JUDGING WITHOUT SCALES

DPhil Thesis

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85,800 Words

Trinity Term 2014

Abstract

This thesis is about the nature of value incommensurability and its significance for judicial reasoning. It argues that there can be incommensurable values and that this incommensurability can have significant implications for judicial reasoning. I argue that incommensurability gives rise to a range of reasonableness, within which it is reasonable but in a sense also arbitrary to decide either way, and that this range is wider than is suggested by the notion that some options are roughly equal, because even a large improvement to one option may not make it the uniquely correct option. The thesis goes on to consider the effect that the authority of law can have on choices between incommensurable options. Although I argue that the authority of law can sometimes provide a conclusive reason to choose one of two incommensurable options, I also argue that it has limits and may not do so in every case of incommensurability. Moreover, the introduction of an authoritative directive may even give rise to incommensurable options where none previously existed.

The thesis then draws out the implications of these claims, first, for human-rights adjudication—where my claim is that 'balancing' is appropriate both in the specification of rights and in assessing the justification for their infringement, provided we acknowledge the limits of balancing in cases of incommensurability—and, secondly, for adjudication involving common law reasoning and statutory interpretation. Finally, I suggest that we can distinguish between different ideals of the rule of law, and that the arbitrariness of judicial decisions involving incommensurable options has different implications for those different ideals. The arbitrariness involved in choosing between undefeated reasons may be necessary contrary to one ideal of the rule of law, understood as the rule of authority, but not contrary to an ideal of the rule of law understood as the rule of reason.

To my mother and the memory of my father

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Introduction

The image of Justitia, with a sword in her right hand and scales in her left—and, in many versions since at least the sixteenth century, a blindfold over her eyes—is one of the most iconic images of justice and law, adorning court buildings around the world. Much is contained in this image, but if one element can be singled out as the most important, it is the scales. In some versions, the goddess is depicted as herself a set of scales, weighing the competing claims in each hand. The metaphor of scales is ubiquitous in the law. The law reports are filled with frequent discussion of 'weighing' and 'balancing' in all areas of law. Sometimes this language is used merely as a way of saying that the various considerations have been taken into account in reaching a decision. But more often than not the image is a metaphor for the idea that the decision is determined by the various considerations that have been taken into account. It symbolises an impartial resolution of a dispute in accordance with objective standards, free from the personal whim of the judge.

Yet is this image of scales always appropriate? One common challenge to this metaphor insists that the alternatives may be incommensurable, in the sense that there may be no common scale or standard capable of resolving the issue. When there is no common scale, we cannot say that one option is better than another or that they are equal. In such cases, there can be no reason to choose one of the options over the other, and yet the fact that they are not equal seems to entail that we should not be indifferent about which option is chosen. When there is a common scale, the commensurability of the options seems to remove any serious conflict between values, for the resolution is determined by reason and the value of one option compensates for the loss of the other. Choices among incommensurable options, by contrast, are undetermined by reason and result in some uncompensated loss, in the sense we do not gain something that is better than the option not chosen. Moreover, in the absence of scales we are free to choose on the basis of our personal whims, in stark contrast with the ideal contained in the image of Justitia.

In modern jurisprudence, the idea that there will always, or almost always, be standards that are capable of providing a rationally determinate answer, is most closely associated with the work of Ronald Dworkin. Dworkin insisted that there are no gaps, or very rarely gaps, in the law, so that judges do not exercise discretion in the sense of rationally indeterminate choice, because one of the parties has an antecedent right to win.[1] This conclusion is in part the consequence of Dworkin's belief that law includes not only source-based standards, but also moral standards that he thought are necessary for the

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[1] See eg Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) ch 4; Ronald Dworkin, *Law's Empire* (Fontana Press 1986) ch 6; Ronald Dworkin, 'On Gaps in the Law' in Paul Amselek and Neil MacCormick (eds), *Controversies about Law's Ontology* (Edinburgh University Press 1991).

interpretation and application of the source-based standards. But, more importantly, he insists that the moral standards themselves will provide a uniquely right answer.

In an early critique of Dworkin's theory of law, John Mackie drew attention to the problem of incommensurability. He argued that Dworkin's theory 'assumes too simple a metric for the strength of considerations, that such strengths are always commensurable on a linear scale'.[2] It is a mistake, he points out, to think that either the considerations for one side must be greater or less than the considerations on the other, or else they are so finely balanced that the slightest addition to one side would make it stronger. As he goes on to say,

> [I]n fact considerations may be imperfectly commensurable, so that neither of the opposing cases is stronger than the other, and yet they are not finely balanced. Consider the analogous question about three brothers: Is Peter more like James than he is like John? There may be an objectively right and determinable answer to this question, but again there may not. It may be that the only correct reply is that Peter is more like James in some ways and more like John in others, and that there is no objective reason for putting more weight on the former points of resemblance than on the latter or vice versa. While we might say that Peter's likeness to James is equal to his likeness to John (because neither is determinately the greater), this does not mean that any slight

[2] John Mackie, 'The Third Theory of Law' (1977) 7 Phil & Pub Aff 3, 9.

> additional resemblance to either would decide the issue; hence, it does not mean that this equality expresses an improbably exact balance.[3]

Mackie did not go into any more detail on this point in his criticism of Dworkin's theory about how judges reason in hard cases. As we shall see, there is now a wealth of literature on the incommensurability thesis and its implications for law and adjudication.[4] But Mackie's initial objection seems compelling.

In Dworkin's early responses to the argument from value incommensurability, he insisted that an argument for incommensurability—for the absence of reasons to prefer one alternative over another—would have to be grounded in one's political convictions, and he doubted whether one's convictions could ground incommensurability.[5] He developed his most extensive defence of value commensurability, however, in his book *Justice for Hedgehogs*, published in 2011.[6] The title of that book refers to the ancient Greek poet Archilochus's remark that 'the fox knows many things, but the hedgehog knows one big thing'. Isaiah Berlin used that remark as a metaphor for the distinction

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[3] ibid 9.

[4] For helpful overviews of the issues, see eg John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980); Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) ch 13; Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard UP 1997); Symposium, 'Law and Incommensurability' (1998) 146 U Pa L Rev 1169.

[5] See eg Dworkin, 'On Gaps in the Law' (n 1) 90.

[6] Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 1. See also Ronald Dworkin, 'Moral Pluralism' in his *Justice in Robes* (Belknap Press 2006).

between value pluralists and value monists.[7] Whereas Berlin was a value pluralist, Dworkin was one of the most significant modern value monists, and *Justice for Hedgehogs* is a significant defence of the unity of value, the idea that value is 'one big thing', in the sense that values are integrated, mutually supporting, and commensurable. Dworkin's argument, in essence, is that values are interconnected and have to be interpreted in ways that draw on other values, and that it is difficult to see how this process of interpretation, which requires moral argument, could produce values that conflict. Dworkin's arguments are complex and interesting. Even those who disagree with his monistic conclusions can agree with many aspects of his arguments. For example, a value pluralist can accept much of Dworkin's argument on the interconnectedness of values, thereby avoiding what Jeremy Waldron called the 'lazy pluralism' of Isaiah Berlin, 'a value-pluralism whose sententious expression is not matched by any intellectual curiosity about possible connections between various ideals.'[8] Berlin's claims may well have been exaggerated at times, overlooking the way in which some values, at least, must be interpreted in light of other values. As he sometimes remarked about other philosophers, few truths win against the resistance of established ideas 'save by being overstated'.[9] But although value

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[7] Isaiah Berlin, *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (Weidenfeld & Nicolson 1953).

[8] Jeremy Waldron, 'Jurisprudence for Hedgehogs' (2013) NYU School of Law, Public Law & Legal Theory Research Paper 13–45, 5, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290309> accessed 4 August 2014.

[9] Isaiah Berlin, 'The Philosophical Ideas of Giambattista Vico' in his *Three Critics of the Enlightenment: Vico, Hamann, Herder* (Henry Hardy ed, Princeton University Press 2000) 102. See also Isaiah Berlin, 'Herder and the Enlightenment' in *The Proper Study of Mankind: An Anthology of Essays* (Henry Hardy and Roger Hausheer eds, Random House 2012) 370: 'Great

pluralists may have exaggerated their claims on some occasions, was Dworkin right to reject the incommensurability thesis completely?

The question of incommensurability is not only an academic concern. From time to time, judges themselves have recognised the problem of incommensurability. For example, in the US Supreme Court, Justice Scalia criticised the idea of judicial 'balancing' by saying that 'the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.'[10] In the Court of Appeal, Lord Justice Thorpe and Lord Justice Sedley referred to the problem of incommensurability in *Evans v Amicus Healthcare Ltd*, arguing that the case required 'a balance to be struck between two entirely incommensurable things. Whatever decision was arrived at might be capable of being explained but would be practically impossible to justify.'[11] Writing extra judicially, Sir Philip Sales, one High Court judge, argued that the proportionality test 'entails a greater requirement to weigh wholly incommensurable values and factors against each other, with the increased uncertainty (and transfer to the

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scientists and philosophers have often made their impact by violently exaggerating their original insights.'

[10] *Bendix Autolite Corp v Midwesco Enterprises, Inc* 486 US 888, 897 (1988) (Scalia J). See also *Secretary of State for the Home Department v AP* [2010] UKSC 24, [2011] 2 AC 1 [4] (Lord Brown): 'Quite how to balance on the one hand the precise length of curfew and on the other hand the degree of social isolation involved in any particular case represents a difficulty: the two are essentially incommensurable.'

[11] *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727, [66] (Sedley LJ). See also *Evans* ibid [110] (Arden LJ). The Court of Appeal's decision was upheld by the European Court of Human Rights: *Evans v United Kingdom* [2006] 43 EHRR 21, [67]–[68]. See generally Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655, 714–16.

courts of practical decision-making power) that inevitably follows from that.'[12] Explicit references to incommensurability in judicial decisions are perhaps rare, but judges may have an intuitive awareness of this problem that is implicit in some of their judgments.

Still, the implications of value incommensurability are not fully understood. Consider, to take just one prominent example, the *Evans* case, which the courts said involved 'two entirely incommensurable things'. The allegedly incommensurable values in that case were said to be Ms Evans's right to found a family and her husband's right to protection of his private live, both found in Article 8 of the European Convention on Human Rights. Ms Evans had commenced *in vitro fertilisation* (IVF) treatment with her husband, but they subsequently separated and he withdrew his consent. This withdrawal of consent was permissible under the Human Fertilisation and Embryology Act 1990, which allows either party to withdraw consent before the implementation of the frozen fertilised eggs in the uterus. The problem for Ms Evans was that during the treatment she was diagnosed with pre-cancerous tumours in her ovaries and they had to be removed. The husband's withdrawal of consent therefore meant that she would be unable to give birth. She argued that her right to found a family under Article 8 had been unjustifiably infringed.

Both the Court of Appeal and the European Court of Human Rights rejected Ms Evans's claim. Their reason was not that Ms Evans had no such right, or that it was outweighed by the husband's rights or interests, but that the

[12] Sir Philip Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 LQR 223, 236.

two were incommensurable and that the technical, bright-line rule contained in the 1990 Act, allowing consent to be withdrawn at any time pre-implantation, was therefore reasonable or proportionate. As the Grand Chamber of the European Court put it, 'the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis, what the Court of Appeal described as "entirely incommensurable" interests.'[13] The European Court thought that the 1990 Act has struck a 'fair balance' in view of the absence of a European consensus on the issue,[14] as if the presence of consensus would have made a difference to the reasonableness of the legislative provisions. The minority in the Grand Chamber, by contrast, concluded that the options were commensurable and that Ms Evans's right to decide to become a genetically related parent 'weighs heavier' than her husband's decision not to become a parent.[15]

The majority's decision in *Evans* can be understood to reflect a belief that having a clear rule is more valuable than whether either Ms Evans's or her husband's alleged rights were upheld, their rights being incommensurable. You may wonder, however, why this principle does not have wider application. The assumption of commensurability is such a prominent feature of judicial reasoning that it is surprising to see the incommensurability argument influence

[13] *Evans v United Kingdom* (2008) 46 EHRR 34 [89]. Intriguingly, although the Grand Chamber—at [25]—quoted Sedley LJ's remarks that a requirement to balance the competing interests would 'require a balance to be struck between two entirely incommensurable things', it removed the sentence in which Sedley went on to say that '[w]hatever decision was arrived at might be capable of being explained but would be practically impossible to justify': *Evans* (n 11) [66] (Sedley LJ).

[14] *Evans v United Kingdom* (n 13) [91]–[92] (majority opinion).

[15] ibid [6].

the decision in this specific case.[16] But it raises questions that were left unanswered, indeed unaddressed, by the courts. Why was this case viewed as one involving incommensurables, whereas similar cases are not? If the incommensurability thesis is indeed correct, as the majority in *Evans* thought, is value incommensurability not a more widespread problem than the courts have been prepared to accept? If a clear rule was needed to prevent arbitrariness in *Evans*, why is it not needed in all the other cases in which courts perform questionable 'balancing' exercises? And is it inevitable that there is an overriding justification for a clear rule when the alternatives are incommensurable? We should not be surprised that judges have been unable to answer these questions. They are complicated questions over which there is much disagreement in moral and political philosophy. But if value incommensurability is pervasive and needs to be taken seriously in judicial reasoning, the questions need to be addressed.

In this thesis, I aim to explain and defend the claim that there can be incommensurability among values and that this incommensurability has significant implications for judicial reasoning. This is a conceptual and normative study in moral, political, and legal philosophy. I argue that value incommensurability is best understood as giving rise to a range of reasonableness within which it is reasonable to decide either way; that choices among incommensurables can be at once both reasonable and arbitrary; that options may remain incommensurable even when they have been settled by a legitimate

[16] See Jacco Bamhoff and Lorenzo Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights' (2006) 2 EuConst 424, 432.

authority; and that the reasonableness and arbitrariness of judicial decisions involving incommensurables have different implications for different ideals of the rule of law. As Joseph Raz suggests, 'incommensurability of the value of options is a pervasive feature with far-reaching theoretical consequences.'[17] But its full implications have not been traced and, moreover, in addition to earlier challenges from commensurabilists, the incommensurability thesis continues to meet with new challenges, among which Dworkin's thesis is perhaps the most notable in recent years.

If one of our concerns is arbitrariness and the rule of law, however, it might be asked why we should focus on value pluralism and incommensurability. The main problem, you may say, is that we disagree about moral judgments. When judges make moral judgments, the argument goes, they are merely expressing their opinion, and surely that is what is arbitrary and contrary to the rule of law, regardless of whether we think that the judgment was based on commensurable or incommensurable considerations. That is the main worry that lies behind the thinking of so-called normative or prescriptive legal positivists, who insist that law ought to be such that legal decisions can be made without the exercise of moral judgment.[18] The claim that values are plural and

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[17] Joseph Raz, 'Incommensurability and Agency' in Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (n 4) 128.

