ARTICLE

JUDICIAL PREFERENCE

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I. INTRODUCTION

Can personal preference operate as a legitimate basis for judicial decision?[1] Sometimes, it appears, the outcome of the case is up to the predilections of the judge: she can decide whichever way she wishes. Neither law nor morality[2] provides a decisive ground for decision, and the judge 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 reason at all. All that is left is her taste or inclination.

Standard descriptions of preference-based choice identify a familiar range of psychological sources for the resulting judicial decision. These include the "judicial hunch" (or what the judge had for breakfast) as well as political ideology, whether conscious or not.[4] Whatever the psychological basis for the resulting decision, having picked a particular option, the judge can only try

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1. I use judicial preference as an equivalent to what Oliver Wendell Holmes called the judge's "instinctive preferences and inarticulate convictions." O.W. HOLMES, JR., THE COMMON LAW 35–36 (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 140–41 (1986) [hereinafter THE MORALITY OF FREEDOM] (stating that people pursue goals for reasons and that they believe the objects of these goals are valuable); *see also* JOSEPH RAZ, ENGAGING REASON 50–51 (1999) [hereinafter ENGAGING REASON] ("[P]eople reason about what they should do, given that they have conflicting desires.").

2. Nor ethics, politics, or some other determinate, extralegal scheme of value.

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

4. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND 100 (1930) ("The process of judging, so the psychologists tell us, seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it."); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 287 (1929) ("This hunch . . . takes the judge vigorously on to his decision; and yet, the cause decided, the way thither, which was for the blinding moment a blazing trail, becomes wholly lost to view."); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 358–59 (1925) (illustrating how judges struggle to frame the issue that sits before them and therefore they must "select the [framing] that seems to them to lead to a desirable result").

to render her decision acceptable post hoc by operation of the "characteristic judicial virtues . . . impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle."[5] None of these virtues are decisive; rather, they provide the judge with cover for her personal preference.

Perhaps because it looks like a naked exercise of power, personal preference as a basis for judicial decision is not terribly popular. Preference-based choice is often characterized as nonrational: either as having no basis in reason because it is 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 embraced as impartial or objective. The court demonstrates that some dominant or decisive reason overrides competing reasons and operates to settle the outcome of a conflict or dispute.[7] In the law, a decisive *legal* reason identifies that outcome 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 the outcome identified by the law, independent of her will.

A major recent trend in legal positivism has been to suggest that legal gaps do not entail discretion. When none of the legal rules or standards provides a decisive reason for decision, the judge should nonetheless seek some decisive extralegal reason in order to break the deadlock.[9] Extralegal reasons may operate to

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5. *See* HART, *supra* note 3, at 205.

6. *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 27–28 (Oxford Univ. Press 1999) (1975) (defining a conclusive reason and discussing the difference between that and an absolute reason).

7. *See id.* at 25–27 (discussing how stronger reason overrides weaker reason in decisionmaking).

8. *See, e.g.*, Brian Bix, *Positively Positivism*, 85 VA. L. REV. 889, 898–99 (1999) (book review) (examining Herbert Wechsler's argument that principles applied by the court must be neutral so that the same principles can be applied to a different set of facts); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1–7 (1971) (discussing neutrality, principle, and reason in Supreme Court decisions); *see also* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1020–21 (1978) (concluding that while some departures from neutrality are necessary, as a rule, judges should always be conscious of it and aspire to achieve it).

9. Joseph Raz calls this type of reasoning "reasoning according to law." *See* Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 1, 8 (1993) (differentiating

close the gap, and the judge has only "weak" discretion to resolve the case.[10] The goal of such weak-discretion theories is to demonstrate the manner in which extralegal reasons, though prima facie not legally obligatory, nonetheless bind the judge.[11]

Whatever the merits of the weak-discretion thesis generally, I argue that judges can and do possess the sort of strong discretion symptomatic of judicial preference. I take for granted that rules can provide determinate guidance and that there is a core meaning to the language of a rule that renders it applicable across a range of cases.[12] Even when rules provide clear direction, however, multiple legally valid rules may conflict in such a manner that none overrides the other. There is no tie-breaking rule to decide the outcome. At this point, preference-based choice is both available and permissible.

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

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between reasons based on the Sources Thesis, reasoning about the law, and those based on moral reasoning, reasoning according to the law), *reprinted in* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 310, 316–17 (1994) [hereinafter ETHICS IN THE PUBLIC DOMAIN].

10. *See* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 33 (1967) (noting that where there are more rules to which a decisionmaker must adhere, discretion is weaker than where there are fewer rules to follow), *reprinted as* RONALD DWORKIN, *The Model of Rules I*, *in* TAKING RIGHTS SERIOUSLY 14, 32 (1977); John Gardner, *Concerning Permissive Sources and Gaps*, 8 OXFORD J. LEGAL STUD. 457, 457–58 (1988) (discussing how some legal gaps can be filled by using a standard that is outside the law).

11. *See* H.L.A. HART, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123, 134 (1983) (explaining that legal decisions are not made in a vacuum; rather, they are always made against a backdrop of rules, principles, standards, and values).

12. *See* HART, *supra* note 3, at 124 (noting that law generally refers to classes of people and classes of acts, so as to operate over vast areas of social life). According to Neil MacCormick, "it is (certainly in Hart's view) a particular feature of governance under law that state legal orders are characterized by the existence of institutions and procedures for formulating in relatively clear, precise and authoritative ways those governing standards of conduct which are 'legal.'" NEIL MACCORMICK, H.L.A. HART 42 (1981). Whether or not Hart is correct is not the subject of his paper; if he is wrong, we are much closer to the Realist "nightmare" than Hart would care to think. *See* HART, *supra* note 11, at 126 (noting the nightmare for litigants—that judges will act as legislators by creating new law, rather than applying existing law to the dispute).

an implied right to rely upon personal preference, a right that derives from the structure of reasoning rather than any express grant of legal discretion.

My goal is to demonstrate that strong discretion exists and operates in ways that are both mundane and notable. In Part II, I consider two exemplary cases that exhibit strong discretion. The mundane case, *Morrison v. Thoelke*, demonstrates that conflicting legal rules may generate a gap and that such a gap is replicated in conflicts present in morality and doctrine.[13] The case illustrates the choice facing the judge: to simply pick one side or the other without some further tie-breaking reason settling the outcome. Accordingly, in the humdrum case, even though a judge can close the gap by simply choosing one of the competing outcomes, that choice has no basis in some further, decisive reason.

The notable case, *Argersinger v. Hamlin* demonstrates the consequences of thoroughgoing legal, political, moral, and doctrinal conflict.[14] *Argersinger* extends *Gideon v. Wainwright*'s requirement that indigent defendants receive the assistance of counsel to offenses in which the potential sentence is less than six months.[15] It does so although *Duncan v. Louisiana* interprets the same language in the Sixth Amendment as precluding the right to jury trial for similar offenses.[16] *Argersinger* generated a line of cases, including *Scott v. Illinois*[17] and *Alabama v. Shelton*,[18] which further explored the right to counsel's relation to the sentence imposed. In none of these cases was the result precluded by pre-existing doctrine; in each there were conflicting legal rules, and choice among them did not depend upon some decisive moral, political, or doctrinal reason.[19]

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13. *See* Morrison v. Thoelke, 155 So. 2d 889, 904–05 (Fla. Dist. Ct. App. 1963) (lamenting that both sides presented persuasive arguments and that a choice must be made even though it may seem unjust).

14. Argersinger v. Hamlin, 407 U.S. 25 (1972).

15. *See id.* at 37 (holding the right to counsel extended even to a defendant charged with a petty offense that was punishable by less than six months in jail); *see also* Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963) (stating that right to counsel is a fundamental right and "any person haled into court . . . cannot be assured a fair trial unless counsel is provided for him").

16. *See* Duncan v. Louisiana, 391 U.S. 145, 159 (1968) ("Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualified as petty offenses.").

17. Scott v. Illinois, 440 U.S. 367 (1979).

18. Alabama v. Shelton, 535 U.S. 654 (2002).

19. *See Scott*, 440 U.S. at 368, 373 (stating the sound legal reasoning underlying the *Argersinger* decision requires the limitation on the Sixth and Fourteenth Amendments); *Shelton*, 553 U.S. at 660–63 (finding *Argersinger* to be controlling and distinguishing the facts presented form those found in cases used to support an alternative conclusion).

The *Argersinger* line of cases is notable for its impact on the criminal justice system as well as the economic, social, legislative, and ethical consequences of the choices it forces on courts, prosecutors, and legislatures as a result of the "actual imprisonment" standard it helped create.[20] It also illustrates the sort of conflict among legal and extralegal rules that others have attributed to, at one end of the scale, some "fundamental contradiction" or inherent instability in liberal attempts to construct a legal order[21] and, at the other, some "pragmatic conflict" inherent in the nature of any modern system of laws as a system of political conflict and compromise.[22] Whether due to necessary or accidental conflicts between the rules of the legal system, I contend such conflicts are: (1) likely to exist in any complex modern legal system; and (2) may only be resolved by personal preference rather than by pointing to some independent, tie-breaking rule.

After introducing *Morrison* and *Argersinger*, I suggest that underlying various proposals for "weak"[23] forms of judicial decisionmaking, linking jurists as disparate as Dworkin and Raz, is the demand for some decisive reason to determine the outcome. The various theories under consideration share the proposal that law embodies a system of heteronomous rather than autonomous judicial choice and that adjudication relies upon something other than the judge's whims or biases. Accordingly, decisive public reasons exclude the personal preference of the judge, thereby maximizing lay autonomy through minimizing official autonomy.

Heteronomous reasons may have a variety of derivations. In many places, the law provides a determinate means of weighing or balancing the strength of competing reasons; to that extent, the law decisively regulates the outcome. At other places the law is gappy, the available legal reasons are vague or conflicting, and so there are no decisive reasons identifying a uniquely required outcome. In such circumstances, while the law may set the boundaries of judicial reasoning, the law does not decisively

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20. *See* Barton L. Ingraham, *The Impact of* Argersinger*—One Year Later*, 8 LAW & SOC'Y REV. 615, 634–35 (1974) (reviewing the impacts of *Argersinger* on misdemeanor prosecutions).

21. *See* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 213 (1979) (discussing the "fundamental contradiction—that relations with others are both necessary to and incompatible with our freedom").

22. *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW 201 (1979) (asserting that pragmatic conflict arises when two laws are "designed to promote or sustain a state of affairs which cannot coexist with that which the other is designed to promote or sustain").

23. *See* Dworkin, *supra* note 10, at 32–33 (explaining that weak discretion is where rules and standards cannot be applied mechanically; rather, there is a need for use of judgment).

regulate the result. So long as that something else is a decisive reason—some uniquely authoritative neutral reason—then judicial preference is properly avoided. Accordingly, the task for weak-discretion theorists is to identify the permissible heternonomous grounds for the "reasoned elaboration"[24] of, or "reasoning according to," law.[25]

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

In Part III, I suggest that fragmentation among the applicable reasons or values presents only one set of problems. Whereas fragmented or incommensurable conflicts certainly undermine determinacy, so too, do conflicts among reasons that are commensurable but of equal value or strength. This type of conflict poses a particular problem for Dworkin, who is willing to accept that they exist (he denies incommensurability) but claims they are exceptional in complex legal systems. I argue that, on the contrary, complex legal systems may have an interest in generating equally strong, yet conflicting, reasons as a means of encouraging judicial experimentation.

The power to decide does not, however, entail the right to decide. Neutral theorists might wish the judge to simply refuse to decide and wait for some other body to generate decisive reasons. In Part IV, I argue this type of deference is not required in a complex system of norms.[26] Personal preference is not only an

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24. HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW 145–52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (originating the phrase "reasoned elaboration").

25. *See* Raz, *supra* note 9, at 7 (delineating between applying the law and reasoning according to the law, which he describes as moral considerations).

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

available but also a permissible basis for judicial decision, conferring not only a power but a right. In deciding on the basis of personal preference the judge is acting not only upon a legally generated ability but also upon a legally implied permission.

Permissions confer an express or implied right to choose. Where, for example, the various legal options conflict and are incommensurable, there is no decisive reason to mandate a particular outcome.[27] Incommensurability can thus generate permission to choose among the legally valid outcomes without giving further, decisive reasons. The judge is both empowered *and* entitled to rely upon personal preference as a basis for judicial decision when faced with legal incommensurability that is matched by moral and doctrinal incommensurability.

The permission to engage in preference-based decision makes sense given the requirement that the judge renders a decision when faced with the parties' conflicting claims. Judicial decision is not like moral decision: in the latter case, the decisionmaker may simply decline to adjudicate.[28] Where the judge is obliged to pick one outcome over another and public, decisive reasons give out, the personal preference may be all that is left to a decisionmaker.

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

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27. *See* RAZ, *supra* note 6, at 86–87 (noting weak permission that is not permitted by a norm, rather existing as a consequence of there being no norms to prohibit the action, is an indication of a gap in the law); RAZ, *supra* note 22, at 75 (explaining that where conflicting reasons are incommensurate, a person is neither permitted nor not permitted to perform a certain act); Gardner, *supra* note 10, at 457–58 (asserting that when there is no answer required by law, a judge can use her discretion, seized from outside of the law, and use it to resolve the case).

28. Perhaps the most notable argument against the requirement that judges decide the cases before them is advanced by Alexander Bickel and more recently taken up by Cass Sunstein. Both advocate a policy of judicial minimalism, whereby the U.S. Supreme Court, in particular, avoids deciding controversial cases or issues using a variety of procedural techniques. *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962); CASS R. SUNSTEIN, ONE CASE AT A TIME 259 (1999) ("When judges lack . . . relevant information, minimalism is an appropriate response.").

