Indecisive Reasons for Decision

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Contact Information:
St. Louis University School of Law
3700 Lindell Boulevard
St. Louis MO 63108
(314) 277-2944
demille33@slu.edu

About the Author:
Eric J. Miller is a Professor at St. Louis University School of Law and a visiting scholar at the University of Oxford. He received his LL.B. from the University of Edinburgh and his LL.M. from Harvard Law School, where he was also a Charles Hamilton Houston Fellow. Professor Miller served as a law clerk for Hon. Stephen Reinhardt of the Ninth Circuit Court of Appeals and for Hon. Myron H. Thompson in the Middle District of Alabama. His areas of interest include criminal law, evidence, civil rights law, and legal philosophy. He has recently published articles in the California Law Review, the Ohio State Law Journal, the Connecticut Law Review, and has an article forthcoming in the Arizona State Law Journal.

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Abstract

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. Ronald Dworkin suggests that such decisions are justified only if a judge can identify the one right answer to the legal problem, that is, some principled reason for decision that defeats all the competing reasons.

Dworkin famously introduces the idealized judge, Hercules, to demonstrate how to identify that right answer. When judges disagree about which answer is correct, according to Dworkin, they disagree about which among plural theories of political morality provides the best description of how to identify that right answer. Accordingly, Dworkin's judge is supposed to develop his or her political convictions to select and defend on among these plural points of view. Choosing the one right answer is thus a method of political commitment as much as a judicial decision.

Dworkin's account of judicial conviction and disagreement catches him between a rock and a hard place, not once, but twice. His 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.

Dworkin's solution to the problem of choice among plural reasons is to recast the difficulty of choice as a judicial character flaw: as judicial apathy or indecisiveness in choosing among competing theories. Judges can solve conflicts of incommensurable reasons by simply deciding to choose among the equivocal points of view. Unfortunately for Dworkin, 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 she has found 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 our judiciary.
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

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1 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 “conflict[ing] … 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)).
compelled or constrained to decide in a particular way?\textsuperscript{2}

Though judges must decide, judges may often be indecisive: unconvinced that the option they have chosen is the uniquely best resolution of the case. There are three ways in which decision-maker faced with a practical choice among conflicting options could be indecisive. The first is volitional indecision: the decision-maker lacks the sort of resolute or unified will necessary to decide the outcome,\textsuperscript{3} but is instead flummoxed or perhaps “paralyzed” by the options.\textsuperscript{4} In the strongest case of indecision, the judge may rationally know what decision she should make, but lacks sufficient resolve to select that outcome.\textsuperscript{5} In either case, what the judge 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.\textsuperscript{6}

\textsuperscript{2} The claim that judges are often not “really” compelled to decide a particular way is made by Robert Cover. \textit{See ROBERT COVER, JUSTICE ACCUSED: ANTI SLAVERY AND THE JUDICIAL PROCESS} 226-28 (1975) (discussing this feeling of conflict in terms of “cognitive dissonance”).

\textsuperscript{3} Unified will is a Kantian concept. \textit{See, e.g.}, CHRISTINE M. KORSGAARD, \textit{THE CONSTITUTION OF AGENCY: ESSAYS ON PRACTICAL REASON AND MORAL PSYCHOLOGY} (2008); \textit{see also} IMMANUEL KANT, \textit{GROUNDING FOR THE METAPHYSICS OF MORALS}; \textit{WITH, ON A SUPPOSED RIGHT TO LIE} (James Wesley Ellington, trans., 3d. ed., 1993) in which autonomous choice is one in which will is not divided (that is, heteronomous). On the problem of heteronomy, \textit{see RONALD DWORKIN, LAW’S EMPIRE} 214 (1993) (integrity as requiring “single coherent scheme of principle”); \textit{see also id. at} 184 (rejecting “inconsistency in principle among the acts of the state personified”); 188-190 (integrity as private and public commitment to fidelity to a scheme of principle).

\textsuperscript{4} Incommensurability is often discussed as producing volitional paralysis, particularly in the context of tragic choice. \textit{See NUSSBAUM, supra} note 1; Richard Warner, \textit{Incommensurability as a Jurisprudential Puzzle}, 68 CHI.-KENT L. REV. 147, 157 (1992). While paralysis may be a feature of tragedy, it is not a feature of incommensurability, and it need not be the case that all tragic choices are by their nature choices among incommensurables. I shall have a little more to say about this, \textit{infra}.

\textsuperscript{5} Here, unlike the incommensurability literature, there is a decisive reason for action, and the decision-maker knows the reason is decisive, but for some reason she remains unable to decide. Knowing what is right and failing to choose to do it is often presented in the Aristotelian literature as a problem of incontinence, and specifically, \textit{akrasia}. ARISTOTLE, \textit{NICHOMACHEAN ETHICS} 122-36 (Roger Crisp, ed., 2000). \textit{Akrasia} may differ from the Kantian problem of heteronomous choice in that heteronomy presupposes conflicting incommensurable points of view, whereas \textit{akrasia} does not. The differences between the two positions need not, however, concern us here.

\textsuperscript{6} For example, Scott Shapiro’s takes the view that, having once decided, a decision-maker ought not to reconsider her commitment to a rule in light of reasons to depart from the rule. \textit{See Scott J. Shapiro, Judicial Can’t, 35 NOÛS,} 530, 550 (Supp. 1, 2001) (“A rule,
The other two forms of indecision are epistemic and ontological and need not be attributable to some failure of judicial will. In each instance, there appears to be no single reason that is better than all the rest and so could 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 action. Alternatively, in the second type of case, the agent may know everything there is to know, but the reasons themselves are indecisive, presenting what Dworkin calls an “ontological question” about the nature of reasons or rationality.

Indecision contradicts Ronald Dworkin’s well-known view that there is one right answer to every legal case. Dworkin believes that, when faced with two options, a judge can always have an “opinion” about which side or argument to prefer. He this regards indecision as, among other things, a once adopted, is not a factor to be considered in future deliberation about whether to comply. Once adopted, the agent no longer deliberates about whether to comply. The rule-guided agent merely figures out what counts as implementation of the rule”). He believes that rules are binding, if at all, in a particularly strong manner: they constrict our will by “doing internally what Ulysses was able to do externally when he lashed himself to the mast. [To adopt a rule or point of view] is to forgo later choice by the operation of the Will.”

7 The relation of knowledge to action has become an important topic in current epistemology. See JOHN HAWTHORNE, KNOWLEDGE AND LOTTERIES (2004); John Hawthorne & Jason Stanley, Knowledge and Action, 105 J. PHIL. 571 (2008); JEREMY FANTL & MATTHEW McGARTH, KNOWLEDGE IN AN UNCERTAIN WORLD (2009).


