. The underlying conflict inheres, and ongoing conviction and stability depends upon the agent’s or the community’s willingness to accept the compromise without question. To do otherwise is to reject, in Dworkin’s terms, to fail to respect — competing political and philosophical positions. A judge, or other decision-maker, is thus justified in feeling conflicted and willing to revisit the issues should an appropriate case come along.\footnote{Melodrama and comedy are ready sources of, and often depend upon, incommensurability and incomparability. Accordingly, the overwrought emphasis on tragedy as the primary source and example of incommensurability artificially raises the stakes of the game. \textit{See, e.g.}, MARTHA C. NUSEBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 27-28 (updated ed., 2001). Compare Wiggins, \textit{supra} note 195, at 64 (Ruth Chang, ed., 1998) (distinguishing between “the (common or garden) incommensurable and the circumstantially cum tragically incommensurable.”).}

\footnote{\textit{See, e.g.}, Wiggins, \textit{supra} note 195, at 64. (“Real dilemmas depend on various values’ making autonomous, mutually irreducible demands on us. The picture offered here suggests how, over and over again in normal life, we may reach accommodations between these demands and live with conviction the accommodations that we find. The picture}
B. First- and Second-Order Incommensurability

It is important to note that there are different types of incommensurability. First order incommensurability does not exclude in this way, but second-order incommensurability does something analogous. Second-order incommensurability rules out options as counting as reasonable from a particular point of view. Importantly, however, second-order incommensurability does not preclude an agent from switching among points of view to express the value of an option. Thus, we might argue that, if I love someone, then I owe them certain duties of arising from that attitude or relationship. One of those duties is to avoid treating them as a means to an end.

In second-order terms, the agent is confusing two incommensurable points of view. Where one agent means “good” from a friendship point of view, the other means “good” from a prudential or market point of view. To disambiguate the two claims, where one says “frood” (the good of friendship or love) the other says “prood” (a prudential good measurable in market terms). The normative consequences of adopting either point of view are similarly different: what one “frought” to do from a friendship point of view is different from what one “prought” to do from a prudential perspective. So, while the agents may agree they have an obligation to act, they differ about its nature. In Dworkin’s terms, they share the same concept of obligation, have different conceptions.

To take a well-worn example: Jean-Paul Sartre hypothesizes the predicament of a student who faces the option of joining the French army in hopes of fighting the Nazis or staying at home to take care of his sick mother. The student thus seems to have two options, join the army or care for his mother, and these conflict in such a manner that the student cannot do both. Sartre thinks these options are not simply incompatible, but makes room for the thought that this is a part of the process by which we acquire characters as we age and so on. The extra thing that needs at this point to be added is that there cannot be any guarantee that, no matter what the circumstances may be, we shall always be able to find this accommodation.

Note that it does not seem to fit sort of interpersonal obligations characteristic of Nagel’s system, and so Nagel may not be able to account for love, but only for familial duties.

See Dworkin, supra note 4, at 71 (discussing difference between concept and conceptions).

The sentence “the student joined the army” is true just in case the sentence “the student cared for his mother” is not true, and vice versa. Accordingly, the truth-value of the first
incommensurable. But why? One answer is that the strength of his reason for joining the army conflicts with, but does not override his reason for caring for his mother, and vice versa, such that the conflicting reasons are not equal, nor are they rankable on some unitary scale of value. When the student asks which option is better, there is no reason for preferring one option over the other: none of the available reasons are decisive one way or the other. Reason indicates that both actions are worthwhile (morally valuable), but has no more to say about which to choose.

How does Sartre know that the conflicting reasons or options are incommensurable? The reasons could be of equal value and the problem of choice would persist: there would be no (further, decisive) reason that indicates that either action is any more worthwhile than the other. One explanation is that there is a first-order conflict between reasons incommensurable as to strength. First-order incommensurability exists when conflicting reasons or values cannot be ranked and are not equal. 217

First-order incommensurability can be individualized or comprehensive. Individualized incommensurability suggests that, taken on a case-by-case basis, certain options or reasons or values may turn out to be incommensurable. 218 For example, John Finnis presents the student's dilemma in a manner suggestive of individualized incommensurability. 219 He thinks that in the student's case, the value of benevolence has fragmented so that one choice embodies an “impartially benevolent” domestic ideal of familial commitments, 220 and the other manifests the “disinterested

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217 On intransitivity, see Raz, supra, note 71, at 325-326 (“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…(1) neither [option] is better than the other, and (2) there is (or could be) another option which is better than one but is not better than the other.”).