II. TWO EXEMPLARY CASES

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

In this Part, I begin by identifying a couple of cases that confront a gap in the law. Gaps can result from the sorts of indeterminacies in language familiar from vague standards like "reasonableness," or from legislative inability to foresee and predict every possible circumstance.[29] Gaps also arise where legal rules conflict; even though the rules may be clearly applicable in the context of the case, the rules are incommensurable, and there is no closure rule to determine which is the stronger. Where rules conflict in this manner, weighing or balancing the strength of the various reasons for decision proves fruitless. My claim is the following: where the extralegal reasons proved similarly conflicted, the judge must simply pick one of the options based on preference.

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

A. *Strong and Weak Discretion*

In the analytic tradition, H.L.A. Hart was perhaps the most significant figure to endorse strong discretion. He suggested that, on occasion, judges are faced with a "choice between open alternatives."[30] While the law may limit the range of available

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29. HART, *supra* note 3, at 128–31 (discussing how legislators cannot possibly anticipate every possible circumstance and that sometimes language broad enough to cover a wide variety of circumstances can leave gaps in the law).

30. *Id.* at 127. A different situation is where, with or without discretion, the judge opts to ignore the law. One might call this judicial nullification by comparison with jury nullification. Here, the judge's decision gains its institutional authority, if at all, after the fact. The decision, because not required by the law, has the same status as a mistaken decision: it is authoritative for the parties and subordinate legal officials because the judge is empowered, if not entitled, to render a decision. It becomes authoritative for judges of equal or higher rank subject to their acquiescence and ratification. For a somewhat radical embrace of this position, see Richard A. Posner, Foreword, *A Political Court*, 119 HARV. L. REV. 31, 40–41 (2005) (arguing the Supreme Court is not bound by legal norms and acts in a fully political way when deciding constitutional cases). Under

options, it does not require a particular decision. Without rules to guide her, the judge's choice as between the available options is unconstrained.[31]

I shall suggest that there are occasions when the judge has strong discretion, at least in choosing among the available legal options. I define strong discretion as any decision made in the absence of a decisive reason; weak discretion, by contrast, is discretion on the basis of some decisive, or tie-breaking reason.[32]

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such circumstances, "all that succeeds is success." HART, *supra* note 3, at 153.

31. *See* Hart, *supra* note 11, at 124–26 (noting the Supreme Court has seemingly unconstrained power to decide what is and what is not constitutional). 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." Dworkin, *supra* note 10, at 33; *see also* Ronald M. Dworkin, *Social Rules and Legal Theory*, 81 YALE. L.J. 855, 879 (1972) ("[I]f no social rule unambiguously requires a particular legal decision . . . , then judges will have discretion . . . because they will have to exercise initiative and judgment beyond the application of a settled rule."), *reprinted as* RONALD DWORKIN, *The Model of Rules II*, *in* TAKING RIGHTS SERIOUSLY, *supra* note 10, at 46, 69.

32. As Brian Leiter points out:

> The distinction between strong and weak discretion is Dworkin's, not Hart's, and it seems to obscure rather than illuminate Hart's actual reasons for thinking judges have discretion. Hart need not maintain that in cases of discretion, judges are bound by *no* authoritative standards: there may, indeed, be binding standards that narrow the range of possible decisions.

Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 21 (2003). What Hart cannot accept, however, is that there is or must be one best, right, or tie-breaking answer that further narrows the range of reasons to one. *See* HART, *supra* note 3, at 127 (discussing possibility of choice between open alternatives). It is this type of discretion—call it weak—that Dworkin endorses in his later jurisprudence, and is implied in his earlier jurisprudence by his rejection, as a matter of fact or decisional heuristics, of ties among rules. *See* DWORKIN, *supra* note 10, at 286–87 (arguing that in a complex legal system the possibility of a "tie" is remote, and if the judge thinks long enough, one alternative will win out). *See generally* Wilfrid J. Waluchow, *Strong Discretion*, 33 PHIL. Q. 321, 321 (1983) (asserting that Dworkin's theory regarding use of discretion in hard cases misdescribes the Anglo-American adjudicative system and is "morally and politically intolerable").

John Gardner also endorses a version of Dworkin's weak-discretion theory. Gardner, picking up on Dworkin's definition, believes there is weak discretion so long as the judge's choice is among a range of undefeated but indecisive legal options. So long as she does not turn outside the legal system for any further decisive or tie-breaking reason and simply picks among the available legal sources, the law provides a "complete" answer in the sense that no extralegal reason is required to solve legal issues. *See* Gardner, *supra* note 10, at 457–58 (noting that there is no complete answer where there is no decision required by law).

Gardner's definition raises, however, the following anomaly: the judge has weak discretion, according to Gardner, when she simply chooses among the reasons "without a resort to *any* further" norms but exercises strong discretion when she bases her decision on a decisive moral (or other extralegal) reason. *Id.* at 460–61 (emphasis added). This seems to get things back to front. The whole point of the weak discretion argument is to suggest that, though legal rules may conflict or prove gappy or indecisive, extralegal reasons may fill that gap. Furthermore, endorsing a form of discretion that ignores decisive extralegal reasons is rationally (and potentially morally) suboptimal. Discretion

The weak-discretion thesis holds that legal indeterminacy need not result in unconstrained decisionmaking. 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.[33] Ronald Dworkin originally coined the term "weak discretion" to demonstrate that adjudication consists of the reasoned elaboration of legal principles that control, albeit non-"mechanically," the outcome of a case.[34] The judge gets all the guidance she requires from legal principles: the judge need not look outside the law to find gap-closing standards.

Dworkin soon reformulated his thesis to include among the relevant legal principles those derived from political morality.[35] More recently, Dworkin has emphasized the relative transparency of legal reasoning to moral theorizing about public reasons.[36] 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

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is weak precisely because, while the law gives the judge a choice, reason determines the outcome. Where those reasons are also moral reasons, then ignoring them and picking against the strongest reason is both irrational and morally problematic. This is to insist that I do not oppose weak discretion as a description of *some* types of choice facing a judge; just that I reject the claim that *all* choices facing a judge must be reduced to weak discretion.

33. *See* Dworkin, *supra* note 10, at 32–33 (discussing weak discretion available to officials). "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." *Id.* at 32. Dworkin also suggests 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.*

34. *Id.* at 34–35 (noting that weak discretion, or further legal reasoning, is needed where laws are vague and no suitable rule has been established); *see also* Leiter, *supra* note 32, at 20–21 (discussing Dworkin's distinction between weak and strong discretion).

35. *See, e.g.*, Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1, 30–31 (1978) (noting that "political morality" is a dimension of determining the best justification for the outcome of a case), *reprinted as* RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, *in* A MATTER OF PRINCIPLE 119, 143–44 (1985) [hereinafter Dworkin, *No Right Answer?*]; Dworkin, *supra* note 31, at 877 (stating that to justify a settled rule, one must look at moral and political theory); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1082 (1975) [hereinafter Dworkin, *Hard Cases*] (arguing that decisions in hard cases can be viewed as a question of political theory), *reprinted in* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 10, at 81, 104–05 (1977).

36. Dworkin, *No Right Answer?*, *supra* note 35, at 30–31 (proffering that political theory and political morality are a large part of legal reasoning).

political materials entails, Dworkin believes, that in each case there can be only one "best" justification.[37]

The contrast between heteronomous and autonomous reasons plays a significant role in Dworkin's discussion of adjudication as a process of principled decisionmaking.[38] Principles are simply heteronomous reasons for decision that operate to give purpose or meaning to the legal materials. They may be contrasted with the sort of autonomous reasons or judicial predilections compatible with strong discretion.

The weak-discretion argument forms one of the many routes by which Dworkin attacks legal positivism: the belief that law is a limited system of norms, one that is separate from morality.[39] Dworkin asserts that because positivists believe the law "runs out," they must endorse some version of strong discretion whereby judicial decision is unconstrained by legal principles.[40] 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.[41]

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.[42] I am concerned primarily with Joseph Raz's

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37. RONALD DWORKIN, LAW'S EMPIRE 400 (1986) ("[P]resent law . . . consists in the principles that provide the best justification available for the doctrines and devices of law as a whole.").

38. Roger Cotterrell, *Liberalism's Empire: Reflections on Ronald Dworkin's Legal Philosophy*, 1987 AM. B. FOUND. RES. J. 509, 512–14 (discussing Dworkin's view on the autonomy of law and political autonomy).

39. On the tenets of legal positivism, see, for example, HART, *supra* note 3, at 207 (listing the "great battle-cries of legal positivism"); RAZ, *supra* note 22, at 37–38 ("[W]hat is law and what is not is a matter of social fact."); John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 199 (2001) ("[W]hether a given norm is legally valid . . . depends on its sources, not its merits."); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (discussing the history of the idea of positivism).

40. Dworkin, *supra* note 10, at 35 ("[W]hen a judge runs out of rules he has discretion, in the sense that he is not bound by any standards from the authority of law . . . .").

41. According to Dworkin, 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.

Dworkin, *supra* note 31, at 879.

42. *See* Gardner, *supra* note 10, at 457–58 (comparing Dworkin and Hart's view on judicial discretion when there is no clear legal decision). I actually think that this is not as "weak" a type of discretion as Dworkin (or Gardner) thinks, certainly given Dworkin's later work.

alternative thesis that morality, though not part of law, nonetheless provides reason-based limits to judicial discretion.[43]

I have no quibble, in certain circumstances, with the positivist embrace of weak discretion. Indeed, the weak-discretion thesis is not limited to Dworkin and Raz; it is embraced by anyone who believes that reason rather than fiat should govern the process of adjudication.[44] In a system of artificial reasoning such as the law, one would hope that most of the time judges are constrained by determinately applicable rules in deciding cases. In this Part, however, my point is that weak discretion is not always the only option open to a judge. On occasion, judges are constrained to exercise weak discretion; but strong discretion is an inherent possibility in a system in which legal indeterminacy is matched by extralegal indeterminacy. In such circumstances, none of the available reasons for decision are decisive, and some remain undefeated. Reason fails to provide a determinate outcome to the legal problem.

The alternative to my partial endorsement of weak discretion is a full embrace of the weak-discretion thesis.[45] I will suggest that Raz endorses a positivist variant of the weak-discretion thesis. His weak-discretion positivism rejects the claim that existing law is sufficient to 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). Thus, Raz joins those who agree that some decisive reason is required to justify judicial decision; the disagreement is over whether that gap-closing morality is part of the law or not.[46]

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43. *See, e.g.*, Raz, *supra* note 9, at 7 (noting there is much more to legal reasoning than simply applying the law, including consideration of morality).

44. The opposition of reason to fiat is taken from Lon L. Fuller. *See* Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 378–80 (1946) (illustrating the antimony of reason and fiat by discussing a hypothetical judge of a deserted island).

45. Hart calls this the "Noble Dream":

> [I]n 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 text of particular constitutional provisions, statutes, or available precedents appears to offer no determinate guide.

HART, *supra* note 11, at 132.

46. *See* BRIAN BIX, LAW, LANGUAGE AND LEGAL DETERMINACY 100 (1993) (discussing the differences between Raz's and Dworkin's view of morality relating to commensurability).

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

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

The mundane case, *Morrison v. Thoelke*,[47] is important primarily as a useful exemplar of the mailbox rule in contract law. It has no major political or doctrinal importance, and is not a literary masterpiece or a monumental decision by a celebrated judge. It is, however, a fairly clear example of legal and doctrinal conflict. The notable case, *Argersinger v. Hamlin*,[48] presents an issue of profound legal and moral importance: whether there is a right to the assistance of counsel for indigent defendants charged with petty offenses.

The problem for the judges in each case is that the available legal rules conflict and there is no decisive legal reason for preferring any among the available legal solutions. Each case presents a problem for a judge who would simply balance the rules or rely on some formalistic type of reasoning that "screen[s] off" consideration of extralegal reasons and instead requires the judge to rely upon the extant legal rules.[49]

Weak discretion solves this problem by suggesting that the judge may turn to extralegal reasons so long as the reasons selected are sufficiently heteronomous and, in particular, objective, neutral, and predictable to avoid preference-based decision. Though they may disagree about the appropriate source of decision, what the different theories of weak discretion have in common is that they all require the judge to identify some

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47. Morrison v. Thoelke, 155 So. 2d 889 (Fla. Dist. Ct. App. 1963).

48. Argersinger v. Hamlin, 407 U.S. 25 (1972).

49. *See, e.g.*, Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) ("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.").

decisive reason to resolve the case. Discretion is weak because the judge acts solely in her applicative or declarative role when the law decisively regulates the outcome.[50] The judge need not choose among conflicting rules or engage in judicial legislation: rather, she finds another, heternonomous extralegal reason that determines the outcome independently of her will.

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

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

1. Mundane Case: Morrison v. Thoelke. Consider, as an example of a conflict among legal reasons, *Morrison v. Thoelke*, a case of first impression concerning formation of contract.[51] 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.[52] Communication may, however, be a temporally extended process, and where there is a lapse of time

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50. *See* RAZ, *supra* note 22, at 182 ("[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.").

51. *Morrison*, 155 So. 2d at 891.

52. *See, e.g.*, CAL. CIV. CODE § 1586 (West 2007) ("A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.").

between the sending of a revocation and its receipt, the offeree may accept the offer. That is in fact what happened in *Morrison*.

Morrison mailed Thoelke an offer for the sale of property; the latter, upon receipt of the offer, sent his acceptance of the contract back through the mail to Morrison.[53] After mailing the acceptance, but prior to Morrison's receipt of it, Thoelke attempted to withdraw his acceptance of the offer.[54] The question is whether the acceptance had legal effect once it had been deposited in the post or only upon receipt.[55] The judge faced a clear conflict between two legally supported choices, neither of which was decisive.[56]

Morrison is a somewhat humdrum case because, by 1963, the doctrinal issue had been fairly well resolved in other jurisdictions one way or another.[57] So, to the extent the issue implicates which party is to bear the risk of rescinding the contract, that issue is essentially limited to the parties. It does not implicate the sort of large-scale political, economic, or social outcome that concerns, for example, many in the Critical Legal Studies Movement.[58] To the extent it implicates a moral problem—promisekeeping—the moral obligation tracks the legal one. The issue is, precisely, whether the moral–legal obligation to abide by the terms of the contract has attached yet.