9 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.

10 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.

11 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
volitional problem: a form of moral or political apathy, induced by the fragmentation of our moral or political values. 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 plural values or outcomes. Dworkin takes Hercules both to undermine the existence of ontological indecision and to show that judges can solve epistemic problems sufficiently well to choose among the relevant options. 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. Accordingly, gaps in our scheme of valuation will likely arise. This, gappy view of the nature of value entails that the Herculean option is wrong, or worse, senseless: the attempt to commensurate values falsifies the nature of value and of ethical choice.


13 See DWORKIN, supra note 3, at 239.

14 See, e.g., Dworkin, supra note 7, at 88-90.

15 See DWORKIN, supra note 3, at 265 (Hercules uses the same grounds for decision as a normal judge).

16 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.”).

17 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.
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.\(^\text{18}\)

Emphasizing the volitional aspects of Dworkin’s theory of integrity produces a surprising conclusion, and one that runs counter to his repeated emphasis on principled decision-making. 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 a judge with more humility and willingness to learn about himself and others in the face of indecisiveness.

In Section I, 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 II, 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 III, 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 epistemic 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 consistent, coherent theory of law such that she can identify the one right answer to any legal problem.\(^\text{19}\) The ordinary-language meaning of integrity captures each of two features essential to the Dworkinian concept. First, it emphasizes some sort of moral uprightness that Dworkin’s more technical understanding translates into a requirement that judges adopt a principled stance towards the law as morally justified and justifiable. Second, Dworkin conceives of the law and of his judges as manifesting the sort of

\(^{18}\) 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.”).

\(^{19}\) See Dworkin, supra note 3, at 3-6, 37-43, 87-88.
unity or cohesion that Dworkin translates into a requirement of coherence, such that the legal system embody a “seamless web” of rules and standards applicable to any case, and the judicial decision-maker interpreting the law experiences it as such.

For any judge or engaged jurist, integrity precludes the sort of internal division between law and morality or fragmentation among values that could engender internal conflicts over which outcome to prefer. 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 theory stands as a radical alternative to other accounts of the relation between law and legal decision-making, namely those that propose that a judge’s legal reasons for decision can conflict with their moral or political reasons for decision. In any case that comes up for decision, law-as-integrity demands a form of principled adjudication in which judges reflect upon the account of morality that best justifies their choice in light of

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21 See DWORKIN, supra note 3, at 183-84, 188-90, 243, 245.
22 See DWORKIN, supra note 3, 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).
23 See DWORKIN, supra note 3, at 237.
24 See DWORKIN, supra note 3, 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.
25 See DWORKIN, supra note 3, at 242-43, 254-56.
26 This is a staple of legal positivism, but not only legal positivism. See, e.g., Scott J. Shapiro Law, Morality, and the Guidance Of Conduct, 6 LEGAL THEORY 127, 128-29 (2000); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 243-46 (2d ed. 2011) (discussing the manner in which authority, including legal authority, creates exclusionary reasons for action that explain conflicts with morality).
the legal system and their community’s political morality. Accordingly, the goal is to show, not how law and morality pull against each other, but how they can be made to cohere.

Dworkin’s central claim is that there may be different domains 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 practice (or within a genre within that domain or practice). For Dworkin, legal and moral judgment like aesthetic judgment comes down to an agent’s rationally tested convictions about what explanation or interpretation is the best, all things considered. Each domain or social practice provides a check upon which convictions have, depending upon the relevant domain or practice, plausible political, moral, and aesthetic value, and so on.

Here Dworkin takes a Rawlsian turn. The philosopher John Rawls revitalized political philosophy by applying the methodologies of constructivism and “reflective equilibrium” to provide moral and political defence of a liberal theory of justice. Rawls’s reflective equilibrium 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. Rawls’s “Kantian constructivism” relies both on a particular understanding of the equal

27 See DWORKIN, supra note 3, at 225.
29 Dworkin, supra note 28, at 132-38.
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).
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).
33 See RAWLS, JUSTICE, supra note 31, at 121.
34 See Id at 221-227; Rawls, Kantian, supra note 31, 515-572; JOHN RAWLS, POLITICAL LIBERALISM 49 (2005) (hereinafter RAWLS, LIBERALISM). For a useful critique
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}

Dworkin’s account of integrity provides a significant twist on the Rawlsian account emphasizing a much greater cohesion between a judge’s (as public decision-maker’s) personal and public morality.\textsuperscript{36} Integrity also extends Rawls’s process of reflective equilibrium into “a more general account of interpretation, which is concerned with explaining how our judgments about various domains of value can be correct.”\textsuperscript{37}

For Dworkin, adjudication is to be understood as a distinctive and legally primary social practice. Constructing a theory of law consists in demanding what moral, political, and legal theory could justify that practice. Over time, Dworkin has analogized adjudication to a variety of social practices: courtesy,\textsuperscript{38} novel-writing,\textsuperscript{39} and so on. In each case, Dworkin is concerned to demonstrate that a theorist cannot make sense of the practice without also seeking to explain or justify it both in terms that the participants in the practice would endorse and in terms that present the practice in its morally best light.\textsuperscript{40}

Dworkin’s version of reflective equilibrium thus depends upon first identifying the set of materials that any informed member of the practice of adjudication 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 practice.\textsuperscript{41} This internal perspective places each jurist, theorist and judge alike, in the position of a participant engaged in a rational reconstruction of the legal system from the inside.

The internal perspective in turn generates important theoretical

\textsuperscript{35} See Rawls, \textit{Kantian}, supra note 31, at 537.


\textsuperscript{38} See DWORKIN, supra note 3 at 47-67.

\textsuperscript{39} See Ronald Dworkin, \textit{Law as Interpretation}, 60 Tex. L. Rev. 527, 540-47 (1982); DWORKIN, supra note 3 at 228-38.

\textsuperscript{40} See, e.g., DWORKIN, supra note 3 at 65-69; \textit{id.} at 230-36.

commitments about how best to justify a given account of a practice of adjudication as both factually accurate and morally defensible. Here, Dworkin turns to a form of constructivism that, like Rawls’, draws upon the methodology of equilibrium: a jurist must “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.”

Dworkin provides a relatively consistent account of the process of judgment across the various practices he has considered. In each case, judgment has both a backward- and a forward-looking aspect. 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.” 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]” 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:

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.

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42 DWORKIN, supra note 3, at 90. 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”).

