JUDICIAL CAPRICE

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ABSTRACT

Caprice — the personal preference of the judge — is an available and legitimate basis for judicial decision. On certain occasions, neither law nor morality provides a decisive ground for decision and all that is left is the judge's taste or inclination. Here, she has both the legal power and the legal right to decide whichever way she wishes.

Perhaps because it looks like a naked exercise of power, caprice, as a basis for judicial decision, is not terribly popular. Capricious choice is often characterized as non-rational because not based upon a particular type of reason — what might be called a decisive reason for decision. Reason-based decision, by contrast, is represented as demonstrating that some decisive reason overrides competing ones to settle the outcome of a legal dispute, independent of the judge's will. Absent such a reason, judicial decision consists of an arbitrary exercise of the power authoritatively to resolve cases.

My claim is that capricious decision-making, whether rational or not, is an inevitable feature of legal decision in a complex legal system, one in which there are conflicts among incommensurable reasons for decision. Where legal incommensurability is matched by extra-legal incommensurability, there may be no correct thing to do. The judge is free to pick among the available options.

A major trend in recent legal positivism is to claim that incommensurability does not entail the sort of judicial discretion characterized by capricious choice. The judge has only "weak" discretion to resolve the case because extra-legal reasons bind the judge.

Whatever the merits of the weak discretion thesis generally, I argue that incommensurability provides the judge with the sort of strong discretion symptomatic of judicial caprice. In such circumstances, the legal system provides, not only the power to decide capriciously, but the right to do so. Capricious decision thus confounds those theories of adjudication that seek to constrain or minimize judicial discretion.

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I. INTRODUCTION

Can caprice operate as a legitimate basis for judicial decision?[1] Sometimes, it appears, the outcome of the case is up to the personal preference of the judge: she can decide whichever way she wishes. Neither law nor morality[2] provides a decisive ground for decision and she is presented with a "choice between open alternatives."[3] The problem here is not just one of constraint, but of rationality. Not only does reason fail to require a particular outcome, but the judge cannot choose between the options on the basis of reasons at all. All that is left is her taste or inclination.

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

Perhaps because it looks like a naked exercise of power, caprice, as a basis for judicial decision, is not terribly popular. Capricious choice is often characterized as non-rational: either as having no basis in reason

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

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

[3] H.L.A. HART, THE CONCEPT OF LAW 127 (2d ed., Penelope A. Bulloch & Joseph Raz, eds., 1994).

[4] See, e.g., Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. Q. 274 (1929); JEROME FRANK, LAW AND THE MODERN MIND (1930); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 AM. BAR ASS'N J. 357, 358-59 (1925).

[5] *See* H.L.A. HART, THE CONCEPT OF LAW 205 (2d ed., Penelope A. Bulloch & Joseph Raz, eds., 1994).

because not based upon reasons or, more accurately, as not based upon a particular type of reason — what might be called a decisive or "conclusive" reason for decision.[6] Absent such a reason, judicial decision is often presented as an act of will or fiat, an arbitrary exercise of the power authoritatively to resolve cases.

Reason-based decision, by contrast, is often represented as demonstrating that some dominant or decisive reason overrides competing reasons and operates to settle the outcome of a conflict or dispute.[7] In the law, a decisive *legal* reason identifies that outcome antecedently required by the pre-existing norms of the legal system. The judge's decision is legally valid only to the extent that it matches the legal rules or standards to the facts of the instant case.[8] Reason thus constrains the judge to defer to that outcome, identified independent of her will.

Complex, modern municipal legal systems are, however, gappy: on occasion, no single legal reason determines the outcome. According to reason-based theories of decision, even when there is a gap in the law, capricious decisions are an inadequate and inappropriate means of resolving legal disputes.[9] When, for example, none of the legal rules or standards provides a decisive reason for decision, the judge should nonetheless seek some decisive extra-legal reason in order to break the deadlock.[10] Capricious decisions — ones that express the will or personal preference of the judge rather than some required outcome — are outside the judge's legitimate authority.

Caprice thus marks the point at which reason no longer operates to determine the outcome. The judge must choose between multiple options, none of which is stronger than the others. No further decisive

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[6] JOSEPH RAZ, PRACTICAL REASON AND NORMS 27-28 (1990).

[7] JOSEPH RAZ, PRACTICAL REASON AND NORMS 25-27 (1990).

[8] *See, e.g.,* Brian Bix, Book Review: *Positively Positivism* (Review of Legal Positivism in American Jurisprudence by Anthony J. Sebok), 85 VA. L REV. 889, 898-99 (1999) (citing Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). *See also* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

[9] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 11-17 (1959) (criticizing judicial "act[s] of willfulness or will").

[10] Joseph Raz calls this type of reasoning "reasoning according to law." For a full discussion, *see* Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS, 1, 8 (1993). *See also* JOSEPH *See* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 339 (1995) (discussing the role of moral and institutional reasons for decision in legal decision-making).

reason resolves the outcome. Although a variety of circumstances might account for the absence of decisive reasons, I am particularly interested in incommensurable conflicts among legally valid rules. I draw a distinction between *decisively regulated cases*, where the law resolves the conflict among reasons to provide a uniquely required outcome, and *completely-but-indecisively* regulated cases, where there are multiple legally acceptable outcomes, but no single outcome is required.[11] Here the scope of the legal decision may be limited to selecting among the available outcomes. Although the available choices are legally valid ones, the law does not mandate any particular result, and there is room for the judge's personal preference to operate.

My claim is that capricious decision-making is an inevitable feature of legal decision in a complex legal system, one in which there is a certain amount of indeterminacy and, in particular, conflicts among incommensurable reasons for decision. Where legal incommensurability is matched by moral or other incommensurability there may be no correct thing to do. The judge is free to pick among the available options.

A major trend in legal positivism has been to suggest that legal gaps do not entail discretion. Extra-legal reasons may operate to close the gap, and the judge has only "weak" discretion to resolve the case.[12] The goal of such weak-discretion theories is, I suggest, similar to what H.L.A. Hart once called "the Noble Dream":[13] to demonstrate the manner in which extra-legal reasons, though *prima facie* not legally obligatory, nonetheless bind the judge.

Whatever the merits of the weak discretion thesis generally, I argue that in a discrete set of circumstances the judge possess the sort of strong discretion symptomatic of judicial caprice. I take for granted that rules can provide determinate guidance and that there is a core meaning to the language of a rule that renders it applicable across a range of cases.[14] I am concerned with the narrower issue of conflicts among

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[11] *See* John Gardner, *Concerning Permissive Sources and Gaps*, 8 OXFORD J.L. STUD. 457-58 (1988); JOSEPH RAZ, THE AUTHORITY OF LAW 75 (1979).

[12] *See* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 33 (1967), reprinted in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); John Gardner, *Concerning Permissive Sources and Gaps*, 8 OXFORD J.L. STUD. 457-58 (1988).

[13] H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123, 134 (1993).

[14] *See* H.L.A. HART, CONCEPT OF LAW 124 (2d ed. 1994). Neil MacCormick glosses Hart thus: "it is (certainly in Hart's view) a particular feature of governance that under law that state legal orders are characterized by the existence of institutions and procedures for formulating in relatively clear, precise and authoritative ways those

determinate rules. Even when rules provide clear direction, multiple legally valid rules may conflict in such a manner that none overrides the other. Here, there is no right answer to the question, "Legally, what ought I to do?" At this point, capricious choice is both available and permissible.

In Section II, I develop an account of capricious decision in contrast to Joseph Raz's reason-based account. Raz considers personal preference forms too unpredictable and partisan a basis for judicial decision. He suggests that law as a public, institutional system of governance according to rules requires the court to operate as an applicative institution bound to apply those rules. In such a system, individuals are entitled to expect the rules to be applied in a predictable and neutral manner. The judge should therefore find some objective, decisive reason to break the tie. Accordingly, Raz proposes a hierarchy of available tie-breaking reasons: legal, moral, and doctrinal.[15]

In the usual situation, where the law provides set of identifiable reasons for decision and precludes the operation of competing non-legal reasons, the judge ought to rely upon valid legal reasons to decide the case. Where the law runs out, Raz believes morality operates to fill the legal gap. He advocates two theses to explain the turn to morality. The first holds that law and morality address similar issues and so overlap. Morality is thus a readily available alternative to legal reasons. The second holds that a judge ought to act morally when the law runs out, so that where moral reasons prove decisive she should choose the morally best outcome.[16]

Morality, however, may prove indecisive. Moral reasons may be conflicting and incommensurable. Raz then proposes that doctrinal reasons, those more general legal reasons organizing a range of rules and cases, might provide a decisive reason. Raz's theory of adjudication is thus a search for public, decisive reasons. Morality and doctrine both provide a neutral, predictable, and transparent basis for decision where personal preference cannot.

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governing standards of conduct which are 'legal.'" NEIL MACCORMICK, H. L. A. HART 42 (1981). Whether or not Hart is correct is not the subject of his paper; if he is wrong, we are much closer to the Realist "nightmare" than Hart would care to think.

[15] *See* Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 1, 7 (1993), reprinted in JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

[16] Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 1, 14 (1993), reprinted in JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995); *See* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 339 (1995).

In Section III, as a first line of criticism, I suggest that doctrine, like morality, may prove conflicted and incommensurable. Accordingly, where there is thoroughgoing incommensurability, that is, where legal incommensurability is matched by both moral and doctrinal incommensurability, there is no decisive reason to dictate the outcome. The judge must exercise her personal preference to select one among the legally valid alternatives. Whichever outcome is chosen will have been chosen without some (legal or other) reason deciding the outcome. Because the resulting decision will be valid as a matter of law, the judge thus has a legal power to decide the case as she wants, even on a whim.

In Section IV, I argue that caprice is not only an available but also a permissible basis for judicial decision, conferring not only a power but a right. In deciding capriciously, the judge is acting not only upon a legally generated ability, but also upon a legally implied permission.

The existence of a permission to rely upon capricious choice depends upon the manner in which legal and extra-legal norms conflict. Legal permissions may be express or implied: an implied permission to rely upon a particular reason exists where there is no reason forbidding so relying. Permissions may thus be generated by the absence of some norm to the contrary. Where the various options conflict and are legally, morally, and doctrinally incommensurable, there is no decisive reason and no outcome mandated.[17]

The available reasons thus fail to constrain choice as between the different outcomes. What results is what I call a *pragmatic permission* to choose among the legally valid outcomes without giving further, decisive reasons. The existence of a pragmatic permission thus suggests that judge is both empowered *and* entitled to rely upon caprice as a basis for judicial decision when faced with legal incommensurability that is matched by moral and doctrinal incommensurability.

The permission to engage in capricious decision makes sense given the requirement that the judge render a decision when faced with the parties' conflicting claims. Judicial decision is not like moral decision: in the latter case, the decision-maker may simply decline to

[17] *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 85-88 (1990); JOSEPH RAZ, THE AUTHORITY OF LAW 75 (1979); John Gardner, *Concerning Permissive Sources and Gaps*, 8 OXFORD J.L. STUD. 457-58 (1988).

adjudicate.[18] Where the judge is obliged to pick one or other outcome, and public, decisive reasons give out, the personal preference may be all that is left to a decision-maker.

The pragmatic permission to judge based on personal preference conflicts with the Legal Process schools emphasis on legal balancing and reasoned elaboration from the extant legal principles. Capricious decision-making exists because where incommensurability precludes balancing the various options and the process of elaboration fails to identify a unique outcome. Under these circumstances, choice turns on personal preference rather than institutional norms.

II. LEGAL GAPS AND JUDICIAL CHOICE

Much recent positivist theorizing about the scope of judicial discretion attempts to demonstrate that judges may have only weak discretion.[19] I am more interested in resuscitating or reinvigorating the thesis that, on occasion, judges have strong discretion. Such discretion exists, for example, where indeterminacy in law is matched by indeterminacy in morality. Wherever the judge looks for guidance, none is forthcoming.

In the analytic tradition, H.L.A. Hart was perhaps the most significant figure to endorse strong discretion. He suggested that, on occasion, judges are faced with a "choice between open alternatives."[20] While

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[18] Perhaps the most notable argument against the requirement that judges decide the cases before them is advance by Alexander Bickel, *see* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962), and more recently taken up by Cass Sunstein, *see* CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). Both advocate a policy of judicial minimalism, whereby the United States Supreme Court, in particular, avoid deciding controversial cases or issues using a variety of procedural techniques.

[19] *See, e.g.*, John Gardner, *Concerning Permissive Sources and Gaps*, 8 OXFORD J.L. STUD. 457-58 (1988); JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995); Neil MacCormick, *Reconstruction After Deconstruction: A Response To CLS*, 10 OXFORD. J. LEGAL STUD. 539, 544 (1990); John Finnis, *On The Critical Legal Studies Movement*, in: OXFORD ESSAYS ON JURISPRUDENCE: THIRD SERIES 145, 160-61 (John Eekelaar and John Bell, eds., 1987). MacCormick and Finnis develop these claims in response to the CLS indeterminacy thesis; Gardner and Raz have other fish to fry.

[20] H.L.A. HART, THE CONCEPT OF LAW 127 (2d ed., Penelope A. Bulloch & Joseph Raz, eds., 1994). A different situation is where, with our without discretion, the judge opts to ignore the law. One might call this judicial nullification by comparison with jury nullification. Here, the judge's decision gains its institutional authority, if at all, after the fact. The decision, because not required by the law, has the same status as a mistaken decision: it is authoritative for the parties and subordinate legal officials because the judge is empowered, if not entitled, to render a decision. It becomes authoritative for judges of equal or higher rank subject to their acquiescence

the law may limit the range of available options, it does not require a particular decision. Without rules to guide her, the judge's choice as between the available options is unconstrained.[21]

The weak discretion thesis holds that legal indeterminacy need not result in unconstrained decision-making. Rather, the judge must choose among a limited range of options to elaborate the available legal standards where their application in a particular case is not automatic.[22] Ronald Dworkin originally coined weak discretion to demonstrate that adjudication consists in the reasoned elaboration of legal principles that control, albeit non-"mechanically," the outcome of a case.[23] The judge gets all the guidance she requires from legal principles: she need not turn outside law to find gap-closing standards.

Dworkin soon reformulated his thesis to include among the relevant legal principles those derived from "political morality."[24] More recently, Dworkin has emphasized the relative transparency of legal

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and ratification. For a somewhat radical embrace of this position, *see* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005) (arguing the Supreme Court is not bound by legal norms and acts in a fully political way). Under such circumstances, "all that succeeds is success." H.L.A. HART, THE CONCEPT OF LAW 153 (2d ed., Penelope A. Bulloch & Joseph Raz, eds., 1994).