In *Morrison* there are two conflicting rules, each of which provides persuasive legal authority for the alternative choices. The "deposited acceptance" rule stipulates that depositing the letter in the post signifies acceptance; the "acceptance on receipt" rule conceives of the post as the agent of the sender and delays acceptance until it is received by the offeror.[59] 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, however, no decisive legal answer. This is a case of first impression and other courts are split on the issue, as is the relevant academic literature. Here, the competing reasons for decision are equally weighty: they are not vague, nor are they

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53. *Morrison*, 155 So. 2d at 890.

54. *Id.*

55. *Id.* at 891.

56. *Id.* at 891, 905.

57. *See id.* at 905 (acknowledging that in adhering to the deposited acceptance rule, the court is adopting a rule that is "contrary to the decisions of other respected courts").

58. *See, e.g.*, Duncan Kennedy, *Toward a Critical Phenomenology of Judging, Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 518–19, 540 (1986) (discussing indeterminacy from a judge's viewpoint on a case arising from a labor protest).

59. *Morrison*, 155 So. 2d at 891, 897–98.

qualitatively different as to strength or value, but rather in equipoise, with no tie-breaking reason to settle which should win out. Faced with such a gap, the judge has no option but to turn outside the law or rely upon personal preference to resolve the case.

2. Notable Case: Argersinger v. Hamlin. In *Argersinger*, the Supreme Court attempted to reconcile two contradictory interpretations of the Sixth Amendment's application to "criminal prosecutions."[60] The Court had previously suggested, in *Duncan v. Louisiana*, that, for purposes of the right to jury trial, "criminal prosecution" meant a prosecution for a nonpetty offense with a potential sentence of six months or more.[61] In a separate line of cases, culminating in *Gideon v. Wainwright*, the Court sought to afford indigent defendants the same access to justice as rich ones, including, in 1963, the right to counsel.[62]

In *Argersinger*, the Court determined whether the right to counsel for indigent defendants applied to petty offenses. While the six-month limitation on the right to jury trial had a common-law history and precedent, no such tradition limited the right to counsel.[63] *Gideon*'s rationale appeared to extend the right to counsel to all criminal cases, no matter the length of potential sentence, and the text of the Sixth Amendment did not (and does not) include the six-month limitation.[64] The Court thus faced two conflicting reasons for decision, neither of which was determinative. In part, the issue turned on whether the right to jury trial precedent was of legal significance in the context of a right to counsel.[65] Resolving that question required the Court to consider two qualitatively different or incommensurable rights and the manner in which they interact in the structure of the Sixth Amendment's endorsement of accusatorial adversarialism.

How the Court resolved the gap would have great significance. The Court could choose to expand *Gideon*'s emphasis on liberty and equality to even petty offenses at a potentially great cost to the states that would be required to fund counsel for indigent defendants in misdemeanor cases. Or the

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60. *See* Argersinger v. Hamlin, 407 U.S. 25, 26–27, 32–33 (1972) (noting the conflict between the six-month requirement in *Duncan* and the suggestion in *Gideon* that there are fundamental rights applicable to all criminal prosecutions).

61. Duncan v. Louisiana, 391 U.S. 145, 159 (1968).

62. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

63. *See Argersinger*, 407 U.S. at 37 ("[N]o person may be imprisoned . . . unless he was represented by counsel at his trial.").

64. *Id.* at 32–33.

65. *Id.* at 30–31.

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

C. The Weak-Discretion Solution: Dworkin and Raz

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

Ronald Dworkin's account, properly understood, suggests the law never runs out; there are no legal gaps, only "hard cases."[66] Adjudication must occur within the context of some interpretive theory of political morality that explains what the law is on the basis of more general principles and, because such principles must cohere, generates unique outcomes to any legal problem. According to Dworkin, then, there is no sharp dividing line between law and nonlaw, and the judge is committed, by virtue of her office, to discovering the one correct outcome based upon that political morality.[67]

Joseph Raz's weak-discretion positivism expressly rejects preference as an appropriate ground of judicial decision.[68] He

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66. *See* DWORKIN, *supra* note 10, at 81 ("It remains the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.").

67. Dworkin, *Hard Cases*, *supra* note 35 at 1104–05.

68. *See* ETHICS IN THE PUBLIC DOMAIN, *supra* note 9, at 194–95 (defending the concept that all law is source-based and that its "existence and content can be identified

splits legal decisionmaking into two, such that, when governed by rules, it is a relatively technical affair of artificial reasoning.[69] When the rules run out, however, the judge is required to identify some underlying moral justification for her decision precisely because morality is neutral, predictable, and apolitical.[70]

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

1. Dworkin and Principled Adjudication. The many-headed Hydra that is Ronald Dworkin's theory (or theories) of law emphasizes that adjudication is a process of principled decisionmaking, a claim that is at the heart of his most recent accounts of law as integrity.[71] He consistently argues that law is a gapless system[72] which presents "one right answer" to every legal problem,[73] and latterly, that the right answer is one that constitutes the "best" reconstruction of the law given the judge's theory of political morality in light of the case's "fit" with pre-existing law.[74]

In *Law's Empire*, Dworkin embraces "constructive interpretation" as a method of identifying and applying the law.[75] Dworkin's injunction to his Herculean judge—that she must provide the "best" possible account of the law—ties together a number of themes from the various stages of his jurisprudence.[76] In particular, Dworkin believes that interpretation is purposive;

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by reference to social facts alone, without resort to any evaluative argument").

69. *See* RAZ, *supra* note 22, at 181–82 (distinguishing between regulated and unregulated cases).

70. *See* Raz, *supra* note 9, at 4–5 (stating that if points of view based on morality are denied, "all values and reasons, whichever point of view they belong to, are based on nothing but arbitrary fiat").

71. *See* DWORKIN, *supra* note 37, at 225 (explaining that if a proposition of law "follow[s] from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice" then it accords with law as integrity).

72. *See, e.g.*, Dworkin, *Hard Cases*, *supra* note 35, at 1093–96 (offering the metaphor of law as a "seamless web" in describing how a judge makes decisions).

73. *See* Ronald Dworkin, *A Reply by Ronald Dworkin*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 278 (Marshall Cohen eds., 1983) (responding to a critique of his theory that, even in hard cases, one answer is the most reasonable).

74. *See* DWORKIN, *supra* note 37, at 230–31 (using the metaphor of a chain novelist's interpretation of a preceding chapter in deciding how to write his portion of the text).

75. *Id.* at 225.

76. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 89–90 (3d ed. 2003) (discussing Dworkin's constructive interpretation theory and how it "is probably best seen as a reworking of earlier themes within a philosophically more sophisticated framework").

the judge must identify one point or value embodied by the type of thing or genre under consideration (in this case, the law).[77] A jurist can then compare different conceptions or interpretations of the law, and different laws, to determine whether they are better or worse than any alternatives.[78]

Underlying the method of constructive interpretation is the claim that legal values are commensurable and so can be brought under one unifying principle or purpose.[79] Dworkin's discussion of law-as-integrity emphasizes (given commensurability among values and the principled nature of legal decisionmaking) the importance of reconstructing the law to express a unitary moral vision, one in which the judge seeks "to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community."[80] The combination of coherence and political morality thus sets a standard to which a judge should aspire and by which to guide her decision: the outcome a judge selects must be the one that makes best sense of the legal materials consistent with her view of the law and of morality.

Dworkin famously rejects the positivist separation of law and morality. He is concerned to blur or erase the line between "the law" and political morality, arguing that the law is each judge's ethical reconstruction of the legal materials in light of her attempt to provide the "best" interpretation.[81] Dworkin's law-as-integrity thus contemplates that judges can disagree, and do so profoundly, over what the best theory of law might be.[82] He suggests that, in criticizing and reconstructing legal doctrine, the judge, lawyer, and legal scholar must adopt, defend, and justify a particular picture of the law.[83] They are not free to select just any version of the law, but must find a principled basis for their opinion, one informed by a political morality that explains what rights the law of a particular system protects, justifies the use of the state's coercive power against citizens, and rationalizes the

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77. DWORKIN, *supra* note 37, at 52.

78. *Id.* at 231–32 (comparing a chain novelist's consideration of various interpretations to that of a judge).

79. *See* Ronald Dworkin, *On Gaps in the Law*, *in* CONTROVERSIES ABOUT LAW'S ONTOLOGY 84, 90 (Paul Amselek & Neil MacCormick eds., 1991).

80. DWORKIN, *supra* note 37, at 255.

81. *Id.* at 255–56.

82. *See* Dworkin, *supra* note 73, at 278 ("[I]n hard cases at law one answer might be the most reasonable of all, even though competent lawyers will disagree about which answer is the most reasonable.").

83. *See* Ronald Dworkin, *Law's Ambitions for Itself*, 71 VA. L. REV. 173, 177–78 (1985) (describing the ways in which a contemplated interpretation must be tested in order to be justified).

pre-existing legal materials in a manner that includes as much of them as possible within its definition of both "law" and "the law" of the legal system under consideration.[84] Though Dworkin emphasizes that judges may disagree with each other over what is the best theory of law, he does not believe that, once a theory of law is selected, it can be ambivalent about the outcome in a given case.[85] Each theory will determine what the one right answer is, though that answer may be different from theory to theory.[86] Thus, for Dworkin there is always some decisive reason which resolves the dispute in a given case.

The one-right-answer imperative is, for Dworkin, essential precisely because it distinguishes courts from legislatures, law from partisan politics.[87] His consistent emphasis upon the priority of principled decisionmaking, from his early attack on a jurisprudence of rules to his more recent discussions of constructive interpretation, is a moral–political argument that courts must act as if there is one right answer if they are to remain "forums of principle," constrained to operate within the extant legal materials, rather than as some quasi-legislative body.[88]

The demand for decisive reasons generated by principle is thus part and parcel of an argument for weak discretion as the proper posture of the judge: a demand based on a moral–political view of the judicial role as constrained to follow reasons rather than generate them, such that the judge should look primarily towards the legal materials and the principles that organize them for the solution to legal problems rather than, as Bix puts it, "turn too quickly . . . to legislative questions."[89]

2. Raz's Weak Discretion. At least one legal positivist agrees with Dworkin that decisive moral reasons provide a determinate answer to problems of legal indeterminacy. Unlike

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84. DWORKIN, *supra* note 37, at 93.

85. *See id.* at 258–59, 66 (stating that Hercules, after deciding a hard case, concedes other judges may find another interpretation to be superior but expressly rejects the idea that there is "no uniquely right answer in hard cases at law").

86. *See id.* at 270–71 (explaining Hercules's choice of settling on one theory over another in adjudicating a hard case where some jurisdictions followed one principle while others followed another).

87. *See* DWORKIN, *supra* note 37, at 243–44 (explaining how the role of a judge is far more constrained than the role of a legislator); Ronald Dworkin, *The Judge's New Role: Should Personal Convictions Count?*, 1 J. INT'L CRIM. JUST. 4, 11 (2003).

88. Dworkin, *No Right Answer?*, *supra* note 35, at 33–34, 69–71 (arguing that when a court must make a "political decision," it should decide based on principle and not on policy).

89. BIX, *supra* note 76, at 95.

Dworkin, however, Joseph Raz separates legal reasoning into two distinct forms: (1) reasoning *about* the law and (2) reasoning *according to* law.[90] 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."[91]

Often, a judge can decide a case without having to consider its moral, social, or political merits. The rules of the legal system fully govern the outcome. The judge needs only to indulge in a technical form of reasoning that, first, identifies which rules apply to the instant case and, second, how these rules apply.[92] 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.[93] Following Raz, we may call this sort of reasoning "reasoning about the law."[94]

Raz's goal is to demonstrate that courts can be bound to follow nonlegal 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 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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90. Raz, *supra* note 9, at 7 ("[T]here is much more to legal reasoning than applying the law, and the rest[,] [referred to as] reasoning according to law, is—arguably—applying moral considerations.").

91. *Id.* at 10.

92. This is 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.

93. It may also include situations in which a global, system-wide closure rule holds, for example, that what is not legally prohibited is legally permitted. *See* RAZ, *supra* note 22, at 76–77 (proving, through logical propositions, what is not legally prohibited is legally permitted).

94. *See* Raz, *supra* note 9, at 10 (stating when courts use their "discretion to modify legal rules," they should apply "moral understanding and sensitivity" along with legal knowledge).

The judge may, however, turn to extralegal reasons to help settle which legal option ought to be preferred on the balance of reasons; the extralegal reasons operate to "break the tie" between the competing, undefeated reasons. 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.[95] So the standard of legal decision does not involve considering all the possible reasons (legal and nonlegal) which may apply to the instant case, but only those extralegal reasons which can help the judge decide between the various legally sanctioned options: in more technical terms, those extralegal reasons which will determine which of the undefeated reasons ought to prevail.[96]

Though the *scope* of reasoning in such circumstances is different from fully fledged moral reasoning, Raz nonetheless believes that moral reasons help the judge decide which, among a range of legal reasons, ought to prevail. He characterizes this as a moral decision, one that does not permit strong discretion.[97] Choice is limited to selecting among the valid but nondecisive (undefeated) legal reasons.[98]

Turning to morality does not, however, mean the judge has the sort of unfettered choice characteristic of strong discretion. First, the range of reasons the judge can consider is narrower than fully fledged moral reasoning because they are framed by the legal issues.[99] Whatever decision the judge makes will be some form of "specification" of the law in light of the available

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95. Raz, as a positivist, considers some reasons as excluded from figuring into the decision process because law is an exclusionary system of practical reasoning. *See* RAZ, *supra* note 6, at 142–44 ("The courts are . . . bound to regard individuals as acting in accordance with legal standards to the exclusion of all other reasons.").

96. *See* Raz, *supra* note 9, at 8 (explaining how laws often "direct the courts to apply extralegal considerations").

97. *See* Raz, *supra* note 9, at 9–10 ("Morality comes only at the preliminary stage . . . .").