43 See DWORKIN, supra note 3, at 225; he also calls it a descriptive and normative aspect. See Dworkin, supra note 20 at 123.

44 See, e.g., Dworkin, supra note 20 at 115-17 (discussing dimension of fit with constitutional, case and statutory law as part of the process for deriving the best answer to a legal problem); DWORKIN, supra note 3, at 66-68; id. at 246-56 (discussing aesthetic and moral applications of fit).

45 DWORKIN, supra note 3, at 91.

46 DWORKIN, supra note 3, at 63-64.
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.47

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.48 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.49

The same process of fitting theories to intuitions occurs in the law.50 Legal theories must justify legal authority: what Dworkin calls state-sponsored uses of force.51 These theories must make sense of our pre-theoretical understandings of the sorts of thing any account of law must explain. For example, any account of a given legal system must include the status of the various constitutions, statutes, ordinances, cases, opinions, and so on that count as relevant sources of law, as well as the various institutional agents, including legislators, judges, administrative officials, police officers, and so on entitled to create, interpret or execute the law. The range of legal materials a judge must consider is thus quite large: not only legal cases, statutes, and constitutions, but “the great network of

47 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 3, at 227-28.
48 Dworkin, supra note 28, at 117-118.
49 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 3, at 245-258 (discussing process by which convictions of justice are tested against legal and community norms).
50 DWORKIN, supra note 3, at 227.
51 DWORKIN, supra note 3, at 93, 190 (the central question of political morality is the justification of state-sponsored uses of force).
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 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.”

52 DWORKIN, supra note 3, at 245.

See DWORKIN, supra note 3, 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 you background [domain-relevant] convictions”).

54 See, e.g., DWORKIN, supra note 3, at 250 (discussing persistance of judicial conflict after work of interpretation is done).

55 See, e.g., DWORKIN, supra note 3, at 233, 254-58 (discussing constructive interpretation in literature and law).

56 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 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.

57 Dworkin, Interpretation, supra note 52, at 543-44.
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. It could accurately predict that participants in the practices fully remove their hats, or merely tip them, or do not remove them at all. Nonetheless, participants would be surprised if informed that the practice of hat-doffing had a lunar component, and wuld certainly reject the claim that, given the lunar cycle, they ought to doff their hats thus and so. The participants would object that the lunar explanation, though descriptively interesting and informative, missed the point of the practice of hat doffing. That is, it left out of the account the participants’ internal attitude to the practice.

Accordingly, 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.58

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.59 Not just any conception will do: the theorist must provide the best version of the extant justifications employed by the community to support its practice. Accordingly, the participants might be surprised to hear that the practice aimed at honoring income-equality among participants, and so those with larger or more elaborate hats should modify them to fit with the more demure ones. Again, the participants might respond, the observer had missed the point of the practice; this time because the observer sought to impose her own values on the community, rather than explicating the practice in terms of the community’s values.

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

58 DWORKIN, supra note 3, at 58.
59 DWORKIN, supra note 3, 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.”).
and purpose of the social practice of law from the participants’ point of view.

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.  

The forward-looking aspect is thus quite stringent. Any 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.”  

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.” 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. 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).  

Dworkin, supra note 3, at 243.

Dworkin, supra note 3, at 245.

Dworkin, supra note 3, at 260.

See Dworkin, supra note 3, at 255; see also id. at 235-37, 244-45, 250.

Dworkin, supra note 3, at 120.
is only better or worse given its presuppositions about the standards of evaluation.

Dworkin’s account of fairness, justice, and procedural due process provide different constraints on any account of justified political coercion, including the result of an adjudicative process. Considerations of fairness ensure that any political or moral theory must treat its subjects as having equal political or moral status, “requiring in practice arrangements which give all citizens equal influence in the decisions that govern them.”

Considerations of justice then explain the sorts of moral and political rights accruing to each individual that political institutions are bound to honor. Like Rawls, Dworkin considers justice a virtue of political institutions, which are required to ensure that their decisions embody a morally defensible outcome.

Justice and fairness operate as the “two constituent virtues of political morality,” and so underpin the justification of any political institution. Procedural due process operates as institutional concept generated by the practice of adjudication. It specifies the procedures that an adjudicative body should use to “promise the right level of accuracy and otherwise treat people accused of violation as people in that position ought to be treated.”

While the applicable standards of justice and fairness must justify the practices and institutions of a specific political community is constructed, Dworkin does not intend the standards and principles of a given community to be read in skeptical manner to suggest that a community’s conception of justice, fairness, and due process embody moral and political virtues because they are the virtues of that community; rather, the conception is justified because they are morally sound. Thus, even if Dworkin is neutral as between the ways in which a given community can manifest its conceptions of justice and fairness, Dworkin is not neutral about what

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67 See DWORKIN, supra note 3, at 97 (“Justice is a matter of the correct or best theory of moral and political rights, and anyone’s conception of justice is his theory, imposed by his own personal convictions, of what those rights actually are.”). Intriguingly, Dworkin treats justice as a social practice, “an institution we interpret … [with] a history … [that] we each join … when we learn to take the interpretive attitude towards the demands, justifications, and excuses we find other people making in the name of justice.” Id. at 73.
68 See DWORKIN, supra note 3, at 165.
69 DWORKIN, supra note 3, at 249.
70 DWORKIN, supra note 3, 165.
justice and fairness require. Accordingly, Dworkin’s commitment to liberalism represents his claim that it best embodies a conception of the just and fair state, by guaranteeing equality of respect and generating the most expansive recognition of political rights.

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. For Dworkin, judges are supposed to develop convictions about what to do in particular cases 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.”

Indecision is a major impediment to forming such a conviction. Indecision comes in three forms: ontological, epistemic, and volitional. Ontological indecision is a feature of the moral or legal world, perhaps because, as a matter of moral or legal fact, various values or options are equal, incommensurable, or incomparable. Epistemic indecision entails that on occasion we cannot or do not know what the right outcome is, and so faced with a variety of options that make some claims to truth, as more or less probable, our choices must be hesitant and revisable (if there is room for decision at all). Finally volitional indecision suggests that the agent cannot bring her self to choose, whether or not there is a right outcome, and whether or not the agent knows it.

Because he thinks that the epistemic hurdle to forming such convictions is surmountable, and the ontological one non-existent, Dworkin assumes 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.” Since judges can compare the various competing legal claims that must be

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71 See DWORKIN, supra note 3, at 41-43, 87-88, 250, 264, 404-05.
72 See, e.g., DWORKIN, supra note 3, 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. See id. at 51-52, 87-90, 248-50, 259.
73 Dworkin, supra note 7, at 85.
74 Dworkin, supra note 7, at 89.
adjudicated “against the general background political culture in which that statute was enacted … experience shows we can always have an opinion.”