218 Thus, norms, goods, sources, options, or other candidates for practical decision function as the grounds of decision and provide a reason to select an option so long as the norm has value — which means most weight, importance, worth, authoritativeness, immediacy, generality or specificity, and so on. There may be other ways to compare and rank options: in terms of sequentiality (we cannot choose one option before the other). On the general relationship between values and reasons, see John Gardner & Timothy Macklem, Reasons, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 440 (Jules Coleman and Scott Shapiro, eds., 2002). Compare Bernard Williams, Ethics and the Limits of Philosophy 58-59 (1993) (claiming that there is a difference between options and values).

219 See Finnis, supra note 16, at 176 (discussing Sartre example).

220 Id. at 143.
benevolence” of a certain public form of political commitment.221

Values may also be comprehensively incommensurable, such that every instance of one value is incommensurable with every instance of another, and there is no further value or reason to explain why this is so. A comprehensive version of the student’s dilemma would insist that the domestic value of family ties or companionship is different from the political value of public welfare or patriotism, and, furthermore, that each companionship reason is incommensurable with each public welfare reason, and vice versa.222 Thomas Nagel, for example, proposes that the “specific obligations to other people or institutions”223 are incommensurable with utility, which he defines as “the effects of what one does on everyone's welfare.”224 For Nagel, these two values, which are plausibly the ones at stake for Sartre’s student, represent different and incommensurable domains. Under this wholesale form of incommensurability, retail trade-offs between values are precluded, in contrast to the individualized account which may permit such comparison. Each value is “formally different”225 and cannot be reduced to any one of the other values.

Incomparability and incommensurability are, however, two different concepts. It might make a difference if we worried less about comparability and more about incommensurability. Part of the problem arises from a view of incommensurability-as-incomparability, which is then take to forclose choice among options. On this model, incomparability produces volitional indecision. Dworkin may take this as the central case of incommensurability, but it need not be so. Similarly, comparability and commensurability are different concepts. We may choose to compare incommensurables, as in the decathlon example. Adopting a scheme or scale of comparison does not, however, change the underlying nature of the values.226 Choosing to rank incommensurable options does not make the outcome less equivocal or arbitrary or fragile.

221 Id. at 149
222 This is the thought pithily expressed by E.M. Forster when he announced that, “if I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country.” E. M. Forster, What I Believe, in TWO CHEERS FOR DEMOCRACY (1962).
224 Nagel, supra note 223, at 129-130.
225 Nagel, supra note 223, at 131-132.
226 Compare CHANG, supra note 70 at 3-5 (discussing covering values).
Dworkin’s claim that justification depends, at bottom, upon an individual’s conviction that a particular explanation is best seems to me indistinguishable from Raz’s discussion of retail incommensurability as grounded in various social forms of value. This is where Dworkin’s burden-of-proof argument carries water: it places the onus on theorists like Raz, who propose a retail, constructivist accounts of incommensurability, to come up with some political justification for their more complex ontology.

Dworkin’s goal is to avoid the common dichotomy between finding the law and legislating it. His solution is to suggest that decision-makers are constrained by (that is, find) the legal materials they must interpret, but choose among (that is, legislate) the moral or political theories to select the one they find most convincing. Nonetheless, while the decision-maker’s choice of theory will be the one that is best for them, that is, fits there convictions and the materials, it cannot be best tout court. If it was, then there would be just one best way, all things considered, to interpret the law independent of any decision-maker’s convictions. This is a position that Dworkin is concerned to reject, in part because it would undermine the idea of disagreement among decision-makers.