[21] *See* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123, 124-26 (1993).This description of strong discretion comports with Dworkin, who asserts strong discretion exists where, "on some issue [an official] is simply not bound by standards set by the authority in question." Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 33 (1967), reprinted in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); *see also* Ronald Dworkin, *Social Rules and Legal Theory*, 81 Yale. L.J. 855, 879 (1972) (reprinted as *The Model of Rules II*) in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

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

[23] Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 35-6 (1967), reprinted in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978). *See also* Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17 (2003) (discussing Dworkin's distinction between weak and strong discretion)

[24] *See, e.g.,* Ronald Dworkin, *Social Rules and Legal Theory*, 81 Yale. L.J. 855, 878-882 (1972) (reprinted as *The Model of Rules II*) in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1082 (1975); Ronald Dworkin, *No Right Answer*, 53 N.Y.U. L. REV. 1, 30-31 (1978); both reprinted in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

reasoning to moral theorizing about public reasons.[25] The judge is to approach each legal problem by attempting to provide the morally best and most coherent reconstruction of the rules and values of her legal system. The general requirement that the judge select one side in a dispute and the fact that the judge does not reinvent the law but must accommodate the outcome within an extant body of legal and political materials entails, Dworkin believes, that in each case there can be only one "best" justification.[26]

Dworkin asserts that, because positivists believe that the law "runs out," they must endorse some version of strong discretion whereby judicial decision is unconstrained by legal principles. According to Dworkin, in other words, the positivist "sources thesis" entails that when there is a legal gap the judge may base her decision on any reason, unconstrained by law.[27] One positivist response to Dworkin points to the limited range of options generally facing a judge. Her discretion is "weak" in that she is constrained to pick one among the legally valid options.[28] I am concerned primarily with Joseph Raz's alternative thesis that, additionally, morality, though not part of law, nonetheless provides reason-based limits to judicial discretion.

I have no quibble, in certain circumstances, with the positivist embrace of weak discretion. In this section, however, my point is that weak discretion is not always the only option open to a judge. On occasion, judges are constrained to exercise weak discretion; but strong discretion is an inherent possibility in a system in which legal incommensurability is matched by moral and doctrinal incommensurability. In such circumstances, none of the available reasons for decision are decisive, and some remain undefeated.

The alternative, which is a full embrace of the weak-discretion thesis, represents a variation of the "Noble Dream":

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[25] Ronald Dworkin, *No Right Answer*, 53 N.Y.U. L. REV. 1, 30-31 (1978); reprinted in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

[26] RONALD DWORKIN, LAW'S EMPIRE (1986).

[27] Dworkin suggests that positivists claim "that when judges disagree about matters of principle they disagree not about what the law requires but about how their discretion should be exercised. They disagree, that is, not about where their duty to decide lies, but about how they ought to decide, all things considered, given that they have no duty to decide either way." Ronald Dworkin, *Social Rules and Legal Theory*, 81 Yale. L.J. 855, 879 (1972) (reprinted as *The Model of Rules II*) in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978)

[28] *See* John Gardner, *Concerning Permissive Sources and Gaps*, 8 OXFORD J.L. STUD. 457-59 (1988).

> that, in spite of superficial appearances to the contrary . . . still an explanation and a justification can be provided for the common expectation of litigants that judges should apply to their cases existing law and not make new law for them, even when the test of particular constitutional provisions, statutes, or available precedents appears to offer no determinate guide.[29]

I will suggest that Raz endorses a positivist variant of the weak-discretion thesis. His weak-discretion positivism departs from the Noble Dream in rejecting the claim that existing law is sufficient to determine all legal problems. Existing law, Raz claims, may be indecisive or gappy; nonetheless, morality often provides a determinate outcome where law does not (and if morality does not, doctrine will). The Noble Dreamers thus agree that some decisive reason is required to justify judicial decision; they disagree is over whether that gap-closing morality is part of the law or not.[30]

A. Courts as Applicative Institutions

Raz famously believes that, from the "point of view" of the system,[31] legal rules are exclusionary reasons for action that provide an authoritative and binding reason for individuals to regulate their behavior.[32] Exclusionary reasons are both first-order reasons for action and second-order reasons that preclude decision-makers from relying on conflicting non-legal reasons in determining what to do. Law is thus an "exclusionary system" that "exclude[s the] application of rules, standards and norms which do not belong to the system or are not recognized by it."[33] Therefore only legal reasons should be considered in deciding what one ought to do if one is to be guided by the law. What I now want to consider is the role of the courts in enforcing legal norms.

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[29] *See* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123, 132 (1993).
[30] *See* BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY 99-101 (1993).
[31] *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 139.
[32] *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 65-9 (1990); *see also* Joseph Raz, *Reasons For Action, Decisions and Norms*, in PRACTICAL REASONING, (Joseph Raz ed., 1978); and Joseph Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, at 1154-1179 (1989).
[33] JOSEPH RAZ, PRACTICAL REASON AND NORMS 145

According to Raz, the legal system is not only an exclusionary, but also an institutionalized system of norms.[34] The characteristic feature an institutionalized system is the presence of what Raz terms "primary norm-applying organs":[35] officials or "institutions with power to determine the normative situation of specified individuals, which are required to exercise these powers by applying existing norms, but whose decisions are binding, even when wrong."[36] These applicative institutions have, according to Raz's definition, three features. By virtue of their institutional role they are granted a power;[37] that power is a limited one, confined to the application of the institution's norms; [38] and their application is authoritative and final upon the subjects of the norms.[39]

In a legal system, courts count among the various applicative institutions of the system.[40] The court's applicative determinations are made on the basis of the existing norms of the system, not, for example, at the discretion of the judge. Thus, although on occasion courts may make law, what distinguishes the court as an applicative institution, and the law as an institutional system, is the courts' declarative (rather than legislative) role.[41]

In contrast to the purely applicative role, a court could have (at least) two different types of discretion. First, one in which the adjudication-

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[34] This statement involves at least two different claims; first, that the law is a *system* of norms; and second, that the law is an *institutionalized* system. For a collection of norms to be held to form a system, the norms must be internally related: its rules, standards and principles possess "a certain unity and interdependence" JOSEPH RAZ, PRACTICAL REASON AND NORMS 113 . For more on law as an institutional system of norms, see JOSEPH RAZ, PRACTICAL REASON AND NORMS ch. 4, Raz, *The Concept of a Legal System* chs. 6 and 7, MacCormick and Weinberger, *An Institutional Theory of Law* ; MacCormick, Law As Institutional Fact (1974) 90 LQR; MacCormick, Legal Reasoning and the Institutional Theory of Law, 9 Rechtstheorie, Beiheft 14.

[35] JOSEPH RAZ, PRACTICAL REASON AND NORMS 136.

[36] JOSEPH RAZ, PRACTICAL REASON AND NORMS 136.

[37] According to H.L.A. Hart, this power is granted through the existence of "rules of adjudication": those "secondary rules empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken…[such rules] confer judicial powers and a special status on judicial declarations about the breach of obligations." H.L.A. HART, THE CONCEPT OF LAW 96-97 (2d ed. 1994).

[38] See JOSEPH RAZ, PRACTICAL REASON AND NORMS 132-3.

[39] Raz believes these features are essential to all primary norm-applying organs of institutionalised normative systems. *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS ch. 4.

[40] Raz points out that "tribunals and other judicial bodies…[and even] other officials, such as police officers, may also be primary organs." JOSEPH RAZ, PRACTICAL REASON AND NORMS 136.

[41] JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 137-7 (2d ed., 1990).

rendering institutions are not required to decide on basis of specified rules, but instead are able to select, at their own discretion, the reasons on which they wish to rely in giving a decision.[42] Such institutions are different from primary organs in that they do not *apply* the (action-guiding) norms of a system, but merely *adjudicate* disputes on the balance of reasons, which they are free to select. This envisages the adjudicative process as one in which the court always possesses "strong discretion,"[43] and its primary function is to render judgment between parties rather than apply systematized standards of behavior.

Second, an adjudication-rendering institution could have a duty to apply the norms of the system, but possess the discretion to ignore those rules that failed some generalized merit test. Here the adjudicative institution is concerned with the guiding function of the institutional system to a limited extent, but is willing to compromise this function when it judges that, all things considered, there is some better decision than that which could be reached by applying the norms, e.g., one which in the circumstances is more just or efficient. This envisages the court as possessing the power and the right to nullify the law based on certain extra-legal standards.

Neither sort of discretion is compatible with Raz's definition of an applicative institution. Rather, such institutions are "'bound to apply…a certain body of norms regardless of their views of the merits and are allowed to act on their views only to the extent that this is allowed by these norms."[44] This is to stress the norm-applying function of the courts.[45]

Courts acts solely in its applicative or declarative role when the law decisively regulates the outcome.[46] A case is regulated when the legal norms, on their own, determine the range of possible legal decisions; a

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[42] The sort of system in which such adjudicatory institutions occur Raz calls "systems of absolute discretion"; *see* JOSEPH RAZ, PRACTICAL REASON AND NORMS pp. 137-140.

[43] Brian Leiter points out that, "The distinction between strong and weak discretion is Dworkin's, not Hart's, and it seems to obscure rather than illuminate Hart's actual reasons for thinking judges have discretion. Hart need not maintain that in cases of discretion, judges are bound by no authoritative standards: there may, indeed, be binding standards that narrow the range of possible decisions." Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 21 (2003).

[44] JOSEPH RAZ, PRACTICAL REASON AND NORMS 139.

[45] *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 142.

[46] *See* JOSEPH RAZ, THE AUTHORITY OF LAW 182 (1979) ("a regulated dispute is one to which the law provides a solution. The judge can be seen here in his classical image: he identifies the law, determines the facts, and applies the law to the facts.").

case is *decisively regulated* where there is one unique outcome to the case.[47] All the court must do is correctly enforce the outcome stipulated by the rules. In a complex institutional system, however, there will be cases in which the rules purport to guide behavior but fail to enable a purely applicative determination to be made. Where the legal norms support multiple options, the case is *indecisively regulated*;[48] where the norms fail to provide guidance given the circumstances, then the case is unregulated so that the court faces a case of first impression. In either circumstance, the manner in which an agent is to comply with the rules is legally indeterminate.

When the law is indeterminate, it would not be correct to say that any proposed determination is uniquely required by the legal rules. Instead, the judge must turn outside the legal system for guidance or pick among the competing outcomes without considering non-legal reasons. Here the judge can no longer simple declare which outcome the law requires and so must make a legislative choice in selecting an outcome. Raz considers that such cases express a legal gap.[49]

B. Conflicts Among Incommensurable Reasons

I am particularly interested in the sort of indeterminacy arising from conflicts of incommensurable reasons. Legal rules or standards are incommensurable or fragmented if competing options represent radically different schemes of valuing.[50] Rather than aligning on some unitary scale such as importance or authoritativeness, the competing values "talk past" each other. Incommensurability represents a challenge to more harmonious accounts of value and provides one potential source of strong discretion.

Incommensurability may be contrasted with more traditional accounts of rational action as dependant upon identifying one option that, because supported by the weightiest reasons, dominates or overrides the others. In this situation, if the agent is to be guided by reason in her decision, she must compare the relevant reasons and act on whichever

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[47] Either because some reason overrides or excludes competing options, or because competing options are rendered null by some canceling condition. *See* John Gardner, *Concerning Permissive Sources and Gaps*, 8 OXFORD J.L. STUD. 457-58 (1988); JOSEPH RAZ, THE AUTHORITY OF LAW 70 (1979).

[48] *See* John Gardner, *Concerning Permissive Sources and Gaps*, 8 OXFORD J.L. STUD. 457-58 (1988).

[49] *See* JOSEPH RAZ, THE AUTHORITY OF LAW 70 (1979).

[50] Thomas Nagel, *The Fragmentation of Value*, in THOMAS NAGEL, MORTAL QUESTIONS 128 (1979).

is the strongest one.[51] This style of rational justification requires the agent to "weigh"[52] or "balance"[53] or "rank"[54] (by "strength" or "importance"[55]) or otherwise commensurate the various competing reasons and identify one of them as decisive (or "conclusive"[56]), that is, one that "overrides,"[57] or "outweighs"[58] the other relevant competing reasons.

This traditional account of rational decision is exemplified by the "balancing test," one of the central components of the American version of weak discretion.[59] Balancing is a means of comparing competing interests by weighing them one against the other. In order for the balancing test to work, there most be some value-neutral way to reduce the competing interests to a single currency and then compare them.[60] It thus provides an *applicative* account legal decision. When

[51] Coleman recognizes the problems with such an assertion. *See* Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 15 n.3 (1995) ("To say that what I ought to do depends on the reasons that apply to me is not to say that the justification of everything I do is settled by reason and reason alone. There are many choices I am justified in making for which I cannot offer conclusory reasons. Still, reasons figure prominently in determining what I ought to do.").

[52] *See* BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY 97 (1993); *see also* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS, 115 (1980). *See also* JOHN FINNIS, FUNDAMENTALS OF ETHICS, 87-88 (1983); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 946 (1987).

[53] *See* BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY 97 (1993).

[54] *See* John Finnis, *Commensuration and Public Reason* in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 215, 215 (Ruth Chang, ed., 1997); Matthew Adler, *Law and Incommensurability: Introduction*, 146 U. PA. L. REV. 1169, 1170 (1998).

[55] *See* Joseph Raz, *Incommensurability and Agency*, in INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON, 110, 110-28 (Ruth Chang, ed., 1997).

[56] *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 27-28.

[57] *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 26-27; JOSEPH RAZ, THE AUTHORITY OF LAW 75 (1979).

[58] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 946 (1987).

[59] Balancing tests are a feature of, in particular, American constitutional adjudication, and is generally defined as requiring, at the least, a comparison of the constitutional rights protected against governmental interests. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 945 (1987); Patrick McFadden, *The Balancing Test*, 29 B.C. L. REV. 585 (1988); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992); Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319 (1992).

[60] Balancing describes "those cases in which the scales serve as the central metaphor, and which explicitly: 1) set a balance by describing the elements to be weighed and the legal effect of the outcome; 2) discuss those elements; and 3) declare the winner based on the results of the balancing procedure." Patrick M. McFadden, *The Balancing Test*, 29 B. C. L. REV. 585, 596 (1988). Balancing fits with the neutral

legal reasons conflict in commensurable manner the judge should identify the conflicting legal reasons, determine their relative strength, and prefer the strongest reason as determining the outcome. The judge does not participate in setting the relative weights of the rights or interests compared; she rather defers to the prior legislative or constitutional assessment and simply declares the outcome.

Balancing works best in an exclusionary system of norms, where the relative weight of the competing reasons may be determined "artificially,"[61] from the point of view of the exclusionary system. Where the system's norms regulate the relative strength of competing reasons, the decision-maker may thus refuse to consider the extra-systemic weights assigned to the competing norms.

There has, however, recently emerged a vigorous debate over whether reasons (or the values which underlie them)[62] are always commensurable *inter se*. Some clearly are: where commensurable reasons conflict, indeterminacy results only if the reasons are equal in strength, precluding any from operating as a decisive reason for decision. A different situation, however, is presented when conflicting reasons for action may not be measured on a single scale (of strength,

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principles aspects of legal process in deferring to legal sources to determine the outcome independent of the judge's will. *See, e.g.,* Dennis v. United States, 341 U.S. 494, 524 (1951) ("But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures. ¶Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress.")