A. Convictions and Complexity

Dworkin’s theory of integrity-as-conviction ensures that, even if the decision-maker cannot persuade others that her point of view is the best interpretation, she can (and 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, 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.

A first challenge to his thesis is ontological: the sort of moral, legal, and political conviction he demands is impossible because the world is indecisive. Assuming that the agent knows that the reasons for action are in equipoise, incommensurable, or incomparable, expressing conviction that there is one right answer would misrepresent the world.

There are at least three ontological explanations of indecisiveness among values, reasons, or options that he must confront: incommensurability, incomparability, and equality. Briefly, reasons are incommensurable if there is no way to suggest one is better than the others and they are not equal. Reasons are incomparable if there is some reason for refusing to weigh them against each other, perhaps because some second-order reason excludes first-order comparisons of this sort. Reasons are equal if they are comensurable and 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

75 Dworkin, supra note 7, at 89 (emphasis added).
76 DWORKIN, supra note 3, at 90.
77 DWORKIN, supra note 3, at 90; Dworkin, Rawls, supra note 35 at 1392, 1396.
78 See, e.g., RUTH CHANG, MAKING COMPARISONS COUNT (2002).
79 See, e.g., JOSEPH RAZ, MORALITY OF FREEDOM 329 (1986).
81 See Ronald Dworkin, Can Rights Be Controversial?, in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 279, 284-86 (1978) [hereinafter Dworkin, Rights].
INDECISIVE REASONS FOR DECISION

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 spent much time expounding it. Rather, I shall consider a more 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’s solution to the ontological problem presented by incommensurability is to recharacterize it as a volitional problem stemming from lack of conviction on the part of the decision-maker. Dworkin regards conflicts among incommensurable (and, to a lesser extent, equal) reasons as a simple problem of choice: his theory of law-as-interpretation is designed to preclude volitional indecision. 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.

Volitional indecision may be condoned or criticized as a response to lack of knowledge or to indifference among the underlying reasons for action. Accordingly, if an agent cannot know which reason is decisive or (in the inclusive sense) if the underlying reasons are indecisive, then the agent is permitted volitional indecision. If, however, an agent could know that a reason is decisive and fails to obtain that knowledge, then her failure to know is criticizable as a form of negligence. An agent may be censured more strongly in circumstances in which she knows that there is a decisive reason for action. This second case is often described as a form of

82 See, e.g., DWORKIN, supra note 3, at 120; Dworkin, Literature, supra note 52, at 159.
83 See, e.g., TIMOTHY WILLIAMSON, KNOWLEDGE AND ITS LIMITS 238-41 (2000) (discussing norms of assertion as justifying praise or criticism of speech acts); See also JOHN HAWTHORNE, KNOWLEDGE AND LOTTERIES (2004).
intemperence or *akrasia*.

If, however, the underlying reasons are indifferent, whether because in equipoise or because incommensurable, then volitional indecision may be condoned as a rational response to the conflict among reasons. Some caution is, however, warranted here. The point is not that absent some decisive reason for a particular decision there is a reason not to pick one option over another. The point is that there is insufficient reason in favor of either choice. In such circumstances, the agent is permitted to rely on one or other of the competing reasons. The agent may or may not be permitted to abstain entirely from deciding. Only if the agent is permitted to abstain from picking is volitional indecision condoneable (or perhaps even praiseworthy). Otherwise, such indecision may be condemned.

As we shall see, Dworkin thinks that incommensurabilists endorse the position that, lacking a decisive reason, an agent cannot decide. Indeed, some do appear to endorse this sort of “paralysis” as part of the phenomenology of indecision. Dworkin’s response is that such paralysis is a form of volitional indecision that is politically or morally criticizable: that in some circumstances, the agent is required to pick an outcome. Hercules’ purpose, in the theory of law as integrity, is to demonstrate how committed moral and political agents can resolve volitional indecision by generating a personal conviction about what is the uniquely best solution to any legal problem. The conviction requirement precludes indecision about the moral, political, or legal value of the decision. However, while Dworkin is correct that, where reasons are indecisive, an agent may nonetheless be volitionally committed to picking, he is wrong that the agent must be volitionally committed to generating a conviction that her choice is (i.e.,

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84 Or perhaps absent any reason for a particular decision. Where the appropriate reasons are provided by closed, institutional systems of reasons, a gap may arise where there is no institutional reason for decision. In such circumstances we say the decision presents a case of of first impression. Here, there is a permission to decide any way the agent chooses.

85 *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). *ALSO SEE STANFORD ENCYCLOPEDIA FOR OTHER PARALYSIS CITES*


87 DWORKIN, *supra* note 3, 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”).
justifying her choice as) uniquely correct.

**B. Convictions and Constructivism**

Hercules operates as a thought-experiment — supposing a judge could be both omniscient and omnipotent — to solve 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. 88 Each judge must, according to Dworkin, eschew the various forms of indecision and fix upon the “one right answer” in the case before her. 89 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. 90

Integrity thus demands that, for any one person, their convictions about which legal outcome is best are homogenous not heterogenous. 91 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 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. 92 Dworkin’s judge’s reasons for decision are transparent. 93

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88 On political and moral convictions, see DWORKIN, supra note 3, at 90-100, 135-45 (1986).
91 See, e.g., DWORKIN, supra note 3, at 178-80; see also id. at 184-90, 219-20.
92 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.
93 Dworkin thus thinks that judges must act sincerely in deciding cases. See e.g., Ronald Dworkin, Justice and Rights, in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY
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. Accordingly, whatever option Hercules chooses will be the right one from his perspective: as such, there seems to be no room for regret; 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 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. Hercules must not only choose, but choose the theory that avoids ontological and epistemological uncertainty or indecision.

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 make prejudice or self-interest in particular cases. The constructive modelfakes 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 Dworkin, supra note 3, 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).