If Dworkin gets to occupy this position between finding and legislating, it must be because his explanation of complexity distinguishes between different ontological types of reasons that the adjudicator must account for in her deliberations. Complexity cannot be simply an epistemic phenomenon, a result of relative ignorance, otherwise the omniscient Hercules would simply work out which single theory was best on the balance of reasons. Put differently, the competing theoretical explanations cannot be commensurable inter se, otherwise there would be a single, best theory precluding genuine disagreement. Accordingly, to preserve his account of disagreement, the decision-makers’ different, conflicting theories manifesting their competing convictions about justice and fairness must be incomparable or incommensurable. In other words, there are ontologically more things to factor into the judgment about justice and fairness (about which theory to choose) than there is to factor into the judgment about fit (how to accommodate the materials). Fit permits, even requires, a

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227 Dworkin thinks that these theoretical “decision[s] will reflect not only [the judge’s] opinions about justice and fairness but his higher-order convictions about how these ideals should be compromised when they compete … Different judges will disagree about each of these issues and will accordingly take different views about what the law of their community, properly understood, really is.” DWORKIN, supra note 4, at 256.
quantitative judgement about the amount of legal material each political or moral theory covers. How much each theory advances justice or fairness is not quantifiable in this way.

Dworkin has expressly argued that the dimension of fit is not about the quantity of legal materials each competing moral theory covers, because “the contest is not to see how many distinct bits of institutional history each explains.” In making this comment, Dworkin was responding to a challenge from John Mackie. Mackie suggested that, for some theories, the question of relative fit could be altered by the discovery of some ancient case explained by one and not the other. In response, Dworkin argued that “justification [is not] improved simply by the discovery of one or two older cases explained by one but not the other.” That response, however, threatens to undermine the concept of fit. At some level, questions of fit must address the quantity of legal materials covered. A theory of law is not a theory about law if it does not explain a great deal of what we would normally consider the sorts of thing a theory of law would cover, or does not provide some compelling ground for changing our beliefs about what sorts of thing a theory of law should be about. This seems to be the sort of work Dworkin’s account of fit is there to do. In fact, Dworkin acknowledges the need for some metric to settle the threshold determination about which proposed theories are theories of law. However, he simply thinks that the metric is more coarse grained than Mackie allows, and provides a “less precise … matter of characterization” than Mackie is after. Thus, Dworkin does not give up the quantitative character of fit, but thinks it is more a matter of approximation than exactitude.

If Dworkin accepts the measure of fit as an approximate or coarse grained quantitative measurement, however, he immediately runs into a problem. The idea that small differences at the margins are irrelevant for the concept of fit suggests that there may be a number of roughly equal theories from which to pick, and no reason, at least on the dimension of fit, to prefer any one of them. Furthermore, it may be the case that competing moral theories are also roughly equal, such that though they are commensurable, there is no way to choose among them. The idea that there could be roughly equal conflicts among theories potentially conflicts with Dworkin’s “thesis, that ties will be rare, [a thesis he also believes]

228 Dworkin contests this claim. See DWORKIN, supra note 10, at 272 (arguing fit is not about quantitative evaluations of the amount of materials legal theories cover).
229 DWORKIN, supra note 10, at 272.
230 DWORKIN, supra note 10, at 272.
231 DWORKIN, supra note 10, at 272.
presupposes a conception of morality other than some conception according to which different moral theories are frequently incommensurate.”

It is at this point that Dworkin’s argument becomes — and throughout is work, remains —extremely murky. The reason, it seems to me, is that Dworkin fails to distinguish between incomparability and incommensurability, and then between first- and second-order types of incommensurability. Dworkin thus does not deal adequately with the issue of picking and choosing among competing theories. The problem, remember, is to select among a menu of appealing options, none of which can be ranked as better or worse than the others.

The simple response to the Buridan’s ass problem is to suggest that there are small differences that, if we were aware of them, would make a difference to choice, and so there are rarely really equal options. One is always a little better than the other. So long as value monism is restricted to first-order, “internal” judgments about the relative value of options, this radically monistic account of value (that small differences along the dimension of fit would make a difference to choice among theories) is available to (at least the early) Dworkin who thinks that there can be one best answer to a given problem. If, as value monists accept, ontological indecisiveness does not exist, then epistemic certainty is possible for someone like Hercules who has enough time and wisdom to scrutinize all the alternatives.