[61] DAVID HUME, TREATISE ON HUMAN NATURE II.i. (L. A. Selby-Bigge & P. H. Nidditch, eds., 1989) (describing justice as an artificial virtue, that is, a human (rather than natural) construct).

[62] In the relationship between values and reasons, values provide grounds for reasons. *See* John Gardner & Timothy Macklem, *Reasons*, in JULES COLEMAN AND SCOTT SHAPIRO (EDS), THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 440 (2002). A justified reason is one that identifies a value (something of value). Some regard reasons as additional based upon desires (and not value), but as Gardner and Macklem suggest, if our desires are subject to reason they too must pick out something of value. *Id.*

importance, etc.) and so balancing is impossible.[63] Instead, the relation between some reasons is intransitive,[64] such that the conflicting reasons remain undefeated,[65] and to commensurate the reasons would be to alter them.[66] These reasons are incommensurable and "reason has no judgment to make concerning their relative value."[67]

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[63] It is important to proceed with caution here. Balancing depends upon a combination of comparability, exclusion, and the presence or absence of canceling facts. Accordingly, the fact that reasons are incomparable does not preclude balancing. Competing reasons may be excluded from operating by the norms of the system, or canceled from operating by some circumstance particular to the individual case. Furthermore, as we shall see, balancing is only one of the techniques relied upon by the American weak discretion noble dreamers; the other is the process of "reasoned elaboration." *See* HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW 143-52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (originating phrase "reasoned elaboration"); Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 Cardozo L. Rev. 601, 632-39 (1993) (discussing role of reasoned elaboration within Legal Process school).

[64] Intransitivity exists where *A* is a reason for *B*, and *B* is a reason for *C*, but *A* is not a reason for *C*. For various discussions of intransitivity, *see* JOSEPH RAZ, MORALITY OF FREEDOM 322, 325-326 (1988) ("*A* and *B* are incommensurate if it is neither true that one is better than the other nor true that they are of equal value…(1) neither [option] is better than the other, and (2) there is (or could be) another option which is better than one but is not better than the other."); BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY 96 (1993); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS at 55, 67-8 (1995) (adopting in part Raz's definition); Richard A. Epstein, *Are Values Incommensurable, Or Is Utility the Rule of the World?*, 1995 UTAH L. REV. 683, 686 (1995) (same); *and see* Richard H. Pildes & Elizabeth Anderson, *Slinging Arrows at Democracy; Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV 2121, 2148-51 2160 (1990); Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 801-802 (1994); Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L. J. 813, (1994).

[65] The undefeated nature of incommensurable reasons, so prominent in John Gardner, *Justifications and Reasons*, in ANDREW SIMESTER AND A.T.H. SMITH (EDS), HARM AND CULPABILITY 103-31 (1996); & John Gardner & Timothy Macklem, *Reasons*, in JULES COLEMAN AND SCOTT SHAPIRO (EDS), THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 440, 470-74 (2002), is also contained in Wiggins identification of a "remainder" and Bernard Williams pointing to some type "residue" in choice among incommensurables. *See* David Wiggins, "Incommensurability: Four Proposals," in RUTH CHANG, (ED.) INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON, 52, 53 (1997); Bernard Williams, *Ethical Consistency*, in PROBLEMS OF THE SELF 166, 172-77, 182-5. Choice does not make the un-chosen values disappear; nor are they ranked lower than the chosen values; nor do they change their nature. *See* Bernard Williams, *Ethical Consistency*, at 172-77.

[66] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS, 115 (1980). *See also* JOHN FINNIS, FUNDAMENTALS OF ETHICS, 87-88 (1983); JOSEPH RAZ, MORALITY OF FREEDOM 339 (1986).

[67] Joseph Raz, The Morality of Freedom 324 (1986). *And see id.* at 334 ("Incomparability . . . marks the inability of reason to guide our action.").

This definition of incommensurability has three features: first, intransitivity entails that changes in the value of one reason will not affect its worth relative to another reason with which it is incommensurable. There is no a "single scale of value" upon which to measure the competing reasons.[68]

Second, the claim that the conflicting reasons remain undefeated entails only that there is no decisive reason supporting a particular option, not that there are no reasons at all. Reason has nothing more to say about their relative value and cannot buttress the decision-maker's preference. If reason is to play a part in the choice, it is not by demonstrating which option overrides the others independent of the chooser's will, but by generating judgment or insight in choosing among the various options, perhaps by providing further justifications for whichever choice is selected. Such reasons do not demonstrate that the rejected options were wrong: rather the rejected options remain as undefeated, justified alternatives to the current decision.[69]

Third, the requirement that comparison transforms the options renders comparison, not so much illegitimate, as loaded. Changing the value of the various options, or the system of reasoning used to validate them, to render them comparable requires justification, and the new way of valuing requires explanation and invites comparison with the old. To commensurate incommensurables, in other words, is not to remove the decision-maker's preference, but to express it.[70]

Where reasons conflict and are undefeated, justification fails in a particular way. It is not that there is no justification whatsoever for a particular outcome, but that there is no reason to prefer one outcome over another. There is no one "right" answer, but multiple right answers. In such circumstances, because there are no reasons that clinch the argument either way, the agent may choose among the competing options without acting contrary to reason.

C. Raz's Weak Discretion

Raz acknowledges that strong discretion is a permissible basis for decision where undefeated reasons conflict.[71] He rejects, however,

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[68] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 111-18 (1980).

[69] The are available as the source of regret or recrimination if the choice was sufficiently moral and consequential.

[70] *See* JOSEPH RAZ, MORALITY OF FREEDOM 327 (1986).

[71] *See* Joseph Raz, *The Relevance Of Coherence*, 72 B.U. L. REV. 273, 312 (1992), reprinted in JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

capricious choice as an option for judges, and instead proposes a theory of weak discretion for judicial decision-making.. The question then becomes why conflicts of undefeated legal norms permit capricious decision for lay decisions-makers, but not for judicial ones.

I shall suggest that Raz's theory is remarkably similar both to Dworkin's and the Legal Process' concept of reasoned elaboration as a process of principled decision-making, an account that is at the heart of the Dworkin's theory of law as integrity.[72] Dworkin's theory depends on the claim that there is "one right answer" to every legal problem, and latterly, that the one answer that constitutes the "best" reconstruction of the law given the judge's theory of political morality in light of the cases "fit" with pre-existing law.[73]

Like Dworkin, Raz requires the judge to decide on the basis of a decisive, or "best" reason, and that Raz believes that morality and doctrinal reasons have a tie-breaking role to play in determining which outcome to choose. In fact, like Dworkin, Raz embraces a theory of coherence or fit, albeit a limited one, to determine how to decide when morality fails. It will turn out that both Raz and Dworkin are similar in this way to the Legal Process school, including its more conservative manifestations. To develop this argument, I shall first consider Raz on weak discretion, or what he calls reasoning according to law.

1. Gaps and Discretion

Raz believes that legal reasoning can be split into two distinct forms: (1) reasoning *about* the law, and (2) reasoning *according to* law.[74] In reasoning about the law, legal rules and standards are sufficient to determine completely the outcome. The case is decisively regulated by the legal norms, which means that the judge need only apply them to generate the outcome. Where, however, the law runs out, judges are required to indulge in something more than technical legal reasoning in deciding what to do, "where [in other words] they have … discretion[,] they ought to resort to moral reasoning to decide whether to use it and how."[75]

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[72] *See* RONALD DWORKIN, LAW'S EMPIRE, 225-75 (1986).
[73] *See* RONALD DWORKIN, LAW'S EMPIRE, 230-31 (1986).
[74] "[R]easoning according to law, is — arguably — applying moral considerations." Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 1, 7 (1993), reprinted in JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).
[75] *See* Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS, 1, 10 (1993), reprinted in JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

Often, a judge can decide a case without having to consider its moral, social, or political merits. Here the rules of the legal system fully govern the outcome. The judge need only indulge in a technical form of reasoning that, first, identifies which rules apply to the instant case and, second, how these rules apply.[76] Here, the court is seen in its applicative or declarative role, and its reasoning depends primarily upon determining the respective legal strengths of the legal authorities independent of the moral, social, or political value of their content.[77] Following Raz, we may call this sort of reasoning "reasoning about the law."[78]

Positivists believe that, on occasion, legal rules or standards fail to provide a determinate outcome in a particular case.[79] For example, legal rules or standards may conflict such that no outcome is required or completely determined by the law.[80] Here there is a legal gap. The judge must either turn to standards "outside" the law or simply pick between the various legally justified options.

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[76] Because a content-independent closure rule determines which legal reason for decision prevails, or identifies a legal permission which the judge can use to close a legal gap.

[77] It may also include situations in which a global, system-wide closure rule operates, e.g., what is not legally prohibited is legally permitted. *See* JOSEPH RAZ, THE AUTHORITY OF LAW 75-77 (1979).

[78] *See* Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS, 1, 10 (1993), reprinted in JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

[79] This failure is a consequence of the a central tenet of legal positivism: the sources thesis. The sources thesis holds that laws are valid by virtue of their pedigree. A reason is a *legal* reason because it can be derived, by procedures recognized as valid by the appropriate legal institutions, from sources that the institutions recognize as valid sources of law. Legal determinacy exists when the sources of law provide a clear, mandatory outcome; indeterminacy exists when the outcome required by the sources is unclear. JOSEPH RAZ, THE AUTHORITY OF LAW at 49-50 ("[T]he law on a question is settled when legally binding sources provide its [the question's] solution. In such cases judges are typically said to apply the law…If a legal question is not answered by standards deriving from legal sources then it lacks a legal answer—the law on the question is unsettled."). Raz's version of the sources thesis claims that sources are the grounds from which legal reasons may be derived, that such reasons can conflict, and that where the sources fail to resolve the outcome of such a conflict, a gap exists. *Id.* at 65.

[80] *See* John Gardner, *Concerning Permissive Sources and Gaps*, 8 OXFORD J.L. STUD. 457-58 (1988). Gardner points out that Raz's definition of a legal gap is ambiguous as between cases in which the law requires a particular result and one in which the law provides a complete solution to a case. In the latter instance, the law may provide a range of permissible outcomes but, due to incommensurability, fail to determine which among them is to prevail. Whether this latter situation ought to count as a gap is discussed, *infra* at Section IV.

Legal gaps arise because legal systems claim to be closed, comprehensive systems of norms: they assert the power to settle disputes even when their rules do not clearly apply to the situation at hand. In other words, there may be cases in which the norms of the legal system purport to guide behavior but fail to apply in a decisive manner. None of the proposed decisions are uniquely required by the rules of the legal system: something more is needed.[81] How an agent is to comply with the law is left *indeterminate* by the rules of the legal system and, if the agent is to be guided by reasons, as opposed to whim,[82] some further non-legal reason is required to enable the application of the legal rules to the given case.[83]

There are three potential ways in which to resolve a legal gap. First, extra-legal standards may provide a determinate answer to the legal issue.[84] Second, where extra-legal standards are also indeterminate, the judge might simply decide which she prefers. Or third, the judge might use her "judgment," without considering extra-legal reasons, to determine that one of the competing options should prevail.[85] Raz endorses the first option, John Gardner the third, whereas I believe that, on occasion, the judge may rely on personal preference. I shall first consider Raz's gap-filling arguments.

2. Raz and the Moral Nature of Extra-Legal Reasoning

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

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[81] Although there may be multiple permissible outcomes, all the solutions may be legal solutions. To that extent, the law provides all the options, although it cannot distinguish which the judge should prefer.

[82] What Raz calls "taste or inclination." *See* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 339 (1995); Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 1, 14 (1993), reprinted in JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

[83] We will return to whether this is in fact a legal gap at Section IV.

[84] Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 1, 7-14 (1993), reprinted in JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

[85] *See* John Gardner *Concerning Permissive Sources and Gaps*, 8 OXFORD J. LEG. STUD. 457, 457-61 (1988); Neil MacCormick, *Reconstruction After Deconstruction: A Response To CLS*, 10 OXFORD J. LEGAL STUD. 539, 544-48 (1990).

The judge may, however, turn to extra-legal reasons to help her determine which legal option ought to be preferred on the balance of reasons; the extra-legal reasons operate to "break the tie" between the competing, undefeated reasons. This reasoning according to law is more limited than fully fledged moral reasoning. Because the law is an exclusionary, institutional system, not just any reason may form the basis of a decision.[86] So the standard of legal decision does not involve considering all the possible reasons (legal and non-legal) which may apply to the instant case, but only those extra-legal reasons which can help the judge decide between the various legally sanctioned options: in more technical terms, those extra-legal reasons which will determine which of the undefeated reasons ought to prevail—this is what he means by reasoning according to law.[87]

Though the *scope* of reasoning in such circumstances is different from fully-fledged moral reasoning,[88] nonetheless Raz believes that moral reasons help the judge decide which, among a range of legal reasons, ought to prevail. This he characterizes as a moral decision. That does not permit strong discretion: what Hart calls "choice between open alternatives."[89] Choice is limited to the valid, but non-decisive (undefeated) legal reasons.[90] The continued availability of the legal reasons as grounds for decision is an important check upon judicial discretion, but does not preclude "what Holmes called the 'sovereign prerogative of choice.'"[91]

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[86] Raz, as a positivist, considers that some are excluded from figuring in the decision process because law is an exclusionary system of practical reasoning. *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS at 141-46.

[87] JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 330-332 (1995).

[88] The correct standard for legal decision is thus not "all things considered" (some reasons are excluded) but rather the balance of reasons.

[89] H.L.A. HART, THE CONCEPT OF LAW 127 (2d. ed. 1994).

[90] H.L.A. Hart acknowledged, however, that, on occasion, judicial discretion may be limited and weak. Where reasons are undefeated, the conflicting reasons for decision do not simply fall away. These reasons limit the grounds of decision: they still operate as reasons justifying decision, but do not provide a "complete" justification requiring a unique outcome. *See* H.L.A. HART, THE CONCEPT OF LAW 204-05 (2d. ed. 1994); *see also* H.L.A. Hart, *Problems in the Philosophy of Law*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 106-07 (1983); H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123, 136 (1993).BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY 26-27 (1993).

[91] H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123, 134 (1993).

Reasoning according to law depends upon the close relationship between law and morality.[92] According to Raz, morality (1) speaks to the same issues as does the law (I call this the Moral Overlap Thesis);[93] (2) takes precedence in resolving those issues when there is a gap in the law (I call this the Moral Supremacy Thesis);[94] and (3) may provide a closed, decisive set of reasons for decision, at least to the extent that they cover the instant case.[95] Although the law generally excludes straightforward moral reasoning as a ground for judicial decision-making, that constraint disappears when legal reasons are indeterminate. In such circumstances, moral reasons become available as a ground for decision. If the judge is to act both legally and morally, she ought to embrace the moral solution.