[18] Jeremy Waldron, 'The Irrelevance of Moral Objectivity' in his *Law and Disagreement* (OUP 1999) 165–70. For defences of normative or prescriptive legal positivism, see eg Neil MacCormick, 'A Moralistic Case for A-moralistic Law' (1985) 20 Valparaiso L Rev 1; Tom Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth 1996); Jeremy Waldron, 'Normative (or Ethical) Positivism' in Jules Coleman (ed), *Hart's Postscript* (OUP 2001). John Gardner describes these theorists as 'positivity-welcomers', rather than legal positivists, because their claim that the positivity of law has value can be endorsed by critics of legal positivism: John Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 46 Am J Juris 199, 205.

incommensurable is sometimes confused with moral disagreement, moral relativism, or moral subjectivism, and in Chapter 2 I spend some time distinguishing value pluralism from these other theses. That is not to say that value pluralism is the only way in which decisions can be arbitrary and contrary to the ideal of the rule of law. Although I argue that we ought to accept that there can be objective values that inform our practical reasoning and, by extension, judicial reasoning, I think we should also recognise our moral fallibility and our weakness of will in the face of what we have most reason to do. But it seems to me that the fact that we disagree suggests that at least one side is wrong (although, as we shall see, there may be reasons for following an authoritative judgment that we think is wrong). Without an additional premise, the existence of disagreement is not a compelling reason for thinking that our moral judgments are arbitrary.

Having sought to defend the idea that there can be objective values and that these values can be irreducibly plural and that they can conflict 'within the breast of a single individual', as Berlin puts it, the remainder of Chapter 2 focuses on the nature of value incommensurability and its implications for practical reasoning. My argument that incommensurability is best understood as giving rise to a range of reasonableness entails that I think that choices between incommensurable alternatives are reasonable. However, slightly more controversial is my claim that there can be no conclusive reason or justification for one incommensurable option over the other, and that the choice is in another sense, to be explained, arbitrary. In developing my account of value incommensurability, I have relied on some persuasive arguments in the works of

John Finnis and Joseph Raz. My approach to value incommensurability is, broadly speaking, a Razian approach, although there are some differences, such as over the correct analysis of what Raz calls mixed-value goods.[19] The position that I defend can also perhaps be located somewhere between the positions of Ruth Chang and Timothy Macklem. I try to answer various objections to this account and explain the subtle differences between the concept of incommensurability and the concepts of rough equality and vagueness.

The rest of the thesis aims to explain the implications of this understanding of value incommensurability for judicial reasoning. The main difference, indeed some would say the only difference, between general moral reasoning and legal reasoning is that the latter is undertaken with reference to authoritative legal sources. When faced with a choice between options of incommensurable value, what difference can law's authoritative sources make? And what are the implications of value incommensurability for the authority of law? These questions are addressed in Chapter 3. Just as the normative or prescriptive legal positivists believe that the positivity of law has value because it can provide a neutral, a-moral basis for legal decisions, so it is possible that the authority of law can provide a justification for a decision among otherwise incommensurable options. This is often tied to scepticism about the legitimacy of judicial authority, to a challenge to the liberal legalism of Dworkin and others, and to the claim that choices between incommensurable values ought to be

[19] See Joseph Raz, 'Mixing Values' (1991) 65 Proceedings of the Aristotelian Society (Supp) 83.

settled in the legislature through politically renegotiable compromises.[20] But can law's authoritative sources provide a common scale, or what Raz calls 'distancing devices'—a standard that can provide an impartial resolution to a conflict between incommensurables?

Like my understanding of the nature of incommensurability, my understanding of the nature of authority is influenced by Raz's account. However, in common with other critics of Raz's account, I make one significant departure from it. I believe that this departure has important implications for how we ought to understand the difference that authority can make to the commensurability or incommensurability of values. The key to understanding the nature of authority is the idea of content-independent reasons for action. According to one influential account of the nature of authority, most notably defended by Raz, authoritative reasons are not merely content-independent, but are also second-order 'exclusionary reasons'. That is, authoritative reasons exclude and take the place of some first-order reasons that would have been relevant but for the authoritative directive. Like many others, I doubt whether authoritative reasons are exclusionary reasons. The reasons for following authority are reasons like any others: they supplement, rather than supplant, other reasons, and they defeat other reasons by 'weight', rather than by being a different kind of reason.

If this objection to the Razian account of exclusionary reasons is sound, and authoritative reasons merely add more weight to the value of one of the

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[20] See eg John Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (new edn, Routledge 2007) 111.

options, then the implications of value incommensurability become more significant for the authority of law. For the additional weight provided by the authoritative reason may not be sufficient to provide a conclusive reason—that is, it may not be sufficient to lift one of the options out of the range of reasonableness that characterises incommensurable options. I explore this possibility in relation to three justifications for the authority of law: epistemic, democratic, and coordinative. In relation to each justification, I argue that, even when they succeed in justifying authority, each justification may fail to provide a conclusive reason to follow the authoritative source, even when that source reflects a choice among incommensurable values, a choice which is by definition reasonable.

In Chapter 4, I draw out some implications for human rights adjudication, which is where the claims of incommensurability have perhaps been most widely discussed by lawyers and legal theorists. It is important to emphasise, however, that my focus in Chapter 4 on human rights adjudication does not reflect any belief that incommensurability is only a problem in that context. Value incommensurability can arise in all areas of law. As Paul Craig observes, if incommensurability is a problem for proportionality in human rights law, it is also a problem in other areas of law.[21] Craig was responding to arguments that incommensurability was a problem only for proportionality review. From the sound point that incommensurability affects adjudication more generally, however, there seems to be some suggestion—more implicit than explicit—that it is not really a problem at all, or that it is not really significant.

[21] Paul Craig, 'The Nature of Reasonableness Review' (2013) 66 CLP 131, 150–55.

'Incommensurability,' as Jeff King says, 'presents problems but is something that judges are accustomed to dealing with. It is part of the imperfect world of judging.'[22] But the fact that incommensurability is widespread should not lead us to doubt that it is a significant issue that calls for further reflection.

My main claim in Chapter 4 is that value incommensurability entails limits to the principle of proportionality, but that it does not provide any reason to reject proportionality review altogether. This is an extension of its implications for practical reasoning in general and judicial reasoning in particular. It is worth concentrating on proportionality and human rights law, not only because it provides a useful example and has prompted a vast literature, but also because it raises interesting questions about the relationship between human rights and value pluralism. According to one influential line of thought, we should not undertake proportionality analysis to determine whether a human right has been justifiably infringed. John Rawls's lexical ordering, Robert Nozick's side constraints, and Ronald Dworkin's rights-as-trumps argument are each perceived as challenges to the idea that rights can be balanced with some other rights and other values. Even some theorists who accept the incommensurability thesis insist that rights are conclusions in practical reasoning, rather than premises or considerations that have to be taken into account in a balancing process before deciding what to do. I argue that rights, or the values that underpin rights, can at times be balanced, but that moral reasoning may run out, with the result that rights may sometimes be incommensurable with competing values.

[22] Jeff A King, 'Institutional Approaches to Judicial Restraint' (2008) 28 OJLS 409, 436.

Chapter 5 draws out the implications of value incommensurability in the context of specific instances of judicial reasoning. In particular, I focus on the conflict between authority and incommensurable values in the development of the common law and in statutory interpretation. For example, in relation to the common law, I draw on examples in tort law to highlight the plausibility of the claim that the reasons for following the authority of precedent, such as the values of predictability and consistency, may be insufficient to outweigh the reasons for the option not chosen in the previous case. In both common law reasoning and statutory interpretation, there is often what could be described as a monistic assumption, conflating the value of authority and conflicting values. So it is claimed that moral reasoning and interpretation, in pursuit of integrity and a coherent, harmonious corpus of law, can determine the content of authoritative directives.[23] By contrast, I call for the disentanglement of the value of authority and conflicting values in statutory interpretation—although the argument is applicable to legal interpretation in general. I argue that the value of authority requires adherence to the ordinary meaning of the text, but that there may be conflicting values that require a departure from the ordinary meaning and therefore a departure from the value of authority.

In Chapter 6, I turn to consider the implications of the incommensurability thesis for the ideal of the rule of law. As I noted at the outset, value incommensurability seems to imply an arbitrary choice and arbitrary choices are commonly thought to be inimical to the rule of law. Timothy Endicott has argued that we need to revise our account of the rule of

[23] See Ronald Dworkin, *Law's Empire* (Fontana Press 1986) chs 6–9.

law, so that the indeterminacies arising from vagueness and value incommensurability are not necessarily arbitrary in a way that counts as a deficit in the rule of law.[24] But do we need to revise our account of the rule of law in this way? Do we need to avoid the conclusion that value incommensurability can give rise to a deficit in the rule of law? The conclusion that it does give rise to such a deficit may simply arise from the fact that there are things that we value besides the rule of law. Nonetheless, I formulate a revised account of the rule of law that differs from Endicott's account. I argue that arbitrary choices among incommensurables are necessarily a deficit in an ideal of the rule of law, in the sense of the rule of clear, general, predictable authoritative sources. But I also argue that there may be another ideal of the rule of law, which is tied more to 'the rule of reason' than the rule of authority.[25] This idea is opposed to decisions that lack reason but not to choices between undefeated reasons.

This thesis aims to be a timely contribution to a discussion that has been steadily growing in recent decades. More and more theorists and lawyers have been grappling with the idea of incommensurability and its consequences. But we are in need of a better understanding of the nature and significance of value incommensurability. It is towards this end that I hope to make some progress.

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[24] Timothy Endicott, 'The Impossibility of the Rule of Law' (1999) 19 OJLS 1.

[25] cf TRS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 LQR 221.

2

The Absence of Scales

The values of alternatives are incommensurable if they lack a common scale, such that, in Joseph Raz's definition, 'it is neither true that one is better than the other nor true that they are of equal value.'[1] If neither alternative is better than the other, and if an improvement in one of the alternatives would still not make it better than the other—or if there is a third alternative that is better than one but not better than the other—then we know that they are not equal. The idea that the alternatives lack a common scale could, on some accounts, be understood to entail that the alternatives must be incommensurable in all circumstances, that there could be no improvement to one of the alternatives that would make it better than the other. In my view, however, the absence of a common scale should be understood to entail that there is a range of reasonableness within which it is reasonable to decide either way.[2] This range may be vaguely bounded, but there may come a point where one of two incommensurable values is improved to such an extent that it is no longer within a range but becomes the

[1] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 322.

[2] Raz also suggests this when he says that two options may be incommensurable and yet a third option might be better than both of them: ibid 325–26.

more valuable or the uniquely correct course of action. This understanding, I will suggest, clears away many confusions and criticisms surrounding the idea of value incommensurability.[3]

In order to defend the claim that there are incommensurable values, I must first defend the idea that values can be irreducibly plural and irreconcilable. Each of these notions—irreducibility, irreconcilability, and incommensurability—is controversial. They meet with important objections not only from value monists, who defend the unity of value and insist that values can only be interpreted by understanding their connections with other values, connections which render them reconcilable. There are also important objections from value-pluralist theorists who question the intelligibility of incommensurability. In examining the nature of value incommensurability, this chapter aims to answer these objections and to offer some preliminary remarks about its significance.

I. VALUE PLURALISM

Objectivity and Conflict

Value pluralism is compatible with moral realism, the idea that there are objective moral truths. That is not to say that it is necessarily incompatible with moral relativism or subjectivism. It may be that value pluralism becomes more significant if it is tied to, or is dependent on, moral realism. John Gray describes

[3] It is worth noting that the incommensurability claim with which I am concerned is a claim about values in the broad sense. It is not limited to moral values, for instance, but extends to the broader domain of the evaluative.

value pluralism as 'a species of moral realism, which we shall call *objective pluralism*.'[4] I do not need to defend this claim, which does not strictly follow from the truth of value pluralism, although in what follows I shall proceed on the basis of a moral realist position, or one so close to moral realism that the difference does not matter for our purpose. What we ought to reject is the common criticism of value pluralism that it leads to relativism, the belief that there is no objective moral truth, or to subjectivism, the belief that moral evaluations are the result of emotions, attitudes and preferences.[5]

Value pluralism entails not something like moral relativism, but a possibility that there may be conflict between values. It is worth setting out one of Isaiah Berlin's definitions of value pluralism:

> There are many objective ends, ultimate values, some incompatible with others, pursued by different societies at different times, or by different groups in the same society, by entire classes or churches or races, or by particular individuals within them, any one of which may find itself subject to conflicting claims of uncombinable, yet equally ultimate and objective, ends. Incompatible these ends may be; but their variety cannot be unlimited, for the nature of men, however various and

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[4] John Gray, *Enlightenment's Wake: Politics and Culture at the Closing of the Modern Age* (new edn, Routledge 2007) 106 (emphasis in original). See also Albert P Brogan, 'Objective Pluralism in the Theory of Value' (1931) 41 International Journal of Ethics 287; John Kekes, *The Morality of Pluralism* (Princeton UP 1993).

[5] See eg Larry Alexander, 'Banishing the Bogey of Incommensurability' (1998) 146 U Pa L Rev 1641, 1642.

> subject to change, must possess some generic character if it is to be called human at all.[6]

The conflict that concerns us is conflict between and among the values that can occur 'within the breast of a single individual', as Berlin put it.[7] This conflict is to be distinguished from disagreement between individuals. As Bernard Williams noted, much philosophical attention has been devoted to the implications of disagreement in the sense of *inter*personal, or two-party, conflict, but the notion of *intra*personal, or one-person, conflict is often overlooked, presumably on the erroneous assumption that individuals each have their own harmonious set of values.[8] Interpersonal conflicts may sometimes be intrapersonal conflicts as well: the interpersonal conflicts that one observes between individuals may be conflicts that one finds within oneself. But there is an important difference between the two. Interpersonal conflicts or disagreements over values do not have any implications for the truth or falsity of those values. But intrapersonal conflicts, within the breast of a single individual, may be part of what is true about moral values.

Moral disagreement is sometimes thought to be a more serious challenge than intrapersonal conflict. It may be true that, as I just intimated, moral disagreement is not a challenge to moral realism, since the intractability of moral

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[6] Isaiah Berlin, *The Crooked Timber of Humanity* (Henry Hardy ed, 2nd edn, Princeton UP 2013) 79–80.

[7] Isaiah Berlin, 'The Pursuit of the Ideal' in his *The Crooked Timber of Humanity* (n 5) 12. See also Bernard Williams, 'Conflict of Values' in his *Moral Luck: Philosophical Papers 1973–1980* (CUP 1981) 72.

[8] Williams, 'Conflicts of Values' (n 7) 72.

disagreement does not give us a reason to believe in any kind of moral relativism.[9] As Michael Moore rightly says, 'the mere fact of disagreement among the judgments of people hardly shows there is no fact of the matter to be agreed upon.'[10] But perhaps moral disagreement is a serious problem regardless of whether moral realism or pluralism is true. Jeremy Waldron offers a nuanced argument along these lines when he argues that moral disagreement calls into question the significance of the claims of moral realists, or indeed that moral disagreement makes the debate about moral realism irrelevant, at least to law and politics.[11] In response to Moore's objection, Waldron argues that 'moral disagreement remains a continuing difficulty for realism, even if it does not entail its falsity, so long as the realist fails to establish connections between the idea of objective truth and the existence of procedures for resolving disagreement.'[12] For Waldron, given that there is, as a matter of fact, intractable moral disagreement, we ought to qualify our moral judgments by saying things like '"I think" and "Of course, it's only my opinion", *even if realism is true*.'[13] To take a moral realist position, however, or something close to a realist position, is not to overlook the existence of intractable disagreement, and of doubt and uncertainty, surrounding moral questions. But the significance of

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[9] For a defence of this argument, see eg David Enoch, 'How is Moral Disagreement a Problem for Realism?' (2009) 13 Journal of Ethics 15.