98. H.L.A. Hart acknowledged, too, that, on occasion, judicial discretion may be limited and weak. Where reasons are undefeated, the conflicting reasons for decision do not simply fall away. These reasons limit the grounds of decision: they still operate as reasons justifying decision, but do not provide a "complete" justification requiring a unique outcome. *See* HART, *supra* note 3, at 204–05 (acknowledging when proper interpretation of the law is in doubt, the judge's decision is acceptable if it results from impartial reasoning); *see also* H. L. A. HART, *Problems in the Philosophy of Law*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, *supra* note 11, at 88, 106–07 (discussing the limitation of a judge's discretion); HART, *supra* note 11, at 136–37 (explaining how a judge must stay within the "system" when making a decision). *See generally* BIX, *supra* note 46, at 26–27 (exploring Hart's interpretation of discretion).

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

moral reasons.[100] 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.[101]

In reasoning according to law, then, although there is *legal* discretion—the law is ambivalent as between the various possible outcomes—there is no moral discretion. The judge's discretion is *weak* because, though generated by legal indeterminacy, it is constrained by moral determinacy. Legal discretion thus does not entail the sort of free flowing choice embodied in strong discretion. Rather, judicial choice is doubly constrained: only some among the available options are legally valid, and morality provides a decisive reason to fix which among the available undefeated legal reasons to select.[102]

D. Extralegal Gaps

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

I shall first consider the situation in *Argersinger*, where the moral reasons applicable to the case are incommensurable. I shall then consider *Morrison*, where doctrinal reasons are

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100. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 284 (1980) (describing the process of specification); Neil MacCormick, *Reconstruction after Deconstruction: A Response to CLS*, 10 OXFORD J. LEGAL STUD. 539, 548 (1990) (elaborating on Finnis's discussion of specification).

101. *See* Raz, *supra note* 9, at 7 (asserting that reasoning according to law involves consideration of moral issues).

102. Legislators may require a judge to consider extralegal moral reasons as a means of forcing them to think more deeply about their legal and moral obligations. *See* Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785, 806–07 (1994) (discussing the idea of commensurability in the application of law). Frederick Schauer suggests that the legislature may expressly stipulate that conflicting reasons are to be treated as undefeated vis-à-vis each other as a method of combating more consequentialist modes of reasoning. *See id.* at 793–94. In that case the legal system elaborates the reasons for not comparing, and decisionmakers must turn to extralegal reasons if they are to resolve the legal issue. Schauer believes this artificial or technical form of moral fragmentation serves an instrumental function, requiring recourse to nonlegal reasons for decision, and so reinforcing certain noninstitutional (Schauer says "morally primary") positions. *Id.* at 804.

similarly unavailing, this time because they are in equipoise. In each situation, the judge must exercise strong discretion to resolve the dispute, relying on personal preference to choose among the available legal reasons.

1. Argersinger *Revisited.* In *Argersinger*, the available moral reasons cannot provide a decisive basis for decision. The distinction between petty and nonpetty offenses, which draws a bright line based on the length of the potential sentence, fails to capture aspects of the criminal prosecution not concerned with liberty. For example, the Sixth Amendment is particularly concerned with the adversarial nature of the criminal process.[103] Adversarialism, as a means of finding truth and protecting individual rights, may be more or less fair or effective based on the crime charged, the facts of the case, and its complexity, rather than the length of the potential sentence imposed; and while the length of prison sentence is a major consideration in the seriousness of the liberty right at stake, it is not the only one.

Fairness considerations may, nonetheless, conflict with other values at stake in the right to counsel. For example, that right is of intrinsic value as one of the constituent rights in the adversary system of justice. A defendant is thus harmed whenever denied the assistance of counsel, not because the underlying procedure is any less accurate or fair, but because an essential part of the process, expressive of its seriousness and dignity, has been removed.[104]

The right is of instrumental value to the extent it secures a number of competing values at stake in the American system of accusatorial adversarialism. The values of liberty, accuracy, fairness, order, and efficiency conflict in ways that do not predetermine the decision to extend or limit the right to counsel. In part, this is because the Sixth Amendment is primarily procedural: it promotes a particularly accusatorial and adversarial model of criminal justice.[105] Were the process afforded defendants charged with petty offenses nonadversarial and inquisitorial, then considerations of justice, accuracy, and efficiency might trump or minimize the liberty interest at stake.

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103. *See* Brewer v. Williams, 430 U.S. 387, 397–98 (1977) (explaining the indispensable role of the Sixth Amendment in the adversarial criminal process).

104. Justice Marshall makes a comparable argument in his dissent in *Strickland v. Washington*, 466 U.S. 668, 711 (1984) ("Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer.").

105. *See* Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 641–42 (2005) (explaining how the Sixth Amendment rests on a foundation of "adversarial and accusatorial traditions").

Certainly, there is no reason to believe that inquisitorial civilian systems are less just.

In fact, there has recently been a strong, judge-led movement away from accusation and adversarialism for certain petty offenses, particularly those that require "problem-solving" rather than a finding of guilt or innocence.[106] In the criminal context, judges, and latterly the federal government, have identified nonviolent drug crime as better dealt with using an investigative and inquisitorial "therapeutic" paradigm rather than the traditional criminal process contemplated in *Argersinger*.[107] Problem-solving courts often retain the power to impose restrictions on liberty, and while they employ counsel, they do so less as client advocates than as therapeutic guardians. Deprivations of liberty are permissible where not wholly, or primarily, punitive. All this is to suggest that the line between petty and nonpetty offenses may be sensitive to both the type of system in place and the justifications for restricting liberty.

The liberty interest identified in *Argersinger*, while profound, is thus not quite decisive; it butts up against the fact that the criminal law imposes a range of sanctions that do not implicate liberty, and that such deprivations may be comparably though incommensurably profound, at least as measured by individual defendants. Furthermore, as Justice Powell observed in his concurrence, liberty interests may implicate economic considerations as much as incarcerative ones.[108]

It is this incommensurability among modes of punishment that makes it difficult to say, *ab initio*, that minor deprivations of liberty are always worse than fines. In particular, the stigmatic effect of certain sanctions, such as public registries for sex offenders, may be, in some sense, "worse" than a short prison sentence with no such reporting requirement. Or a short prison sentence may be "better" than an eighteen-month period of supervised probation in drug court. This, of course, may simply point to a difference between positive and negative notions of

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106. *See* Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 441–42 (2001) (recognizing the rise in nonadversarial problem-solving courts dealing with crimes involving drugs, guns, and domestic violence).

107. *See* Eric Lane, *Due Process and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 955, 990–91 (2003) (acknowledging the role of federal funding in starting problem-solving courts dealing with treatment of individuals accused of nonviolent crimes).

108. Argersinger v. Hamlin, 407 U.S. 25, 48 (1972) (Powell, J., concurring) ("Serious consequences also may result from convictions not punishable by imprisonment. Stigma may attach to a drunken-driving conviction or a hit-and-run escapade. Losing one's driver's license is more serious for some individuals than a brief stay in jail.").

liberty; if so, the issue then becomes one of justifying one conception over another.

As the justices in *Argersinger* discovered, turning to morality does not always resolve the decision in a determinate manner. Although moral reasons sometimes operate to fill the legal gaps, they are not always available in this way. Problems arise if extralegal reasons for decision are themselves gappy.[109] The relevant moral reasons may themselves be vague and ambiguous, or conflicting and incommensurate. That is, moral indeterminacy may match legal indeterminacy, and the weak-discretion solution to legal gaps proves unavailing.

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

Not quite. Raz has repeatedly rejected preference as a basis for public decision.[110] The problem, Raz suggests, is that preference-based decisions are a legally inappropriate means of resolving the legal issue.[111] Legal decision is, if nothing else, the exercise of a normative power giving the judge authority to determine the normative status of the parties to the case. Raz suggests that legal authority is *legitimate* only if based upon reasons which attend to the discrete circumstances of individual subjects[112] and the legislature, agency, or judge is more

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109. 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.

HART, *supra* note 3, at 204.

110. Raz suggests:

> [I]t 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 the judges.

Raz, *supra* note 9, at 14.

111. 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 favouring one solution over another." *Id.* at 14.

112. ETHICS IN THE PUBLIC DOMAIN, *supra* note 9, at 194, 195.

knowledgeable or has more expertise in resolving the relevant issues than the subjects of regulation.[113] Under this "service conception" of authority, individuals are, in the circumstances, better off following the law rather than determining how to act for themselves.[114]

Two specific types of indeterminacy in particular, Raz believes, are likely to render law and morality gappy. They are social and moral pluralism:[115] "inconsistent views on moral, religious, social and political issues in democratic (and in many other) societies."[116]

Social and moral pluralism, what he elsewhere calls "pragmatic conflict" in the law,[117] threatens to undermine the legal values of predictability and stability, and has serious consequences under Raz's service conception of authority. In acting without some decisive reason for an outcome, legislatures and courts simply pick an option, and do so without any better reason than the individuals they seek to regulate. Furthermore, by choosing on the basis of personal predilection, courts act on their own rather than the regulated individual's reason for action.

This type of choice might be justifiable as an exercise of authority when preference-based decisions seek to guide the behavior of small numbers of people in direct contact with the norm-setting authority.[118] In a modern, municipal legal system, however, the law seeks to govern large numbers of people through shared standards of conduct applicable without further direction.[119] Accordingly, some institutional, shared, and

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113. *Id.* at 199.

114. *Id.* Legal authorities, Raz suggests, "are not there to introduce new and independent considerations . . . . They are meant to reflect dependent reasons in situations where they are better placed to do so. They mediate between ultimate reasons and the people to whom they apply." *Id.*

115. A third situation in which considerations of local coherence have value for judicial decisionmaking exists when some distinct and determinate moral value is enshrined as a legal value. Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 311–14 (1992), *reprinted in* ETHICS IN THE PUBLIC DOMAIN, *supra* note 9, at 261, 298, 300–03. Because the value is itself coherent, judges should apply it consistently and coherently when working out its ramifications in the law. *Id.* When institutionalizing this type of moral value, anything other than local coherence would be morally suboptimal. *Id.*

116. *Id.* at 311.

117. *See* RAZ, *supra* note 22, at 201.

118. *See* Raz, *supra* note 115, at 312 (discussing how legislation based on personal preference is appropriate when no mix of values is superior to another). An example of the acceptable role of preference in a small legal community may be Solomon, the wise judge personified, who might fit the service conception's criteria for a legitimate authority. *See* 1 *Kings* 3:16–28.

119. *See* HART, *supra* note 3, at 124 ("In any large group general rules, standards,

predictable standard of decision is required. Preference-based decision risks being sufficiently random to undermine this feature of law.[120] Raz appears to believe that, in such circumstances, if the judge cannot be right she might at least be orderly.[121]

Raz's solution is to steal a trick from Dworkin; while Raz does not endorse Dworkin's globalizing use of principles to reconstitute the legal system in the image of some political morality, Raz does believe, when faced with an *intractably* hard case, that coherence has a part to play.[122] *Local* coherence enables the judge to order decisions based upon heteronomous institutional legal values rather than moral values or personal preference. The judge looks backward to statutes, decided cases, and the legal doctrines that organize them, to use doctrine as a source of legal decision. Local coherence prevents too much unpredictability or change among the governing legal values from destabilizing the legal system; instead the judge should organize apparently conflicting doctrine under some governing value or set of values.[123] When selecting some extralegal organizing principle threatens too radical a change in legal doctrine, the judge should generally resist the temptation to engage in a broad-ranging reconstruction of the law rather than a local reform of legal doctrine. Local coherence thus has institutional value, even if the result is morally inferior to broad reform.[124]

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.[125] The only option, Raz suggests, is to turn

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and principles must be the main instrument of social control, and not particular directions given to each individual separately.").

120. *See* Raz, *supra* note 115, at 312 (discussing the conflict of choosing the "best" choice over one that adheres to precedent).

121. *Id.* at 313 (explaining the importance of adhering to a choice once it is made).

122. *See id.* at 311–13 (asserting that a lack of consistency in the application of law would lead to chaos).

123. *Id.* at 310–11 ("[W]e must recognize that the application of each of the distinct values ought to be consistently pursued, and this generates pockets of coherence . . . where the law should reflect one overriding moral or evaluative concern.").

124. *See id.* at 311–12 (examining the role local coherence plays in resolving the "dilemma of partial reform").

125. "[T]he return from morality, when asked for its contribution to the issue at hand, is that it has no guidance to give . . . . [T]he return from morality is that whatever we decide to do becomes . . . the right thing to do." Raz, *supra* note 9, at 10–11. Where the law is concerned, Raz believes, "[i]t may be unacceptable that people when acting as judges should simply express their will, their inclination or taste favouring one solution over another." Raz, *supra* note 9, at 14.

back to the law to seek some form of determinate outcome.[126] Doctrinal or formalist legal values, he believes, provide the only remaining legitimate source of decisive reasons upon which to base institutional choice.

The problem for Raz's return to doctrine is, as with morality, the doctrine itself may prove indeterminate. This is the case in *Morrison*. Indeed, the *Morrison* court expressly considered the persuasive academic literature surrounding the various justifications for the different versions of the postal rule.[127] After elaborating the academic and legal doctrinal debate, however, the judge discovered that the weight of argument and authority was evenly split.[128] Neither the deposited-acceptance rule nor the acceptance-on-receipt rule had greater doctrinal heft than the other.

In *Morrison*, remember, moral reasons had not yet attached. All that was left to break the tie were doctrinal reasons. Both the doctrine and the rule proved to be in equipoise.[129] The moral and legal issues awaited the judge's choice, rather than directed it. Accordingly, the judge faced a choice without a decisive reason for recommending any particular option. While future cases require predictability, the current case required a decision.[130] Whichever reason the judge chose would suffice, but he must choose one.[131] His choice was not, however, determined by any chosen doctrine, but it instead endorsed one.