Turning to morality thus does not mean the judge has the sort of unfettered choice characteristic of strong discretion. First, the range of reasons the judge can consider is narrower than fully-fledged moral reasoning because framed by the legal issues.[96] Whatever decision the judge makes will be some form of "specification" of the law in light of the available moral reasons.[97] Second, those moral reasons are there to "break the tie"; they help decide which, among a range of legal reasons, ought to prevail. Reasoning according to law thus requires the judge to decide on the basis of reason: where no decisive legal reason is available, the strongest moral reason fills the gap.[98]

In reasoning according to law, then, although there is a *legal* discretion — the law is ambivalent as between the various possible outcomes — there is no moral discretion. Legal discretion does not entail the sort of free-flowing choice embodied in strong discretion. Rather, judicial

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[92] *Id.* at 8.

[93] Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 1, 8 (1993), reprinted in JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

[94] Given the moral impact of the decision, the judge must "produce a body of grounds for decisions which can be reasonably believed to be morally better than any alternative." Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 1, 8 (1993), reprinted in JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995). Thus, "reasoning according to law, is — arguably — applying moral considerations." Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 1, 7 (1993), reprinted in JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

[95] JOSEPH RAZ, THE AUTHORITY OF LAW 75-76 (1979)

[96] The correct standard for legal decision is thus not 'all things considered' (some reasons are excluded) but rather the balance of reasons.

[97] On the process of specification, *see* JOHN FINNIS NATURAL LAW AND NATURAL RIGHTS 284 (1980); Neil MacCormick, *Reconstruction After Deconstruction: A Response To CLS*, 10 OXFORD J. LEGAL STUD. 539, 544-48 (1990). They both refer to specification as "*determinatio*."

[98] Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 1, 7 (1993), reprinted in JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

choice is doubly constrained: only some among the available options are legally valid; and morality provides a decisive reason to fix which among the available undefeated legal reasons to select.

At this point, it is worth noting that Raz's "reasoning according to law" presents a strong endorsement of the positivist "sources thesis": legal validity depends upon social sources, not merit.[99] The positivist contention is that the source-based ability to validate norms is what differentiates law from morality.[100] When reasoning according to law, there is a legal gap, *not* because the judge has any choice or discretion, but because the legal system does not provide a complete justification of the outcome.

D. Against Preference: Raz on Doctrinal Reasons for Decision

Turning to morality does not always resolve the decision in a determinate manner. Although moral reasons sometimes operate to fill the legal gaps, they are not always available in this way. Problems arise if extra-legal reasons for decision are themselves gappy.[101] The relevant moral reasons may themselves be vague and ambiguous, or conflicting and incommensurate. That is, moral indeterminacy may match legal indeterminacy. When both legal and moral reasons run out, there is no way to decide on the basis of a decisive reason, moral or otherwise. The judge would appear to be able to choose as she wishes among the available legal options, based on nothing more than preference alone. The judge possesses strong discretion.

Raz distrusts capricious judicial decision-making even when legal indeterminacy is matched by moral indeterminacy. He suggests two reasons for not relying on preference: a political reason and a coherence-based reason. The political reason is to assure the public that judge is either neutral or following some set of institutional rules, so that, even although the judge is deciding according to law but without moral guidance, she is nonetheless acting in her institutional capacity.[102]

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[99] John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 199-202 (2001).

[100] John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 203-04 (2001).

[101] As H.L.A. Hart was among the first to recognize: "Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer." H.L.A. HART, THE CONCEPT OF LAW 204 (2d. ed. 1994).

[102] JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN at 339. The political justification targets the transparency of preference to value. Preferences, according to Raz, make

The coherence reason responds to the public's demand for shared, predictable rules of law. In a modern, municipal legal system, the law seeks to govern large numbers of people through shared standards of conduct applicable without further direction.[103] While capricious decisions may be able to guide the behavior of small numbers of people in direct contact with the norm-setting authority, they are unable to coordinate large numbers of people, particularly in atomistic societies.[104] Accordingly, some institutional, shared, and predictable standard of decision is required. Capricious decision risks being sufficiently random to undermine this feature of law.[105]

This applicative model of adjudication, though subject to different expressions and assaults, forms the central case of decision "according to law."[106] Such a view fits comfortably within most modern liberal trends in legal political theory, and receives its strongest modern expression in the Legal Process school,[107] and Dworkin's "right answer" thesis.[108] These envisage the law of modern, liberal legal

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sense only if what is valued actually is valuable. They are thus not reasons in themselves, merely endorsements of (independently existing) values or goods. JOSEPH RAZ, THE MORALITY OF FREEDOM at 140. Accordingly, to avoid relying upon her legally arbitrary personal taste, preference or inclination — the judge's values rather than the law's — the judge should base her decision upon doctrinal reasons if she is to decide in a manner faithful to her role as a judge. Raz suggests that "it may be unacceptable that [the judge's] private tastes should determine rules about duties of disclosure of information in contract formation, or standards of care in negligence. If so, we need an artificial system of reasoning which could help determine cases where natural reason runs out, thus assuring the public that decisions are no mere expression of personal preference on the part of judges." JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN at 339.

[103] *See* H.L.A. HART, CONCEPT OF LAW at 125 (1st ed. 1990).

[104] Joseph Raz, *The Relevance Of Coherence*, 72 B.U. L. REV. 273, 312 (1992), reprinted in JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

[105] *See* Joseph Raz, *The Relevance Of Coherence*, 72 B.U. L. REV. 273, 312 (1992), reprinted in JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

[106] Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS, 1, 8 (1993).

[107] For a strong legal process rejection of personal preference as an exercise of naked power, and an insistence on some principled, neutral tie-breaking reason, *see* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11-16 (1959). *See also* Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 90-91, 94-96 (1935). More conservative versions of Wechsler's endorsement of neutral principles appear in the work of, e.g., Alexander Bickel and Robert Bork. *See* Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

[108] *See, e.g.,* Ronald Dworkin, *No Right Answer*, 53 N.Y.U. L. REV. 1, 30-31 (1978); reprinted in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

systems as a system of general rules or standards applicable to a multiplicity of cases in a more-or-less determinate manner. The source and scope of judicial authority to decide cases rests, at bottom, upon the principles or values underlying the social order of which the government, and in particular the judiciary, is a part.

I shall first consider Raz's rejection of preference before comparing it to the Legal Process and Dworkin's discussion of adjudication.

1. Raz Against Preference

Raz asserts that two specific types of indeterminacy in particular are likely to render law and morality gappy, requiring a turn to doctrinal reasons: (1) social and (2) moral pluralism.[109] "Social pluralism…is…the existence of a plurality of inconsistent views on moral, religious, social and political issues in democratic (and in many other) societies."[110] Local coherence, the attempt to make sense of apparently conflicting doctrine by organizing it under some governing value or set of values,[111] prevents too much unpredictability or change among the governing legal values destabilizing the legal system. Where selecting some extra-legal organizing principle threatens too radical a change in legal doctrine, the judge should generally resist the temptation to engage in a broad-ranging reconstruction of the law rather than a local reform of legal doctrine. Local coherence has institutional value, even if the result is morally inferior than broad reform.[112]

According to Raz, when confronted with social pluralism, local coherence requires us to use legal values as way of organizing social values. Within an area of doctrine, the judge must consider the legal rule, not in isolation, but as tending to organize or "make sense of" a particular aspect of the law. She should then select that rationalization which fits best within the relevant corpus of legal materials, rather than

[109] A third situation in which considerations of local coherence have value for judicial decision-making exists when some distinct and determinate moral value is enshrined as a legal value. Because the value is itself coherent, judges should apply it consistently and coherently when working out its ramifications in the law. When institutionalizing this type of moral value, anything other than local coherence would be morally sub-optimal. Joseph Raz, *The Relevance Of Coherence*, 72 B.U. L. REV. 273, 309-14 (1992), reprinted in JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).
[110] Joseph Raz, *The Relevance Of Coherence*, 72 B.U. L. REV. 273, 311 (1992), reprinted in JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).
[111] Joseph Raz, *The Relevance Of Coherence*, 72 B.U. L. REV. 273, 311 (1992), reprinted in JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).
[112] Joseph Raz, *The Relevance Of Coherence*, 72 B.U. L. REV. 273, 309-14 (1992), reprinted in JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

simply expressing her preference for one outcome over another. Intra-legal considerations of "fit" and "making sense" thus substitute for straightforward moral reasons or judicial caprice.[113]

Moral pluralism suggests that moral values may conflict in a manner that precludes reducing distinct and competing values to a single scale. Where small numbers of people are involved, "there is no moral objection to adopting any of the mixes which are not ruled out as inferior. People simply do what they like, choosing in accordance with their personal taste."[114] Where, however, larger numbers are affected, some relatively coherent scheme of social organization is valuable to co-ordinate a given range or type of activity.[115] Local coherence enables institutions regulate general social behavior by ensuring shared, predictable standards of conduct.

Social and moral pluralism suggest that local coherence has particular value, then, when the judge is confronted with conflicts between incommensurable and so undefeated reasons. In such circumstances, Raz appears to believe that, if the judge cannot be right, she might at least be orderly. Local coherence enables the judge to order decisions based upon autonomous and institutional legal values rather than moral values or judicial caprice. Coherence forces her to look backwards at the law as it is and at legal doctrine and to use them as the source of legal decision.

Raz produces, in effect, a pragmatic and consequentialist argument in favor of judicial conservatism. Faced with the prospect of unsettling the public's established expectations through too sudden and too global a change, the judge ought to stop and defer to legal doctrine, even if so doing is morally suboptimal.[116]

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[113] See, e.g., Neil MacCormick, Reconstruction After Deconstruction: A Response To CLS, 10 OXFORD. J. LEGAL STUD. 539, 544 (1990); John Finnis, On The Critical Legal Studies Movement, in: OXFORD ESSAYS ON JURISPRUDENCE: THIRD SERIES 145, 160-61 (John Eekelaar and John Bell, eds., 1987).

[114] Joseph Raz, *The Relevance Of Coherence*, 72 B.U. L. REV. 273, 312 (1992), reprinted in JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

[115] *See* Joseph Raz, *The Relevance Of Coherence*, 72 B.U. L. REV. 273, 312 (1992), reprinted in JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN (1995).

[116] Raz could be considered to hold a weaker, descriptive position. This would suggest that he is simply stating the practice of a particular legal system when he relates that in an effort to avoid pragmatic conflict the courts, forced to choose between partial reform inducing pragmatic conflict and a conservative policy, tend to favor conservatism and clarity unless the "evils of the existing doctrine . . . [are] grave enough to justify . . . partial reform." RAZ, AUTHORITY OF LAW at 201. This, Raz suggests, is the main constraint upon judicial innovation and prevents judge-

Raz's concern with the limits of the judicial role in a democratic society also provides a point of contact with the Legal Process school. He shares their concern that the judge should not attempt too much due to lack of information about the potential consequences and lack of institutional competence to take responsibility should things not work out as planned. Judges should not, consciously or accidentally, destabilize the law where morality is indeterminate.

Two features of the Legal Process movement are relevant here: the claim that judges should rely on "neutral principles"[117] as a function of their adjudicative role; and the use of "reasoned elaboration" to determine which principles ought to win out in the absence of a legally sanctioned decisive principle.[118]

As Brian Bix notes, "'neutral principles' was an effort to find constraint and legitimacy in judicial decisionmaking, which had been attacked as being (inevitably) political and result-oriented."[119] According to Herbert Wechsler, neutral principles preclude judicial caprice by providing "criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will."[120] Rather than indulging their personal preferences, judges are required to rely upon pre-existing, legislated (and in the context of constitutional interpretation, *constitutional*) values.[121] The legislature thus determines the relative weight of the different values, rendering them commensurable. The principle technique for applying such values is

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made law from reaching the same conclusions, or having the same sweep, as legislated law.

[117] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[118] *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031 (1994) (discussing development of concept of reasoned elaboration).

[119] Brian Bix, Book Review: *Positively Positivism* (Review of Legal Positivism in American Jurisprudence by Anthony J. Sebok), 85 VA. L REV. 889, 898-99 (1999).

[120] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11 (1959).

[121] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959); *see also* Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200 (1984) ("The neutral principles that we are enjoined to seek are based on values, not the full range of values each individual judge might be tempted to enlist from among a personal collection of political, economic, or social preferences, but the values that can reasonably be asserted to have legitimacy for the adjudication process."). *See also* Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 90-91, 94-96 (1935).

some form of balancing test, which simply declares which of the reasons proves decisive in this case.[122]

The Legal Process school exemplified H.L.A. Hart's "Noble Dream" of fully determinate adjudication in which the court is constrained to operate only in its applicative or adjudicative role. The striking similarity between Raz and Legal Process suggests that Raz participates in a positivist version of the "Noble Dream." Both are motivated by the search for some decisive reason as an alternative to the "Nightmare" of private, arbitrary adjudication that they take capricious decision to entail.

Perhaps more intriguing is the similarity of aspects of Raz's theory of adjudication to Ronald Dworkin's.[123] Though Raz and Dworkin disagree about where the line between legal and extra-legal justifications is to be drawn,[124] they both agree that decisive moral reasons constrain judicial discretion, and that, on occasion, considerations of coherence do so too (although they disagree over the extent to which the law may be represented as coherent). Furthermore, to the extent that they agree about the form and function of adjudication as a predominantly applicative enterprise, they do so for similar underlying reasons. They both believe that neutrality and predictability require some sort of public — Dworkin would call it principled[125] — style of decision-making to respect the democratic nature of the judicial process.

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[122] Bix suggests that "Wechsler's 'neutral principles' led to more conservative restatements of legal process views by commentators like Alexander Bickel and Robert Bork, who combined the post-realist concern about constraining judicial action with a deep skepticism generally about morality and specifically about official attempts to apply moral principles." Brian Bix, Book Review: *Positively Positivism* (Review of Legal Positivism in American Jurisprudence by Anthony J. Sebok), 85 VA. L REV. 889, 898-99 (1999) (citing Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). *See also* Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 642 (1989) ("The hope was that judicially conceived notions of self-restraint and the duty to render a 'reasoned decision' would establish constraints on the freedom of a judge in deciding issues of subjective value."). *See also* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

[123] Perhaps such a similarity should not be surprising, given Dworkin's indebtedness to some of the sensibility, at least, of the legal process school. *See* Vincent A. Wellman, *Ronald Dworkin and the Legal Process Tradition*, 29 ARIZ. L. REV. 413 (1987).

[124] BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY at 99-101 (1993).

[125] RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

III. REJECTING RAZ'S RETURN TO DOCTRINALISM

So far, I have suggested that Raz shares with certain American theories of adjudication the belief that a decisive reason can ensure that judicial decisions are free from caprice, that is, the personal preference of the judge, or what Oliver Wendell Holmes called "the sovereign prerogative of choice."[126] For Raz, as for Dworkin and the Legal Process school, personal preference undermines the judge's institutional role and militates against predictable, neutral, transparent decision-making. Accordingly, if the judge is to remain within her predominantly applicative role[127] and simply declare the law, she must identify some decisive reason, whether legal, moral, or doctrinal, that resolves the case.