[10] Michael Moore, 'Moral Reality' (1982) 1982 Wis L Rev 1061, 1089–90.

[11] Jeremy Waldron, 'The Irrelevance of Moral Objectivity' in his *Law and Disagreement* (OUP 1999); Jeremy Waldron, 'Moral Truth and Judicial Review' (1998) 43 Am J Juris 75.

[12] Waldron, 'The Irrelevance of Moral Objectivity' (n 11) 177.

[13] ibid (emphasis in original).

moral realism is that it insists that, when we make moral judgments, we make them as true moral claims that others ought to accept, and not merely as our opinion, which others are free to accept or reject. It is not clear why moral disagreement calls into question the significance of that claim.

Turning from interpersonal to intrapersonal conflict, the difficulty that value pluralists may have with explaining how value pluralism is compatible with moral realism in part stems from the difficulty in understanding how there could be objective moral truths. The world of 'ought' is different from the world of 'is', and as David Hume was right to say, no 'ought' statement can follow from an 'is' statement without a further presupposed 'ought'.[14] In relation to moral judgments, there can be no fact of the matter, out there, waiting to be discovered. That might be how scientific inquiry makes progress, but it does not apply to moral inquiry. Hume's claim may therefore be thought to imply the impossibility of knowing whether our moral claims are true, suggesting a moral scepticism or noncognitivism. According to Ronald Dworkin, however, 'Hume's principle, properly understood, supports not skepticism about moral truth but rather the independence of morality as a separate department of knowledge with its own standards of inquiry and justification.'[15] In making moral claims we *presuppose* their truth, and where we disagree or are uncertain, our disagreement or uncertainty over moral questions presuppose that there is a right answer to disagree about or to doubt. The argument for the truth of a moral claim just is the

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[14] See David Hume, *Treatise Concerning Human Nature* (first published 1739, LA Selby-Bigge ed, OUP 1888) 469. See also RM Hare, *The Language of Morals* (Clarendon Press 1952) 29.

[15] Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 17.

argument for accepting that moral claim. The very fact that we make a moral judgment presupposes that we accept its truth.

This is where value pluralists can sometimes face a problem. For the truth of value pluralism is often defended on the basis of empirical observation. Berlin, for example, wrote:

> [I]f we are not armed with an a priori guarantee of the proposition that a total harmony of true values is somewhere to be found—perhaps in some ideal realm the characteristics of which we can, in our final state, not so much as conceive—we must fall back on the ordinary resources of empirical observation and ordinary human knowledge. And these certainly give us no warrant for supposing (or even understanding what would be meant by saying) that all good things, or all bad things for that matter, are reconcilable with each other. The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others.[16]

Berlin therefore suggests that the question of whether value pluralism is true is different from the question of whether it is desirable that value pluralism is true.

[16] Isaiah Berlin, 'Two Concepts of Liberty' in his *Four Essays on Liberty* (2nd rev edn, OUP 2002) 213–14.

For Berlin, it seems, pluralism is a fact of life, albeit one that may have a finite lifespan.[17] Bernard Williams puts it slightly differently:

> It is notable that insofar as it is features of our moral experience that draw us towards ideas of the objectivity of ethics, the experience of moral conflict is precisely one that conveys most strongly such an idea. That there is nothing that one decently, honourably, or adequately *can* do seems a kind of truth as firmly independent of the will or inclination as anything in morality.[18]

Williams went on to point out that although there are objective moral truths—that is, the truth of values, and conflicts of values, is indeed independent of the will—it does not follow that these truths are independent of oneself.[19] This point is in my view correct. If we are right to treat moral principles as objective truths, we should also recognise that these truths are not independent of our personal experience and perspective. This is precisely because objective moral truths are not like facts about human nature that await scientific discovery; they are, rather, moral claims that each of us defend on the basis of our own internal judgments. Value pluralism, if it is true, can be defended on the basis of just such claims. The fact that the truth of our moral claims, and hence of value pluralism, is not

[17] See ibid 217: 'It may be that the ideal of freedom to choose ends without claiming eternal validity for them, and the pluralism of values connected with this, is only the fruit of our declining capitalist civilisation'.

[18] Williams, 'Conflicts of Values' (n 7) 75 (emphasis in original).

[19] ibid 75.

independent of oneself does not entail a subjectivist view that morality is determined by one's emotions or attitudes; nor does it entail a relativist view that what is right for me is not necessarily right for you. Susan Wolf is therefore not quite right to say that, for value pluralists, '[r]ightness … is not relative to anything, it is not a matter of perspective. It is just indeterminate.'[20] Value pluralists, like moral realists more generally, can accept the that rightness is a product of one's own perspective—what else could it be?—while also holding that one's moral claims about rightness hold true for everyone, regardless of their different perspectives.

It is worth emphasising that this understanding does not treat objectivity as a matter of transcending how things appear to particular points of view. There is no Archimidean, perspective-independent point of view from which to establish that one's moral claims are true. But we should reject the idea that values are plural and incommensurable because evaluative perspectives are plural, an idea that has been called the 'interpretive incommensurability of values'.[21] This idea can be found not merely in an alleged failure of an Enlightenment project, as Alasdair MacIntyre thought; it arguably also has classical roots in Protagoras's maxim that 'man is the measure of all things', which has been credited as one of the earliest formulations of value pluralism.[22]

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[20] Susan Wolf, 'Two Levels of Pluralism' (1992) 102 Ethics 785, 789.

[21] This idea can be found in Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Duckworth 1981) 70–78. For discussion, see Richard H Pildes and Elizabeth S Anderson, 'Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics' (1990) 90 Colum L Rev 2121, 2145–66; Richard H Pildes, 'Conceptions of Value in Legal Thought' (1992) 90 Mich L Rev 1520, 1529.

[22] See Lauren J Apfel, *The Advent of Pluralism: Diversity and Conflict in the Age of Sophocles* (OUP 2011) chs 2–3.

We should reject this idea and its relativistic implications. The central claim of value pluralism is that values are often plural and incommensurable because our interpretation of the values makes them so, not because they are subject to a plurality of different views and interpretations.[23] Pluralism, unlike more relativistic accounts of morality, allows us to criticise different moral views—moderated, to some extent, by the fact that tolerance is also something we value. This position could be described as a version of Simon Blackburn's 'quasi-realism',[24] but it contains nothing that a moral realist need reject.

The belief that there are objective moral truths should not lead us to the misconception that there is comprehensive determinacy in morality, that there is a uniquely right answer to all, or almost all, moral questions. Indeterminacy can arise either because values give rise to ineliminable vagueness—as in the case of a sorites paradox—or because they are irreducibly plural, conflicting, and incommensurable.[25] Conflict between values does not in itself establish that there is no uniquely right answer to some moral questions. For the right answer may be, for example, to choose the lesser of two wrongs. To establish that there may be no right answer in conflict between irreducibly plural values, we need the incommensurability thesis. This kind of indeterminacy is arguably the most

[23] For a similar point, see eg John Finnis, 'Commensuration and Public Reason' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard UP) 216–17.

[24] Simon Blackburn, *Spreading the Word: Groundings in the Philosophy of Language* (Clarendon Press 1984) 197, describing his quasi-realism as the project of 'trying to earn our right to talk of moral truth, while recognizing fully the subjective sources of our judgements, inside our own attitudes, needs, desires, and natures.'

[25] See Matthew H Kramer, 'When is There Not One Right Answer?' (2008) 53 Am J Juris 49, criticizing Dworkin for ignoring both vagueness and value pluralism and incommensurability as sources of indeterminacy.

important kind, partly because, in cases of conflicting moral obligations neither of which outweighs the other, whatever one does will be wrong.

But the very possibility of indeterminacy arising from conflicting values faces a significant challenge from Ronald Dworkin. In earlier work Dworkin had argued that in judicial decision-making, although the competing considerations could in theory be evenly balanced, this was very unlikely in a mature legal system.[26] In later work, however, he confronted the argument that there may be conflicts involving incommensurable values. His response is not merely to challenge the incommensurability thesis, but to defend a value monism that calls into question the very plausibility of conflicting values. He argues that 'in political morality integration is a necessary condition of truth.'[27] Dworkin's claim about the unity of value is not that there is only one value, but that we interpret each value in light of the others, that 'interpretation knits values together', and that there is in this sense 'an interconnected and interdependent system of principles and ideas.'[28] He draws from this the conclusion that there 'are no genuine conflicts of values'.[29] Some of Dworkin's argument in defence of the unity of values leaves unclear whether he thinks that there is unity of value because *we unite* values by engaging in sound interpretive reasoning, with the result that the unity of values is dependent on the way in which we arrive at a belief about values, or on the contrary whether he thinks that there is unity of

[26] Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1978) 286–87.

[27] Ronald Dworkin, *Justice for Hedgehogs* (n 15) 5–6.

[28] ibid 101, 116.

[29] ibid 119.

value because values *are united* in a way that is independent of our processes of interpretive reasoning.[30] Perhaps Dworkin's argument is that there is no incompatibility between these two positions: correct interpretations of values depend on truths about the nature of values and their unity, and these truths can only be discovered through interpretation. But if truths about values are discovered through interpretive reasoning, can Dworkin provide a convincing explanation for why a correct interpretation of a value must establish, or reveal, its unity with other values? Does the existence or non-existence of conflict between values not have to await the interpretation of particular values? I will now try to explain why I think Dworkin's argument is ultimately unsuccessful.

The Abstract and the Concrete

There is a kernel of good sense in Dworkin's argument. Although in my view the integration of values is not a necessary condition of their truth—since, as I shall attempt to explain, the integration of values has its limits—it is nonetheless true that a defence of a particular conception of a value may require us to draw on other values. It is necessary, in other words, to concretise values. As Dworkin rightly points out, we ought to be concerned not merely with values in the abstract, but with concrete values or bearers of value, and the concretisation of a value requires us to show how it relates to other values. It is the recognition of this need to concretise values that saves us from descending into what Waldron

[30] For a critical discussion of various possible interpretations of Dworkin's thesis, see Joseph Raz, 'A Hedgehog's Unity of Value' (2014) Oxford Legal Studies Research Paper 32/2014, <http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2441858> accessed 1 September 2014.

called 'lazy pluralism'.[31] But the need to concretise values is compatible with value pluralism.

What explains Dworkin's anti-pluralism? It cannot be explained through his criticism of 'Archimedeans',[32] because Isaiah Berlin also stressed that there is no Archimedean point.[33] Dworkin is of course right to say that value pluralism and incommensurability 'must be earned and defended like any other interpretive claim'.[34] Such an argument, he says, must be made from the internal point of view of the participant, based on assumptions about the practice to which it belongs.[35] He says:

> Consider the legal claim … that when lawyers disagree, and there is no knock-down argument available to reconcile them, it follows that the case for neither side is better than the case for the other. There are an unlimited number of reasons why some but not all lawyers might think that one side had the better of a particular legal argument. Someone defending the argument that no such reason can in fact tip the balance either way in any controversial

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[31] Jeremy Waldron, 'Jurisprudence for Hedgehogs' (2013) NYU School of Law, Public Law & Legal Theory Research Paper 13–45, 5, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290309> accessed 6 December 2013.

[32] See Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 OJLS 1.

[33] Isaiah Berlin, 'The Concept of Scientific History' in Isaiah Berlin, *Concepts and Categories: Philosophical Essays* (first published 1978, Henry Hardy ed, Pimlico 1999) 114.

[34] Ronald Dworkin, *Law's Empire* (Harvard UP 1978) 237–38.

[35] Ronald Dworkin, 'On Gaps in the Law' in Paul Amselek and Neil MacCormick (eds), *Controversies about Law's Ontology* (Edinburgh UP 1991) 89–90.

> case faces an enormously difficult task, much more difficult than that faced by someone who wants to argue for one decision rather than another in a particular case.[36]

An enormously difficult task, you may well think, but not an impossible one. Since value pluralism is not a claim about moral uncertainty, Dworkin asks, 'When are we entitled, not simply to the negative idea that we do not know what it is right for us to do, but to the positive claim that we know that nothing that we do is right because, whatever we do, we do something wrong?'[37] Dworkin considers the latter sort of claim to be 'extremely ambitious', and doubts whether it can be defended. But it is no more ambitious than the claim that there is a right answer.

To sustain his argument, Dworkin uses the following example: does a government do wrong in prohibiting racist speech or does it do wrong in permitting such speech?[38] It is worth quoting Dworkin's argument at length:

> [W]e are drawn to each of the rival positions through arguments that, if we were finally to accept them as authoritative, would release us from the appeal of the other. If we really believe that citizens have a right to speak out even in ways that offend certain

[36] Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 27 Phil & Pub Aff 87, 138–39.

[37] Ronald Dworkin, 'Moral Pluralism' in his *Justice in Robes* (Beknap Press 2006) 110.

[38] ibid 110–11.

> other citizens, then it would be odd also to believe that certain citizens have a right not to be offended by what other citizens say. And vice versa. … It seems puzzling how we could be persuaded, at one and the same time, that citizens have a right that racial insults not be uttered and that citizens have a right to utter racial insults. But unless we can finally accept both of these claims, and at the same time, we cannot claim the positive view that we violate citizens' rights whatever we do about racist speech.[39]

Dworkin accepts that abstract values, such as liberty and equality, can be given definitions that make them inevitably conflict. If liberty is freedom from interference to do whatever you like, then it will inevitably conflict with other values. But he resists the idea that we should accept such a definition of liberty. He concludes, 'Nothing is easier than composing definitions of liberty, equality, democracy, community, and justice that conflict with one another. But not much, in philosophy, is harder than showing why these are the definitions that we should accept.'[40] It may seem that either way our definition of values begs the question: either values are interdependent and must be defined by integrating them with other values, in which case conflict is excluded from the start; or values must be defined independently of other values, in which case conflict becomes inevitable.

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[39] ibid 111.

[40] ibid 116.

But our way of defining values need not beg the question in this way. The definition of values, as Dworkin rightly says, is a question of substantive moral and political philosophy.[41] But it is an open question whether, in any particular context, substantive moral and political philosophy requires a definition of a particular value that is integrated with or independent of other values—or, more accurately, the extent to which a particular value is integrated with other values—and also whether the values conflict. There are two separate questions here: First, to what extent are values integrated? Are all values integrated, as Dworkin claims, or are only some of them? Secondly, where values are integrated, so that they must be interpreted in light of their connections with each other, do these connections eliminate conflict, or is it possible for the integrated values to conflict? There does not seem to be any reason to deny, from the outset, that in some circumstances some values are integrated and do not conflict, that in other circumstances other values are not integrated, or are not fully integrated, and do conflict, and that in yet other circumstances values that are integrated do conflict. It may well be the case, for example, that in some contexts the soundest moral argument does not extend free speech to include the protection of extreme hate speech that offends the dignity and equality of others. In that case, the values are harmonious and there is no conflict—for the value of liberty did not extend far enough to conflict with equality. But that is not to say that in other contexts the soundest moral argument defines free speech to protect a particular form of hate speech *and* it defines equality in a way that protects others against that same hate speech. We cannot rule out this latter definition,

[41] ibid 113.

which entails conflict, any more than we can rule out the former definition, which removes conflict.