94 So, for the most part, are we. See Dworkin, supra note 3, 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.”).


96 See, e.g., Dworkin, supra note 30, at 1083.

97 Dworkin, supra note 7, at 90; Dworkin, supra note 11, at 272-75; Dworkin, supra note 28, at 134-38.
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.98

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.99 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 the case and his public pronouncement.100 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

98 Dworkin, Rights, supra note 81, at 280.
99 DWORKIN, supra note 3, 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 valutes 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.
100 DWORKIN, supra note 3, at 189-90, 248-50, 255.
result the agent can acknowledge with confidence as the one right answer: they are, in Dworkin’s terms, “hard cases.”¹⁰¹ 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.¹⁰² 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,¹⁰³ or because (2) she lacks some information about how they would taste.¹⁰⁴ But everyone else is ready and 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

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¹⁰¹ Dworkin, supra note 20, at 83.
¹⁰² In part, his theory depends upon there being few or no equally good options. See Dworkin, Rights, supra note 81, at 286-87; Dworkin, supra note 9, at 31.
¹⁰³ 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).
¹⁰⁴ 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 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.
would be as odd as choosing none.\(^{105}\) 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:\(^{106}\) 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.\(^{107}\) 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.\(^{108}\) 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).

**Chang:**

Problem for Chang is that parity/equality \(\rightarrow\) indecision
No decisive reason and no one justification

Having an opinion about or picking an option, in other words, need not

\(^{105}\) 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.


\(^{107}\) 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).

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 arguments from consequences. In that case, the decision-maker will have a conviction about the proper grounds of moral justification that she will be

109 See, e.g., JOSEPH RAZ, PRACTICAL REASON AND NORMS 25-28 (1990) (who calls such rationally adequate answers “complete.”).
111 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 3, at 245-50.
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 [s]he 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.

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112 Dworkin, supra note 28, at 135.
113 Dworkin, supra note 7, at 88-89.
114 Note that John Finnis has a long section, in his criticism of LE, on Dworkin’s epistemology. WHAT DOES FINNIS SAY

My critique of Dworkin’s epistemology is somewhat different. The central worry Dworkin seeks to address is decision under conditions of uncertainty. If the fact that $p$ is a reason for agent $X$ to perform act $\phi$, then $X$ is justified in $\phi$-ing only if $X$’s doxastic state is sufficiently robust. Some accounts of the relevant belief demand only that $X$ has a credence level sufficiently approaching certainty: that is, $X$ is personally willing to bet “that $p$” is true given sufficiently high odds. CITE TO HACKING. This is not Dworkin’s position; it is too much like the relativist claim that we noted earlier he rejects as too skeptical an account of value.

A more objective or interpersonal account of the relevant belief may present $X$ as making the hypothesis that $\phi$-ing is justified on condition that there is some logical relation between $X$’s evidence and her hypothesis that $p$. So long as the evidence is sufficiently high, rendering an outcome probable beyond some degree, then $X$ has reason to $\phi$. CITE TO HACKING. Such an account might fit with Dworkin’s methodological commitment to reflective equilibrium: the agent measures her belief that $p$ against the moral and political evidence, and modifies her claims in light of these objective, underlying facts. By a process of alternatively considering her account and the facts, she approaches greater and greater certainty (and achieves more and more conviction) about the moral validity of her position. In this way, the decision-maker moves from a subjective position to an intersubjective one, and from a low-credence, low-conviction epistemic position to a high-credence, high-conviction epistemic position.

Hercules, as omniscient, cures subjectivity in the agent’s reasoning process. That is, Hercules precludes mistakes in the agent’s initial assumptions or in assessing the subsequent evidence as objectively true. Hercules thus ensures that the process of dynamically refining the agent’s moral beliefs is not only valid, but sound. A less superhuman intellect may lack assurance that her credences track reality sufficient to warrant the level of conviction Dworkin requires.

Other accounts stress knowledge as the norm of action JOHN HAWTHORNE,
The Dworkinian judge thus starts with her own moral and legal intuitions, “h[er] own convictions and preferences,” and proceeds to “inspect and reform [her] 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 “[sh]e 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.

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

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115 Dworkin, supra note 20, at 123.
116 DWORKIN, supra note 3, at 111.
117 Dworkin, supra note 20, at 130.
118 See DWORKIN, supra note 3, at 78-85.
119 Dworkin, Rights, supra note 81, at 280.
120 Dworkin, Rights, supra note 81, at 280.
121 See DWORKIN, supra note 3, at 78-85.
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. The early Dworkin’s one-right-answer theory required the decision-maker to decide what it is best to do, all things considered. Deciding what is best mandated some form of comparison or commensuration along each of the dimensions of fit and political 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

122 Compare Ronald Dworkin, Can Rights Be Controversial?, in RONALD DWORKIN, 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 DWORKIN, A MATTER OF PRINCIPLE (1986) with Dworkin, supra note 3. 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 “tr[ying] 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).

123 Dworkin, Rights, supra note 81, at 285-87.

124 See, e.g., Dworkin, Rights, supra note 81, 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).

125 See, e.g., Dworkin, supra note 9, at 30-31 (discussing dimensions of fit and morality). See also DWORKIN, supra note 87, at 340-42 (discussing fit and morality).

126 FINNIS, supra note 15, at 373-74 (discussing Dworkin’s early work as two-stage process).
the judgement to establish how much legal material was covered by any proposed political theory.\textsuperscript{127} 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.”\textsuperscript{128}

Dworkin’s early theory was concerned to deny the claim that, in “hard cases,”\textsuperscript{129} judges have “strong discretion”;\textsuperscript{130} 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.”\textsuperscript{131} Conflict occurs between the judges but not within a judge’s understanding of the law. Her decision “represents a choice”\textsuperscript{132} among conflicting judgments of fit and political morality no matter whether the case is easy or hard, determined by reason or indeterminate.\textsuperscript{133} Either way, the ultimate criterion for decision was the judge’s confidence in the soundness of her legal and political judgments.\textsuperscript{134}

Dworkin initially acknowledged that hard cases may perhaps represent a “‘tie’ judgement.”\textsuperscript{135}

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

\textsuperscript{127} “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.
\textsuperscript{128} Dworkin, supra note 9, at 30-31.
\textsuperscript{129} See Dworkin, supra note 20, at 81-130 (1978).
\textsuperscript{131} Dworkin, Rights, supra note 81, at 282.
\textsuperscript{132} Dworkin, Rights, supra note 81, at 282.
\textsuperscript{133} Dworkin, Rights, supra note 81, at 282.
\textsuperscript{134} Dworkin, Rights, supra note 81, at 285.
\textsuperscript{135} Dworkin, Rights, supra note 81, at 285. See also Dworkin, supra note 20 at 81.
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{136}

Dworkin thus represented the choice facing a judge as similar to that facing Buridan’s ass:\textsuperscript{137} which of two equally appetizing, but equally distant bales of hay to choose.\textsuperscript{138} 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{139}

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 systems are “complex,”\textsuperscript{140} that is, they are:

\begin{enumerate}
\item Dworkin, \textit{Rights}, supra note 81, at 285.
\item On Buridan’s ass and similar problems, see Nicholas Rescher, \textit{Choice without Preference}, 51 \textit{Kant-Studien} 142 (1959/1960).
\item Dworkin, \textit{Rights}, supra note 81, at 287. For further comments on complexity, see e.g., Dworkin, supra note 20, 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 …”).
\end{enumerate}
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 beasts 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 “petitites 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 towards either.” Given moral complexity, Leibnitz thinks, there are likely to be “unperceived impressions, which are capable of inclining the balance.” Similarly, in 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.