The problem, however, is that the options may be roughly equal without being perfectly equal. Rough equality exists when the various options, though in principle comparable, may only be measured using a metric that cannot be fine-grained enough to distinguish among a set of comparable options. This avoids incommensurability, to be sure, but it increases the

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232 DWORKIN, supra note 10, at 272.
233 This way of phrasing matters leaves both equality and incommensurability as available explanations of indecision.
234 Rescher, supra note 130, at 161.
235 Dworkin considers and rejects the concept of rough equality. He gives the example of a horse race in which the management of the track has purchased equipment for deciding among apparent ties that is somewhat imprecise. Though the equipment will narrow the cases in which a tie is a possible outcome, nonetheless on some occasions “it cannot be clearly established which horse has won, [and] they shall be deemed to have tied, in spite of the fact that superior equipment might have shown a winner.” Dworkin, Rights, supra note 73, at 286. Dworkin thus collapses one sort of problem — whether this is the sort of thing that can be finely measured — into another — whether our knowledge of the thing can be improved upon by better measuring devices. This is a feature of his constructivist approach: if the point of view does is not sufficiently precise, that may count as a reason
possibility of ties, and so the possibility of epistemic indecision. Dworkin cannot have his cake and eat it. His response that this is all political\textsuperscript{236} is again to emphasize volition.\textsuperscript{237}

In fact, at the second-order level of conflict among comprehensive points of view, Dworkin accepts something like either rough equality or incommensurability. Mackie holds out something very like the Leibnizian petites perceptions solution to Dworkin, but (as we have seen) Dworkin rejects it. Dworkin instead suggests that the characterization if theories as better or worse is not this precise. Accordingly, there is no reason that could permit us to choose among the sorts of option that seem equally attractive. For Dworkin, then, the problem is not choosing among facially identical theories, but similarly (though not equally) compelling ones. And, as we have seen, the reason they are similarly compelling is that there is no reason that makes one more attractive than the other.

If Dworkin wishes to retain commensurability, it would seem he would have to explain what he means by imprecision: if theories are only approximately commensurable then they could be roughly equal in terms of how compelling we find them. If they are not equally compelling because approximately commensurable, then one would think they are similarly compelling because incommensurable. But Dworkin rules out incommensurability too. Accordingly Dworkin expressly disavows both commensurability and incommensurability as justifications for his theory.

Dworkin is stuck on the horns of a trilemma. Value monism renders him susceptible to Mackie’s challenge — the Leibnizian response to Buridan’s ass. Rough equality undermines his insistence that equalities are rare. And first-order incommensurability is ruled out as politically untenable. Since there seems to be no obvious alternative to either commensurability or incommensurability, and since adopting either commits Dworkin to conclusions he regards as untenable, the onus is on Dworkin to explain the way in which he manages to avoid both commensurability and incommensurability. The problem is that it is a just

\textsuperscript{236}“Mackie’s main objection is … a political objection,” Dworkin, supra note 11, at 272.

\textsuperscript{237}“The judges who decided these cases were, as citizens, politically committed: they … had views about the rights of individuals.” Dworkin, supra note 11, at 273.
this point that Dworkin becomes repeatedly inscrutable.\textsuperscript{238}

What is inscrutable is Dworkin’s repeated insistence on what, it is apparent, is second-order incommensurability among comprehensive moral and political points of view, yet his rejection of first-order incommensurabilities between different values, reasons, or outcomes within a particular comprehensive point of view. If his challenge is one of ontological simplicity, then he should be a monist or coherentist, not only at the first-order level, but at the second-order level as well.\textsuperscript{239}

The idea that complexity is an ontological phenomenon thus undermines Dworkin’s anti-commensurability argument from ontological simplicity: that it is up to the incommensurabilist to justify a more complex ontological scheme. Dworkin expressly concedes that, for there to be one right answer, the world must be politically and morally complex. Otherwise, competing political theories or points of view could be ranked. But to be sufficiently morally complex to preclude equality, moral or political theories must be qualitatively different, which means ontologically complex. Accordingly, Dworkin answers his own challenge: if the onus is on the incommensurabilist to demonstrate that the world is ontologically more complex than a commensurabilist thinks it is, and Dworkin thinks that the world must be sufficiently ontologically complex to intra-personal conviction, then the incommensurabilist can simply assert that such a world as Dworkin describes is sufficiently ontologically complex to ensure intra-personal indecision.

Furthermore, Dworkin cannot simply purge his theory of complexity. Rather he needs ontological complexity, because without it he thinks he runs into another problem: the rational equivalence of competing outcomes.