Dworkin appears to propose that the conflicts of reasons of the type identified in *Argersinger* are chimerical, and those of the type identified in *Morrison* are unimportant. He is committed to

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126. "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." Raz, *supra* note 115, at 335. 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.

127. Morrison v. Thoelke, 155 So. 2d 889, 904 (Fla. Dist. Ct. App. 1963) (weighing the persuasiveness of writings by Christopher Columbus Langdell, Samuel Willinston, and Robert A. Samek).

128. *Id.* (deciding, ultimately, that adhering to precedence be "in accord with . . . essential concepts of contract law").

129. *See id.* (finding persuasive arguments by both advocates and critics).

130. *See id.* (noting both sides offered persuasive arguments, but that a decision had to be made based on considerations of a rule that could be of general application in the future).

131. This seems to be the way things appeared to the court. The court first justified its decision 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." *Id.* at 903. The court next considered that its decision would be "in accord with the . . . essential concepts of contract law." *Id.* at 904. This is a doctrinal reason for action.

a robust form of commensurability, and he appears to reject incommensurability as a form of moral apathy or indolence on the part of the decisionmaker.[132] He considers that, when faced with two options, we can always have an "opinion" about which to prefer.[133] In fact, his one-right-answer thesis makes it imperative that a judge be an opinionated, committed legal actor.[134] Our ability to form an opinion refutes incomparability by demonstrating that apathy may be overcome and decisions made.[135] For Dworkin, commensurability, like incommensurability, is a choice, and a political one at that.[136] As an incommensurability skeptic,[137] he believes that the decision to compare or not to compare expresses one's social or political commitments rather than some fact about the structure of value.[138] If he is correct, then once a theory is selected, preference-based decision is never an option.[139] Things are

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

133. *See* Dworkin, *supra* note 79, at 90 ("My view just comes to this: within the very limited terrain on which we can compare different interpretations of a particular statute against the general background of political culture in which that statute was enacted, on the very limited terrain of that comparison, experience shows that we almost always can have an opinion.").

134. *See* DWORKIN, *supra* note 37, at 255–58 (reasoning that when making a decision a judge must consider his own convictions and opinions, as well as examining the legal and political history of the community); Dworkin, *supra* note 87, at 8–9 (noting that the convictions judges rely on are political convictions).

135. Compare Dworkin's comments to Brian Bix's claim that "after long consideration of the options . . . the decisionmaker slowly begins to identify with one alternative rather than the others," BIX, *supra* note 46, at 105, and Jeremy Waldron's description of choice among incommensurables as necessitating some calamity to force decision. *See* Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L.J. 813, 815–16 (1994) (observing that incommensurability can leave a decisionmaker paralyzed such that only a tragic event can force a decision).

136. *See* Dworkin, *supra* note 73, at 272 (arguing that if two theories meet a decisionmaker's threshold of fit, then the choice will be determined by "political morality").

137. For a discussion of such skepticism, see ENGAGING REASON, *supra* note 1, at 50–54 (discussing the belief/desire account of reasoning and the two arguments against it).

138. Dworkin, *supra* note 79, at 90. 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.

139. *See, e.g.*, Dworkin, *supra* note 87, at 8 (claiming that judges' decisions are

different, however, at the level of picking an underlying "theory" by means of which to organize the law.[140]

While I do not have space to engage in a comprehensive discussion of Dworkin's arguments in favor of commensurability, perhaps two points are worth making here. The first is to address his repeated challenge to produce some positive justification for endorsing incommensurability over commensurability as an explanation of moral or ethical conflict.[141] The second is that his theory of internal skepticism and political judging is one that seems to support and repress, rather than undermine, incommensurability.

To take up the challenge first: one common example of incommensurability requires an individual, call her Jane, to choose between two life-changing opportunities.[142] Dworkin suggests a choice between "pursu[ing] a promising career as a public-interest lawyer in Los Angeles or emigrat[ing] to a kibbutz in Israel."[143] These are, we should suppose, major life decisions—and decisions, moreover, about what sort of life Jane should live and what sort of person Jane should be. "Now suppose," Dworkin proposes, "someone says that she is silly to worry about any of this, because, since both of these lives are valuable, there is no right answer to the question which is, all things considered, the best. That surprising view . . . needs as much positive argument or instinct or conviction as the contrary claim . . . "—that is, Dworkin's claim that there is one best answer.[144]

The idea that "someone [would] say it is silly to worry about any of this" is indeed a surprise, not just to Dworkin or Jane, his hypothetical lawyer–kibbutzer, but also to someone like me who believes that values are incommensurable. The incommensurabilist's claim is not that the worry is, on significant

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almost always political, but in the sense of political morality); Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 166 (1982) ("[E]ach judge's decision about the burden of past law depend[s] on his judgment about the best political justification of that law, and this is of course a matter of political morality.").

140. *See, e.g.*, DWORKIN, *supra* note 37, at 45–46 (arguing that legal disagreements are genuine because they are disagreements over theories of law).

141. *See* Dworkin, *supra* note 79, at 89–90 (opining that anyone who believes there is a problem of commensurability does so as a result of one's political convictions); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 136 (1996) (finding the belief that there is "no right answer" is not true in law, nor is it true in ethics, aesthetics, or morals).

142. This is an issue that Joseph Raz addresses in his *Morality of Freedom*, and one that Dworkin appears to implicitly take issue with in choosing his example. *See* THE MORALITY OF FREEDOM, *supra* note 1, at 341–45 (suggesting that having to choose between a career in law or a career in teaching would be an incommensurable decision).

143. Dworkin, *supra* note 141, at 136.

144. *Id.*

occasions, silly or pointless.[145] The claim is simply that there is no decisive reason that can settle the fact of the matter. The only thing to do is to choose, and the incommensurabilist's point is that this choice is an autonomous one rather than a heteronomous one. It is a choice that says something about the *chooser* rather than (just something about) the structure of ethical or moral reasons pertaining to the choice at hand.

Choice among undefeated reasons *is what it means to live an autonomous* (as opposed to merely rational) *life*, one the agent can make her own and for which she can take responsibility. Worrying over a choice is not silly, certainly in this situation, precisely because of its moral and ethical consequences. Once chosen, that life must be lived, and it should be a life that embraces ethical concerns about authenticity, identity, and integrity that are significantly independent of "the obvious fact that there are many values, and that they cannot all be realized in a single life."[146]

For commensurabilists who believe that there is some decisive fact of the matter, the choice here is not properly between different versions of how to live, but about what reason requires. The choice is about being (more or less) rational; between being right and being wrong (or more right and more wrong). The incommensurabilist's rejoinder is that this type of choice presents what Bernard Williams calls a "rationalistic conception of rationality."[147] The commensurabilist makes no room for autonomy in his calculus over choice, because the decisionmaker does not choose how to live her life but merely finds it in the structure of (heteronomous) reasons.

The point can perhaps be made by introducing Minerva, a scientist with similar talents and endowments as Dworkin's

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145. I would insist the bare fact of incommensurability does not make the choice significant. Whether to prefer apples or oranges for lunch is not, in the usual run of things, a significant life-altering decision.

146. Dworkin, *supra* note 141, at 136. As an ethical matter, the agent would be a different type of person if she was immortal. In such a case, she could, perhaps, live out as many different experiences as she wanted. Choosing *all* the options, however, says as much about who she is as choosing one option—it too is an autonomous, ethical choice, one perhaps of indecision, or dilettantism, or extreme self-sacrifice, depending upon the reasons for the choice and the manner in which she inhabits her choice. Raz raises the issue of habituation in *The Morality of Freedom*. *See* MORALITY OF FREEDOM, *supra* note 1, at 308 (noting that conditions of personal wellbeing depend on a person's willingness to accept goals and pursuits and his actions and success in following them).

147. *See* BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 18 (1985) ("The drive toward a *rationalistic conception of rationality* comes . . . from social features of the modern world, which impose on personal deliberation and on the idea of practical reason itself.").

model judge, Hercules.[148] Imagine for a moment that Minerva and Hercules are omniscient, omnipotent, and immortal (characteristics that are not too dissimilar to those already attributed to them) *and* that they are identical twins.[149] They are born at sufficiently identical times and are so close as to experience things from sufficiently identical perspectives, so that they always face the same range of choices over how best to live. A theory of morality or ethics based on the heteronomous role of reason would suggest they should both (because sharing the same experiences) make the same life choices. There would be no "Minerva's life" or "Hercules's life," because, for each of them, the only choice would be between a right or wrong life, not a differentiated one.[150]

What is ethically important, however, is not only that a life is well-lived but also that it is authentic.[151] Dworkin sometimes writes as if what differentiates individuals ethically, morally, or politically is their upbringing and acculturation.[152] But equally plausibly, it is their tastes and inclinations. There is no place in his ethical theory for such nonrational differences to flourish, except perhaps at the pre-interpretive level.[153] Instead, he

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148. *See* Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 357–60 (1997) (setting forth two hypothetical characters with which to compare; Minerva and Hercules).

149. For the thought experiment to have more bite, they would have to both share the same gender.

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

151. *See* KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 5 (2005) (noting what is important about life is the ability for one to choose her own life plan).

152. *See* RONALD DWORKIN, SOVEREIGN VIRTUE 17 (2000) (commenting that people have three types of preferences, one of which is personal preference which takes account of one's own experience or situation).

153. Agreement over the criteria that constitute the basis of judgment can be rephrased in terms acceptable to Dworkin as the sort of pretheoretical or "pre-interpretive" understanding we share when applying a concept. *See* DWORKIN, *supra* note 37, at 91 (contending that when entering a particular practice, one's basis of judgment is usually contingent and local). The relevant point here is that we share a certain community, with all that that implies. *See id.* at 63–64 (setting forth some of the different elements that a community of social practice must have). This relation to community requires that we share a certain commitment—we are participating in a particular point of view towards the community. That point of view is not itself theorized. In developing the individual's point of view into a theory of political morality, however, Hercules and Minerva may subject it to the sort of reflective testing championed by John Rawls. *See* Ronald Dworkin, *Rawls and the Law*, 72 FORDHAM L. REV. 1387, 1391–92 (2004) (explaining how Rawls believes that philosophers of justice should "try to generate principles of some general scope and match those general principles to the concrete judgments about what is just and unjust with which we begin, shifting [their] views about

appears to believe that identical twins Hercules and Minerva can live ethically individuated lives only if one decides to live an ethically suboptimal one. Yet his theory elsewhere emphasizes the (bounded) value of individualistic liberalism.[154] The incommensurabilist's point is, then, that he (and pluralism-supporting commensurabilists generally) cannot have his cake and eat it, too.

A theory of autonomy insists that what makes Hercules and Minerva different is their choices; that because, over a range of choices, reason is indecisive and has no direction to give, they may rationally choose among the options without risking mistake. Deliberation is important because the consequences of their choices matter (though they may not be decisive) for them and for the world. What matters most, however, is what happens after they choose: how well they inhabit their choice. To reiterate, the task is not just to choose, but having chosen, to live well.[155]

The argument against thoroughgoing heteronomy is also relevant for my second point: Dworkin's explanation of moral and political conflict. Dworkin accepts that disagreement, certainly at the theoretical level, where jurists are generating some claim about the ("best") political–moral justification of law, can be *genuine*.[156] If disagreement was not real or genuine, but rather rested on some mistake about political morality, then disagreement would simply entail that someone was both wrong and ignorant. While that would be a statement about the fallibility of human knowledge, and perhaps an important point against consequentialism, it would render his account of disagreement somewhat less interesting.[157]

Assuming values are commensurable, however, if Hercules and Minerva sat down to discuss the best interpretation of

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either principles or concrete judgments, or both, as becomes necessary to achieve an interpretive fit"). The problem of ethically individuating Hercules and Minerva is precisely that, as I have put the issues, each of them share the same pretheoretical experiences. If there is one right answer, reflective reconstruction fails to differentiate their ethical lives.

154. *See* DWORKIN, *supra* note 152, at 120–33, 158–62, 180–83 (discussing his theory of liberty).

155. *See* APPIAH, *supra* note 151, at xii (opining that how well a person lives depends entirely upon that person).

156. *See* DWORKIN, *supra* note 37, at 45–46 (observing that legal concepts should also be considered genuine disagreements).

157. *See, e.g.*, Thomas D. Perry, *Contested Concepts and Hard Cases*, 88 ETHICS 20, 33 (1977) (suggesting that some decisions over contested concepts decided on "political theories that judges might construct would be wrong on [a] point while others would be right," and observing that Dworkin has not given an explanation for this and as a result he still begs the question).

American law, both would agree over the correct interpretation of law.[158] Given a determinate ranking of values—which is what commensurability proposes—and the same "pre-interpretive"[159] understanding of what counts as the relevant set of materials for elaborating a theory of law, disagreement becomes unlikely if not impossible.[160] Put differently, there will be one right answer, not just within the theories, but as between theories. Agreement is generated, not by reference to some external, "Archimedian" point of view, but by the gradual refinement of every possible theory towards the one that makes best political and moral sense.

Hercules and Minerva, upon agreeing, could believe their project is to convince the ignorant about the content of legal–political morality and its application to the American legal system. This is a noble, liberal tradition, one grounded in the possibility of enlightened conversation as the means for generating insight, and may indeed be one Dworkin endorses. It has much resonance in American law.[161] But it comes at the price of suggesting that judicial disagreement is equivalent to judicial ignorance. That seems to run counter to Dworkin's claim in *Law's Empire*—a claim that is the major part of his indictment of positivism[162]—that disagreements are genuine.

Dworkin might be understood more recently as having rejected the distinction between incommensurability and commensurability-as-ranking to embrace the metaphor of commensurability-as-mutual-support.[163] Under his new conception, values are horizontally integrated rather than vertically ranked, as to limit and reinforce each other in the manner of a geodetic dome rather than lining up on some

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158. My argument holds true even for the sort of internal skepticism that Dworkin proposes, whereby there is no external "Archimedian point" from which to assess the worth of someone else's theory of law.

159. *See* DWORKIN, *supra* note 37, at 91 (commenting that lawyers of a particular culture must largely agree on what counts as a practice of law).