Dworkin’s inclination here is to suggest that, in the case of ties, our chosen cale is simply insufficiently discerning to discriminate among right and wrong results. His example is of a horse race in which the management

141 Dworkin, Rights, supra note 81, at 286.
142 Dworkin, Rights, supra note 81, 286 (emphasis added).
143 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 81, 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 20, at 119; or when he discusses the “complex matters of political administration.” See Ronald Dworkin, Constitutional Cases in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 131, 133 (1978).
144 Rescher, supra note 130, at 161.
145 Rescher, supra note 130, at 161 (his italics).
146 Rescher, supra note 130 at 161.
147 Dworkin, Rights, supra note 81, at 286.
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 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 for switching to a more fine-grained point of view.

More fine-grained, however, does not necessarily mean more complex, and vice versa. A more complex system could also produce more lumpiness. That is, the closer we look at it, the less smooth the world appears. Choosing among competing options becomes a matter of selecting among roughly equivalent options. Or a more complex system could reveal that things just are in equipose, as the cruder scale indicated.

Moreover, 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 ameliorates 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. The problem is not only, however, how much law the judge must evaluate, but what the judge must know about the moral world in which the law and a particular decision are to be evaluated. By analogy with the horse race, the judge may seek to limit consideration to the two horses in the race that are tied at the finish-

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148 Dworkin, Rights, supra note 81, at 286.
149 Put differently, the more epistemically complex the world, the lower should be an agent’s credences. See, e.g., David Lewis, Desire as Belief, 97 MIND 323-332 (1988). Or, on the Williamson model of knowledge, it may be that an agent requires more evidence to know epistemologically complex facts. TIMOTHY WILLIAMSON, KNOWLEDGE AND ITS LIMITS (2000); see also JOHN HAWTHORNE, KNOWLEDGE AND LOTTERIES (2004).
line, rather than the relative positions of all the horses in the race. However, the judge must also understand how the camera and the underlying technology for enhancing its pictures are prone to distort or accurately represent the position of the horses relative to some line, and how thick the line is to be drawn given the pixellation of the picture. Even then, the possibility of a dead heat cannot be discounted.

Given this background knowledge, the challenge of understanding the law is nominally one that requires “a lawyer of superhuman skill, learning, patience and acumen … Hercules.” Accordingly, Dworkin’s counsel of “humility,” 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, epistemic indecision remains in practice a feature of ordinary judicial decision-making. In cases of epistemic uncertainty, where confidence risks becoming overconfidence, humility, not conviction, is the right answer.

Dworkin solution is to point out that epistemic indecisiveness in the 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.”

Post-hoc conviction provides the wrong sort of justification for decision. “Coming to think” that one reason was better than the others is self-deception: better to grasp nettles than to avoid them. In the equipoise

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150 Dworkin, supra note 30, at 1083.
151 Dworkin, supra note 30, at 1109.
152 Dworkin, Rights, supra note 81, 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.
153 The worry about self-deception also provides a response to the claim, advanced by Ruth Chang, that reasons where reasons are incommensurable or equipose, so that there is no decisive way to choose among them, the decision-maker should select some alternative
situation, 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.

However, the sort of conflict that produces inter-personal judicial disagreement is not epistemic but ontological (and especially if the indecision due to equality is sufficiently widespread) then Hercules would be unable to arrive at a right answer because, in fact, there is no unique outcome to choose. Instead, there is a permission to use discretion to pick among the available outcomes.

Without also precluding equipoise, commensurability will not support Dworkin’s claim that the right answer or best interpretation demands some reason for choosing one option over the others. Furthermore, his response to equipose — a pluralistic account of value, such that there are multiple plausible comprehensive political or moral points of view from which to assess fit and justice — tends to undermine an ontological commitment to 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.

“covering value” that makes comparison possible. See e.g., Ruth Chang, Introduction, in INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON, 1, 7-9 (Ruth Chang, ed., 1997). Changing the evaluation, however, like “coming to believe,” misrepresents the range of justifications on which the parties relied. To use Chang’s example: if the two finalists in a music contest were each adjudged equally (or incommensurably) good on some evaluative scale of musical talent, it would not do to tell them that one had been chosen because she was more attractive. They did not ask to be judged on that alternative scale of value, and would justifiably criticise the move to some alternative means of breaking the tie.

\footnote{CITE TO HART}
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].”155 He subsequently moves away from this position, rejecting the Liebnitzian petites perceptions solution — that some historically remote case might tip the balance one way or another.156 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.”157 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.158

D. The Fog of Choice

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.159 Nonetheless, while the decision-maker’s

155 Dworkin, supra note 9, at 30.
156 Dworkin, supra note 10, at 272.
157 Dworkin, supra note 9, at 31.
158 Dworkin, supra note 7, at 89.
159 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
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 quantitative judgment about the amount of legal material each political or moral theory covers.160 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.”161 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.”162 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

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160 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).
161 DWORKIN, supra note 10, at 272.
162 DWORKIN, supra note 10, at 272.
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.\textsuperscript{163} 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] presupposes a conception of morality other than some conception according to which different moral theories are frequently incommensurate.”\textsuperscript{164}

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.\textsuperscript{165}

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

\textsuperscript{163} DWORKIN, supra note 10, at 272.
\textsuperscript{164} DWORKIN, supra note 10, at 272.
\textsuperscript{165} This way of phrasing matters leaves both equality and incommensurability as available explanations of indecision.
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 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 is again to emphasize volition.

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 Leibnitzian 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

166 Rescher, supra note 130, at 161.
167 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 81, 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. The idea of rough equality does not, however, depend upon the practical inability to measure, but the conceptual or ontological absence of a measurement that could, even in principle, be sufficiently fine-grained to measure the sorts of difference at stake. It suggests that our moral measurements are coarser than Dworkin allows.
168 “Mackie’s main objection is … a political objection,” Dworkin, supra note 11, at 272.
169 “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.
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 Leibnitzian 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 this point that Dworkin becomes repeatedly inscrutable.170

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.171

The idea that complexity is an ontological phenomenon thus undermines

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170 Dworkin, supra note 7, at 88-90; Dworkin, supra note 10, at 271-73; Dworkin, supra note 9, at 31-32.
171 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.
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.