Social and moral pluralism place the judge in a predicament. In either circumstance, the available legal and moral values are conflicting and incommensurable and cannot provide a decisive reason for decision.[128] The only option, Raz suggests, is to turn back to the law to seek some form of determinate outcome.[129] Doctrinal or formalist legal values provide the only remaining legitimate source of decisive reasons upon which to base institutional choice.

Raz's belief that doctrinal reasons operate to close legal-moral indeterminacy appears to conflict with his claim that where the law is indeterminate and formalist reasons conflict with moral ones, then moral reasons should win out. Formalism, as a theory of adjudication,

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[126] Oliver Wendell Holmes, *Law in Science and Science in Law*, in O.W. HOLMES, COLLECTED LEGAL PAPERS 239 (1920) (cited in H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123, 136 (1993)).

[127] I do not deny that Raz recognizes that judges, on occasion, have a legislative role. My claim is that he seeks to constrain the legislative role by requiring the judge to rely upon decisive moral or doctrinal reasons where legal reasons runs out.

[128] "[T]he return from morality, when asked for its contribution to the issue at hand, is that it has no guidance to give." All we have left is judicial caprice; it seems like "the return from morality is that whatever we decide to do becomes the right thing to do." JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN 335 (1995). Where the law is concerned, Raz believes, "it may be unacceptable that people when acting as judges should simply express their will, their inclination or taste in favoring one solution over another." Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS, 1, 14 (1993).

[129] "Doctrinal reasons, reasons of system, local simplicity and local coherence, should always give way to moral considerations when they conflict with them. But the[doctrinal reasons] have a role to play when natural reason runs out." JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN 335 (1995). That role is to take the place of personal preference and to provide an institutional reason for decision when both legal and moral reasons are incommensurable.

is an attempt to prescribe how judges ought to decide gappy cases: it holds that, even although the legal reasons underdetermine the result of a case, nonetheless the judge ought not to turn outside the law to extra-legal reasons.[130] Instead, the judge should rely upon some legal principle or wait for the legislature to resolve the issue.

Where the relevant rule, taken in isolation, fails to generate a unique outcome, the interaction of similar rules in the area of law at issue may reveal or generate a doctrinal structure and purpose inherent in that body of law. Relying on such formalistic or doctrinal reasons has the advantage of preserving the institutional values of predictability and neutrality, and promotes public, institutional, decisive reasons over private or extra-legal reasons for decision. Formalism has costs, of course. It encourages rigidity and insensitivity to particular circumstances. Furthermore, because formalism excludes consideration of extra-legal reasons, it leads to morally sub-optimal outcomes.[131]

Raz rejects formalism as a means of resolving legal indeterminacy where morality is determinate, but embraces formalism, or something like it, where incommensurable conflicts among legal reasons are matched by moral incommensurability. I shall first examine the reasons for rejecting formalism, and then those for re-embracing it in the presence of moral indecisiveness, before proposing a three-fold critique of that re-embrace.

A. Formalism as a Preference-Excluding Device

Formalist reasons operate in the presence of a legal gap. They thus compet with moral reasons for decision. But formalism expressly rejects relying upon moral reasons to decide a case: the only reasons that count are legal reasons. It thus conflicts with Raz's belief in the prmacy of morality where legal reasons no longer exclude the operation of moral reasons. The point of reasoning according to law is that moral

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[130] *See, e.g.,* Frederick Schauer, *Formalism* 97 YALE L. J. 509 (1988). Schauer defines formalism thus: "Formalism is the way in which rules achieve their 'ruleness' . . . by . . . screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account. Moreover, it appears that this screening off takes place largely through the force of the language in which rules are written. Thus the tasks performed by rules are tasks for which the primary tool is the specific linguistic formulation of a rule." *Id*. at 510.

[131] *See, e.g.,* Frederick Schauer, *Formalism* 97 YALE L. J. 509, 534-35 (1988); *see also* Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 355 (1973) (formalism as view that rule application is mechanical and that mechanical rule application is just); ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 1-2 (1986) (formalism as constrained and comparatively applitical decisionmaking).

reasons can bind judges. Morality does so by covering the same ground as law and providing a more compelling basis for decision, all things considered.

In the face of a legal gap, where formalist reasons conflict with moral reasons, the prinacy of morality entails the rejection of formalism. Reasoning according to law mandates choosing the legally correct outcome that comports with the morally correct outcome.[132] Unless formalist reasons coincidentally comport with moral ones, they will not generate the correct outcome. Legal doctrine is never an appropriate basis for filling the gap unless it supports the outcome that is morally best on the balance of moral reasons.

Formalism thus does no work where morality is determinate. If (1) there is a legal gap, and (2) the scope of morality and law overlap at this point, and (3) morality determines what is the best outcome, on the balance of reasons, then where formalist and moral reasons conflict, moral reasons defeat formalist reasons. On the other hand, where formalism comports with morality and identifies (by luck or design) a moral reason for the outcome, it is redundant. We would be better off (things are simpler, quicker, and more appropriately motivated) immediately turning to morality to determine what is morally best.

Raz suggests that formalism does, however, have a role to play in the face of capricious decision, and for the same reason that it is redundant when decisive moral reasons are available. Raz's primary worry is personal preference expressed through capricious choices among available options. To avoid basing her decision upon her personal taste or inclination, the judge must substitute some decisive reason for breaking the deadlock. Where legal rules and moral reasons both fail to generate a determinate outcome, considerations of local coherence and consistency may generate a determinate resolution of the case.

The idea that formalist or doctrinal reasons can adjudicate between competing outcomes faces three potential objections. First, doctrinal reasons may themselves be gappy, and so, logically, preference may come into play even after considering legal rules, morality, and the underlying principles and purposes of a legal system (or of law more generally).[133]

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[132] JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN at 330-335.

[133] It is worth noting that the possibility of capricious discretion is theoretically unlimited: whether it is some aberrant feature of legal reasoning or some more commonplace occurrence requires empirical investigation. There is, theoretically, no reason to believe that this sort of indeterminacy is limited to the most important questions of law or morality. A case may be "hard," in the sense of having no

Second, Raz may consider that morally excluded institutional reasons may return to figure as a basis for decision where morality proves indecisive. Thus, doctrinal reasons that were overridden or excluded by moral ones in the face of a legal gap reappear when incommensurable conflicts render morality unable to provide a decisive reason for decision. My claim is that the moral reasons do not drop out of consideration simply because they are indecisive: these reasons continue to operate to override or exclude the doctrinal reasons. Rather than relying on otherwise sub-optimal reasons, the judge should choose among the optimal reasons in rendering decision, even if her ultimate choice expresses her preference rather than some objective standard of decision.

Third, Raz might believe that doctrine has a creative role to play where legal and moral reasons are indeterminate. Rather than "finding" doctrine, the judge's duty is to generate it. The doctrinal imperative operates to ensure that the judge justify the outcome using only institutional reasons and so avoid non-institutional justifications. The judge's duty is thus independently to generate some doctrinal resolution of the legal and moral conflict without turning outside the law. She must re-interpret the law upon the assumption that some decisive doctrinal reason can justify the outcome in the case. If this is the role of doctrine, however, predictability suffers. There is no decisive advance reason for believing one (version of) doctrine will override another — or perhaps even what the doctrine will be.

The only remaining justification for endorsing doctrine as a closure device would be that it relies upon public and neutral reasons. If preference does so too, then doctrine does not trump preference: in fact, I shall show that there are good reasons to believe the opposite is true.

1. The Return of Morally Excluded Doctrinal Reasons

Raz appears to consider that the doctrinal reasons do not simply fall away, but come back into consideration after moral reasons prove indeterminate. That is, where morality is indecisive, doctrinal reasons fail to be "trumped" by any moral reasons, and so figure in legal reasoning all the time. The legal reasons have not run out: at least some of them operate to decide the outcome when moral reasons fail. He makes it clear that "[d]octrinal reasons, reasons of system, local

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determinate legal, moral, or doctrinal resolution, but nonetheless trivial, altering the rights of only the parties, or a few individuals, or settling a relatively unimportant question of law.

simplicity and local coherence, should always give way to moral considerations when they conflict with them. But they have a role to play when natural reason runs out."[134] That role is to take the place of personal preference and to provide an institutional reason for decision when both legal and moral reasons are incommensurable.

How do reasons that could not cure a legal incommensurability before we turned to moral reasons do so after we have turned to moral reasons and found them insufficient (not, it should be noted, absent)? Raz suggests that there is no conflict in this sort of situation: that doctrinal reasons are decisive just because moral indeterminacy renders them unopposed, and so there is no reason that could defeat them.[135] I suggest that this view is mistaken. Just because the moral reasons do not provide a decisive reason for decision does not mean that they somehow fail to conflict with doctrinal reasons: "running out" does not mean "disappear." Moral reasons are still present, they just fail to recommend one, unique option.

Raz's appears to believe that, where morality is indecisive, the turn to morality has sent us down a blind alley and so we must make do with the law. "[T]he return from morality, when asked for its contribution to the issue at hand, is that it has no guidance to give."[136] All we have left is judicial caprice; it seems like "whatever we decide to do becomes the right thing to do."[137] The return from morality is not, however, negligible: it is only indecisive. Moral reasons have overridden or excluded legal reasons: the legal reasons do not suddenly become morally acceptable just because morality is indecisive. Morality has not exhausted itself in this way.

Doctrinal reasons are not decisive just because other moral reasons are indecisive. Undefeated but indecisive moral reasons for decision may still be stronger than the doctrinal alternatives. That is, the fact that a reason does not outweigh *every* other reasons is not a barrier to it being weightier than some other reasons. According to reasoning according to law, non-excluded moral reasons outweigh doctrinal reasons when they conflict. This will not change simply because the moral reasons conflict with other moral reasons and are incommensurable with them.

Accordingly, the same argument that justified the turn to morality in preference to formalism when legal reasons proved gappy prevents

[134] JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN at 340.
[135] JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN at 339-40.
[136] JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN 335 (1995).
[137] JOSPEH RAZ, ETHICS IN THE PUBLIC DOMAIN 335 (1995).

returning to formalism when moral reasons fail to produce a decisive outcome. The moral reasons are not cancelled just because they are incommensurable and indecisive. Doctrine provides no new information about the relative strength of the reasons: it is not the case that their relative strength has changed.

Where moral reasons have attached, although the legal, moral, and doctrinal reasons are fragmented, the move from moral reasons to doctrinal reasons appears particularly capricious given the Anglo-American legal system's tradition of rational justification. In such legal systems, it is usual for the judge to give reasons that explain or justify her decision. In a situation in which there are no decisive reasons for favoring one decision over the other, the judge may have to make her decision palatable to the losing side by advancing whatever justificatory reasons she can. These may indeed be technical, doctrinal reasons. But the use of such reasons may be the means by which the judge signals to the parties that there was no decisive reason which determined the outcome: case was a close one, some decision had to be made, and in the end she judged that this would be the better outcome.

Once the judge has started to consider moral reasons, then simply to argue that these reasons no longer apply and that technical legal considerations ought to decide the issue appears to be an evasion of the issues.[138] Deciding on the basis of technical reasons may itself be considered a partial and prejudiced manner of deciding the issue, especially as such considerations are innately conservative, favoring the status quo. Where, however, the court's primary institutional role is applicative and justified by the values of predictability and neutrality, courts should avoid engaging in unwarranted and controversial legislation, instead favoring the status quo.

2. Incommensurable Conflicts Among Doctrinal Reasons

The most straightforward objection to Raz's reliance on doctrinal reasons is to suggest that they may be conflicting and incommensurable rather than cohesive and mutually supporting. It turns out that many theorists tend to organize areas of law around conflicting, rather than unitary, doctrines, and I begin by giving a few examples. If doctrinal reasons, along with the more directly applicable legal and moral reasons, are as fragmented as is often claimed, then judicial caprice

[138] Perhaps because the parties have alerted the judge to the moral arguments, perhaps because morality is unavoidable, given the circumstances. *See e.g.*, ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975)

must operate to resolve the outcome. This is so even though all the possible outcomes are legally valid outcomes.

Doctrinal reasons may be incommensurable. That is to say, different systems of reasoning used to organize areas of law into coherent chunks may overlap and compete to explain the more particular rules or standards. For example, the basic concepts of contract law are notoriously contradictory, some favoring communitarian values that "channel[] and regulat[e]…market transactions according to ideals of social justice," others embodying market values of *laissez faire* by providing "a facility for individuals to pursue their voluntary choices."[139] Each theory purports to explain the manner in which the law of contract is organized, and consequently the attitude of the legislature and courts towards the point and purpose of contractual arrangements. The two models propose to account for the values that do or should underlie the law of contract. They offer a means by which to gauge and critique different procedural and substantive arrangements, but which conflict at different points and in different ways, often providing incommensurable reasons for decision

The type of doctrinal conflict — between commensurables or incommensurables — impacts the structure of a particular area of law. Where the doctrines conflict in a commensurable manner, once a legal source (a case, statute or custom) determines the relative strength of one doctrine *vis-à-vis* the other, a judge can and should use that source to identify the outcome of future conflicts. The case, statute or custom authoritatively determines how subsequent cases are to be decided.[140] To the extent that the doctrines are incommensurable, doctrinal conflicts are "nested."[141] That is to say, conflicts between the communitarian and *laissez faire* models constantly re-appear, unsettled, in conflicts among rules or principles that embody each value (or embody both at the same time). The outcome is not predetermined by prior resolutions of the conflict but must be reconsidered anew on each occasion the conflict arises.

American jurisprudence has, at significant periods, considered doctrinal reasons to exist in a more-or-less regimented state of nested conflict. For example, Karl Llewellyn suggested that legal doctrine existed in conflicting canonical statements, such that each doctrinal argument

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[139] Hugh COLLINS, THE LAW OF CONTRACT 1 (1986).

[140] This is a central feature of Hart's description of core and penumbra. *See* H.L.A. HART, THE CONCEPT OF LAW 119 (2nd ed. 1994). (discussing "duality of a core of certainty and a penumbra of doubt").

[141] Duncan Kennedy, *A Semiotics Of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991).

could be opposed with a conflicting one.[142] Duncan Kennedy developed Llewellyn's argument by suggesting that there are a range of stereotyped doctrinal "argument bytes" that it is the business of the lawyer to know and deploy. Each byte is matched by an opposite, and both are nested, recurring throughout the law in various situations, so that on each occasion the conflict must be resolved anew.[143] A final familiar version of this thesis is Roberto Unger's suggestion that the law is structured by various principles and counter-principles, such that the judge must choose between them whenever deciding a case.[144]

It is not necessary to embrace Legal Realism or Critical Legal Studies to recognize that doctrine may be indederminate. Consider, as an example of an conflict among doctrinal reasons, *Morrison v. Thoelke* [145] a case of first impression concerning formation of contract. The problem addressed by the court in *Morrison* is that, under the general rules of contract formation, an offer may be revoked at any time before its acceptance is communicated to the offeror, but not after acceptance.[146] Communication may, however, be a temporally extended process, and where there is a lapse of time between the sending of a revocation and its receipt, the offeree may accept the offer. That is in fact what happened in *Morrison*.