160. Dworkin, at times, appears to suppose moral and political differences, rooted in upbringing, are pre-interpretive and so not a matter of agreement.

161. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

162. *See* DWORKIN, *supra* note 37, at 4–5, 45–46 (discussing the semantic sting argument).

163. *See* Dworkin, *supra* note 141, at 134–36 (stating his view that precise ranking makes no sense).

hierarchical scale.[164] The challenge for the judge then becomes one of line-drawing rather than ranking: determining where each value abuts against the other.

The horizontal-ordering-of-values thesis is an attempt to embrace pluralism while retaining the (instrumental) value of coherence.[165] Dworkin's argument is that if we interpret values correctly, in a manner that is "dynamic" or "normative" rather than "descriptive" or "flat," we can avoid conflict altogether.[166] By properly interpreting the various other values—Dworkin particularly emphasizes liberty, but also authenticity and independence—as consistent with the underlying theory of equality, they need never conflict and so need never present an incommensurable conflict among values.[167] Each value would rather interact with others in a manner that helps define and reinforce others. Nonetheless, Dworkin still selects one "sovereign virtue," that of equality (or rather a particular

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164. *See id.* at 134–35 (observing that a comparison of horizontal hierarchies does not clarify the decision, but rather substantive views should be "ranked alongside the other substantive views in the neighborhood").

165. *See* Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1, 18 (2004) ("[T]he preposterous premise that truth in political philosophy, or in the theory of value more generally, is a matter of coherence. Elegant and exquisitely coherent theories of political morality may be false, even repulsive. We aim, not at coherence for its own sake, but at both conviction and as much coherence as we can command.").

166. Dworkin's opposition of flat with dynamic or normative values appears to be a variant upon or updating of his "semantic sting" argument. Whereas the semantic sting argument sought to undermine "descriptive" or "conventionalist" theories of law by suggesting that only some politically committed theories explain disagreement, his new argument suggests that descriptive theories of value entail disagreement where normative or dynamic theories do not. *Compare* DWORKIN, *supra* note 37, at 45–46 (describing Dworkin's "semantic sting" argument"), *with* Ronald Dworkin, *Do Values Conflict? A Hedgehog's Approach*, 43 ARIZ. L. REV. 251, 254 (2001) (stating that under the dynamic conception of values, liberty and equality do not conflict, but that under flat conception of values, conflict is "apparent and inevitable").

167. *See* DWORKIN, *supra* note 152, at 120–33, 147–52, 158–62, 180–83 (defending the more general claim that accepting equality of resources as the best conception of distributional equality will allow liberty to become an aspect of equality, rather than being in conflict with it). Aaron Rappaport suggests that Dworkin's theory embodies principles of rational reconstruction, which he takes to

> possess a distinct architecture. First, it means that each individual normative claim must rest on a single moral principle, which provides the ultimate grounds of justification. . . . [T]his is the requirement of "vertical consistency." Second, the analysis suggests that conflicts among mid-level, instrumental norms must be reconcilable in terms of the higher principle, and ultimately in terms of a single moral norm. This might be called the requirement of "horizontal consistency."

Aaron Rappaport, *The Logic of Legal Theory: Reflections on the Purpose and Methodology of Jurisprudence*, 73 MISS. L.J. 559, 598, 625 n.151 (2004).

"conception" of that "concept" of equality) to which all other values are subsidiary.[168]

The fact that values can be compared such that they are mutually limiting, rather than conflicting, does not disprove incommensurability, but represses it.[169] Incommensurability does not entail incomparability: lines can always be drawn, and values can always be ranked. The incommensurabilist's claim need only be that commensurating incommensurable options entails a change in the values upon comparison.[170] Accordingly, the issue raised by Dworkin's dynamic argument for redefinitions of value to avoid conflict is not whether it can be done, or whether it makes sense of certain values, but on whose terms. So, while Dworkin may suggest equality as the denominator in all moral or ethical calculations, a skeptic holding a different conception of equality or identifying a different value as primary may insist that Dworkin's choice is an imperial one; an exercise of sovereign fiat, dependant not on some moral or political value but on internal preference or predilection.

Prioritizing commensurability and coherence as heuristic devices for resolving difficult cases does have the advantage of insisting that the judge maintain the posture of weak discretion and responsiveness to heteronomous values. However, it does not settle the question of incommensurability but rather stifles it. This is a problem for Dworkin because the decision over which theory to pick becomes itself a matter of preference or predilection—or perhaps acculturation. So, while the decision in any case may be "weak"—that is, based on principles—the

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

169. *See, e.g.*, Schauer, *supra* note 102, at 796 n.32 (noting that Dworkin presupposes purposive comparability of incommensurable reasons). The converse is also true. Incommensurability does not entail disagreement. Given incommensurability, Hercules and Minerva might still agree on a theory of law so long as the choice among values had no impact on the outcome. But it looks like disagreement at the theoretical level because it suggests something more than truisms about the plurality of value.

170. *See* FINNIS, *supra* note 100, at 115 (suggesting while items may appear incommensurable, methods can be adopted that will allow values to be assigned to the items so that a choice can be made); *see also* JOHN FINNIS, FUNDAMENTALS OF ETHICS 87–88 (1983) (noting that one does not have to value an item cardinally but may do so ordinally by considering "more than any alternative"); THE MORALITY OF FREEDOM, *supra* note 1, at 339 (stating the fact that options are incommensurate does not prevent a choice); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 146 (1996) ("Human goods cannot without significant loss be reduced to a single "superconcept" . . . . Any such reduction produces significant loss because it yields an inadequate description of our actual valuations when things are going well. . . . If we devise a scale, we will have to recharacterize the relevant goods in a way that changes their character and effaces qualitative differences.").

decision about which theoretical argument to pick is not.[171] And because the choice of theories may be necessary at any time, given the difficulty of the case, incommensurability is always potentially present when deciding a hard case.

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

The problems would not end for Dworkin by accepting some form of localized, intertheoretical incommensurability. Equally troubling would be the suggestion that a significant number of legal conflicts result in equipoise rather than incommensurability. Dworkin does not bother to deny the possibility that sometimes conflicting reasons are equally strong; as a commensurabilist, he has to allow for that possibility.[172] He simply argues that, in a complex legal system, such conflicts are likely to be rare. I have already suggested that *Morrison* provides one example of equipoise among conflicting reasons. It is a case of first impression where the judge turned to other jurisdictions, and to legal doctrine, for a solution to the legal conflict.

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

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171. This assumes the disagreement is genuine and judges disagree over the appropriate grounds for a concept or theory of law.

172. *See* RONALD DWORKIN, *Can Rights Be Controversial?*, *in* TAKING RIGHTS SERIOUSLY, *supra* note 10, at 279, 286–87 (observing that different theories of law often have equally good justifications).

III. COMPLEXITY AND COMMENSURABILITY

So far, I have suggested that both Dworkin and Raz believe a decisive reason can ensure that judicial decisions are free from the personal preference of the judge, or what Oliver Wendell Holmes called "the sovereign prerogative of choice."[173] For Raz, as well as for Dworkin, personal preference undermines the judge's institutional role and militates against predictable, neutral, transparent decisionmaking. Accordingly, if the judge is to remain within her proper role and simply declare the law,[174] she must identify some decisive reason, whether legal, moral, or doctrinal, that resolves the case.

Conflicts among sources equal in strength are more common than Dworkin supposes. To demonstrate this claim I shall reformulate John Gardner's discussion of conflicts among legal sources to suggest: (1) there are express (and implied) conflicts among both incommensurable and commensurable-but-equal sources of law; and (2) the point of generating such conflicts is to provide a means of experimenting with different (but not better or worse) solutions to legal and social problems.[175] The point of such experimentation is to encourage a diversity of equally or incommensurably good solutions. In such circumstances, the fact that someone else has fixed upon a solution may be a reason for following them or may not, depending upon the judge's predilections. Again, complexity generates such conflicts, rather than minimizing them.

A. Legislating Conflicts in Complex Systems

In the Anglo-American legal system, courts generally treat their own precedents as mandatory sources of law. On occasion, however, a legal system may expressly allow a court of one jurisdiction to use the precedents of another.[176] In such circumstances there is a conflict between the intrajurisdictional and extrajurisdictional sources.[177] John Gardner points out that these different sources of law may conflict with each other in at

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173. OLIVER WENDELL HOLMES, *Law in Science—Science in Law*, *in* COLLECTED LEGAL PAPERS 210, 239 (1920), *cited in* HART, *supra* note 11, at 134.

174. 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 run out.

175. *See* Gardner, *supra* note 10, at 459–60 ("[I]n cases of conflict between two incommensurable standards, we may simply 'judge', without resort to *any* further norms . . . .").

176. *Id.* at 458 (listing courts that use the precedents of another jurisdiction).

177. *Id.* at 457–60.

least two ways. Where the conflict is among hierarchically differentiated sources, the hierarchically superior source will win out. Where, however, the conflict is among hierarchically undifferentiated sources—Gardner considers only incommensurable sources[178]—then none wins out.

I shall supplement Gardner's account by suggesting that the conflicting sources may be either commensurable, because they are of comparable law-generating authority, or incommensurable, such that comparison between the two presents significant problems.[179] I shall then argue that complex legal systems may chose to generate this type of conflict as a means of experimentation.

1. Conflicting Sources. To suggest 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.[180] The English Court of Appeal is usually bound by its own previous decisions. However, where such a decision conflicts with a decision of the Privy Council, the Court of Appeal may follow a Privy Council decision.[181] Here there are multiple sources for the Court of Appeal's 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."[182]

Gardner's claim, that *these* sources—the Court of Appeal as compared to the Privy Council—are incommensurable, seems, without more, odd on its face. Incommensurability consists of the inability to weigh and rank the competing options.[183] To

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178. Gardner attributes the inability to differentiate among sources to the "fragmentation of value" characteristic of incommensurable conflicts. *Id.* at 460.

179. 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.

180. Gardner, *supra* note 10, at 458.

181. *Id.*

182. *Id.* at 459–60. While Gardner, following THOMAS NAGEL, MORTAL QUESTIONS 128, 128 (1979), calls such conflicts "incomparable," I prefer the more accurate term "incommensurable."

183. "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." THE MORALITY OF FREEDOM, *supra* note 1, at 322. This statement concerns incommensurability as to value but could easily be reformulated to provide a definition of incommensurability as to strength.

commensurate the options would transform the nature of the source to be commensurated. But there is no evidence that the Court of Appeal regards its own precedent-setting authority and that of the Privy counsel in this way.[184] Instead, these sources are not differently (incommensurably) authoritative but rather of equal authority.

Consider another example of equally ranked sources, this time from the American legal system: the doctrine of intracourt comity—"a rule that generally dictates that judges of coordinate jurisdiction should follow brethren judges' rulings on identical issues."[185] 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.[186] This type of conflict appears identical to the sort contemplated by Gardner, a conflict between sources that the doctrine of intracourt comity identifies as equally authoritative and commensurable.

Another example is the U.S. federal court system, which is divided into geographically differentiated inferior appellate courts.[187] In this system, each federal circuit court of appeals is equally as authoritative as any other and able to create binding precedent only in its own jurisdiction.[188]

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

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184. *See* Worcester Works Fin. Ltd. v. Cooden Eng'g Co., [1972] 1 Q.B. 210, 217 ("[W]hen the Privy Council disapprove of a previous decision of this court . . . , we are at liberty to depart from the previous decision.").

185. Am. Silicon Techs. v. United States, 261 F.3d 1371, 1381 (Fed. Cir. 2001).

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

187. *See, e.g.*, Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 73 (partitioning the United States into thirteen judicial districts). Justice Frankfurter called this the "transcendent achievement" of the Act. *See generally* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 4, 258–98 (1928).

188. *See* Law of June 25, 1948, ch. 646, § 41, 62 Stat. 869, 870 (codified as amended at 28 U.S.C. § 41 (2000)) (establishing the number and composition of the circuits); *see also* SUP. CT. R. 10 (providing that one reason for granting certiorari is to correct a split among circuit courts).

It is certainly possible that sources of law may be incommensurably, rather than equally, authoritative. Consider, for example, the situation where a Scottish judge faces a case of first impression that has been differently decided in both the Dutch and the English legal systems.[189] The Scottish judge might first note that Scotland's law is a "mixed" system, containing elements of both the continental civilian tradition and the English common law tradition before next acknowledging the influence of Dutch and English legal thought on Scottish law.[190] Finally, the judge might attempt to discern whether the civilian system, concerned as it is with broad principles of law, would apply in the Scottish context as compared with the common law's incrementalist approach. Each style presents a different, and arguably incommensurably, authoritative source of law. Picking between them appears to be a matter of judicial predilection rather than the application of some decisive reason.

In all these cases, whether the available sources are commensurable or incommensurable, the judge could, of course, turn to morality as easily as turning to the other courts' precedents. Nonetheless, the major difference between the precedents (which may contain moral reasoning) and straightforward moral considerations is that extrajurisdictional law identifies those solutions that have been reached in other relevant jurisdictions.

Considering rival solutions is thus focused on consequences rather than deduction from pre-existing principles or sources.[191] Sir Neil MacCormick, for example, stresses the importance of consequential reasoning for those sorts of decisionmakers, including judges, whose decision may have a profound impact upon society.[192] Holding judges responsible for those consequences is, he suggests, an important political activity.[193] Experimentation both endorses and mitigates this emphasis on consequences for legal decisions.[194]

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189. My thanks to Sir Neil MacCormick for this example.

190. *See* Lord Rodger of Earlsferry, *"Say Not the Struggle Naught Availeth": The Costs and Benefits of Mixed Legal Systems*, 78 TUL. L. REV. 419, 421–23 (2003) (describing the "mixed nature" of the Scottish legal system).

191. *See, e.g.*, Neil MacCormick, *On Legal Decisions and Their Consequences: From Dewey to Dworkin*, 58 N.Y.U. L. REV. 239, 245 (1983) (discussing theories of consequentialist arguments as related to judicial decisionmaking).