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. 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 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”\textsuperscript{172}; 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,

\textsuperscript{172} Michael Stocker, Plural and Conflicting Values 165-66 (1990).
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 “ha[s] in no way failed to get the good [she] was really aiming at.”\textsuperscript{173}

There reasons for doubting whether Stocker’s version of value monism requires the sort of simple comparisons of value he projects.\textsuperscript{174} 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.\textsuperscript{175} 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.\textsuperscript{176} And even on a pleasure-based hedonic account of value, there are reasons to suspect that values can be of different kinds, and so sufficiently plural to avoid monism.\textsuperscript{177}

\textsuperscript{173} STOCKER, supra note 148, at 169.

\textsuperscript{174} 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).

\textsuperscript{175} See, e.g., ARISTOTLE, NICHOMACHEAN ETHICS 122-36 (Roger Crisp, ed., 2000).

\textsuperscript{176} 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 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. 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.”).

\textsuperscript{177} Aristotle provides a more detailed account of the distinction between simple and complex pleasures than Mill. See ARISTOTLE, NICHOMACHEAN ETHICS 187-92 (Roger Crisp, ed., 2000). There, Aristotle claims that pleasures differ in kind as the activities differ
Monism denies that there are other 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.

The commensurabilist ontology is simpler than the incommensurabilist. 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 burden of proof. 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. He must maintain that conflicting reasons for decision are sufficiently complex to preclude first-order equality, but sufficiently simple to avoid first-order incommensurability. 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

\[\text{in kind, and furthermore that these pleasures are not simply homogenous: they can conflict. If successful, these arguments rebut Stocker's worries about value-monism. They do not provide support for Dworkin’s one-right-answer or integrity theses, however because they fail to preclude the possibility that pleasures, whether simple or complex, may be of equal value or intensity.}\]

\[\text{178 There is, however, a different way of eliminating conflict among values, and that is to stipulate that values do not conflict, but instead mutually support each other. That move concedes the incommensurabilists ontological point.}\]

\[\text{179 Dworkin made a version of this argument as early as the 1970s. See Ronald Dworkin, The Model of Rules II in RONALD DWORIN, TAKING RIGHTS SERIOUSLY 46, 71 (1994) (1977); see also NRA, supra note 9, at 31-32. For a later version of the argument that more directly addresses the incommensurability problem, see Dworkin, supra note 7, at 88-90.}\]
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 just this point that Dworkin becomes repeatedly inscrutable. 180

III. INCOMMENSURABILITY

A variety of theorists, including Mackie,181 Raz,182 Finnis,183 and in a different way, Duncan Kennedy,184 pointed out that, on occasion, a given jurist may be personally conflicted because there are multiple 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,185 he has now developed a powerful response. Dworkin insists that, despite his advocacy of complexity, his is an ontologically simple position: certainly more simple 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

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180 See Dworkin, supra note 7, at 88-90; DWORKIN, supra note 10, at 271-73; NRA, supra note 9, at 31-32.
182 See e.g. RAZ, supra note 15, at 309 n.64 (providing an incommensurability response to Dworkin’s theory of coherence).
183 FINNIS, supra note 16; Finnis, supra note 15, at 357.
185 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”).
challenge. On the one hand, he retreats from the commensurabilist account of moral, political, and legal judgment. 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 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

186 See Dworkin, supra note 3, 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.”).
187 See Dworkin, supra note 3, at 248.
188 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.
189 Dworkin, supra note 7, at 89.
190 Id.
191 Id.
192 Raz, supra, note 71, at 322-43.
incommensurability,\textsuperscript{194} 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 $A$.\textsuperscript{195} 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.”\textsuperscript{196} 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.”\textsuperscript{197}

Intransitivity does not, however, uniquely identify incommensurability: exclusionary reasons can also generate intransitivities. According to Raz, reasons may conflict in a variety of ways.\textsuperscript{198} 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\textsuperscript{199} one that, in combination with the first-order reason

\textsuperscript{194} Raz, supra, note 71, at 325-26.


\textsuperscript{196} Raz, supra, note 71, at 322.

\textsuperscript{197} Raz, supra, note 71, at 325.

\textsuperscript{198} 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).

\textsuperscript{199} 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.”).
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 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.

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201 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.


203 RAZ, supra, note 71, at 174.
Furthermore, incommensurability cannot explain some features of incomparability.\textsuperscript{204} Across a range of cases, exclusion better explains incomparability than incommensurability does.\textsuperscript{205} Incomparability is a somewhat vague term: it includes both the inability and the refusal to compare one reason or value against another.\textsuperscript{206} Since incommensurability entails that competing values cannot be reduced to each other or measured in terms of some independent value, the incommesurabilist’s claims must be that comparisons are nonsensical or arbitrary.\textsuperscript{207}

Comparison misrepresents the reasons (or better, falsely claims that there could be a decisive reason) for choosing one value over others.\textsuperscript{208} 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{209} 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 — “conceptual incommensurability”\textsuperscript{210} that renders comparisons as senseless “just by understanding the concepts involved”\textsuperscript{211} — is irrelevant in the political

\textsuperscript{204} Chang thinks it is to take sides. \textit{See} Ruth Chang, \textit{Introduction}, in \textit{INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON}, 1 (Ruth Chang, ed., 1997).

\textsuperscript{205} 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. \textit{See} Cass R. Sunstein, \textit{Incommensurability and Valuation in Law}, 92 Mich. L. Rev. 779, 801-802 (1994).


\textsuperscript{207} \textit{See}, e.g., Finnis, \textit{supra} note 16.

\textsuperscript{208} 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.” \textit{JOHN FINNIS, FUNDAMENTALS OF ETHICS}, 87-88 (1983). \textit{See also} Finnis, \textit{supra} note 15, at 115.

\textsuperscript{209} 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{210} Dworkin, \textit{supra} note 7, at 89.