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

In *Morrison*, there are two conflicting rules, each of which provides persuasive legal authority for the alternative choices. The "deposited acceptance" rule stipulates that depositing the letter in the post signifies acceptance; another rule conceives of the post as the agent of the sender, and delays acceptance until it is received by the offeror.

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[142] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401-06 (1950) (describing a series of canons and counter-canons that are interrelated as a series of doctrinal thrusts and parries).

[143] Duncan Kennedy, *A Semiotics Of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991).

[144] ROBERTO M. UNGER, CRITICAL LEGAL STUDIES MOVEMENT (1983).

[145] 155 So. 2d 889 (1963).

[146] *See, e.g.,* Cal. Civ. Code § 1586.

Whichever rule is selected will fill a gap in the revocation-of-contract rule, in which the term "communicated to the offeror" is vague. There is no decisive legal answer, because this is a case of first impression and other courts are split on the issue, as is the relevant academic literature. There is also no moral answer. Obligation, whether legal or moral, has not attached yet. Here legal and moral obligations cover the same ground.

More to my point, doctrine itself is indeterminate. The *Morrison* court noted that there is a persuasive academic literature surrounding the various justifications for the different versions of the postal rule.[147] Unfortunately for the judge, the academy failed to provide an overriding reason for selecting one among the various doctrinal justifications. The various doctrinal reasons remained undefeated without any reason, moral, legal, or doctrinal, to break the tie.

Here balancing fails because the competing legal (and other) reasons are of equal strength or incommensurable. No reason is decisive and the judge must exercise a choice. Balancing, however, is only one half of the Legal Process prescription for neutral adjudication. The other half consists in what Legal Process scholars call the "reasoned elaboration of purposive law."[148] Reasoned elaboration operates where commensurability fails and balancing is impossible. It requires the outcome to be justified by a neutral, public, participative process that engages in, on the one hand, a technical explanation of the judge's institutional competence and, on the other, an exploration of the purposes of the substantive rule or doctrine at issue, "consistent with the other established applications of it and . . . in the way which best serves the principles and policies it expresses."[149]

The process of elaboration cannot remain neutral if the judge's personal preference becomes the tipping point when comparing competing options. The whole point of reasoned elaboration is that the relevant reasons transcend the immediate result. They are to be contrasted with the personal political or social preferences of the judge. Accordingly, the tie-breaking reason must derive from some neutral source, not from willfulness or personal preference.

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[147] Morrison at 155 So.2d at 904.

[148] William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2042 (1994).

[149] William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2043 (1994) (internal quotations omitted).

Purpose serves the function of neutrality in two distinct ways. First, it operates as a substantive criterion of any law, requiring the judge to determine the goals it was enacted to serve given the other valid rules and standards. In this way, purpose can operate as a form of hypothetical testing,[150] to exclude non-conforming outcomes and remove indeterminacy over the rule's application. Second, it operates as a procedural criterion, such that certain styles of reasoning are appropriate given the different roles and competencies of diverse institutions within the law.[151]

In *Morrison*, however, after elaborating the doctrines, neither is weightier than the other. The process of hypothetical testing has excluded an insufficient range of options, and the judge must still pick among them. In this case, the moral and legal issues await the judge's choice, rather than direct it. Reasoned elaboration takes the judge only so far: she must still choose without some decisive reason for so doing. For future cases, what is required is certainty: thus, all that is required is a decision.[152] Whichever reason the judge chooses will do, but she must choose one.[153] Her choice is not, however, determined by the chosen doctrine, but endorses it.

3. The Duty to Generate Decisive Doctrinal Reasons

A final version of formalism may hold that where legal reasons prove indecisive, and the available doctrinal organization of the rules does not determine the outcome, then the judge should generate another version of the doctrine, one that does resolve the issue at hand. The judge's duty is thus to expand or innovate doctrine in an attempt to settle the case based upon the adjudicative imperative to decide. Here, the point of reasoned elaboration is not to find and declare the legally mandated outcome, but to *create* it.[154] So long as the judge provides some neutral

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[150] *See* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 667 (1958).

[151] William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2043-45 (1994).

[152] *See* Morrison, 155 So. 2d at 904.

[153] This seems to be the way things appeared to the court. The judge first justified his decision first on the need to decide the case one way or the other. "We can choose either rule; but we must choose one. We can put the risk on either party; but we must not leave it in doubt." Morrison, 155 So.2d at 903. The court next considered that its decision would be "in accord with the… essential concepts of contract law." Morrison at 155 So.2d at 904. This is a doctrinal reason for action.

[154] *See* HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW 143-52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); William N. Eskridge, Jr. & Philip P.

principles for the rational exposition of the law, judicial legislation may be sufficiently determinate as to be neutral and predictable.[155]

Dworkin pointedly rejects incommensurability as having a role in adjudication.[156] Rather, Dworkin argues that a set of coherent legal principles exists to settle the outcome in each case.[157] For Dworkin, as for the legal process school, the judge's goal is to link the instant case to the more general principles organizing the legal materials, and to use these to generate a determinate or at least "neutral" processes by which to resolve legal indeterminacy.

Neil MacCormick , like Joseph Raz, provides a positivist account of judicial decision-making as that embraces incommensurability. MacCormick attempts to accommodate the sort of "reasoned elaboration" characteristic of the Legal Process school and the principled decision-making propounded by Dworkin. MacCormick adopts two of the requirements of reasoned elaboration: (1) that an outcome be "formally just,"[158] which is to say, generalizable from a particular *ruling* to a more general *rule* or principle; and (2) that the rule or principle identified is a *legal* rule or principle, or can be derived from legal rules or principles. He too suggests that, where the law proves indeterminate, the job of the judge is to harmonize the operative rules with the general principles of the legal system.[159] Where the principles fail resolve the case, necessitating a choice on consequentialist grounds, "evaluation should be made by reference to legally appropriate values. . . [and] must be shown to be coherent with the rest of the legal system or the relevant branch of it."[160]

MacCormick is not, however, methodologically committed to commensurability. He believes that it is perfectly possible, however, that coherence simply will feature "weakly" or not at all in the

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Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031 (1994) (discussing development of concept of reasoned elaboration).

[155] *See See* RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); Vincent A. Wellman, *Ronald Dworkin and the Legal Process Tradition*, 29 ARIZ. L. REV. 413 (1987); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 11-17 (1959) (propounding importance of neutral principles for constitutional adjudication).

[156] *See* Ronald Dworkin, *On Gaps in the Law*, in CONTROVERSIES ABOUT LAW'S ONTOLOGY, 89, 90 (Paul Amselek and Neil MacCormick, eds, 1991) (best political theory for resolving hard cases is one that rejects incommensurability).

[157] *See* RONALD DWORKIN, LAW'S EMPIRE, 225-75 (1986).

[158] *See* NEIL MACCORMICK LEGAL REASONING AND LEGAL THEORY 81, 86 (1994).

[159] *See* Neil MacCormick, *"Principles" Of Law*, JURIDICAL REV. 217, 222 (1974).

[160] *See* NEIL MACCORMICK, H. L. A. HART 126 (1981).

justification of a particular outcome.[161] There may be more than one legally valid rationalization of the rules, so that multiple proposed rules are perfectly coherent with legal doctrine. A choice must somehow be made between them. That choice may be made on the basis of consistency with prior extensions of the law or on consequentialist grounds.

Consequentialist arguments are a means of testing possible rules by considering how they "make sense" of both the law and the real world, and limited to those supported by legal principle.[162] On the one hand, the judge must evaluate which rationalization fits *best* (rather than merely *fits*) with the corpus of valid legal materials.[163] On the other hand, as with the process of reasoned elaboration, the judge tests the impact of the rule by considering its effects in the world. The purpose of testing is to determine which form of the proposed rule is most likely to achieve the ends contemplated by the controlling principle.[164]

MacCormick thus avoids John Finnis's critique of Dworkin's coherence-based theory of "law as integrity."[165] Finnis suggests that the two values Dworkin adduces a comprising law as integrity, "fit" and "justifiability," are incommensurable with each other, and so no judge can engage in the sort of balancing that Dworkin proposes would produce a unique "best" or decisive outcome.[166] MacCormick does not seek a unique outcome: he instead proposes that judges should evaluate the consequences of the various proposed rules. All possible outcomes are legally justified, because based on some rule coherent with the existing legal principles. Each outcome has a different impact on the world. MacCormick's point is that it is worth evaluating what that impact is, and determining whether it is consistent with prior rulings in that area.[167] If, at the end of this process, there are multiple such

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[161] "[C]onsiderations of 'coherence' may be considered only weakly justifying considerations. . . .coherence concerns the derivability of a novel decision or ruling in law from the re-existing body of law, not the ultimate defensibility of the decision or ruling from a moral point of view." Neil MacCormick, *Coherence In Legal Justification*, in THEORIE DER NORMEN: FESTGABE FÜR OTA WEINBERGER ZUM 65. GEBURTSTAG , 47 (Werner Krawietz et al., eds., 1984).

[162] *See* NEIL MACCORMICK LEGAL REASONING AND LEGAL THEORY 101-2 (1994).

[163] *See* NEIL MACCORMICK LEGAL REASONING AND LEGAL THEORY 101-3 (1994).

[164] NEIL MACCORMICK LEGAL REASONING AND LEGAL THEORY 150 (1994).

[165] *See* RONALD DWORKIN, LAW'S EMPIRE, 225-75 (1986).

[166] *See* John Finnis, *On Reason and Authority in* Law's Empire, 6 L. & PHIL. 357, 370-76 (1987).

[167] Compare JOSEPH RAZ, THE MORALITY OF FREEDOM 363 ((1986) ("where an agent is faced with only two options and they are incommensurable … [o]ne cannot compare the value of the options, one can only judge their value each on its own.").

justified outcomes, the judge must pick among them. Capricious choice remains a possibility.

Where incommensurability exists, so does the possibility of capricious choice. Accordingly, to the extent doctrinal arguments are incommensurable they fail to insulate decision from caprice. The judge will have, at certain points, the power to decide capriciously. In certain situations, I now argue, she will have a legal right to do so.

IV. PERMISSIONS

So far, I have suggested that there is a distinction between decisively regulated cases, where the law resolves the conflict among reasons to provide a uniquely required outcome, and completely-but-indecisively regulated cases, where there are multiple legally acceptable outcomes, but no single outcome is required.[168] Here the scope of the legal decision may be limited to selecting among the available outcomes. At a minimum, the distinction between decisively and indecisively regulated cases indicates the possibility that the only basis for judicial decision is judicial caprice. Where there is thoroughgoing incommensurability, that is, where legal incommensurability is matched by both moral and doctrinal incommensurability, there is no decisive reason to dictate the outcome. The judge must exercise her personal choice to select one among the legally valid alternatives.

In this section, I demonstrate that the legal power to choose capriciously is matched by the legal *right* to do so. That right is generated by an implied legal permission just to pick one of the competing options — an implication that arises from the undefeated nature of the competing reasons. When reasons are undefeated they are converted into what I call pragmatic permissions. To show how, I shall consider some comments by John Gardner and Raz on structure of conflicts among reasons.

A. Express and Implied Permissions

Permissions confer the right to act, not only the ability to do so.[169] An ability is a power to change an individual's normative status;[170]

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[168] JOSEPH RAZ, THE AUTHORITY OF LAW 75 (1979) (where . . . two [conflicting reasons] are equally balanced [t]hey cancel each other and it is false that there is a conclusive reason for the act and false that there is a conclusive reason for its omission.").

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

however, the power to change an individual's normative status need not entail the right to do so. For example, the doctrine of double jeopardy confers a power upon a criminal jury: to disregard the law and reject conviction.[171] It is generally conceded, however, that the jury has no right to nullify — no law permits nullification — and so no right to be informed of its power.[172] Hence one source of discomfort with jury nullification: the jury appears to disregard its oath to follow the law and illegitimately invade the authority rightfully exercised by the judge, legislature, and prosecutor.

Permissions, on the other hand, indicate a legally-conferred right to act in a particular manner. Permissions may be "express" (or "explicit"[173]) or implied. Express permissions are exclusionary, precluding the operation of reasons that conflict with the permitted action, as well as providing a permission to act or not, as the agent so chooses.[174] The agent is not required to perform the act stipulated, but rather *may* (or may not) perform it. So if, for example, the rules of a particular golf course stipulate that: "If a player's golf ball lies on a path on the course, then the player is permitted to drop the ball within one club's length of the path," there is then an express permission to move the ball if it lies on the path. The player may equally well elect not to move the ball, instead playing it from where it lies, and still conform to the rules of the course.

Express permissions depend upon a source stating that such a permission exists. Such permissions are not to be inferred from the absence of reasons for action (the absence of constraint), nor are they tied to any reason for action.[175] Express reasons thus only exist in source-based systems of reasoning.

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[170] JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 215 (1990).

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

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

[173] *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 90 (1990); JOSEPH RAZ, THE AUTHORITY OF LAW 65 (1979).

[174] JOSEPH RAZ, PRACTICAL REASON AND NORMS 89-91 (1990).

[175] JOSEPH RAZ, PRACTICAL REASON AND NORMS 89-91 (1990).

Implied permissions exist when there are no reasons imposing practical constraints upon action, that is, when there are undefeated reasons to the contrary. Raz calls these "weak" or "conclusive" permissions,[176] and they exist in the absence of a clear reason for action—in law, a clear or determinate source. They are "conclusive" (I prefer "decisive") because they form the conclusion of an argument over what sorts of reasons there are for doing a particular act. Where there are no reasons that clinch the argument either way then there is a permission. Raz considers that there is an implied permission where reasons of equal strength conflict.[177] Each cancels the other, transforming the conflict from one regulated by reasons into one in which neither of the conflicting reasons operate — a position that, it turns out, is only partly correct.

It is worth considering in some detail the nature of implied permissions. Because Raz believes that the conflicting reasons or equal strength cancel each other out, he believes that these reasons disappear.[178] In such circumstances, the scope of an implied permission is constrained only by the other norms of the system. The judge can rely on any non-excluded reason to decide the outcome — what John Finnis would call "'open-ended' practical reasoning,"[179] and what Hart would call an open choice. I believe that, where reasons or equal strength *or reasons incommensurable as to strength* conflict, they are not canceled in this way. They remain to operate as undefeated grounds for decision, and the scope of the permission is limited to choosing among the conflicting undefeated reasons.