\textit{D. Plurality is Incommensurability}

Dworkin wants to collapse pickings into choosings, or preferences into reasons. The judge must opt for some outcome that affects another person — parties $A$ and $B$ to the legal dispute. Dworkin points out that the judge

\textsuperscript{238} Dworkin, \textit{supra} note 7, at 88-90; Dworkin, \textit{supra} note 10, at 271-73; Dworkin, \textit{supra} note 9, at 31-32.

\textsuperscript{239} Part of the problem is that to pick does not require ranking or comparison. So Dworkin does not think that we can engage in ranking of second-order points of view; but that we can engage in ranking of first-order reasons. He counts a theory that denies first-order rankings as incoherent; nonetheless, Dworkin is committed to the claim that refusals to rank are not only permissible for, but a central feature of, second-order rankings.
can always pick among the competing options: her volition is not constrained or paralyzed, and some form of decision is required. Given that the judge can opt for an outcome, and cannot opt not to opt, then she ought to do so. But Dworkin goes further: he thinks that the judge must not simply pick among the various outcomes — not simply express her preference: she must choose among the competing outcomes — she must give a reason that would bind the other parties to the decision.

Dworkin’s claim is that, although usually this picking simply expresses some preference for a given outcome, given the fact that reasons are to bind some third party, A or B, then we need a reason that applies to them, not just one that expresses the preference of the judge. Rather than simply picking, Dworkin believes the judge must give reasons for her decision that apply to both parties. And Dworkin thinks those reasons must be public reasons: reasons that are derived from and make best sense of the political and moral history of the community in which the dispute arises. Only sufficiently public reasons are going to operate as reasons for everyone, rather than reasons for some and not others.

The problem for Dworkin, however, is that he recognizes that no one theory is likely to gain rational or political consensus a plural society. Instead, judges must choose between competing theories each making radically different appeals to our moral intuitions. Whichever theory a judge opts for as the best interpretation of the community’s political and moral history will be the right theory for her: it depends upon her assessment of what is the best interpretation. So the problem of rational choice is simply pushed back a level: reasons will not operate at the level of convictions over theories, and so the judge simply picks, not chooses, her preferred theory.

Accordingly, Dworkin is a monist about outcomes: he thinks that, within any theory, that we can pick (prefer) one right outcome means we can choose (rationally defend) it. But he is a pluralist about justifications: he recognizes that any outcome may have a number of defensible justifications. But each justification, while pointing outwards towards the sorts of reasons that are acceptable in the public realm for political communities, also point inwards to express the reasons that each judge finds appealing for her. Dworkin’s theory is thus univocal about the public and private motivations of legal officials: the judge’s private convictions about which political theories are best and legal answers are right, all things considered, matches her public utterances. But we are stuck with an irreducible plurality among justifications: accordingly, judges will publicly
disagree and that disagreement will be transparent as to their public and private motivations.\footnote{DWORKIN, supra note 10.}

The problem for Dworkin is that multiple competing points of view stake claims to control the outcome of a particular dispute. Their claims apply, not only between decision-makers, but upon a decision-maker. Dworkin’s embrace of the concept-conception distinction, and so of the points-of-view, second-order approach to incommensurability, must then explain why a decision-maker must develop a unitary approach to the competing points of view that claim her attention. Predictability and consistency are appealing candidates, but may have to give way when, as he acknowledges, the legal materials are sufficiently complex as to preclude reduction to some politically arbitrary unitary measurement.

Put differently, Dworkin challenges the incommensurabilist to come up with a political argument justifying first-order incommensurability. Behind the political challenge is an ontological one: that a commensurabilist ontology is simpler than an incommensurabilist one. One legitimate incommensurabilist tactic is to suggest that, if Dworkin’s ontological challenge fails, his political one loses its bite. If Dworkin cedes the ontological high ground, then his theory depends upon the fundamentally correct claim that we can pick among options and retrospectively convince ourselves that the choice was the unique right answer. However, arbitrariness and self-deception is a thin ground upon which to mount a political theory of adjudication.

A different approach is to suggest that, while predictability and consistency are important values, they are insufficiently important to support his demand for a unitary approach to adjudication. If there are other plausible grounds for imposing obligations upon agents — if, that is, rights are not the only objective political reasons — then a degree of unpredictability and inconsistency may be both permissible and mandated by the legal system. Judicial conflict remains, or includes, disagreement about the nature of law and which political or moral point of view best explains and justifies our current legal compromises. However, that conflict goes deeper even than Dworkin is willing to acknowledge, inside the judge rather than simply among judges.