Some theorists who defend value pluralism treat concretisation in a rather different way. 'The concrete situation is almost everything,' Berlin wrote, but he meant something quite different from how I have understood concretisation.[42] For Berlin, the concrete situation makes it possible for one course of action to be better or worse, right or wrong, notwithstanding the incommensurability of values. Similarly, for Thomas Nagel, despite conflicts between plural and incommensurable values, it is possible for there to be judgments that resolve those conflicts in some contexts—a form of Aristotle's *phronēsis* (practical wisdom), 'which reveals itself over time in individual decisions rather than in the enunciation of general principles.'[43] The concretisation that I have in mind, by contrast, is one that determines whether or not values, which may appear to conflict in the abstract, actually do conflict in the concrete situation. And, as we shall see, I doubt whether there can be a justification of the sort that Berlin and Nagel envisage in cases of incommensurable values.

Although Dworkin might object that definitions that produce conflicts are implausible, they are no less plausible than definitions that produce complete harmony, such that the definition of one value must limit the definition of the other. Dworkin's book *Justice for Hedgehogs* is an extended argument for definitions of values that limit each other in precisely this harmonious way, thereby excluding conflict. To refute this general argument, you may think, we

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[42] Isaiah Berlin, 'The Pursuit of the Ideal' (n 7) 19.

[43] Thomas Nagel, 'The Fragmentation of Value' in his *Moral Questions* (CUP 1979) 135.

would need to refute his individual arguments for particular definitions of values. That may be so, but it is nonetheless important to notice that there is a question-begging aspect to Dworkin's argument: his argument is that there is complete harmony among values because we must interpret values in a way that establishes them to be integrated and not to conflict, but whether they conflict, and hence whether they are commensurable or incommensurable, is the very question at issue in the interpretation of values.

The recognition that values must be concretised, and that this concretisation must, at least sometimes, involve an evaluation of the relation among values, does not rule out the possibility that, once they are concretised, values may be irreducibly plural in the sense that they conflict. Two values may be irreducibly plural not merely because they are not instances of some third value, but because the definition of one value, if you like, encroaches upon the definition of another value, and vice versa. To defend the possibility of genuine conflict we need only show that at times integration can—or *should*—take us only so far, and that there is no reason to hope, from the outset, that values will fit together harmoniously.

Values and Reasons

Before we turn to consider the nature of value incommensurability in more detail, one further clarification is necessary. I have been assuming a particular relation between values and reasons for action, such that the greater the value of an action, the greater the reason to perform that action. The corollary seems to be that if values are irreducibly plural and incommensurable, then so are the reasons for action. For this reason I will talk interchangeably about incommensurable values, incommensurable reasons, and incommensurable options—all of which is short hand for saying that we have no reason to choose one option over the other, because one is not more valuable than the other, and they are not of equal value. But perhaps, in addition to value-based reasons, there are further reasons for action that can provide a uniquely right answer. I will return to this possibility later. But for the moment let's consider the possibility that one's own desires or preferences might provide reasons, and perhaps even conclusive reasons, notwithstanding the incommensurability of values.[44]

One answer, defended by Raz, is that our wants or desires are not reasons for actions, because reasons derive from the value or good of the options. In Raz's view, it is the value of an option and not our desire to pursue it that provides a reason for action, and 'our wants become relevant when reasons have run their course.'[45] Now, I broadly agree with this account. But there seems to be no reason to deny that one's desires, preferences, tastes and so forth can, at times, provide reasons for action, at least of some sort. In other writings, Raz has accepted this point, maintaining that some reasons for actions do not derive from the value of those actions; there can be preference-based reasons, although these reasons do not make one option more valuable than the other.[46] If this is so, then

[44] For an helpful discussion of this issue, see John Gardner and Timothy Macklem, 'Reasons' in Jules L Coleman and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002).

[45] Joseph Raz, 'Incommensurability and Agency' in Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (n 23) 126–25

[46] Joseph Raz, 'Mixing Values' (1991) 65 Proceedings of the Aristotelian Society (Supp) 83, 83–84, 100.

even when the values of two options are incommensurate, there may be a reason to choose one option over the other. One's preferences can provide reasons, even when they are not themselves based on reasons, or at least value-based reasons. If you prefer apples to oranges, then you have a reason to choose an apple rather than an orange. And if, all things considered, you have an undefeated reason to satisfy your desires—undefeated, say, by any need for variety in your diet—then you have an undefeated reason to choose an apple rather than an orange. The value of something must be independent of an agent's will. But perhaps the fact that an agent prefers one option to the other stems from the fact that the preferred option is more valuable *for the agent*. You may have certain characteristics, or prior choices and commitments, which may have originally been an exercise of your will (though that is often not the case in relation to characteristics), but which cannot now be undone. These characteristics therefore give one option more value for you than it would otherwise have had. In that case, however, you would be bound to acknowledge that the option is not genuinely more valuable for everyone, but has merely been given more value for you in view of your prior choices, commitments, characteristics and so forth.

There are therefore two levels of reasons: those that derive from the value of the options—that is, their genuine value—and those that derive from the choices, commitments, and characteristics of the agent. It is also important to note that there may be no agent-relative reasons at all. But where they exist, the merely agent-relative reasons are less significant than value-based reasons. In many circumstances, and always when they are mere matters of will, the agent-relative reasons become relevant only when the value-based reasons are incommensurate. One way of putting this point is in terms of what has been called 'hierarchical voluntarism',[47] according to which 'an agent cannot have a voluntarist reason unless her non-voluntarist reasons have "run out."'[48] Regardless of whether we say that one's will provides reasons in such cases—and perhaps even makes one option more valuable for the agent—the point remains that in a choice among irreducibly plural and incommensurable values, the choice is not determined by the reasons that are most important, the non-voluntarist reasons. These non-voluntarist or value-based reasons, as Raz says, set 'a range of eligible options before agents, who choose among them as they feel inclined, who do what they want to do or what they feel like doing.'[49] I will return to this issue later in the chapter, when I look more closely at the implications of value incommensurability for practical reasoning. But I wanted to raise this issue before turning to consider the nature of value incommensurability.

II. VALUE INCOMMENSURABILITY

Irreducibly plural values are not by their nature incommensurable. They are only sometimes commensurable. This concession, if it is a concession, may be thought to give away a great deal, and to raise doubts about whether values are

[47] Ruth Chang, 'Voluntarist Reasons and the Sources of Normativity' in David Sobel and Steven Wall (eds), *Reasons for Action* (CUP 2009) 246: 'hierarchical voluntarism maintains that voluntarist reasons—reasons whose normative source is an act of will—depend on their being *non-voluntarist* reasons—reasons whose normative source is not an act of will.'

[48] ibid 246.

[49] Raz, 'Incommensurability and Agency' (n 45) 127.

ever incommensurable.[50] The idea of incommensurable values is closely related to the idea of a range of reasonableness, the idea that there is no conclusive reason to choose one alternative over another. Part of my argument is that incommensurability is one way in which a range of reasonableness can arise. That is not to say that it is the only way. A range of reasonableness may arise because of rough equality, for example, and—in a slightly different sense—we may have a duty to defer to another's decision within a certain range, which may be described as a range of 'reasonableness', although it may not reflect our view of what reason requires absent the duty to defer. But incommensurability is one distinct and important way in which there can be a range of reasonableness. The idea of a *range* is important, however, not just to describe a plurality of reasonable options, but also as an explanation for how incommensurability itself arises. This might seem counter intuitive, because incommensurability is the idea that there is no common scale, and a range implies a common scale. But the thought here is that, of two values, there may be a range on the scale in which one option may not be better than the other, and yet they are not of equal value. There is no common scale that can determine which option is better within that range. But the options will cease to be incommensurable when there is sufficiently more of one value and there is no longer a range of reasonableness. My aim in this section is to defend this understanding of incommensurability and to explain how it differs from apparently similar notions with which it is often confused, namely rough equality, uncertainty, and vagueness.

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[50] Donald Regan, 'Value, Comparability, and Choice' in Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (n 23) 135.

Incommensurability and Incomparability

There has been some debate about whether the issue here is one of incommensurability or incomparability. Some theorists treat these two terms interchangeably, even while accepting that they have different meanings.[51] But precisely because they have different meanings, it is important to keep them distinct. And in my view the distinction ought to be kept fairly simple: incommensurability occurs when it is not the case that one option is better than another, nor that they are of equal value; incomparability, by contrast, means that the options cannot be compared. In common usage people often invoke the term 'incomparability' in various ways: it is said that one alternative is incomparably better than another—that is, so vastly better than the other that it makes no sense to compare them—or it is said that alternatives are incomparable because one is not better than the other. But both of these uses of incomparability lose sight of the fact that only by comparing the options can we know that one option is vastly better than another or that they are incommensurable. If the options were incomparable, then we could not determine whether they are commensurable or incommensurable. Incomparability arises, to the extent that it does arise (if at all), because of the indeterminacy of the values.[52] In any case, incommensurability is the more significant notion. And by using the term

[51] See eg Raz, *The Morality of Freedom* (n 1) 322; cf Raz, 'Incommensurability and Agency' in Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (n 23) 273 n 1: 'incommensurability is not to be confused with incomparability'.

[52] Raz, *The Morality of Freedom* (n 1), 329. cf Timothy Macklem, 'Choice and Value' (2001) 7 Legal Theory 1, 4, arguing that 'there is no such thing as incomparability'.

'incommensurability' to describe the phenomenon of one option being neither better nor worse than the other, nor equally valuable, we avoid the misleading conclusion that these two options are incomparable—misleading because we can only reach that conclusion by comparing them.

Yet, for theorists such as Ruth Chang, incomparability, not incommensurability, is 'ultimately the more significant notion'.[53] Chang comes to this conclusion because her understanding of the difference between the two notions is very different from mine. Chang understands the distinction in terms of another distinction, that between ordinal and cardinal ranking. She claims that options are incommensurable if they cannot be *precisely* measured and ranked on a cardinal scale (that is, precisely measured by a common unit of value); options are incomparable if they cannot be ranked on an ordinal scale (that is, ranked on a list).[54] Chang's point is that one alternative can be morally better than another without being precisely measured in terms of a single scale of value. The flaw in Chang's argument is that her interpretation of incommensurability is too literal. There is no reason to think that incommensurability, as it is understood in moral philosophy, requires precision of measurement or balancing. Although the term 'incommensurable' has its roots in classical Greek mathematics, its use is different in moral philosophy. With the possible exception of some utilitarians, few if any moral philosophers believe that options with moral value can be measured against one another with mathematical precision. Rather, in moral

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[53] Chang, 'Introduction' in Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (n 23) 2.

[54] ibid 2. See also John Broome, *Weighing Goods* (Blackwell 1991) 70–75.

philosophy incommensurability is used to refer to those situations in which the value of one alternative is neither better nor worse than, nor equal to, the value of another. In this sense, incommensurability entails the impossibility of both cardinal and ordinal ranking. While it is correct to distinguish between the ideas of incommensurability and incomparability, it is wrong to do so for the reasons given by Chang.[55] When Chang refers to incomparability, we should take her to be referring to incommensurability.

There is, however, a widespread view that incommensurability, although fatal for cardinal ranking, is compatible with ordinal ranking; or to put it another way, that incommensurability precludes 'quantitative' reasoning, but does not preclude 'qualitative' reasoning; or that incommensurability precludes evaluating differences in 'weight' but not differences in 'status'.[56] Indeed, some theorists suggest that value incommensurability just is the notion that values can be ordinally but not cardinally ranked. According to Griffin, two values are incommensurable if one trumps or outranks the other—that is, to put it crudely, if any amount of one is more valuable than any amount of the other.[57] To my mind, Griffin is describing as incommensurable what is clearly commensurable. His mistake, again, is to believe that commensurability depends on a common scale of units for precise measurement, rather than merely a common standard

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[55] See also Ruth Chang, 'Value Incomparability and Incommensurability' in Iwao Hirose and Jonas Olson (eds), *The Oxford Handbook of Value Theory* (OUP 2013).

[56] See eg James Griffin, *Well-Being: Its Meaning, Measurement and Moral Importance* (Clarendon Press 1986) ch 5; Pildes and Anderson, 'Slinging Arrows at Democracy' (n 20) 2147–58; Elizabeth Anderson, 'Practical Reason and Incommensurable Goods' in Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (n 22) 104–7; Jeremy Waldron, 'Fake Incommensurability: A Reply to Professor Schauer' (1994) 45 Hastings LJ 813, 815–17.

[57] Griffin, *Well-Being* (n 56) 83–85.

that could provide a reason for the judgment that one alternative is better than the other or that they are equally valuable. Since, in my view, value commensurability does not depend on the alternatives being precisely measured in terms of a common scale of units of value, when I refer to value incommensurability, I mean the inability to rank, whether cardinally or ordinally, concrete values or particular bearers of value.[58]

But what does it mean to say that two values can or cannot be ranked in terms of a common standard? Does commensurability depend on a common standard? What is 'common' about a common standard? We could think of a common standard in two ways: either there is a single common standard in terms of which all bearers of value can be ranked; or, more modestly, there are common standards in terms of which bearers of values can be ranked, though not necessarily the same common standard for every choice.[59] The discussion of value pluralism suggested some objections to the first form of commensurability. The second form of commensurability, involving a plurality of common standards, is compatible with value pluralism. In order to understand whether incommensurability provides limits to the second form of commensurability, we need to look more closely at what is meant by the claim that there may be no common standard between alternatives.

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[58] I think a similar point can be made against Raz's idea of 'constitutive incommensurabilities', but I will not defend that claim here. See Raz, *The Morality of Freedom* (n 1) 345–53.

[59] Henry Richardson calls this a distinction between 'strong commensurability' and 'weak commensurability' respectively: see Henry Richardson, *Practical Reasoning about Final Ends* (CUP 1994) 104–5.