1. Conflicts, Gaps, Permissions

Raz's discussion of implied permissions depends upon the concept of "canceling."[180] Canceling is familiar to lawyers. The classic example is frustration of contract, and the classic case on frustration is *Krell v. Henry*.[181] *Krell* resulted from the postponement of Edward VII's Coronation due to the King's appendicitis. Henry had paid Krell a deposit to hire an apartment overlooking the route of the coronation procession; after the procession was cancelled Henry refused to pay the balance. Krell sued. The Court of Appeals sided with Henry, asserting

[176] JOSEPH RAZ, PRACTICAL REASON AND NORMS 89 (1990); JOSEPH RAZ, THE AUTHORITY OF LAW 64 (1979).
[177] *See* JOSEPH RAZ, THE AUTHORITY OF LAW 75 (1979).
[178] *See* JOSEPH RAZ, THE AUTHORITY OF LAW 75 (1979).
[179] John Finnis, *On the Critical Legal Studies Movement*, 30 AM. J. JURIS. 21, 38 (1985).
[180] *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS at 27.
[181] [1903] 2 K.B. 740 (C.A.), aff'g in part 18 T.L.R. 823 (K.B. 1902).

that there was no breach of contract because the contract was frustrated by "the non-existence" of the foundation of the contract, namely the procession.[182]

As the frustration analogy makes apparent, canceling conditions do not outweigh the other reasons for choice, nor do they exclude one reason for decision. They are simply facts that makes a reason disappear from our calculus over what to do.[183]

Raz considers that when reasons of equal strength conflict, the conflicting reasons cancel each other out; they not only block each other's operation but disappear as reasons for action.[184] There are no longer any reasons requiring a particular decision, only an implied permission. The judge's discretion is not limited to choice between the competing reasons when deciding what to do. It is not only the conflicting outcomes that are permitted: the scope of the legal permission is larger than that, because the conflicting reasons are cancelled — gone — and no longer operate to constrain choice. In the absence of regulation, *anything* not precluded by law is permitted.[185]

I propose a modification of Raz's account of conflicts of reasons of equal strength. To see why, consider the game of basketball. In basketball, a reason for calling a foul on a player is that there is a source — one of the "Rules of Basketball" produced by the National Basketball Association, basketball's governing body[186] — for the basketballing reason-statement that if a player holds or otherwise impedes the progress of an opponent using her hand or forearm, then the player has fouled the opponent.[187] The source for calling the foul is the governing body's authoritative statement of the rules of basketball. The rule operates as a reason requiring the official to call a foul whenever she observes one.

Now, by the rules of basketball, only one personal foul can be called on a given play. Nonetheless, on any given play, multiple players could

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[182] [1903] 2 K.B. 740, 747 (C.A.).
[183] JOSEPH RAZ, PRACTICAL REASON AND NORMS 27 (1990).
[184] JOSEPH RAZ, PRACTICAL REASON AND NORMS 89 (1990); JOSEPH RAZ, THE AUTHORITY OF LAW 64 (1979).
[185] JOSEPH RAZ, PRACTICAL REASON AND NORMS 85-89 (1990); JOSEPH RAZ, THE AUTHORITY OF LAW 75 (1979).
[186] *See* Official Rules of the National Basketball Association at http://www.nba.com/analysis/rules_index.html (last checked August 30, 2006).
[187] *See* NBA Rule 12: Fouls and Penalties at http://www.nba.com/analysis/rules_12.html?nav=ArticleList (last checked August 30, 2006).

hold or impede their opponent. Whichever happens first blocks (Raz would say "cancels") the later fouls from operating as a reason for assessing a foul.[188] But what happens if both events occur simultaneously, that is, if two players foul an opponent at the same time. There are two equally strong reasons that conflict, one for assessing a foul on Player 1, and another for assessing a foul on Player 2. Who is to be called for the foul?

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

The referee's discretion is, however, constrained to the available options. It is not the case that the reason for calling the foul is frustrated. The reasons for calling the foul — Players 1 and 2 each fouled their opponent — do not disappear but are transformed from decisive to undefeated reasons for decision. That is, the fact that Player 1 fouled the opponent does not override the competing reason for calling the foul on Player 2, but is not overridden in its turn, and vice versa.

Furthermore, the scope of the permission is limited to the competing reasons. There are a range of other non-excluded reason she could point to:[189] that yet another person, Player 3, fouled the opponent; or that, in the absence of a reason for calling a foul she could just let play continue.[190] Because the reasons do not disappear, however, she is limited to relying on the fact that each player fouled the opponent, but has no decisive reason for picking a particular player. She ought just to "judge" between the two options in order to render her decision. But how? She is beyond judgment here: judgment was what established the parity of the conflicting reasons for calling simultaneous fouls.[191] All

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

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

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

[191] A further point: decision here is does not match Dworkin's second category of weak discretion, i.e,., that the decision is simply unreviewable. The laws of cricket provide that this type of decision may be reviewed by a third umpire on television.

she can do is pick one or other of the players. Her choice of player will be capricious, and permissibly so.

B. Conflicts Among Reasons of Equal Strength

As we have seen, Raz believes that where conflicting reasons of equal strength conflict, there is a permission. John Gardner's view is more difficult to discern: he states that there is an express permission to decide among incommensurable sources in certain circumstances; but the circumstances he cites concern commensurable sources. By elaborating upon his examples, I shall suggest that: (1) there is an implied permission where undefeated reasons, whether incommensurable or equal-and-commensurable in strength, conflict; (2) that the existence of such permissions depends upon a modified version of Raz's account of conflicts among reasons of equal strength; and (3) that the resulting permission is limited and "pragmatic" — the underlying reasons do not disappear, but remain to limit the ensuing range of options.

1. Permissive Sources

Gardner's discussion of legal permissions considers the phenomenon of permissive sources of law. A permissive source exists where there is a conflict between intra-jurisdictional and extra-jurisdictional sources, such that the court may rely upon either type of source.[192] The conflicting sources may be either commensurable, because they are of comparable law-generating authority, or incommensurable, such that comparison between the two presents significant problems.[193]

To suggest that sources are incommensurable is to suggest that two or more socially identifiable entities make incompatible claims to authority upon our practical deliberations. Gardner believes he has identified the following example in the English legal system.[194] The English Court of Appeal is usually bound by its own previous decisions. However, where such a decision conflicts with a decision of

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However, because the reasons for given each batsman out are in equipoise, review will not remove discretion

[192] John Gardner *Concerning Permissive Sources and Gaps*, 8 OXFORD J. LEG. STUD. 457, 457-60 (1988).

[193] Permissive sources may also be express or implied. An express permission exists where the jurisdiction has enacted a norm allowing the court to rely upon either type of source. An implied permission exists where two commensurable and equally authoritative sources conflict.

[194] John Gardner *Concerning Permissive Sources and Gaps*, 8 OXFORD J. LEG. STUD. 457, 459-60 (1988).

the Privy Council, the Court of Appeal may follow a Privy Council decision. Here there are multiple sources for decision (the different courts, with their ability to generate binding legal norms) and on occasion those sources may conflict over what counts as the correct reason for decision (they establish different precedents). Gardner treats such sources as incomparable."[195]

Gardner's assertion that *these* sources — the Court of Appeals as compared to the Privy Council — are incommensurable seems, without more, odd on its face.[196] Incommensurability consists in the inability to weigh and rank the competing options.[197] To commensurate the options would transform the nature of the source to be commensurated. But there is no evidence that the Court of Appeals regards its own precedent-setting authority and that of the Privy counsel in this way.[198] Instead, these sources are not differently (incommensurably) authoritative, but rather of equal authority.

Consider another example of expressly permissive sources, this time from the American legal system: the doctrine of intra-court comity, "a rule that generally dictates that judges of coordinate jurisdiction should follow brethren judges' rulings on identical issues."[199] The doctrine applies at the federal trial-court level, such that a district court judge may consider the decisions of her trial-court colleagues in a particular district or circuit, but is not bound by them.[200] This type of permission appears identical to the sort contemplated by Gardner, and represents a conflict between sources that the doctrine of intra-court comity identifies as equally authoritative and commensurable.

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[195] John Gardner *Concerning Permissive Sources and Gaps*, 8 OXFORD J. LEG. STUD. 457, 459 (1988). While Gardner, following Thomas Nagel, *The Fragmentation of Value*, reprinted in MORTAL QUESTIONS 128 (1979), calls such conflicts "incomparable," I prefer the more accurate term "incommensurable."

[196] I happen to think that Gardner is wrong here. His mistake is a result of Raz's argument that there is no legal gap where permissions conflict. RAZ, AL at 75-76. Gardner wishes to argue that there is a gap, and so he assumes that the sources are simply incommensurable, rather than of equal strength.

[197] "A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value." JOSEPH RAZ, THE MORALITY OF FREEDOM 322 (1986). This statement concerns incommensurability as to value, but could easily be reformulated to provide a definition of incommensurability as to strength.

[198] *See* Worcester Works Finance Ltd. v. Cooden Eng. Co. Ltd. [1972] 1 Q.B. 210, 217.

[199] American Silicon Technologies v. United States, 261 F.3d 1371, 1381 (Fed Cir. 2001).

[200] Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co., Ltd., 240 F.3d 956, 965 (11th Cir. 2001) ("While the decisions of their fellow judges are persuasive, they are not binding authority.").

2. Implied Permissive Sources

According to Gardner, the type of gap generated by a permissive source derives from an express permission. I suggest in instead that the sort of discretion Gardner contemplates can result from an implied permission. Furthermore, it does not matter whether the conflicting legal reasons are equal in strength or incommensurable: so long as they are undefeated the judge possesses a permission to pick among them to resolve the case.

Judges may have an implied permission to consider a range of sources of law based on the existence of an implied permission. The United States federal court system is a two-tier system of geographically divided inferior federal courts in which each federal circuit court of appeals equally authoritative as any other. Each circuit court is able to create binding precedent only in its own jurisdiction; such precedent does not bind the courts of sister circuits.[201]

In any given circuit, where there is no applicable precedent, each of the other federal courts of appeal constitutes an equally authoritative source of law. Where the sister court precedents conflict, choice among them depends upon an implied permission: each source is of equal strength, and none overrules the other. Accordingly, each federal court of appeals has an implied permission to use its sister-courts' precedents where its own precedents fail to determine the outcome of a case and the sister courts' precedents conflict.

If a court in the First Circuit lack an authoritative intra-circuit precedent, it could, of course, turn to morality as easily as turning to sister circuit precedents. Nonetheless, the major difference between the other circuits' precedents and moral considerations is that extra-circuit precedents identify the solutions that have been reached in comparable jurisdictions. A persuasive source thus provides a concrete example of hypothetical testing, sharing the same sort of subject matter and standards of reasoning as the First Circuit, and showing the consequences for legal doctrine in a similar legal regime and consequences for the same general society. The court may then compare such consequences to the hypothetical impact of other, non-legal reasons on the balance of reasons.

Extra-circuit sources provide a judge with a legal way to resolve a gap in the law. They are often adverted to by courts, especially when faced

[201] *See* Judicial Code of 1948, Chapter 3; *see also* Supreme Court Rule 10 (reason for granting certiorari is splits among circuit courts.)

with cases of first impression featuring issues that have been addressed in other jurisdictions. Recognizing that conflicts among equal-and-commensurable reasons generate permissions demonstrates how such permissions operate as a to avoid potential indeterminacies. Where there is an express permission to resolve intra-jurisdiction indeterminacy by considering equally authoritative sources, that permission enables the judge to evaluate what is going on around her and to rely upon her fellow judges' decisions. There may also be an express permission to consider extra-jurisdictional sources, as when the English Court of Appeals may consider the European Convention on Human Rights in certain circumstances.[202]

Furthermore, there may be an implied permission to choose among conflicting, equally strong extra-jurisdictional sources. Such a permission permits uniformity or comity in the substantive law of related or abutting (but nonetheless distinct) jurisdictions. The court can avoid conflict with those jurisdictions or, where there is conflict, consider which has the best set of arguments on the merits. There is no need to turn to open-ended practical reasoning.[203]

3. Nesting

So far, in considering both express and implied permissions, I have considered conflicts between equally authoritative sources of law. Conflicts between sources equal in strength manifest none of the fragmentation of value that Gardner is concerned about. Because the conflicting reasons are commensurable, the outcome is "on the same plane" whichever reason is preferred. Here there is no change in the mode of evaluation after a decision rendered. The scope of the permission is limited to relying on one or other of the legal sources as a ground of decision. This would appear to comport with Gardner's description of weak discretion, picking one or other reason without considering further moral, political, or pragmatic justifications.[204]

There are, however, some features of the conflict between the Court of Appeal and Privy Counsel that do appear to mimic conflicts between incommensurable reasons. In particular, the resolution of any one

[202] *See* John Gardner *Concerning Permissive Sources and Gaps*, 8 OXFORD J. LEG. STUD. 457, 458 (1988).
[203] *See* John Gardner *Concerning Permissive Sources and Gaps*, 8 OXFORD J. LEG. STUD. 457, 458 (1988).
[204] *See* John Gardner *Concerning Permissive Sources and Gaps*, 8 OXFORD J. LEG. STUD. 457, 458 (1988).

conflict does not establish that one source is more authoritative than the other for *future* conflicts: the conflict remains "nested."[205]

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

Parity between the sources, however, explains the reason why: choice between the sources fails to establish a hierarchy for subsequent cases. Establishing such a hierarchy would remove discretion because the superior source would defeat the inferior. Maintaining the sources in equipoise without resolving their conflict retains the discretion to use one or other source. Thus, despite the availability of the Privy Counsel's decisions, in a case of first impression, to fill a gap or, where its decision conflicts with a pre-existing precedent of the Court of Appeal, change the law, we learn nothing new about the system's structure, because the competing sources continue to operate as available alternatives.

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

Such an option is important for the English legal system as a pressure valve, permitting the Court of Appeals to reconsider its past decisions. The case is regulated if it conforms to past precedent, but precedent is defeasible dependant upon the available permissive sources.[206]

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[205] "'[N]esting' [is] . . . the reproduction of the of particular argumentative oppositions within the doctrinal structures that apparently resolve them." Duncan Kennedy, *A Semiotics Of Legal Argument*, 42 SYRACUSE L. REV. 75, 112 (1991); *see also id.* at 112-116; J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990) (book review).

[206] *See* Richard H.S. Tur, *Defeasibilism*, 21 OXFORD J. LEG. STUD. 355, 359 (2001) (defeasibility entails that "the defeating consideration impacts only upon the result but not on the rule. Th[e] . . . rule . . . remains intact and available to be applied

Gardner's example of permissive sources thus depends upon the presence of a source — the Court of Appeal, which has the power to bind itself — generating the express permission to consider the Privy Counsel as an alternative source of precedent. This device enables the Court of Appeal to change tack without having to overrule itself or await overruling from a higher court. The rule of intra-court comity also functions as an express permission, allowing a judge to conform her decisions to those of her colleagues.

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

> When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purposes of this rule, of a general word.[207]

Here, Hart appears to indicate that the core is essentially expanding, reaching out to provide determinate guidance because the court's decision resolves the legislative indeterminacy. Of course, legislation may introduce new indeterminacies, and this is as true for judicial as for Congressional or Parliamentary legislation. Where, however, courts confront some indeterminacy, however, Hart suggests that their decision resolves it.