The alternative account of judicial conflict regards law as, in one sense, more superficial than Dworkin is willing to treat it, and in another sense as
of central political importance. On the one hand, separating the law from
the reasons used to justify the law separates the available public
justifications for legal decision-making from the judge’s private or personal
reasons. If the relationship between the judge’s public and private reasons
for decisions is permissible equivocal, rather than necessarily univocal, the
law may permit pretextual decision-making, such that the judge’s
announced reason — the law — is not her motivating reason for decision.

On the other hand, the law provides an important public constraint on
judicial conduct. The judge’s public reason for decision must, at least, be a
legal reason. Whatever the judge’s private political, moral, or other project,
the law provides some constraint upon that conduct. Law thus provides a
common ground for shared, public decision, as well as for debate over what
the law’s purposes are and should be. This equivocal picture of the nature
of law and of legal decision is, it seems to me, more accurate and at least as
compelling as Dworkin’s political picture. It permits a broader judicial
consciousness than Dworkin’s theory. Where Dworkin’s judge is
convinced and single-minded, able to reject others opinions as, to some
extent, irrelevant to her own convictions, incommensurability makes room
for judges with an internally conflicted consciousness, hesitant about
conclusions and solicitous of different points of view as making claims
upon her attention. Rather than an empire of law held together by the might
of Hercules, incommensurabilists regard law as a forum for discussion that
is always likely to be indecisive, requiring the intellectual, political, and
moral courage and humility of a Socrates to challenge its received wisdoms.

CONCLUSION

Any account of judicial decision-making must take account of epistemic
and ontological indecision, and not treat indecision as solely a volitional
problem. Indecision is not always, or even primarily, attributable to a
decision-maker’s moral incontinence or apathy. Instead, a decision-maker
may be forced to make a choice in circumstances that undermine the
possibility of full knowledge or in which no outcome is best.

241 Neil MacCormick and John Finnis made this point against what they perceived to be the
Critical Legal Studies claim of widespread indeterminacy in the law. See Neil
MacCormick, Reconstruction After Deconstruction: A Response To CLS, 10 OXFORD J.
LEG. STUD. 539 (1990); John Finnis, On The Critical Legal Studies Movement in: OXFORD
ESSAYS ON JURISPRUDENCE 145 (A.W.B. Simpson, ed., 1987). Duncan Kennedy, for one,
agrees that the law constrains. Duncan Kennedy, Freedom And Constraint In
constraint to material constrain upon our “chosen project[s],” including political projects).
Dworkin’s one-right-answer thesis attempts to avoid two forms of ontological indecisiveness: ties and incommensurability. Dworkin recognizes that each of these present the sort of choice in which there is no right answer to a given legal problem, but rather an open choice between compelling alternatives. His challenge to incommensurabilists is that his one-right-answer thesis is ontologically simpler than incommensurability, so that it is up to the incommensurabilist to provide some reason for adopting the more complex stance.

Dworkin’s problem is that, by his own admission, too simple an ontology increases the likelihood of ties. Accordingly, Dworkin’s account of judicial decision-making depends upon moderate complexity, such that ties are unlikely but that incommensurability is avoided. Built into Dworkin’s theory, however, is a commitment to moderate, second-order incommensurability between conflicting comprehensive moral or political points of view. Given his willingness to endorse, as a political theory, second-order incommensurability it is unclear why he would reject, as a political theory, endorsing the much simpler account of first-order incommensurability between values within a comprehensive point of view.

Dworkin is thus hoisted by his own petard: his theory is both too complex or not complex enough to avoid indecision. If it is too complex, he is susceptible to his own challenge to the incommensurabilists. If it is insufficiently complex, then widespread ties become a real possibility, undermining the availability of unique right answers. Too simple an ontology renders him susceptible to global commensurability: the position that Socrates takes. The Socratic response might be to emphasize epistemic indecision — the difficulty of knowing the right answer, even if there is one — of the sort that Hercules is specifically designed to preclude. Either form of indecision, however, suggests that law is a republic, not an empire, and that the intellectual humility of Socrates, not the muscular conviction of Hercules, provides the model for ideal judge.