Common Standards and Evaluative Purposes

The problem is that we often judge some alternatives to be better than others, notwithstanding the fact that they display a variety of values, ostensibly with no common value among them. We should discard the simple view that different instantiations of different goods—or, for that matter, different instantiations of the 'common good'—are, by that fact alone, incommensurable.[60] If there is a plausible defence of value incommensurability, it must allow for the existence of judgments of commensurability among alternatives that bear different values. Joseph Raz has suggested one way in which this may be done. Through his account of 'mixed-value goods', Raz argues that although many if not most intrinsic goods display a variety of different values, we can nonetheless distinguish between degrees of success and failure of those goods. The value of a novel, he says, depends on a combination of such values as its plotting, linguistic skill, humour, insight, and so forth.[61] Yet no one would deny that some novels are better than others. It must therefore be possible to commensurate mixed-value goods. Perhaps, if one novel is better in respect of one value, and not inferior in respect of any other value, then that novel is 'Pareto superior'. Or perhaps, if all the values are roughly equal—that is, the novels are, roughly speaking, just as funny, just as enchanting, just as insightful—then the novels themselves are roughly equal. But Raz is concerned with those situations in

[60] For a fleeting example of the simple view, which I do not think he intended to endorse, see eg HLA Hart, *The Concept of Law* (first published 1961, 3rd edn, Clarendon Press 2012) 167: 'When a choice has been made between … competing alternatives it may be defended as proper on the ground that it was for the "public good" or the "common good". It is not clear what these phrases mean, since there seems to be no scale by which the contributions of the various alternatives to the common good can be measured and the greater identified.'

[61] Raz, 'Mixing Values' (n 46) 86–87.

which we say, for example, that one novel, though not as funny as another novel, is superior in virtue of its power to enchant.

Raz's answer is that commensuration of the value of mixed-value goods is possible because '[t]he very nature of the good they exhibit includes a standard of its own excellence.'[62] The value of a novel, he says, is not merely an aggregation of the constituent values it displays, but 'a new independent good which is constituted by the constituent goods being present *in the right way and in the right proportions*.'[63] This allows us to evaluate instances of the same mixed-value good, which Raz says is 'a necessary corollary of its dependence on a sustaining social practice'.[64] After all, Raz asks, what criterion, if not social practices, could determine which mix of values constitutes a mixed-value good? This is a content-independent justification, relating not to the content of the good but to the fact that the good is created by a sustaining social practice.[65] By virtue of its sustaining social practice, a mixed-value good has an inherent standard that is capable of ranking different instances of that good. Raz argues that his explanation of the commensurability of instances of a mixed-value good cannot be extended to evaluating instances of different goods. In order for there to be a mixed-value good, there must be an inherent standard capable of ranking different instances of that good. But no standard for evaluating different goods is necessary for the existence of different goods.

[62] ibid 87.

[63] ibid 88 (emphasis in original).

[64] ibid 90.

[65] ibid 98.

Raz's argument in this respect is unconvincing. It is, as James Griffin noted, deeply implausible that mixed-value goods contain an ideal proportion of values.[66] Indeed, in this respect, Raz's argument looks not unlike a scaled-down version of the argument for the unity of value. Although we should accept that some instances of a mixed-value good can be ranked in terms of the good's inherent standard, there seems to be no reason to assume that all instances of a mixed-value good must be capable of being ranked. Some instances may fall short of the inherent standard in different ways—which was the original problem that animated Raz's discussion of mixed-value goods in the first place. There is no reason to deny that the different instances may fall short of the inherent standard in ways that make those instances neither better nor worse than the other, nor of equal value.[67] Furthermore, there is no reason for thinking that alternatives can only be commensurable if they instantiate the same mixed-value good. Alternatives may be commensurable even if they instantiate different goods. Therefore, just as the existence of an inherent standard does not necessarily entail commensurability in the case of mixed-value goods, so the absence of an independent standard of this kind in the case of different goods need not entail incommensurability.

Nevertheless, if one alternative is better than another, we should be able to answer the question: better with respect to what? As others have rightly observed, claims of commensurability and incommensurably must be based on

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[66] James Griffin, 'Mixing Values' (1991) 65 Proceedings of the Aristotelian Society (Supp) 101, 105.

[67] For a similar point, see Macklem, 'Choice and Value' (n 52) 14.

some evaluative purpose.[68] What is the relationship between common standards and evaluative purposes? Here is Timothy Macklem's understanding of the relationship:

> Standards …are reflective of human purposes, and human purposes, far from being arbitrary products of our will, are reflective of our rational quest for a good life, a life composed of valuable activities. It follows that incommensurability arises in ways that matter to us if and to the extent that the values that inspire and sustain human purposes are plural in nature, so as to prevent a choice between valuable activities from being assessed in terms of a common standard.[69]

It is not clear why the second sentence in this quotation follows from the first. The values that inspire and sustain human purposes may well be plural in nature, but that does not entail that our purposes are plural to the same extent. Our purposes reflect the values that we have reason to pursue, but they are not coterminous with them. We can see this in Macklem's own account when he discusses the example of apples and oranges. If our purpose is to eat good fruit and we are presented with a good apple and a good orange, then we seem to be faced with a choice between incommensurables, due to the different qualities that make apples and oranges good. But suppose that, in a particular context, our

[68] ibid 5. Chang refers to this as a 'covering value': Chang, 'Introduction' (n 53) 6.

[69] Macklem, 'Choice and Value' (n 52) 5.

purpose is to choose the fruit that is easiest to peel, or that has more Vitamin C. In those cases, our purposes provide a common standard that renders the alternatives commensurable.[70] They provide a common standard notwithstanding the plurality of the values. To put it another way, our purposes in a particular context may reflect the fact that the pursuit of one value has become more important than the pursuit of other values, and, as a result, that value becomes dominant and the alternatives become commensurable. The particular context may elevate a value to the point that our purpose should be to pursue this value above all others, and it is this elevated value—which may or may not be instantiated in all the alternatives—that provides the common standard in terms of which one alternative is better than the other. Thus, when Macklem says that the issue here 'is not so much incommensurability as value pluralism', he is underestimating the extent to which incommensurability plays an important role in addition to value pluralism. Values, by which I mean concrete values or bearers of value, may be plural and yet commensurable.

But, unless we assume that alternatives are always commensurable, there need not always be a covering value or an evaluative purpose that provides a common standard. Our purposes may leave us with one alternative that is better in one respect, another alternative that is better in another respect, and neither is better overall. But in such circumstances, we must still ask: with respect to what is neither better overall? If we follow Chang in equating covering values with evaluative purposes, it would be wrong to say that there can be no covering value at all. The claim that there is no covering value, Chang rightly says, is not a

[70] ibid 4–5.

claim of incommensurability (or incomparability, as she calls it), because 'incomparability must proceed relative to a covering value, and if there is no covering value with respect to which the intrinsic merits can be compared, then there can be neither comparability nor incomparability with respect to it.'[71] But the evaluative purpose, or covering value, may be very broad indeed. Chang considers and rejects the idea that the covering value may simply be 'what there is most reason to do, all things considered' or 'betterness, all things considered'. These cannot be covering values, she says, because they 'have no content apart from that given to them by the choice situations in which they figure.'[72] If neither alternative is better overall, then the covering value or evaluative purpose must be independent of the alternatives: it cannot be a value with respect to which one of the alternatives is better. But it may, in my view, be a composite value, such as the value of a good piece of fruit in the context of a choice between apples and oranges. This composite value, or evaluative purpose, need not have the inherent standard that Raz claimed is present in mixed-value goods. That is, it may leave the alternatives incommensurable.

Large–Small Tradeoffs

If value incommensurability is not properly understood, there is a danger that its implications become far-fetched. For if our interpretation of incommensurability were too literal and we were to believe that values lack a common scale irrespective of the concrete situation, we would be compelled to conclude that,

[71] Chang, 'Introduction' (n 53) 7.

[72] ibid 31.

even if the gain in the value instantiated by one alternative is very great and the loss of the value instantiated by another alternative is very small, neither alternative is better than the other. In many contexts, this is clearly not the case. We often recognise 'large–small tradeoffs', [73] or 'nominal–notable comparisons'. [74] An understanding of large–small tradeoffs is crucial to understanding the nature of incommensurability. It provides much of the justification for treating incommensurability as a range of reasonableness.

The essential point has been captured by Julian Rivers in terms of a conflict between two allegedly incommensurable values: liberty and security. 'Few would view with indifference,' Rivers writes, 'a massive loss of liberty for a marginal gain in national security. Our problem is not that the values are incommensurable, but that relative assessments can only be carried out in a crude manner'. [75] Leaving aside, for the moment, the misconception that incommensurability entails indifference—which suggests that Rivers regards incommensurability as a form of equality or 'rough equality'—he is right to think that no defender of the incommensurability thesis would deny that the two options, 'a massive loss of liberty' and 'a marginal gain in national security', may be commensurable. The existence of large–small tradeoffs was also explicitly in Bernard Williams's account of value pluralism:

[73] David Luban, 'Incommensurable Values, Rational Choice, and Moral Absolutes' (1990) 38 Clev St L Rev 65.

[74] Chang, 'Introduction' (n 53) 14–16.

[75] Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174, 201:

> [O]bviously there are possible changes by which (say) such a trivial gain in equality was brought by such an enormous sacrifice of liberty that no one who believed in liberty at all could rationally favour. So either it is false that these values are, as such, incommensurable, or incommensurability is a less discouraging or, again, deep feature than had been supposed.[76]

I agree with Williams that the latter of these two alternatives should be accepted: incommensurability is a less deep or wide-ranging feature than some pluralists may have supposed. There is one inadequate response to the argument from large–small tradeoffs that needs to be set aside. It would be inadequate to respond by suggesting that what is really going on in these tradeoffs is that the value of one alternative is being reduced to such an extent that it is equivalent to having no value at all. The description of one option as having 'marginal' or 'nominal' value certainly suggests that the option is not really valuable, and so we are in fact comparing one valuable option with a non-valuable option.[77] This response is inadequate, however, because we do recognise the possibility of large–small tradeoffs when both alternatives have some value.

The possibility of large–small tradeoffs is one reason why basing the incommensurability of values merely on the plurality of values must fail. Chang illustrates this point through the example of Mozart and Michelangelo, who are

[76] Williams, 'Conflicts of Values' (n 7) 77.

[77] Williams's example of 'such a trivial gain in equality' in the previous quote may have suggested a response along these lines. See also Macklem, 'Choice and Value' (n 52) 15.

both notable bearers of the covering value of creativity, but who are creative in different ways, and the imaginary Talentlessi, a very bad painter, who is a nominal bearer of the covering value of creativity. Chang posits that Michelangelo and Talentlessi bear the same contributory values of creativity, albeit to different degrees: clearly Michelangelo is a better painter than Talentlessi. But these contributory values are different from those that Mozart bears. If incommensurability arises from the mere diversity of values, then it is not only Michelangelo and Mozart whose work is of incommensurable value, but also Mozart and Talentlessi. But surely we would all agree that Mozart is better with respect to creativity than a very bad painter. Chang insists that 'we know that Mozart is better than Talentlessi with respect to creativity', and so if Mozart and Michelangelo really are incommensurable with respect to creativity, 'it cannot be the diversity of the values borne *per se* that accounts for bearer incomparability.'[78] From this sound point, however, Chang goes on to argue that, given that that there is a scale linking Michelangelo and Talentlessi, there must come a point at which, through a series of small improvements, Talentlessi might match Michelangelo in creativity. We already know that Talentlessi and Mozart are commensurable, despite their diverse values, and so Mozart's creativity must also be commensurable with Michelangelo's creativity.[79] But this does not follow.

The possibility of large–small tradeoffs, or nominal–notable comparisons, is compatible with value incommensurability if value

[78] Chang, 'Introduction' (n 53) 15.

[79] ibid 14–16.

incommensurability is understood to be a range of reasonableness. Within that range, it is not true that one option is more valuable than another, or that they are of equal value. But outwith this range, one alternative is better than the other. The absence of a common scale therefore holds only for the alternatives that are both within the range of reasonableness. And the limits of that range depend on the context. John Finnis puts this point well when he responds to Luban's claims about large–small tradeoffs. In one of Luban's examples, a college athlete severely damages his academic studies by undertaking a rigorous training regime. Luban insists that this is irrational, because the college athlete has no intention of playing his sport professionally, so that the loss is large and the gain is small.[80] But, as Finnis points out, if the context is changed and the athlete does intend to turn professional, then the gain is no longer small.[81]

It is worth recalling that the mark of incommensurability is that alternatives are neither better nor worse than each other, and an improvement in one of the options does not make that option better than the other.[82] Chang calls this the 'small improvement argument', and describes it as the most powerful argument for the incommensurability of values.[83] But the mark of incommensurability does not mean that there can be no improvement that would make one alternative better than the other. As Timothy Endicott writes, 'To

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[80] Luban, 'Incommensurable Values, Rational Choice, and Moral Absolutes' (n 73) 75.

[81] Finnis, 'Concluding Reflections' (1990) 38 Clev St L Rev 231, 239.

[82] Raz, *The Morality of Freedom* (n 1) 325–26. See also Walter Sinnott-Armstrong, *Moral Dilemmas* (Basil Blackwell 1988) 65–66; Ronald de Sousa, 'The Good and the True' (1974) 83 Mind 534, 544–46.

[83] Chang, 'Introduction' (n 53) 23; Ruth Chang, 'The Possibility of Parity' (2002) 112 Ethics 659, 667–68.

conclude that A really is incomparable [i.e., incommensurable] with B is to conclude that there is *some* improvement in A that would not make A clearly better than B.'[84] But one of the options may be improved to such a large extent, or devalued to such a large extent, that it is taken outside the range in which it was reasonable to choose either option. Yet is my acceptance of this point not fatal to my acceptance of the incommensurability thesis? Would an improvement that makes one option better overall not show that the options were not incommensurable after all? Would it not show that they were in fact equal? I now want to explain why I do not think that it does.

Rough Equality

If one option is better than the other, it is natural to assume that, by reducing the value of the first option and improving the other, there will come a point at which the two options are equal. But, as Joseph Raz rightly says, this mistakenly assumes that the degrees of improvement are infinitely divisible. There may, on the contrary, be no point at which they are ever equal.[85] This does not by itself make it possible that one option could be neither better nor worse than the other, nor are they of equal value. For it may simply be that one option goes from being better to being worse without passing through an intermediate stage of equality. But the question is this: besides equality, is there more to the intermediate stage between being better and being worse? To put it another way, is there a fourth

[84] Timothy AO Endicott, *Vagueness in Law* (OUP 2000) 152 (emphasis in original).

[85] Raz, *The Morality of Freedom* (n 1) 323. See also Raz, 'Facing Up: A Reply' (1989) 62 S Cal L Rev 1153, 1221 n 145: 'More of one thing may be better than a certain amount of another, even if less of the first is incommensurate with that amount of the other.'

value relation—or more than one further value relation—in addition to the standard three value relations, 'better than', 'worse than', and 'equal to'? Some theorists have claimed that, when the standard three value relations do not apply, there is a fourth value relation: the alternatives are 'roughly equal' or 'on a par'.[86] There is much plausibility in this claim. But, even if we concede that rough equality or parity is a fourth value relation, it would be wrong to believe that the possibility of rough equality precludes the possibility of incommensurability, or that incommensurability simply is rough equality.