\textsuperscript{211} Dworkin, \textit{supra} note 7, at 89.
sphere.\footnote{Dworkin’s example of conceptual incommensurability is a question such as: “Which is more clear, an argument by Descartes or the Greek sky?”; Dworkin, \textit{supra} note 7, at 89.}

There are two possible reasons why this might be so: first, the volitional claim that an agent can always choose among competing incommensurable reasons; and second, a scalar claim that even if cardinal comparisons are impossible, ordinal rankings may still be made. Conceptual incommensurability, Dworkin seems to think, reduces incommensurability to cardinal comparisons among competing values. Like Ruth Chang,\footnote{See, e.g., Ruth Chang, \textit{Introduction}, in \textit{INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON}, 1 (Ruth Chang, ed., 1997).} he suggests that ordinal comparisons may still be on the table. Consider, for example, John Finnis’s 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.”\footnote{FINNIS, \textit{supra} note 16, at 115.} 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.\footnote{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. \textit{See} THOMAS S. KUHN, \textit{THE STRUCTURE OF SCIENTIFIC REVOLUTIONS} (2d. ed., 1970). Neither incommensurability nor incomparability presupposes this “semantic” (Kuhn) or “categorical” (Dworkin) incompatibility.} The cardinal version of incommensurability precludes monism but not complex commensurability.

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 \textit{arbitrary} is, however, vague. It could mean “lacking reasons” or it could mean “lacking authority.” The authority claim suggests that decisions are authorised only if completely justified, that is, if the decision-maker can adduce one right
reason or chain of reasons for decision. This second sense of “arbitrary” thus identifies a thesis about the nature of justified choice.

There are three positions we could take on the nature of justified choice: that choice is fully justified only if it is made, first, on the basis of a decisive reason; 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 or equal 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), 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.

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. We have simply become accustomed to treating certain preference-orderings as intrinsically valuable when they are in fact only instrumentally so. If we were to reflect upon the nature of rights or an other seemingly intrinsically worthwhile good other than happiness, we would recognize that we value the goods only to the extent that they conduce towards our happiness.

The incommensurabilist revision of Mill is to suggest that certain 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

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216 Chang, *supra* note 181, at 1; (Ruth Chang, ed., 1997); CHANG, supra note 70.
217 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.
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.\(^\text{221}\)

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.\(^\text{222}\)

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 points-allocation to measure success across disciplines.\(^\text{223}\)

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


\(^\text{222}\) 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, *VALUE IN ETHICS AND ECONOMICS*, 49 (1995). I do not think we need to commensurate to avoid the incommensurability realist’s objection.

\(^\text{223}\) 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).
arbitrary, irrational, or nonsensical it may be outside the context of the decathlon.\footnote{Anderson rejects the claim that a usable scale would be nonsensical: she believes that only those scales that are “authentic” could gain traction. \textit{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.} 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.”\footnote{Finnis, supra note 183, 87-88. \textit{See also} Finnis, supra note 16, at 115.}

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. In that way, 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 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.\footnote{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.}

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.

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)

227 See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).
228 For a skeptical discussion of incomparability, see CHANG, supra note 70 at 70-73.
229 See, e.g., Warner, supra note 3, at 157.
231 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. Exclusion 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.
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”\textsuperscript{232} 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.”\textsuperscript{233}

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.\textsuperscript{234} Instead (on the Pildes and Anderson incomparably-higher account) one subset of values on some scale is always higher than another set of values on the same scale, though there is no unique ranking of values within the subsets. Pildes and Anderson think that the problem of ranking justifies asserting that the values are incomparable, and assume that incommensurability best explains incomparability.\textsuperscript{235} Their assumption is wrong.

As the examples drawn from Warner, Pildes, and Anderson suggest, the incomparabilist wants some further means of preventing comparison than

\textsuperscript{232} “[H]uman life, friendship, freedom, and human rights.” ELIZABETH ANDERSON, VALUE 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.

\textsuperscript{233} Richard H. Pildes & Elizabeth Anderson, Slinging Arrows at Democracy; Social Choice Theory, Value Pluralism, and Democratic Politics, 90 COLUM. L. REV 2121, 2148 (1990). See also ANDERSON, supra note 196, at 68.

\textsuperscript{234} 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.”).

\textsuperscript{235} 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).
simple incommensurability. They think that, when faced with a choice of loving the daughter or choosing the money, tossing a coin would be wrong. That could not be the case if the values of love and money were 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 loving 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 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 not 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. The argument is the same if the difficulty in comparative valuation results from incommensurability.

The incomparabilist requires, however, some argument that incommensurability 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.” Constitutive incomparability suggests that some types of comparison profoundly undermines the nature of a value. Thus, to 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.

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 competing reasons, would still be one of the necessary conditions of strong incomparability.

This is precisely how Raz characterizes the distinction between love and money as a “constitutive incommensurability.” See Raz, supra, note 71, at 345-46.

Melodrama and comedy are ready sources of, and often depend upon, incommensurability and incomparability. Accordingly, the overwrought emphasis on
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.

Incomparability and incommensurability are 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. Choosing to rank incommensurable options does not make the outcome less equivocal or arbitrary or fragile.

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. But to unquestioningly accept is to reject tragedy as the primary source and example of incommensurability artificially raises the stakes of the game. See, e.g., MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 27-28 (updated ed., 2001). Compare Wiggins, supra note 195, at 64 (Ruth Chang, ed., 1998) (distinguishing between “the (common or garden) incommensurable and the circumstantially cum tragically incommensurable.”).

239 Compare CHANG, supra note 70 at 3-5 (discussing covering values).
— in Dworkin’s terms, to fail to respect — other, competing political and philosophical positions. Where reasons for decision are equal or incommensurable, a judge or other decision-maker is justified in feeling volitionally conflicted and willing to revisit the issues should an appropriate case come along.\footnote{See, e.g., Wiggins, 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 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.")}.  

**B. Plurality is Incommensurability**

Another way of putting the central criticism advanced thus far is that Dworkin wants to collapse pickings into choosings. 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 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 pick. But Dworkin goes further. He thinks that the judge must not simply pick among the various outcomes without the help of some, decisive reason. He thinks, instead, that she must choose among the competing outcomes — she must give a decisive reason that would bind the other parties to the decision.

Dworkin’s claim is that, given the fact that reasons are to bind some third party, A or B, then we need a decisive reason that applies to them, not one that expresses the judge’s choice among indecisive reasons. 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.\footnote{See DWORKIN, supra note 3 at 248.} Only sufficiently public reasons 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.\footnote{See DWORKIN, supra note 3 at 264.} 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. 243 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, the fact that we can pick 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.244

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 “within” a decision-maker. Dworkin 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.245

Put differently, Dworkin challenges the incommensurabilist to come up with a political argument justifying 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

243 See DWORKIN, supra note 3, at 257.
244 DWORKIN, supra note 10.
245 See DWORKIN, supra note 3, at 100-101; 239.
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 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 permissibly 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 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.

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. One 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 intellectual humility, not the muscular conviction of Hercules, provides the model for ideal judge.