192. *Id. at* 240.

193. *Id.*

194. *See generally id. at* 239–40 (concluding that consideration of consequences should not be the sole factor in a decision but should play a role); NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 103 (1994). *But see* Barbara Baum Levenbook, *The Role of Coherence in Legal Reasoning*, 3 LAW & PHIL. 355, 358 (1984) (complaining that

In the U.S. federal system, for example, the circuit courts' resolutions of similar issues provide a concrete example of hypothetical testing of a proposed resolution, sharing the same sort of subject matter and standards of reasoning, and showing the consequences for doctrine in a more-or-less similar legal regime and consequences "in the world" in a more-or-less similar society. The judge may then compare such consequences to the hypothetical impact of other, nonlegal reasons on the balance of reasons.

Two lessons may be drawn from these examples. First, conflicts among incommensurable or equal-and-commensurable sources can operate as a fragmentation-avoiding device. Where the judge can resolve intrajurisdiction indeterminacy by considering equally or incommensurably authoritative sources, the judge can evaluate what is going on around her and rely upon her fellow judges' decisions, insofar as is appropriate. The advantage of this way of proceeding is it permits uniformity or comity in the substantive law of related or abutting (but nonetheless distinct) jurisdictions. Second, having considered the way in which different jurisdictions have attempted to resolve things, the judge may decide to try some yet-untested option. Here the judge is promoting rupture, at least between jurisdictions. In either circumstance, the judge may choose, not because one solution is the best or is correct, but for the purpose of avoiding or engaging in experimentation. Such a choice may express no more than the judge's preference or predilection: as having a more conciliatory or conservative disposition on the one hand, or a more contrarian or activist disposition on the other. Complex legal systems may, on certain occasions, wish to leave it up to judges to determine where and when to engage in experimentation, or refrain from so doing, and incommensurability and equipoise provide the opportunity to do just that.

2. Nesting. Conflicts between sources equal in strength manifest none of the fragmentation of *value* that Gardner is concerned about, though they might, as I have just suggested, promote fragmentation of outcomes. Nonetheless, because the conflicting reasons are commensurable, the outcome is "on the same plane" with whichever reason is preferred. Here there is no change in the mode of evaluation after a decision rendered. The

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MacCormick believes "an argument from coherence can be defeated by evaluative arguments from a range of social, political, and moral considerations that he loosely calls 'consequences'").

scope of the permission is limited to relying on one or other of the legal sources as a ground of decision.

There are, however, other features of the conflict between the Court of Appeal and Privy Counsel that do appear to mimic conflicts between incommensurable reasons. In particular, the resolution of any one conflict does not establish that one source is more authoritative than the other for *future* conflicts—the conflict remains "nested."[195]

Nesting generally describes the ability of reasons to retain their strength even though defeated in particular circumstances.[196] 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 redecided 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 reappears 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 the 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, to 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 the doctrinal issue is determined for the future because the Court of Appeal 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 Appeal to reconsider its

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195. "'[N]esting' [is] the reproduction 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 112–16 (describing the concept of nesting); J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669, 1683–87 (1990) (book review) (applying the concept of "nested opposition" to legal doctrine).

196. Kennedy, *supra* note 195, at 112.

past decisions. The case is regulated if it conforms to past precedent, but precedent is defeasible and dependant upon the available permissive sources. The ability to choose among sources enables the Court of Appeal to change tack without having to overrule itself or await overruling from a higher court. The rule of intracourt 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:

> 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.[197]

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 courts confront some indeterminacy, however, Hart suggests their decision resolves it. My account of nested conflicts suggests, however, that although the court's decision achieves some local determinacy in the instant case, which source will win out in future cases remains to be relitigated when the sources next conflict.

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

Nesting, I suggest, operates with our limited ability to predict consequences as a safety valve, enabling experimentation. Where the consequences of a decision are

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197. HART, *supra* note 3, at 129.

obscure, nesting provides a method for reconsidering decisions should they turn out badly. Since real judges, unlike Hercules, have a limited ability to see into the future, their responsibility for consequences should not be absolute but should on occasion, especially where the law is in flux, be partial and able to be rethought. Complex legal systems recognize this need and nest reasons of equal or incommensurable strength to permit legal experimentation.

IV. POWERS AND PERMISSIONS

So far, I have suggested 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.[198] Here, the scope of the legal decision may be limited to selecting among the available outcomes. At a minimum, the distinction between decisively and indecisively regulated cases indicates the possibility that the only basis for judicial decision is judicial preference. Where there is thoroughgoing incommensurability—that is, where legal incommensurability is matched by both moral and doctrinal incommensurability—there is no decisive reason to dictate the outcome. The judge must exercise strong discretion, using her personal choice to select one among the legally valid alternatives.

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

I begin my discussion of the legal right to engage in preference-based decision by introducing Hohfeld's famous account of legal rights.[199] Under Hohfeld's scheme, neither powers

198. RAZ, *supra* note 22, at 75 ("[W]here . . . 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.").

199. *See generally* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 23–27 (Walter Wheeler Cook eds., 1919) (inquiring into the nature of law and legal relations); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence*

nor permissions—what he calls privileges—are properly equivalent to legal rights.[200] Preferences entail that the holder of the preference has no duty to refrain from the act while others have no right to (or more accurately, no-right not to) preclude the act.[201] A power entails that the holder has no disability to perform the act, and imposes a liability on another who tries to interfere with the act.[202]

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

A. Powers: Normative and Legal

My purpose in this section is simply to demonstrate that under one definition of the concept of having a right, an individual has a right to do a particular act where she has both a privilege or permission to do it, as well as the power or "ability to change the normative relations between the person and the right-holder" with respect to that act.[203] I then argue that judges have both a legal power and a legal permission to decide cases on the basis of preference or predilection. Put differently, they have legitimate authority to exercise strong discretion when legal indeterminacy is matched by extralegal indeterminacy.

Hohfeld's discussion of a right is primarily concerned with distinguishing legal rights from liberties (Hohfeld calls them "privileges").[204] He famously distinguishes between different colloquial uses of "rights" and their opposites and claims that all legal relations may be characterized in terms of them.[205] The

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from Bentham to Hohfeld, 1982 WIS. L. REV. 975, 986–93 (analyzing Hohfeld's system).

200. HOHFELD, *supra* note 199, at 35–39 (discussing the relationship between rights and duties and between privileges and "no-rights").

201. *Id.* at 38–39.

202. *Id.* at 50–52 ("[A] legal power . . . is the opposite of legal disability, and the correlative of legal liability.").

203. Scott Shapiro, *Authority*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 395 (Jules Coleman & Scott Shapiro eds., 2002).

204. HOHFELD, *supra* note 199, at 36–39.

205. Joseph William Singer explains:

> "Rights" are claims, enforceable by state power, that others act in a certain manner in relation to the rightholder. "Privileges" are permissions to act in a

important relations for my purposes are those generated by powers and privileges. A power, according to Hohfeld, is an ability[206] and correlates with (or enables) the power-holder to alter power-subject's entitlements.[207] A permission (or "privilege") is a freedom from obligation (or "duty")[208] and precludes permission-subjects from subjecting the permission holder to normative coercion.[209]

Scott Shapiro provides a more modern take on Hohfeld's discussion of powers, privileges, and rights. Shapiro utilizes a more Razian conception of rights, privileges, and powers:

> A right-holder has a privilege against another to perform an act when the right-holder is not under a duty to that person not to perform that act. For example, I have the privilege against you to enter my home in that I am not under a duty to you not to enter my home.
>
> Alternatively, one might mean by the right-ascription that the right-holder has the normative power over the other person with respect to a certain set of acts. A right-holder has a power over another to perform a certain act when the right-holder has the ability to change the normative relations between the person and the right-holder [with respect to that act].[210]

Thus, Hohfeld, Shapiro, and Raz[211] agree that a normative power is the ability to alter another's normative status. The classic case is the ability of a superior to promulgate orders that an inferior is bound to obey. Issuing an order thus changes the normative situation of the inferior: she is now under a duty to act as directed, and should she disobey, she is now liable to sanction for disobeying. In such a circumstance, the inferior obeys, not because she agrees with the order, but because (given her relation to the superior) she is not free to disregard the order. The fact that an order has been issued by an authority

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> certain manner without being liable for damages to others and without others being able to summon state power to prevent those acts. "Powers" are state-enforced abilities to change legal entitlements held by oneself or others, and "immunities" are security from having one's own entitlements changed by others.

Singer, *supra* note 199, at 986.

206. It has as its opposite a disability: "the absence of power to alter legal entitlements." *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. Shapiro, *supra* note 203, at 394–95.

211. RAZ, *supra* note 6, at 98–99; RAZ, *supra* note 22, at 18.

empowered to issue commands is the ground for obedience. It does not matter what the content of the order is, nor whether the inferior agrees or disagrees with the content of the order.[212]

Power and authority are, on this understanding, interlinked: "A normative power is tantamount to having an authority when it is a power over others."[213] Joseph Raz's influential framing of this issue defines a normative power as the ability to alter exclusionary reasons.[214] He defines exclusionary reasons as both first-order reasons for action and second-order reasons that preclude decisionmakers from relying on conflicting reasons in determining how to act.[215]

For example, consider the activity of promising in terms of exclusionary reasons.[216] If Jack promises to lend his car to Jill on Tuesday, he has changed his normative status with regard to Jill. He now has an obligation, albeit a voluntary one, to deliver his car to Jill on the appointed day. The promise is an exclusionary reason: it is a first-order reason to deliver the car to Jill, and a second-order reason for Jack to disregard competing claims on his car on Tuesday. Jill has a power over Jack; she can hold him to his promise or release him from it. She thus has the authority to determine what to do with his car on Tuesday. Jack, of course, could renege on his agreement; but if he did so, Jill would be justified in engaging in the "normative acti[vity]"[217] of criticizing him for doing so.[218] So, too, in the case of ordering, the superior's order constitutes both a reason for the inferior to act as

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212. *See* H.L.A. HART, *Legal Duty and Obligation*, *in* ESSAYS ON BENTHAM 127, 158–59 (1982) (discussing a judge's adherence precedent in the practice of adjudication without taking a personal opinion regarding such precedent); ENGAGING REASON, *supra* note 1, at 35–37 (describing "authoritative utterances" as "content-independent" reasons for a subordinate to follow a command).

213. RAZ, *supra* note 6, at 101.

214. For discussions of powers and authority that endorse Raz's exclusionary reasons, see, e.g., FINNIS, *supra* note 100, at 234 (defining exclusionary reasons as reasons for judging or acting in the absence of understood reasons); Shapiro, *supra* note 203, at 402–03 (noting Raz thinks it essential that law have the "legitimate authority to regulate the conduct of its citizens").

215. RAZ, *supra* note 6, at 39. Raz later modified his position to suggest a normative power is the power to change, not only exclusionary reasons for action, but also exclusionary permissions. He calls these "protected" reasons for action. RAZ, *supra* note 22, at 18 & n.19.

216. *See, e.g.*, THE MORALITY OF FREEDOM, *supra* note 1, at 173–76 ("[The] same interest on which the power to promise and the duty to keep promises are based is also the ground for holding others to be subject to a duty not to interfere with one's promising.").

217. G.P. BAKER & P.M.S. HACKER, WITTGENSTEIN: RULES, GRAMMAR, AND NECESSITY 45 (1985).

218. *See* THE MORALITY OF FREEDOM, *supra* note 1, at 174 (positing that power and right to promise are interlinked).

commanded and a reason for her to disregard any conflicting reasons for action.

Exclusionary reasons also play an important role in Raz's positivist, "source-based" account of law.[219] He believes that law is an "exclusionary system" that "exclude[s] the application of reasons, standards and norms which do not belong to the system or are not recognized by it."[220] The judge's role in that system is to determine authoritatively the normative situation of legal subjects.[221] Judges are thus granted a power to determine what these subjects ought, or ought not, to do according to the law;[222] that power is a limited one, confined to the application of legal rules;[223] and the judge's application of the rules is authoritative and final.[224] The judge's institutional competence is thus limited to applying the enacted norms, unless they prove gappy or inconsistent.[225]

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.[226] It is generally conceded, however, that the jury currently has no legal right to nullify—no law permits nullification, and the court's instruction to follow the law appears to preclude it—and so no right to be informed of its power.[227] Hence one source of discomfort with jury nullification:

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219. RAZ, *supra* note 6, at 145.

220. *Id.*

221. HART, *supra* note 3, at 96–97.

222. 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." *Id.*

223. *See* RAZ, *supra* note 6, at 132–33 ("Norm-applying institutions should . . . be identified by the way they fulfil [sic] their functions rather than by their functions themselves.").

224. Raz believes these features are essential to all primary norm-applying organs of institutionalized normative systems. *See id.* at 134–37 (describing the court's role as a primary organ of an institutionalized normative system).

225. This view of the judge's role is, in part, a feature of the service conception of legitimate legal authority. *See id.* at 139–40.

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

227. *Compare* People v. Dillon, 668 P.2d 697, 726 n.39 (Cal. 1983) (opining that giving juries the right to be informed of power to nullify would lead to "anarchy"), *with* United States v. Datcher, 830 F. Supp. 411, 417 (M.D. Tenn. 1993) (considering the power

the jury appears to disregard its oath to follow the law and illegitimately invades the authority rightfully exercised by the judge, legislature, and prosecutor.

The judicial power to determine authoritatively the normative situation of legal subjects entails that a court's determination of the situation is binding on those subjects once reached. To this extent, the court is like the jury: the power exists even if the court makes a mistake about the law or intentionally (that is, without mistake) decides to render a decision contrary to that stipulated by the law. The power and authority to make binding determinations does not make a court's decision correct. As Justice Jackson famously pointed out, "We are not final because we are infallible, but we are infallible only because we are final."[228] So how a judge *ought* to apply the legal rules in a given instance remains independent from the manner in which she *does* in fact apply them in a particular case. That her decision is legally authoritative does not render it legally justified; just because she had the power to decide the case does not mean she had the right to decide as she did.[229] To possess the right, in addition to the power, to decide, the judge must decide correctly, or have permission to decide where none of the outcomes is uniquely correct.