Incommensurability can perhaps best be understood as a further value relation in the intermediate space between being better and worse, in addition to equality and rough equality—a fifth value relation, as it were. The idea is that the difference between rough equality and incommensurability may only be a matter of degree. The idea of rough equality suggests that the options are very nearly equal; it might also suggest that we are uncertain about which is equal, a point to which I will return in a moment. But incommensurability is different. When options are incommensurable, we do not think that they are very nearly equal, nor need we be uncertain about whether they are equal, and yet we do not think that one is better than the other. The range of reasonableness is therefore not as narrow as the range of roughly equal options. When options are significant and significantly different, we need not maintain that they are equal, roughly equal, or very nearly equal, and yet nor need we maintain that one is better than the

[86] On 'roughly equal', see Derek Parfit, *Reasons and Persons* (OUP 1986) 431; James Griffin, 'Incommensurability: What's the Problem?' in Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (n 23). On 'parity', see Chang, 'Introduction' (n 53) 25–27; Chang, 'The Possibility of Parity' (n 80).

other. If there is a further positive value relation to describe options within the intermediate stage, the range of reasonableness as I have been calling it, then I do not see why incommensurability and rough equality cannot both occupy this intermediate stage.[87] These further value relations may well have similar consequences—both may entail that it is reasonable to decide either way, since both are within the range of reasonableness—but there is nonetheless a danger in confusing them.

If we define choices between roughly equal options to include only those choices about which we are right to be indifferent,[88] then it is this association of rough equality with indifference that can make it inappropriate to describe incommensurable values as roughly equal. It is true that we may be indifferent between some incommensurables. There are many insignificant incommensurables, as Raz points out, such as a cup of tea and a cup of coffee. I consider a cup of tea to be neither better nor worse than a cup of coffee, and an improvement (or at least a slight improvement) to the cup of tea will not make it better than the coffee. The two cups are therefore incommensurable, but trivially so.[89] In these trivial choices, 'incommensurable options can be of roughly equal

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[87] I suspect that Raz was the source of some confusion on this point. See Raz, *The Morality of Freedom* (n 1) 322: 'Is there a fourth possibility [besides 'more important', 'less important', and 'equal in importance']? Of course, this way of describing the problem is very misleading. We are not looking for another judgment of the relative importance of two valuable options. Rather, we are looking for failure of comparability (I will use "incomparable" and "incommensurate" interchangeably).'

[88] See eg Raz, *The Morality of Freedom* (n 1) 331: 'Two options are roughly equal if and only if it does not matter which one is chosen, if it is right to be indifferent between them.' cf Griffin, 'Incommensurability: What's the Problem?' (n 86) 38–39.

[89] Raz, *The Morality of Freedom* (n 1) 328–29.

value'.[90] But not all choices among incommensurables are trivial. Raz gives one example of significant incommensurability: the choice between alternative careers, such as a career as a lawyer and a career as a musician. According to Raz, it is not the fact that one option is better supported by reason that makes the choice significant; rather, it is the importance of the reasons for the options and the degree to which they differ.[91] Now, this may not be entirely satisfactory. If the diversity of the reasons does not prevent one alternative being better than the other, why should it prevent the alternatives being equal or roughly equal? But I think it is nonetheless important to distinguish between rough equality and incommensurability. The importance of the options, and the fact that even a significant improvement in one of the options need not make that option better than the other, entails that incommensurables are not best described as roughly equal.[92]

Rough equality suggests the alternatives are indistinguishable in value, so that they are more or less equal,[93] or that the options are effectively equal for one evaluative purpose, though one may be better for another purpose.[94] Nonetheless, I think that there is no reason to deny that rough equality or parity is a separate

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[90] ibid 332.

[91] ibid 331–32.

[92] See also Endicott, *Vagueness in Law* (n 84) 153.

[93] Griffin, *Well-Being* (n 56) 97: 'Where we have rough equality, we treat the items, when it comes to choice, simply as equals.'

[94] Macklem, 'Choice and Value' (n 52) 19–20. Macklem denies that rough equality is a fourth value relation.

value relation beyond the three standard relations.[95] And, if we define rough equality or parity as Chang and others seem to define it, so that it is not right to be indifferent to choices among roughly equal options, then it may even cover the whole range of incommensurables, whether significant or insignificant. Whether the alternatives are equal, roughly equal, on a par, or incommensurable, in that intermediate stage between being better and being worse, the choice is underdetermined by reason, since there is no conclusive reason to decide either way. But I think that incommensurability is a better term to define this phenomenon in significant conflicts of value, so I shall continue to talk of value incommensurability.

Uncertainty and Vagueness

One final possible objection to this account of incommensurability that I want to discuss is the claim that what we think of as incommensurability is in fact uncertainty or vagueness. My claim that incommensurable options fall within a range, within which neither is better than the other, could be taken to actually mean that we do not know whether one is better than the other, either because we are ignorant, having not adequately reflected upon the matter, or because of some vagueness surrounding the options, or perhaps because the right answer is unknowable. This would be a mistake. If the issue really were one of uncertainty or vagueness, then it would seem to be fatal to the incommensurability theses, at

[95] Chang, 'The Possibility of Parity' (n 83). See also Ruth Chang, 'Parity, Interval Value, and Choice' (2005) 115 Ethics 331. cf Joshua Gert, 'Value and Parity' (2004) 114 Ethics 492, 493, arguing that 'any other positive value relations that we might wish to make use of can be defined in terms of the three traditional relations.'

least if it suggests that there may well be a right answer out there, somewhere, if only we could find it. Perhaps what we think of as incommensurability is really just a little bit of abstractness left over from our efforts to work out what is of concrete value. Perhaps it can be eliminated with further reflection, by digging deeper, as it were. Or perhaps it is a problem not in our efforts to concretise values, but in our efforts to understand the relationship between concrete values. Donald Regan, for example, argues that values will always be commensurable, if only we work harder to refine our perception.[96] He says that someone choosing between life as a clarinettist and life as a lawyer may spend much time deliberating, and yet still not be certain either that one is better than the other or that they are equally good. In such circumstances, however, there is no warrant for saying that the alternatives are incommensurable, because, as Regan points out, our uncertainty about the existence of a common standard does not give rise to the certainty that there is no common standard. [97]

In order to defend the possibility of value incommensurability, we need to defend the possibility that in some circumstances there are clearly no common standards, so that one alternative is clearly not better than the other and they are clearly not equally valuable. John Broome argues that this creates a fatal problem for defenders of the incommensurability thesis, because what people are talking about when they talk about incommensurability is actually vagueness.[98] Broome

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[96] Regan, 'Value, Comparability, and Choice' (n 50) 137–38.

[97] ibid 139.

[98] John Broome, 'Is Incommensurability Vagueness?' in Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (n 23) 67.

asks us to imagine that we have to compare the redness of a reddish-purple patch of colour and a reddish-orange patch of colour—which is redder? The answer, he says plausibly enough, may be indeterminate. Both of the patches can be placed on different spectrums—the red–blue spectrum and the red–yellow spectrum, respectively—and there will be some range in which it is not clear whether or not one is redder than the other. It is this range of vagueness that Broome believe characterises the range of incommensurability. Broome thought that this meant that the alternatives were not really incommensurable, and proponents of incommensurability have denied its association with vagueness for this reason.[99] But, once the two notions are properly understood, we need not deny an association between vagueness and incommensurability, though not necessarily the one that Broome intended.

Vagueness is often associated with borderline cases in which it is not clear whether or not a proposition is true. This kind of vagueness may be distinguished from a second kind of vagueness, according to which the vagueness of a proposition entails that the proposition is neither true nor false.[100] When A is incommensurate with B, however, it seems that neither kind of vagueness applies. The problem is not that the proposition 'A is better than B' is neither true nor false. Moreover, the problem is not that it is not clear whether the proposition 'A is better than B' is true or false. Rather, we know that the proposition 'A is better than B' is false in cases of incommensurability. The

[99] See eg Macklem, 'Choice and Value' (n 52) 22–26.

[100] For an argument that this second form of vagueness is a misleading way of putting the indeterminacy claim, see Endicott, *Vagueness in Law* (n 84) 63–70

following propositions are not vague or unclear; they are true—'A is not better than B', 'B is not better than A', and 'A and B are not equal'. However, there does seem to be some vagueness surrounding the reasons for action in cases of incommensurability. This is vagueness in the second sense: the proposition 'X should choose A over B' is neither true nor false. If that proposition were false, then the proposition 'X should not choose A over B' would be true—which it is not. Incommensurability arises when there is no conclusive reason to choose A over B and no conclusive reason to choose B over A. In cases involving incommensurables, there is a right answer to the question of which alternative is better than the other (the answer being that neither is better), but there is no right answer to the question of which alternative should be chosen. So incommensurability can arise even where there is no vagueness or uncertainty, but incommensurability is nonetheless the cause of indeterminacy—namely, the failure of reason to determine which option should be chosen.

It might be objected that this is a distinction without a difference. Regardless of whether we start with vagueness, the conclusion is the same: we end up with the indeterminacy of reason. But such an objection overlooks the distinctiveness of incommensurability. Consider one of Endicott's examples of vagueness in a borderline case: the point at which a spacecraft leaves the earth's atmosphere. Could it be that there comes a point, or a range of points, at which the spacecraft is clearly not in the earth's atmosphere and yet it is clearly not outside the earth's atmosphere? That seems implausible, for surely the spacecraft is either in the earth's atmosphere or not, or else it is unclear whether or not the spacecraft is in the earth's atmosphere.[101] That suggests that we may well be justified—or, at least, it is unclear whether or not we are justified—in saying that the spacecraft is in the atmosphere, even though (or, perhaps, precisely because) there is no clear right answer to the question of whether it is in or outside. Cases of value incommensurability are different. In such cases, there does seem to be a range within which A is clearly not better than B and B is clearly not better than A. If that is correct, then it follows that, given there is clearly no right answer to the question of which option should be chosen, it would be reasonable to choose either way, but, as I will now suggest, it would not be reasonable to say that the choice is, or may be, justified.

III. Practical Reasoning and Choice

Let us now explore further the idea of reasonable choice that is implied by a range of reasonableness. As Raz puts it, '[r]ational action is action for (what the agent takes to be) an undefeated reason. It is not necessarily action for a reason which defeats all others.'[102] But although choice between undefeated reasons is reasonable, it is also in an important sense arbitrary. It is arbitrary in the sense that it lacks reason. Although there are undefeated reasons to choose each option, there is no conclusive reason to choose one option over the other. In other words, the choice itself lacks reason or is not determined by reason. There are no

[101] ibid 69.

[102] Raz, *The Morality of Freedom* (n 1) 339.

grounds for judging one alternative to be better than another.[103] It is this sense of arbitrariness that John Gray emphasises when he writes that value incommensurability 'marks a limit to rational choice, and an occasion for radical choice—for the kind of choice that is not, and cannot be, reason-based, but consists in making a decision or a commitment that is groundless'.[104] The options are reason-based, but the choice of one option over the other is not reason-based. As Raz puts it, since 'there is no reason to shun one of the alternatives in favour of the other, we are in a sense free to choose which course to follow.'[105] If reason does not determine the choice, we are free to choose, arbitrarily, on the basis of our will or whim. Regardless of which alternative is chosen, however, the choice will be reasonable. Although the choice is not determined or mandated by reason, it is governed by reasons and is not contrary to reason. The choice is reasonable to the extent that it is taken for undefeated reasons and it is arbitrary to the extent that it is not taken for a conclusive reason. I will return to the idea of arbitrariness in Chapter 6, when considering the implications of value incommensurability for the rule of law.

Not all value pluralists share this account of the implications of value pluralism and incommensurability for practical reasoning. Indeed, two of the most well-known pluralists, Isaiah Berlin and Bernard Williams, rejected the idea that reason is indeterminate in choices among incommensurables, an idea

[103] Raz, *The Morality of Freedom* (n 1) 333–34.

[104] Gray, *Enlightenment's Wake* (n 4) 105.

[105] Raz, *The Morality of Freedom* (n 1) 334.

which they described as 'obviously false'.[106] They regard as rather 'wild' the idea that a choice among incommensurables is a matter of preferences, desires, or tastes.[107] Their assumption appears to be that although values may be incommensurable in general or in the abstract, it is nonetheless possible for reason to determine which alternative is more important in a particular context or in a concrete situation. Berlin claims that reason cannot provide abstract, 'all-embracing' solutions to conflicts over values and that it is only possible to act rationally in the concrete situation.[108] Rationality, for Berlin, is about the capacity to choose and not to have the rationality of one's actions determined a priori by abstract values, in advance of the concrete situation.[109] Whereas I argued earlier that a contextual approach is necessary to define values and their limits, Berlin argues that a contextual approach makes practical reasoning possible in the face of incommensurable values. This is in effect a denial of value incommensurability, as I understand it. In my view, the better understanding of value incommensurability treats it as setting limits on reason, not only in the abstract, but also, more importantly, in concrete cases.

Those who defend the incommensurability thesis have sometimes been taken to be arguing that there can be no rational choice among

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[106] Isaiah Berlin and Bernard Williams, 'Pluralism and Liberalism: A Reply' (1994) 42 *Political Studies* 306, 307.

[107] ibid 307.

[108] Berlin, 'The Pursuit of the Ideal' (n 7), 18. See also Michael Stocker, 'Abstract and Concrete Value: Plurality, Conflict, and Maximization' in Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (n 23).

[109] Isaiah Berlin, 'Introduction' in his *Four Essays on Liberty* (OUP 1969, reprint 1991) lii.

incommensurables.[110] But in many ways the opposite is true and, as Finnis says, 'incommensurability implies the *possibility* of rational *choice*'.[111] When the options are commensurable, there is only choice in the limited sense that one should choose the better option. When, on the other hand, the options are incommensurable, there is the free choice that comes with the indeterminacy, or underdeterminacy, of reason—a choice which, I have suggested, is both reasonable (taken for an undefeated reason) and arbitrary (not taken for a conclusive reason). In these circumstances, as Finnis notes, someone might choose one of the alternatives on the basis of the 'feeling' that that alternative is preferable, perhaps even rationally preferable; but this feeling, Finnis suggests, is characteristically the result of a failure to evaluate the options rigorously.[112] Properly evaluated, there was no *reason* to prefer one option to the other.

What does it mean to say that there is no reason to choose one option over the other? According to Raz, 'once reason has failed to adjudicate between a range of options, we normally choose one for no further reason, simply because we want to. … [I]n those circumstances, doing what one wants is the rational thing to do.'[113] This is obscure. From my earlier discussion about the relation between values and reasons, it will be recalled that Raz argues that 'our wants

[110] Luban, 'Incommensurable Values, Rational Choice, and Moral Absolutes' (n 73) 67–68.

[111] Finnis, 'Concluding Reflections' (n 81) 236 (emphasis in original). Surprisingly, Finnis is still being misinterpreted in this way. See eg Virgílio Afonso da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31 OJLS 1, 7: 'According to Finnis … incommensurability leads to the impossibility of rational choice'.

[112] Finnis, 'Concluding Reflections' (n 81) 245. On the role of reason and feelings in commensuration, see also Finnis, 'Commensuration and Public Reason' (n 23) 227.