One interesting outcome of my analysis is to suggest that conflicts among permissive sources equal as to strength results not only from some indeterminacy, but preserves that indeterminacy — at least with regard to the strength of the conflicting reasons — for future cases. The conflict remains "penumbral" and particular legal decisions fail to settle the issue in so far as the "core" is concerned.[208]

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again and again even though trumped or defeated by equitable conditions in a particular case.").

[207] H.L.A. HART, THE CONCEPT OF LAW 129 (2d ed., Penelope A. Bulloch & Joseph Raz, eds., 1994)

[208] *See* H.L.A. HART, THE CONCEPT OF LAW 126-29 (2d ed., Penelope A. Bulloch & Joseph Raz, eds., 1994); *see also* NEIL MACCORMICK, H.L.A. HART 124-27 (1981) (discussing Hart's theory of core and penumbra). *See also* **BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY** 18 (1993) (same).

C. Pragmatic Permissions?

Raz considers that, where reasons of equal strength conflict, both reasons disappear because they are mutually canceling.[209] In that case there is a permission to rely on any reason because there is no reason to limit the range of permissible reasons for decision. Raz further claims that incommensurable reasons do not conflict in this way. They do not cancel each other and so, logically, do not entail the existence of an implied permission.[210] I suggest a modification of this theory based on the basketball analogy.

If there is a permission where reasons conflict, it is not due to the absence of any constraint, but due to the undefeated nature of the conflicting reasons. So far, the discussion has been limited to conflicts among commensurable reasons of equal strength. But if, as I claim, the distinctive feature of an implied legal permission depends upon the undefeated nature of the competing reasons, then undefeated-ness, rather than equality, is the key to implied permissions where reasons conflict.

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

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

[209] JOSEPH RAZ, THE AUTHORITY OF LAW 75 (1979).
[210] JOSEPH RAZ, THE AUTHORITY OF LAW 75 (1979).

adduce a tie-breaking reason. The judge may simply prefer one reason to the other.

Pragmatic permissions are not limited to conflicts among sources. Where there is a pragmatic conflict among the available legal reasons, courts cannot always wait upon the legislature to settle the issue, but generally must decide as which party is to prevail. That decision cannot always rest upon some decisive legal, moral, or doctrinal reason. In such circumstances, there is a legally implied pragmatic permission to pick among the conflicting reasons. Whatever result is selected will be legally justified. The "real" basis for picking among the reasons — the judicial hunch, what the judge had for breakfast, or political preference — need not be. To that extent, the judge's choice is capricious, and expresses strong discretion.

1. Scope of Capricious Decision

How prevalent is capricious decision depends upon how widespread is incommensurability. There are a number of different points of view on this front, and space only to sketch them out rather than attempt a resolution.

Incommensurability skeptics[211] such as Ronald Dworkin deny incommensurability exists and propose a two-step argument to prove it: first, it is always possible to compare options (comparability is always an option); so second, the decision to compare or not to compare expresses one's social or political commitments rather than some fact about the structure of value.[212] If they are correct then capricious decision is never an option.

Incommensurability, then, cannot just be assumed or asserted just because a decision-maker cannot find (or imagine) a reason that demonstrates that one option is better than the various alternatives. The absence of comparability does not entail the presence of

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

[212] Dworkin, for example, points out that the various features of incommensurability — intransitivity, undefeatedness, and change in value — may be explained, individually or in conjunction, by other features of practical reasoning. Exclusion, for example, explains how reasons may be both intransitive and incomparable. Other explanations for the inability to compare reasons may include the operation of a canceling condition, which knocks one or more competing options out of consideration; the requirement that reasons operate in a particular order; or that competing values may be vague or open-textured. *See, e.g.,* Ronald Dworkin, *On Gaps in the Law*, in CONTROVERSIES ABOUT LAW'S ONTOLOGY, 89, 90 (Paul Amselek and Neil MacCormick, eds, 1991).

incommensurability. To demonstrate the existence of incommensurability, Dworkin claims, requires the production of some formal or objective mark that explains why the different values cannot be compared.[213]

There are a variety of possible rejoinders to Dworkin. One set of responses suggests that there is some objective "scheme of value" which "stands behind" and "marks out" the set of commensurable values from the set of incommensurable ones and determines which reasons are commensurable or incommensurable with which. Such a "scheme of value" is supposed to provide a source for incommensurability.

The simplest scheme of value is one in which all values are, by their very nature, incommensurable. This is implausible as a universal thesis about the nature of values because some discrete values can be compared without loss or transformation. A more sophisticated version suggests that values are logically grouped into different categories, the formal features of which render the categories incommensurable *inter se*, although the values in each category are commensurable *intra se*.[214] Yet another version suggests that there are certain basic goods or values that must, as a logical precondition of practical reasoning, be incommensurable.[215]

A different thesis is that our decision to consider values commensurable or not expresses the way in which we value. No objective scheme of value exists to assure the accuracy of our decision to commensurate or not. One version of this theory suggests that such expression may take a more or less standard "social form," with some room for experimentation.[216] Another version suggests that our expressions of comparative value are more or less reasonable dependant upon contextual features.

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[213] Another theorist who demands such a mark is Richard Epstein. *See* Richard A Epstein, *Are Values Incommensurable, Or Is Utility the Rule of the World?*, 1995 UTAH L. REV. 683 (1995).

[214] Thomas Nagel, *The Fragmentation of Value*, in THOMAS NAGEL, MORTAL QUESTIONS 128 (1979).

[215] *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS, 115 (1980). *See also* JOHN FINNIS, FUNDAMENTALS OF ETHICS, 87-88 (1983); John Finnis, *Commensuration and Public Reason* in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 215, 215 (Ruth Chang, ed., 1997); Matthew Adler, *Law and Incommensurability: Introduction*, 146 U. PA. L. REV. 1169, 1170 (1998).

[216] *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 344-58 (1986).

Finally, it is worth noting that incommensurability may be more or less worrisome, dependant upon its source and nature. For the most part, we do not worry about inconsequential incommensurabilities: so long as judicial choice among apples and oranges has no significant social consequences there is no great issue in permitting the judge to pick among the alternatives. Problems arise, however, where choice is of constitutional magnitude and the stakes are high. I shall conclude by considering one high-stakes example of incommensurability: what would happen if sources *were* in fact incommensurable in the manner Gardner suggests, and what legal means the judge has to choose among them.

D. Conflicts Among Incommensurable Permissive Sources of Law

Consider the following modification of Gardner's argument that there may be incommensurable sources of law; but these would appear to be most likely to arise where there is some choice between two sovereigns, such that comparing them would differently represent or alter the nature of the authority exercised by one or both of the sovereigns. One famous example of this phenomenon can be found in Sophocles' *Antigone*.[217] Polynices lost a quarrel with his brother, Eteocles, over which of them would succeed their father, Oedipus, to the throne of Thebes. Thus thwarted, Polynices raised an army to seize the throne by force. Both brothers died in the ensuing battle. The play begins with news that Creon, the new king of Thebes, has decreed that Polynices should be disgraced by remaining unburied, in direct contravention of religious custom. Polynices' sister, Antigone, thus faces a choice between conflicting incommensurable institutional sources: the law of Thebes or the law of the Gods.

The problem is not whether each institution — in broad terms, the state and the church — is authoritative for her: they both clearly are so. Antigone's problem is to determine how she is to accommodate and give weight to the claims made upon her by each institution; how and what weight as a source of reasons for action each ought to have.[218] To compare the different sources in terms of its rival, or some third institutional system, would be to transform them. Accordingly, the

[217] Sophocles, Three Theban Plays: Antigone, Oedipus the King, Oedipus at colonus, (1988).

[218] Antigone's tragedy is thus to exist when the underlying sources of social obligation are becoming secularized, so that the commands of the Gods are replaced by considerations of justice. Justice Moore's claim, *infra*, that the courts should pay more attention to the religious bases of American law, is perhaps an attempt to reverse this process.

sources are incommensurable. That does not appear to be the situation presented by the Court of Appeal in Gardner's example.

There may be incommensurable sources in American law. For example, the recent controversy surrounding the use of international sources to interpret various terms of the American Constitution may be understood as debate over the belief that non-American law provides a permissive source for interpreting the constitution. Those who resist the use of foreign sources may be understood to suggest that comparing the sources transforms, at least, the American legal system. It is not that the other legal systems are better or worse, they are just significantly different.[219]

Another example, and one that perhaps provides a more modern version of Antigone's problem, is the American controversy over the separation of church and state.[220] As currently framed, one of the claims made by religionists is that secularists fail properly to respect religious values embodied in the structure of American law.[221] Where liberal secularists behave "as if agnosticism about the theistic foundations of the universe were common ground among believers and non-believers alike,"[222] religion provides not only a separate epistemology but one that is properly understood as incommensurable, "really an alien way of knowing the world — alien, at least, in a political and legal culture in which reason supposedly rules."[223]

The religionist's claim, that secular and religious traditions present different sources of authority (epistemological and practical) and distinct standards of reasoning, presents a difficulty for adjudication. In a society that recognizes multiple religions, or multiple versions of the same religion, or that religion and un-religion may properly co-exist, the problem becomes one of maintaining neutrality between incommensurable religious traditions. To understand the issues

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[219] This may, of course, be the Gardner's claim. If so, he has not expressly made it. *See* John Gardner *Concerning Permissive Sources and Gaps*, 8 OXFORD J. LEG. STUD. 457, 459-60 (1988); compare Worcester Works Finance Ltd. v. Cooden Eng. Co. Ltd. [1972] 1 Q.B. 210. From an institutional point of view, moreover, Gardner's choice of authorities are clearly comparable among the hierarchy of courts.

[220] Particularly the Establishment Clause jurisprudence codified in the *Lemon* test. *See* Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).

[221] *See, e.g.,* Glassroth v Moore, 335 F.3d 1282, 1295 (11th Cir. 2003) (presenting religionist's disagreement with Supreme Court over moral status of Ten Commandments).

[222] Michael McConnell, *God is Dead and We Have Killed Him: Freedom of Religion in the Post-Modern Age*, 1993 BRIGHAM YOUNG U. L. REV. 163, 174 (1993)

[223] STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 142 (1993).

presented in terms of one tradition (and use it as a basis for decision) is exactly to endorse that tradition.[224] Choosing precisely transforms the source and style of epistemological and practical authority to that of the chosen religion.[225]

A particularly strong version of the religionists claim is presented in *Glassroth v. Moore*,[226] a case in which Roy Moore, the then-Chief Justice of the Alabama Supreme Court, placed a 5280-pound granite monument in the rotunda of the Alabama State Judicial Building.[227] Moore's purpose was "to remind all Alabama citizens of, among other things, his belief in the sovereignty of the Judeo-Christian God over both the state and the church."[228]

Is Justice Moore asserting that the Ten Commandments, precisely because it is a repository of Judeo-Christian morality,[229] is a permissive source of legal values?[230] Imagine that, contrary to current interpretations of American law, Moore is correct that the Decalogue is a permissive source. There would then be an incommensurable conflict

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[224] To the extent that the adjudicator remains neutral among religions, and seeks some rational (as opposed to faith based) means of deciding among them, she remains in the secular, alien realm.

[225] That may be the very goal of some religionists (so long as the chosen religion is theirs). Appiah, for example, suggests that such a choice is a high-stakes gamble: "The ultimate result of such epistemic forbearance [adopting the religionists viewpoint and alternative epistemology], however, goes beyond protecting the sectarian from unwelcome interference; the ultimate result is to erase the legal distinction between spiritual and temporal considerations," KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 87 (2005) — a result which positively invites secular interference.

Another means of making the link between *Antigone* and the modern Establishment Clause debate is to consider an interpretation of the play suggesting that Antigone goes out of her way to deny the city's law and so herself creates the conflict between the two sources. Perhaps that is one way of understanding one religionist demand that its epistemology be properly acknowledged in the secular sphere.

[226] 335 F.3d 1282 (11th Cir. 2003).

[227] Glassroth, 335 F.3d at 1285.

[228] 335 F.3d 1282, 1284 (11th Cir. 2003). Moore's campaign for the Alabama Supreme Court depicted him as "the 'Ten Commandments Judge" . . . . The central platform of his campaign was a promise 'to restore the moral foundation of law.'" Glassroth, 335 F.3d at 1285. Furthermore, when dedicating the monument, "He explained that the location of the monument was 'fitting and proper' because: "this monument will serve to remind the appellate courts and judges of the circuit and district courts of this state, of the truth stated in the preamble of the Alabama Constitution, that in order to establish justice, we must invoke 'the favor and guidance of Almighty God.'" *Id.*

[229] In other words, for Moore it is the Decalogue's source, as a command from God, rather than its content, that establishes it as a permissive source of law.

[230] He may mean to suggest that the Decalogue is a mandatory source that trumps all other sources of law.

between the Establishment Clause, purporting to preclude the government from preferring a particular (or any) religion, and the Decalogue as a founding text of a particular religion or set of religions. Here, the nature and sources of American government are at stake. That appears to be precisely how Roy Moore sees things.

Nonetheless, the problematic legal status of the Decalogue brings to the fore the core tenet of legal positivism: some sources of practical authority are not legal sources. Legal sources are the relevant law-creating institutions of a particular legal system. Because the law is an exclusionary system, courts are entitled to rely upon the rules created by legal sources and ignore those created by non-legal sources. Exclusion provides an alternative to incommensurability as grounds for rejecting the Decalogue. Accordingly, from the point of view of the United States Constitution, as currently interpreted, religion is not only an incommensurable, but also an excluded source of legal norms.

V. CONCLUSION

I have suggested that a judge has both a legal power and a legal permission to simply pick an outcome from among multiple available options where legal incommensurability is matched by moral and doctrinal incommensurability. Accordingly, the Noble Dream of will-less decision, which holds that the judge's personal preference never operates — or should never operate — to determine the result of a case, is unattainable in legal systems where some of the reasons are incommensurable. Capricious decision is a necessary feature of such systems. How widespread a feature depends upon the amount of incommensurability in the various legal reasons for decision.

Furthermore, the absence of a decisive reason does not entail that there is a gap in the law. We thus should not assume that it is only in unregulated cases, where there is a legal gap, that the judge is able to utilize her discretion. An implied pragmatic permission arises where commensurable reasons of equal strength or incommensurable reasons conflict. The court has the power and the duty to apply the norms of the legal system, but in the system is ambivalent as to which of two conflicting norms the court should choose. The legal system thus grants the court a permission to choose which of the conflicting reasons it wishes to apply. There is no gap because whichever norm the court chooses to apply has a legal source. The case is regulated. This suggests that there is not always an easy correlation with the presence of a discretion for the court, and the presence of a gap in the law. There may be no gap, but still a discretion. This point complements

Raz's belief that, when reasoning according to law, that there may be no discretion in the presence of a gap.