B. Permissions: Express and Implied

Permissions indicate a legally conferred right to act in a particular manner not only the ability to do so.[230] Express permissions are exclusionary, precluding the operation of reasons that conflict with the permitted action, as well as providing permission to act or not as the agent so chooses.[231] The agent is not required to perform the act stipulated but rather *may* (or may not) perform it.[232] So if, for example, the rules of a particular golf course stipulate that "[i]f 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 an express permission to move the ball if it lies on the path. The player may equally well

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to nullify to be of constitutional magnitude, though the jury has no right to be informed of such power).

228. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

229. If she is wrong, and there is a superior court, her decision will be vacated.

230. "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." RAZ, *supra* note 6, at 89.

231. *See id.* at 89–91 (explaining permissions based on exclusionary reasons).

232. *See id.* at 90 (stressing that permissions "do not in themselves determine what one ought to do").

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 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.[233] Express reasons thus only exist in source-based systems of reasoning.

Implied permissions exist when there are no reasons imposing practical constraints upon action, that is, when there are undefeated reasons to the contrary. Raz calls these "weak" or "conclusive" permissions, and they exist in the absence of a clear reason for action—in law, a clear or determinate source.[234] 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, there is permission. Raz considers that there is an implied permission where reasons of equal strength conflict.[235] Each cancels the other, transforming the conflict from one regulated by reasons into one in which neither of the conflicting reasons operate[236]—a position that, it turns out, is only partly correct.

It is worth considering in some detail the nature of implied permissions. We have already encountered them in *Morrison* and *Worcester Works Finance Ltd. v. Cooden Engineering Co.*,[237] the English appellate decision establishing that the Privy Counsel constitutes an equally authoritative "permissive source" of law.[238] Raz believes that conflicting reasons of equal strength cancel each other out so that these reasons disappear from our calculus over how to decide.[239] 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 nonexcluded reason to decide the outcome—what John Finnis would call "'open-ended'

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233. *Id.* at 89–91 (defining a permission as something which may be granted by another party).

234. *See id.* at 88–89 (describing inferentially that implied permissions are weak); *see also* RAZ, *supra* note 22, at 64–65 (describing implied permissions as "conclusive").

235. *See* RAZ, *supra* note 22, at 74–75 (explaining that when reasons of equal strength conflict, neither one is conclusive and results in an implied permission).

236. *See id.* (arguing when equally good reasons conflict they cancel each other out).

237. Worcester Works Fin. Ltd. v. Cooden Eng'g Co., [1972] 1 Q.B. 210.

238. *See* Gardner, *supra* note 10, at 458 ("'[A]lthough decisions of the Privy Council are not binding on this Court, nevertheless when the Privy Council disapproves of a previous decision of this Court or casts doubt upon it, we are at liberty to depart from the previous decision.'" (quoting *Worcester Works*, [1972] 1 Q.B. at 217)).

239. *See* RAZ, *supra* note 22, at 74–75 (arguing that conflicting reasons cancel each other out of the decision equation).

practical reasoning"[240] and what Hart would call an open choice.[241] I believe, where reasons of 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."[242] Canceling is familiar to lawyers. The classic example of canceling is frustration of contract, and the classic case on frustration is *Krell v. Henry*.[243] *Krell* resulted from the postponement of Edward VII's coronation due to the King's illness.[244] 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, and Krell sued.[245] The Court of Appeals sided with Henry, asserting there was no breach of contract because the contract was frustrated by "the non-existence" of the foundation of the contract, namely the procession.[246]

As the frustration analogy makes apparent, canceling conditions do not outweigh the other reasons for choice, nor do they exclude one reason for decision; they are simply facts that make a reason disappear from our calculus over what to do.[247] Given the purpose of the contract was to rent a room from which to watch the coronation, once the coronation was canceled the reason for engaging in the contract vanished. Either Henry or Krell could decide to honor the contract or not, for any reason or no reason. Put differently, they had a (very) strong discretion: no decisive reason dictated that they honor the contract (nor that they break it, either individually or together), and so they each had a choice not among bounded reasons but among open alternatives, with the scope of each of their decisions unconstrained by law.[248]

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240. J.M. Finnis, *On "The Critical Legal Studies Movement"*, 30 AM. J. JURIS. 21, 38 (1985).

241. *See* HART, *supra* note 3, at 127 (describing the choice as "between open alternatives"). I call this strong discretion.

242. *See* RAZ, *supra* note 6, at 27 ("[C]ancelling [sic] conditions [are] of great importance to the study of reasons for action.").

243. Krell v. Henry, [1903] 2 K.B. 740 (C.A.).

244. *Id.* at 740.

245. *Id.*

246. *Id.* at 747.

247. RAZ, *supra* note 6, at 27.

248. Put differently, each could decide individually to "rescind" (because the contract

Raz considers conflicts among reasons of equal strength to work in the same way as frustration of contract. The conflicting reasons cancel each other out; they not only block each other's operation but disappear as reasons for action.[249] There are no longer any reasons requiring a particular decision only an implied permission to exercise unconstrained practical reason.[250] 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.[251]

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

To see why, consider the game of basketball. By the rules of basketball only one personal foul can be called on a given play. Nonetheless, on any given play, multiple players could impede their opponent. Whichever happens first blocks (Raz would say "cancels") the later fouls from operating as a reason for assessing a foul.[252] But what happens if both events occur simultaneously, that is, if two players foul an opponent at the same time? In such circumstances, there are two equally strong reasons that conflict, one for assessing a foul on Player 1, and another for assessing a foul on Player 2. Who is to be called for the foul?

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

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was frustrated, actual rescission was not required) or they could collectively decide either to "rescind" or to enter into a new contract for the apartment.

249. *See* RAZ, *supra* note 22, at 74–75 (explaining that conflicting reasons cancel each other out and are no longer part of the decision process).

250. *Id.*

251. *See* RAZ, *supra* note 6, at 85–86 (describing the variety of permissions and discussing how conflicting reasons cancel each other out); *see also* RAZ, *supra* note 22, at 74–75 (discussing how conflicting reasons cancel out each other).

252. This is a somewhat simplified version of the rules. *See* NBA Rule 12: Fouls and Penalties, http://www.nba.com/analysis/rules_12.html?nav=ArticleList (last visited Jan. 19, 2008).

The referee's discretion is, however, constrained to the available options. The reason for calling the foul is not frustrated. The reasons for calling the foul—Players 1 and 2 each illegally impeded their opponent—do not disappear. The players and referee cannot simply decide there was no foul, nor that, if there was a foul, it should not be assessed on one of the players. The reason for calling the foul on the player is thus *not* canceled. Instead, the competing reasons are transformed from decisive to undefeated reasons for decision. That is, the fact that Player 1 fouled the opponent does not override the competing reason for calling the foul on Player 2, but it 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 nonexcluded reasons she could point to:[253] that yet another person, Player 3, subsequently fouled the opponent; or that, in the absence of a reason for calling a foul she could just let play continue.[254] 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 "judge" between the two options in order to render her decision.[255] But how? She is beyond judgment here: judgment was what established the parity of the conflicting reasons for calling simultaneous fouls.[256] All she can do is pick one or other of the players. Her choice of player will be preference-based, and permissibly so.

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

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253. 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 game-related reasons, such as one player has had a better game and should be awarded accordingly.

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

255. *See* Gardner, *supra* note 10, at 457–58 (noting when there are two options permitted by law, the judge "must exercise discretion").

256. A further point: Decision here does not match Dworkin's second category of weak discretion—that the decision is simply unreviewable. In other sports, this type of decision may be reviewed by a third umpire on television. *See supra* note 32 (explaining how a decision is no longer closed if judge can look outside the legal system for further reason). However, because the reasons for canceling the foul are in equipoise, further review will not remove discretion.

C. *Pragmatic Permissions?*

It should now be clear that this is the sort of situation described in *Morrison*. The legal and extralegal reasons were in equipoise, and there was a legal and extralegal gap.[257] The judge, by virtue of his role, had the legal authority to decide the case. The conflict between reasons of equal strength also generated a legal permission to decide the case.

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

All that is left is to demonstrate a similar right existed in *Argersinger*, where the reasons were not in parity but incommensurable. Raz considers that, where reasons of equal strength conflict, both reasons disappear because they are mutually canceling.[258] In that case there is 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.[259] They do not cancel each other and so, logically, do not entail the existence of an implied permission.[260] I suggest a modification of this theory based on the basketball analogy.

If there is permission where reasons conflict, it is not due to the absence of any constraint—which appears to be the basis for Raz's explanation why permission is created—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 undefeatedness, rather than equality and total lack of constraint, generates to implied permissions where reasons conflict.[261]

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257. *See supra* text accompanying note 13 (describing gap creation).

258. *See* RAZ, *supra* note 22, at 74–75 (explaining when two conflicting reasons cancel each other out).

259. *See id.* at 75 (describing the difference between conflicting reasons and unresolved conflict).

260. *See id.* (explaining that incommensurable reasons do not imply permission).

261. My analysis of permissions thus suggests that a permission may exist where there is the partial or bounded lack of constraint associated with conflict among undefeated reasons, rather than the total lack of constraint Raz claims for mutually canceling reasons.

Conflicts between undefeated reasons, whether equal in strength or incommensurable, need not logically imply 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 are undefeated where they are equal in strength. What matters is the absence of a decisive reason combined with the need to decide. If this is correct, conflicts among incommensurable reasons result in a pragmatic permission: to pick among the reasons without having to adduce a tie-breaking reason. The judge may simply prefer one reason to the other.

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

One last point is that bounded strong discretion permits the judge to rely upon the morally best justifications in a manner that Raz's doctrinal reasons do not. Raz's belief that doctrinal reasons operate to close legal–moral gaps appears to conflict with

his claim that moral reasons generally defeat doctrinal (formalist) ones.[262] Raz makes clear that "[d]octrinal reasons, reasons of system, local simplicity and local coherence, should always give way to moral considerations when they conflict with them. But they have a role to play when natural reason runs out."[263] That role is to take the place of personal preference and to provide an institutional reason for decision in the absence of a legally or morally decisive reason.

Raz appears to believe that where morality is indecisive, the turn to morality has sent us down a blind alley, and so we must make do with the law. "[T]he return from morality, when asked for its contribution to the issue at hand, is that it has no guidance to give . . . ."[264] All we have left is judicial personal preference; it seems like "whatever we decide to do becomes . . . the right thing to do."[265]

My basketball analogy makes clear, however, the return from morality is not negligible; it is only indecisive. Moral reasons have overridden or excluded legal reasons; the legal reasons do not suddenly become morally decisive just because morality is indecisive. Morality has not exhausted itself in this way.[266]

Doctrinal reasons do not occupy the field, nor change their relative strength and character, just because moral reasons fail to resolve the case. Undefeated but indecisive moral reasons for decision may still be stronger than the doctrinal alternatives. In other words, the fact that a reason does not outweigh *every* other reason is not a barrier to it being weightier than some other reasons. According to Raz's own theory, nonexcluded moral

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262. Formalism, as a theory of adjudication, is an attempt to prescribe how judges ought to decide gappy cases: it holds that, even though the legal reasons underdetermine the result of a case, the judge nonetheless ought not to turn outside the law to extralegal reasons. Instead, the judge should rely upon some legal principle or wait for the legislature to resolve the issue. *See generally* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 509–10 (1988) (describing formalism as a set of rules that "constrict the choice of the decisionmaker"). Schauer defines formalism as follows:

> 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.

263. Raz, *supra* note 9, at 14.

264. *Id.* at 10.

265. *Id.*

266. Put differently, the conflict among equal or incommensurable moral reasons does not result in them canceling each other out.

reasons outweigh doctrinal reasons when they conflict.[267] That does not change simply because those moral reasons in turn conflict with other moral reasons and are incommensurable with them.

My point is that once judges start to consider moral reasons, Raz cannot simply argue that these reasons no longer apply and that judges ought to use technical legal considerations to decide the issue. For the judge to choose the formalist path is itself an evasion of the issues. Deciding on the basis of technical reasons may itself be considered a partial and prejudiced manner of deciding the case, especially as such considerations are innately conservative, favoring the status quo.

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

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

V. CONCLUSION

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

Where there is no decisive legal or extralegal reason for decision, the court has both a power and permission to choose which of the conflicting reasons it wishes to apply. The combination of power and permission is tantamount to a legal right to exercise strong discretion, at least in choosing among the

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267. *See* Raz, *supra* note 9, at 15 ("Legal doctrines are justified only if they are morally justified, and they should be followed only if it is morally right to follow them.").

available legal options. I have defined strong discretion as any decision made in the absence of a decisive reason; weak discretion, by contrast, is discretion on the basis of some decisive, or tie-breaking reason. Given my reading of *Morrison* and *Argersinger*, it should be clear why I reject any version of adjudication—at least in complex legal systems—that suggests that judges do, or should, exercise only weak discretion.

These exemplary cases—one mundane, one notable—make clear the stakes of the argument. Where legal rules conflict, it is sometimes the case that no tie-breaking rule resolves that conflict. In such circumstances, the judge must rely upon personal preference to choose among the available outcomes. Sometimes, choice will have a limited impact; sometimes a profound one. Whether or not the profound choice implicates something along the lines of Duncan Kennedy's "fundamental contradiction," in which liberal law contains conflicting, nested, and irresolvable, values,[268] or a more local and pragmatic political or moral conflict, is immaterial. So long as there are legal gaps caused by conflict, and the legal gap is matched by extralegal conflict, then whether those gaps are accidental or necessary is beside my point. My point is simply that, on occasion, there is no legal or extralegal tie-breaking standard to close the gap. There, judicial preference comes into play.

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

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268. *See* Kennedy, *supra* note 21, at 211 (defining the "fundamental contradiction").

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