[113] Raz, 'Incommensurability and Agency' (n 45) 125.

become relevant when reasons have run their course.'[114] For some critics of the Razian account, if two options are incommensurable, then the choice between them is unintelligible, because deliberation about what we want must turn on the comparative value of the two options.[115] 'Choice between two specific goods,' Donald Regan insists, 'must be based on reason to prefer one of the goods to the other. Where there is no adequate reason for preference, there can be no real choice.'[116] This claim is tied to the thought that commensurability is necessary for practical reasoning and rational choice, or rather that in the exercise of practical reasoning we will come to realise that seemingly incommensurable options are in fact commensurable.[117]

In arguing that we need to commensurate options for the choice between them to be reasonable or justified, Ruth Chang has suggested that the contrary view is not able to make sense of our choices. She argues that if it is reasonable to choose either of two incommensurable options, then 'practical reason or the "will" could, in principle, justify a series of choices analogous to cyclical preferences with disastrous "money pump" consequences.'[118] Chang gives the example of a choice between hot tea and hot coffee, with the assumption that

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[114] ibid 125.

[115] Regan, 'Value, Comparability, and Choice' (n 50) 138.

[116] ibid 144. See also Regan, 'Authority and Value: Reflections on Raz's *Morality of Freedom*' (1989) 62 S Cal L Rev 995, 1062–64.

[117] For a slightly different argument that treats commensurability as the result, rather than the precondition, of practical reasoning, see eg Millgram, 'Incommensurability and Practical Reasoning' in Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (n 23) 157: 'the considerations to which deliberation appeals *are* incommensurable at the outset of deliberation, but … the process of deliberation *renders* them commensurable.'

[118] Chang, 'Introduction' (n 53) 11.

they are incommensurable. Chang asks us to imagine that, having chosen coffee, one is then presented with a cup of warm tea. We then have a second choice, which is between the coffee and the warm tea: the warm tea is incommensurable with the coffee, although it is not as good as the hot tea that could have been chosen in the first place. On this assumption, in the second choice it would be reasonable to choose the warm tea. And so forth. 'Through a series of choices sanctioned by practical reason or the "will",' Chang writes, 'I have moved from something I consider better to something I consider worse.'[119] Chang considers this to be a challenge to those who believe that there can be reasonable, or justified, choice between incommensurable options. Commensurability, according to Chang, is necessary for the possibility of rational choice,[120]

Chang argues that practical reason cannot ask us to choose between incommensurable options, and so, when it appears that the options are incommensurable, the correct conclusion to draw is that we have misconceived the choice situation. We have already seen that Chang believes that practical reason must always provide a covering value with respect to which the relevant merits of the alternatives can be compared.[121] When there appears to be no covering value, either the appearances are deceptive or 'the choice situation has been misconceived; practical reason requires not *that* comparison but a different one—one that is not, as a formal matter, guaranteed to fail.'[122] Consider Chang's

[119] ibid 11.

[120] Ruth Chang, 'Comparison and the Justification of Choice' (1998) 146 U Pa L Rev 1569, 1572.

[121] Chang, 'Introduction' (n 53) 31.

[122] ibid 31 (emphasis in original).

example of two possible birthday presents for a friend: a copy of *Pride and Prejudice* and an elegant chiffon scarf. If the choice were to turn on which is intrinsically better, then we would find, according to Chang, that it makes no sense to compare the literary merits of the book with the sartorial merits of the scarf. The conclusion, Chang says, must be, not that the two alternatives are incommensurable or incomparable, but that the choice situation has been misconceived.[123] The covering value must not be its intrinsic merit but, say, the friend's tastes, or some other value with respect to which comparison is formally possible. The covering value may even be 'nameless'.[124] This is not necessarily what Raz called an '*a priori* methodological commitment to commensurability', [125] but Chang does think that the commitment to commensurability is forced on us because, in order to engage in practical reason, the options must be commensurable—or, as Chang prefers, comparable. We must look for a covering value that would render comparison possible.[126] Yet even for those who reject this approach, Chang raises an important question: 'How can practical reason, as part of rationality in general, require an exercise of deliberation that cannot, on formal grounds, succeed?'[127]

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[123] ibid 33.

[124] ibid 32.

[125] Raz, *The Morality of Freedom* (n 1) 339.

[126] Chang does not quite say that we must look for a covering value that would render the alternatives comparable. She treats the requirement of a covering value as a formal requirement for either comparability or incomparability. However, once she has made her claims about nominal–notable comparisons and parity, she can see no grounds for the conclusion that two alternatives may be incomparable with respect to a covering value.

[127] Chang, 'Introduction' (n 53) 33.

The simple—you may say, simple-minded—answer is that it just does. That is, practical reason can often require us to choose not the better of two options, but merely one of a range of reasonable options. As we saw, although there must be an evaluative purpose with reference to which the choice is made, there does not need to be an evaluative purpose capable of rendering the alternatives commensurable. Reasons support each of the alternatives, but it does not justify the choice either way. In his critique of Chang's arguments, Macklem is right to insist that the choice situation cannot be reconceived in a way that avoids incommensurability if to do so is to invoke considerations that were not relevant to that situation and the purpose of the choice. Where we consider the options to be incommensurable, as Macklem says, 'there is no reason to choose the choice value that avoids incommensurability. Absent a belief in commensurability, to do so is just another way of being arbitrary.'[128] It is arbitrary, that is, because in the initial choice situation there was no reason to choose one option over another, and to change the choice situation is in effect to choose one of the initially undefeated options.

It is true, however, that in many cases involving allegedly incommensurable options, it does not seem to be appropriate to make the choice on arbitrary, nonrational grounds of taste or whim. Elizabeth Anderson has suggested that although in these cases of incommensurability there can be no evaluation of the relative value of the options, it is nonetheless possible for there to be a conclusive reason to choose one over the other—a reason that is provided not by the relative values of the options, but by what we owe, by our

[128] Macklem, 'Choice and Value' (n 52) 9.

obligations.[129] In this way, she claims, commensurability is not necessary for the existence of rational choice in the sense of fully justified choice. Such choices, she says, 'do not generally require that we rank their values on a common scale and choose the more valuable good; they require that we give each good its due.'[130] As I have already explained, I think that this is a misleading distinction. If there is a conclusive reason to choose one alternative over another, then the alternatives are not incommensurable. Although it may feel inappropriate to choose arbitrarily between significant incommensurable options, this feeling should not lead us to believe that there must be a conclusive reason determining the choice. Rather, it highlights the significance of incommensurability, which is often said to give rise to tragic choices. Moral decisions may well be tragic even when the options are commensurable. But the tragic nature of a choice is heightened by the fact that the choice was made for no conclusive reason and was in that sense arbitrary.

There is still the question of whether, and if so how, one's character, culture, and prior commitments can overcome the problem of incommensurable values. Since we are concerned with the evaluation of options in concrete situations, rather than in the abstract, it would seem that considerations of character, culture, and commitment form part of that concrete situation. Can these considerations make otherwise incommensurable options commensurable, at least for the person to whom the choice is relevant, even if it would not better

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[129] Elizabeth Anderson, 'Practical Reason and Incommensurable Goods' in Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (n 23) 102–3.

[130] ibid 104.

for others who do not share that character, culture, or commitment?[131] The issue is a complicated one, and requires some unpicking. It is surely true that these considerations have some role to play. For one thing, one's character or culture may entail that one option could not be fulfilled, or could be fulfilled only with great difficulty, in which case these considerations may provide a reason not to choose that option. For another, it would be odd to discount the fact that one option may be more congruent with one's character, culture, and prior commitments. At least in some circumstances, it seems plausible that these considerations may provide a reason to choose one option over another when the options would *otherwise* have been incommensurable. But it is surely equally true that one's character, culture, and prior commitments cannot in general provide reasons for action. And even when the options are incommensurable, these considerations may not provide a conclusive reason. To assume otherwise, as Macklem says, is to 'escape from value pluralism … into subjectivism and relativism.'[132] The value in acting consistently with one's character and culture may be incommensurate with the value in trying something new. The former may be insufficient to take one of the options outside the range of reasonableness. Either way we are stuck with the problem of incommensurability.

The features that make up one's character, culture, and—especially—commitments are often, though not always, based on one's choices in the past,

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[131] See eg Charles Taylor, 'Leading a Life' in Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (n 23) 178–83.

[132] Macklem, 'Choice and Value' (n 52) 27.

including one's choices among incommensurables.[133] As Finnis puts it, the incommensurability thesis does not deny that commensurability can be possible after we have made enough assumptions, choices or commitments.[134] These considerations commensurate the options for reasons such as the one that I mentioned when criticising Chang's merit-pump argument: the reasons for pursuing the valuable options in the first place count against constantly changing one's choice to the extent that it prevents either option from being pursued. Our choices can therefore help shape our self-interest or well-being, which in turn can give us conclusive reasons in future choices, even though the alternatives would have been incommensurable for others.

But if that is true of the choices in one's personal life, what is its implications for the important difference between decisions affecting one's own life and decisions affecting the lives of others, especially where those others have different commitments and interests? In part due to people's different interests, the incommensurability of the values underpinning those interests takes on increased significance in decisions affecting the lives of others. These decisions, it is commonly thought, ought to be made on the basis of reasons that can be acceptable to people with diverse interests. For Kantian liberal theories, this accounts for the need to distinguish between the right and the good, and to find a

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[133] In one incautious remark, Macklem says that 'character and culture, far from being premises for choice among options, are subjects of choice themselves': ibid 27. As he goes on to explain, this is true only to some extent. See also Raz, *The Morality of Freedom* (n 1) 345: 'The conditions of our well-being … are determined by our choices, and therefore they can guide our choices only to a limited extent.'

[134] Finnis, 'Concluding Reflections' (n 81) 238–41.

common basis for the former despite pluralism over the latter.[135] However, it does not seem to be possible to insulate liberal values from conflicts over incommensurable goods in the way that these liberal theories suggest.[136] The extent to which there can be other considerations, in the face of incommensurable options, that can provide a rational basis for decisions affecting others is a question that will be explored in subsequent chapters, in the context of judicial decision-making.

IV. CONCLUSION

This chapter has sought to defend the proposition that there can be incommensurable values. My understanding of incommensurability is influenced by the work of Joseph Raz, although I have made some additions to his argument. I have sought to defend that account against several challenges, including the wholesale rejection of value conflict from theorists such as Dworkin, the wholesale rejection of incommensurability from theorists such as Donald Regan, and the more retail rejection of discrete parts of the incommensurability thesis, such as the claim that incommensurable values can be ordinally ranked even if they cannot be cardinally ranked. I have also sought to defend the plausibility of incommensurability against various arguments that exaggerate its extent. In particular, I have argued that irreducibly plural values

[135] See John Rawls, *Political Liberalism* (Columbia University Press 1993).

[136] See Gray, *Enlightenment's Wake* (n 4). cf George Crowder, *Liberalism and Value Pluralism* (Continuum 2002).

are not necessarily incommensurable. If incommensurability is understood, as I have understood it, as a range of reasonableness, it follows that options that each instantiate different values may fall within the range of reasonableness in some contexts but not in others.

3

The Scales of Authority

I. INTRODUCTION

The idea of incommensurability among values has important implications for the authority of law. When they are relatively determinate, the law's authoritative sources—statutes, precedents, customs—play an important role in resolving conflict among incommensurable options, commensurating the incommensurable, as it were, picking out one of the options to become the uniquely correct answer for citizens and officials applying the law. If the nature of incommensurability and authority is properly understood, however, there are limits to the extent to which the law's relatively determinate and authoritative sources can provide common scales that will commensurate options that would otherwise have been incommensurable. This is not merely because there are limits on the spheres into which governmental authority can legitimately interfere. It is more generally because some incommensurable options may remain undefeated following the authority's choice of one of the options, even though there are good reasons for following the authority's reasonable choice. This chapter explains and defends that proposition.

Legal and political philosophers who have developed value-pluralist theories often call for a curtailment of the role of the courts, criticising the liberal-legalist project of Ronald Dworkin and others, and arguing that conflict over incommensurable values ought to be resolved by politicians in legislatures rather than in courts. The political philosopher John Gray, for example, argues that there is a 'natural presumption' in favour of resolving conflict among incommensurable values by political reasoning and legislation rather than by legal reasoning and judicial review.[1] Gray's concern is that that the liberal legalism of Dworkin and others is part of what he calls a 'liberal project, or illusion, of *abolishing politics*, or of so constraining it by legal and constitutional formulae that it no longer matters what are the outcomes of political deliberation.'[2] This has been expressed as a concern about 'the enclosure of politics within the straitjacket of law', a concern that liberal legalism leads to the mistaken view that the law, over which the courts are considered to be the guardians, is a monistic framework of rational principles, untouched by (and constraining) the political task of choosing between incommensurable goods.[3]

[1] John Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (new edn, Routledge 2007) 111. Gray adds a note of caution that 'nothing follows inexorably, as a matter of strict implication or logical necessity, for the design of liberal institutions, from the truth of value pluralism' (ibid).

[2] ibid 114–15. See also Chantal Mouffe, *The Return of the Political* (Verso 1993) 1.

[3] Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing 2000) 5, 123–24, 234–35. See also John Mackie, 'The Third Theory of Law' (1977) 7 Phil & Pub Aff 3, 9; John Finnis, 'On Reason and Authority in *Law's Empire*' (1987) 6 Law & Phil 357, 372–75.

This objection to the liberal-legalist project, however, may be overstated. Although that project might underestimate value pluralism by treating as immutable standards of right reason what are in fact choices among incommensurables, we should acknowledge that value pluralism entails merely that goods will be incommensurable in some circumstances. Value pluralism is entirely compatible with the commensurability of goods in other circumstances, and it says nothing, by itself, about whether or not judicial review of legislation is justified.

When the legislature has resolved a conflict between incommensurable goods, it may seem self-evident that the legislature's choice—which will, by its very nature, be reasonable—should be conclusive. Since the legislature's resolution is reasonable, the court's role, you may say, should be restricted to applying that resolution, and it should be for the legislature to negotiate, manage, and, temporarily at least, resolve the conflict. If no such resolution is available, the court should make its own choice, which will then become an authoritative source of law to be applied in future cases. In this way, the creation of the law's sources, whether legislative or judge-make, is said to amount to *determinatio*, making determinate what was previously indeterminate. On this view, they are what Thomas Aquinas called a common 'rule or measure'.[4] 'As far as it can,' John Finnis explains, 'the law is to provide sources of reasoning—statutes and

[4] See John Finnis, 'Commensuration and Public Reason' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard UP 1997). See also Joseph Raz, 'The Politics of the Rule of Law' in his *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev. edn, Clarendon Press 1994) 378, arguing that the rule of law requires a culture of legality, in which people accept that 'when disagreements arise, and have to be settled by public authorities, the law provides the common measure of right and wrong in the country.'

statute-based rules, common law rules, and customs—capable of ranking (commensurating) alternative dispute-resolutions as right or wrong, and thus better and worse.'[5] By 'law's distinctive devices' of specifying rules through relatively determinate sources, the law is said to fulfil an important moral task of providing the techniques, or *technē*, of legal reasoning capable of turning hard moral dilemmas into 'easy questions', 'an algorithm for deciding as many questions as possible—in principle every question—yes (or no), this course of action would (or would not) be lawful'.[6] The courts' role, on Finnis's analysis, is to ensure that their decisions are consistent with 'the relatively determinate sources which can be the subject of legal *learning*: legislation, custom, and judicial precedent'.[7] Grégoire Webber sums up this argument well when he writes that:

> By the legislative act of choosing between incompletely commensurable alternatives, the law is partly self-constitutive. Once made, the choice between alternative options establishes an answer for the chooser and those on behalf of whom the choice is made. When confronted with a similar 'choice' again, it becomes obvious which alternative should be favoured because an answer was previously established. One may then appeal to that answer—

[5] John Finnis, 'Natural Law and Legal Reasoning' in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (OUP 1994) 142.

[6] ibid 142.

[7] John Finnis, 'Human Rights and Their Enforcement' in John Finnis, *Human Rights and the Common Good: Collected Essays Volume III* (OUP 2011) 42, reprinted from John Finnis, 'A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence' (1985) 71 Proc Brit Acad 303.

> the choice already made—and conclude that one is no longer confronted with a choice: a technically-determined answer is at hand.[8]

This kind of argument is not unique to those theorists who argue that there is a prima facie moral obligation to obey the law. Among those who deny that there is such a general moral obligation, Joseph Raz argues that judges should follow existing legal rules when the underlying considerations would otherwise have been incommensurable. Raz argues that value incommensurability presents 'a problem specific to law and to other public actions'.[9] Facing a choice between incommensurable options, the judge will have to make a decision that, according to Raz, is explainable only in terms of non-rational dispositions or tastes, and hence is contrary to a principle of public morality that requires public accountability for public actions. 'When morality runs out,' Raz says, 'the requirements of proper institutional conduct bar reliance on their personal tastes and preferences. To avoid that, they have to rely on artificial reasons.'[10] Thus Raz argues that it is desirable to have what he calls 'distancing devices', found in the formalism of legal doctrine, which are available to distance judges from their non-rational dispositions once moral resources have been exhausted.[11] This

[8] Grégoire Webber, 'Rights and the Rule of Law in the Balance' (2013) 129 LQR 399, 415.

[9] Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Joseph Raz, *Between Authority and Interpretation* (OUP 2009) 368–69.

[10] Joseph Raz, 'On the Autonomy of Legal Reasoning' in Raz, *Ethics in the Public Domain* (n 4) 339.

[11] Raz, 'On the Authority and Interpretation of Constitutions' (n 9) 369–70. The idea of legal doctrine as a distancing device is also explored in Raz, 'On the Autonomy of Legal Reasoning'

argument is not that judges should never depart from the authoritative legal sources, but that it is inappropriate for them to depart from the sources when the underlying options are incommensurable, and that it is desirable to ensure that such sources will be available.

This common line of reasoning, seemingly axiomatic for many who write about value pluralism, may reflect a strong intuition, but this chapter seeks to show that it is at best a rebuttable presumption. I do not deny that, when the options are incommensurable and hence there is an undefeated reason to decide either way, the authority's choice of one option over the other will be reasonable (albeit arbitrary at the same time).[12] But it does not necessarily follow that the courts should follow the authority's choice. Even when the options underlying the authority's choice are incommensurable and even if there is a reason to treat the authority's directive as binding, the reasons for following authority may be outweighed by—or incommensurate with—a rival value. This chapter begins by outlining, in brief, the nature of authority and the affect that it can have on practical reasoning. It then explores some of the main justifications for authority—epistemic, democratic, and coordinative—and considers the ways in which each may either succeed or fail to commensurate the incommensurable.

(n 10). See also Peter Cane, 'Theory and Values in Public Law' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (OUP 2003) 18.

[12] See Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 339: 'Rational action is action for (what the agent takes to be) an undefeated reason. It is not necessarily action for a reason which defeats all others.'

II. THE NATURE OF AUTHORITY

My argument largely proceeds on the assumption that Joseph Raz's theory of the nature of authority is correct, save in one or two respects that have significant implications for the incommensurability thesis. Raz's theory of authority, labelled the 'service conception of authority', is one of the most insightful and developed theories of authority that we have. It primarily consists of three main theses. The first is the 'dependence thesis', which claims that authorities should base their directives on the reasons that apply to their subjects and that bear on the circumstances covered by the directives. He calls these reasons 'dependent reasons'.[13] The second is the 'normal justification thesis', which claims that:

> The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly.[14]

This specifies a condition of legitimate authority. It is a consequence of Raz's theory that the answer to the question of whether the authority is legitimate will

[13] Joseph Raz, 'Authority, Law and Morality' in his *Ethics in the Public Domain* (n 4) 214.

[14] ibid 214.

vary from individual to individual because, and to the extent that, the other valid reasons applying to each individual, or the stringency of the authority-justifying reasons, often vary.[15] The third thesis, labelled the 'pre-emptive thesis', is a claim about the effect that legitimate authority has on our practical reasoning. According to this pre-emption thesis, 'the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other reasons when assessing what to do, but should exclude and take the place of some of them.'[16] When a legitimate authority issues a directive, it affects our practical reasoning by providing a 'first-order' reason to act as the authority directed and a 'second-order' reason not to act on some of the reasons that conflict with the directive.[17] This is Raz's response, influenced by the tradition of indirect utilitarianism,[18] to the anarchic objection to authority, according to which being subject to authority is incompatible with reason or autonomy.[19] Raz's account has faced many challenges and it would not be

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[15] This is an implication of Raz's normal justification thesis. See Raz, *The Morality of Freedom* (n 12) 80: 'the normal justification thesis … yields the conclusion that the extent of governmental authority varies from individual to individual, and is more limited than the authority governments claim for themselves in the case of most people.'

[16] ibid 46. See also Raz, 'Authority, Law and Morality' (n 13) 214.

[17] Joseph Raz, *Practical Reason and Norms* (first published 1975, 2nd edn, OUP 1999) 35–48. See also HLA Hart, 'Commands and Authoritative Legal Reasons' in his *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press 1982) 253–55, referring to authoritative reasons as content-independent peremptory reason for action.

[18] The indirect-utilitarian theory of David Hume, Jeremy Bentham, John Stuart Mill, Henry Sidgwick, and others, holds that the principle of utility may actually require rules that impose constraints on the principle of utility, to ensure that the rules are not constantly threatened by the utilitarian calculus. See John Rawls, 'Two Concepts of Rules' (1955) 64 The Philosophical Review 3. It is important to note that Raz's thesis does not share indirect-utilitarian theory's emphasis on utilitarian considerations as providing the ultimate justification. cf David Lyons, *Forms and Limits of Utilitarianism* (OUP 1965).

[19] See Robert Paul Wolff, *In Defense of Anarchism* (University of California Press 1970) 14.

possible in this thesis to do justice to the long-standing debate between Raz and his critics, in the course of which the respective arguments on each side have become increasingly refined.[20] I will instead suggest some modest departures from Raz's theory, which have significant relevance for the difference that authority can make to conflicts between incommensurable options.

My concern arises from an implication that Raz draws from the pre-emption thesis and its connection to the normal justification thesis. I will assume that the pre-emption thesis is correct to in so far as it claims that the directives of a legitimate authority provide a reason to act as directed and a reason not to act on some of the conflicting reasons. Before I pinpoint the precise location of my worry about (and departure from) Raz's account, it will be useful to set out some more of Raz's nomenclature. Following HLA Hart, Raz describes authoritative directives as an example of 'content-independent reasons'—that is, reasons to follow the directive irrespective of its content.[21] Our requirements flowing from legitimate authority are also what Raz calls 'protected reasons'. A protected reason is a reason to ϕ combined with a reason not to act on some of the reasons that conflict with ϕing. It is protected in the sense that it is a reason to act as directed, but also a reason not to act on some of the reasons that conflict with

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[20] For some important early criticisms of Raz's account of authority, see Michael S Moore, 'Authority, Law, and Razian Reasons' (1989) 62 S Cal L Rev 827; Stephen R Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 S Cal L Rev 913; Donald H Regan, 'Authority and Value: Reflections on Raz's *Morality of Freedom*' (1989) 62 S Cal L Rev 995.

[21] On the idea of content-independent reasons, see HLA Hart, 'Legal and Moral Obligations' in AI Melden (ed), *Essays in Moral Philosophy* (University of Washington Press 1958) 82–107; Hart, 'Commands and Authoritative Legal Reasons' (n 16) 261–66; Raz, *The Morality of Freedom* (n 11) 35–37; Leslie Green, *The Authority of the State* (OUP 1988) 36–62, 225–26. cf Noam Gur, 'Are Legal Rules Content-Independent Reasons?' (2011) 5 Problema 175, 180–82.

acting as directed. Raz describes this latter reason as an 'exclusionary reason', and the conflicting reasons are the 'excluded' reasons.[22]

My concern is with one of the implications that Raz draws from the idea of an exclusionary reason. On Raz's account, the protected reasons can defeat other reasons in two ways: it has the ordinary weight of an ordinary reason for action and it has the special force of an exclusionary reason that excludes certain conflicting reasons. The ordinary weight of the protected reason may or may not outweigh non-excluded reasons. That is an open question. But its exclusionary force necessarily defeats the excluded reasons. The excluded reasons are defeated by being excluded, rather than by being outweighed. One of the problems with this account is that the distinction between 'outweighing' and 'excluding' can be confusing, although Raz has been explicit about the difference, notably in *Practical Reason and Norms*. The description of some reasons as exclusionary captures the idea that the reason not to act on some of the reasons that conflict with ϕing always defeats those conflicting reasons. As Raz puts it, in conflicts between a first-order reason for action and a second-order reason for not acting on that first-order reason, the second-order reason 'always prevails'.[23] Regardless of whether we use the metaphor of weight or of exclusion, the important point is that, on Raz's account, the component of the

[22] Note that both reasons may figure in our deliberation about what to do. Raz's point is that a protected reason is in part a pre-emptive reason not to act for some other reasons, rather than a peremptory reason not to deliberate about other reasons. As a separate issue, it is possible that in some contexts there may be exclusionary reasons that provide reasons not to act on the reasons to deliberate. But exclusionary reasons are not necessarily reasons against deliberating. See Raz, *The Morality of Freedom* (n 12) 39. cf Hart, 'Commands and Authoritative Legal Reasons' (n 17) 253; Joseph Raz, 'Reasons, Requirements, and Practical Conflicts' in Stephan Körner (ed), *Practical Reasoning* (Basil Blackwell 1974).

[23] Raz, *Practical Reason and Norms* (n 17) 46.

protected reason that Raz calls an exclusionary reason—that is, the reason not to act on some of the conflicting reasons—necessarily defeats those conflicting reasons. It is this claim that I want to question. My argument will be that the protected may defeat the conflicting reasons when we conform better to reason, all things considered, by treating the directive as binding, but not when we conform better to dependent reasons in some ways but not in others, and there is no best option overall.

Raz argues that the directives of a legitimate authority pre-empt the underlying dependent reasons that the authority was supposed to consider in issuing its directive.[24] This argument is supported by the dependence thesis. Since the authoritative directives should be based on the balance of dependent reasons, they cannot be added to the dependent reasons but must replace them. In considering what to do, to count both the directive and the dependent reason is 'to be guilty of double counting.'[25] As Raz makes clear, that is not to say that the dependent reasons are irrelevant or that excluding them entails blind obedience to authority. The dependent reasons are relevant when determining whether the authority is justified. According to Raz:

> At the level of general justification the pre-empted reasons have an important role to play. But once that level has been passed and

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[24] Raz also suggests that authority pre-empts not only the background reasons on which the authoritative directive was based, but also reasons such as the desirability of deciding for oneself: see Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minn L Rev 1003, 1019 n 19. I doubt whether this is consistent with his other argument (ibid 1015–16), considered below, that these reasons may be incommensurate with authoritative reasons.

[25] Raz, *The Morality of Freedom* (n 12) 58.

> we are concerned with particular action, dependent reasons are replaced by authoritative directives. To count both as independent reasons is to be guilty of double counting.[26]

The claim here is that we have to assess the balance of dependent reasons to determine whether the normal justification thesis is satisfied, but that, once the normal justification thesis is satisfied, the pre-emptive thesis takes effect and the balance of dependent reasons should not be considered in determining whether to follow authority. We may be uncertain about whether the authoritative directive tracks the balance of dependent reasons,[27] in which case we are uncertain about whether the authority is legitimate. Although in early writings Raz suggested that the directive pre-empts all dependent reasons, including those that count in its favour, he later clarified the thesis. In what has been interpreted as a revision in response to his critics, Raz explained: 'the preemption excludes only reasons that conflict with the authority's directive.'[28] We may act for the protected reason or

[26] Raz, 'Authority, Law, and Morality' (n 13) 215.

[27] See Scott J Shapiro, 'Authority' in Jules L Coleman and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 414: 'The dependent reasons are not here being counted twice—rather they are being used to ensure that they are at least counted once.'

[28] Raz, 'The Problem of Authority' (n 24) 1022. cf Stephen Perry, 'Political Authority and Political Obligation' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 2* (OUP 2013) 45 n 81, arguing that, in view of Raz's revision, 'it is no longer clear exactly what, on Raz's general account of practical authority, a preemptive or exclusionary reason is supposed to exclude.'

for the dependent reason or both,[29] but it would be irrational, on Raz's account, to act for the conflicting dependent reasons, since they are defeated.

One of the crucial points to understand about Raz's account is that the excluded reasons are defeated because of our determination that the normal justification thesis is satisfied, which is a necessary (though not a sufficient) condition of legitimate authority. In that determination, the balance of all the dependent reasons is relevant. Another crucial aspect of Raz's account is that the dependent reasons—those reasons that apply to the subjects directly, in the absence of the authoritative directive—include both content-independent and content-dependent reasons.[30] That is to say, an authority that satisfies the normal justification thesis can better secure conformity to the dependent reasons both through its content and also irrespective of its content. When assessing whether the normal justification thesis is satisfied, we have to consider, first, whether the *content* of the directive is more likely to track right reason than our own judgment, but also, secondly, whether the directive, irrespective of its content, satisfies some content-independent reason that applies to us directly.[31]

Suppose, for instance, that there is a conflict between individual liberty and national security, and a legitimate authority issues a directive that favours

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[29] But note that Raz insists that 'the ideal case' of legitimate authority is one in which we should conform with its directives because we are required to by the authority and not because of the other reasons that support the action: Raz, 'The Problem of Authority' (n 24) 1023.

[30] This is perhaps a point of contention in the interpretation of Raz's theory of authority. cf Shapiro, 'Authority' (n 27) 406: 'I will assume that when Raz speaks of "dependent" reasons, he is referring to what I have called "content-dependent" reasons.'

[31] cf Scott Hershovitz, 'Legitimacy, Democracy, and Razian Authority' (2003) 9 Legal Theory 201, 219, arguing that accommodating procedural considerations such as the value of democracy within the normal justification thesis makes that thesis empty.

security over liberty. Liberty and security provide us with content-dependent reasons, because they go to the content of the directive. But there will be reasons for having an authoritative decision that are not concerned with whether or not security should be favoured over liberty, and hence are not concerned with the content of the directive. These content-independent reasons may be attributable, for example, to the expertise of the authority, or to the value of having democratically legitimate decisions, or to the value of coordinating common action. These are content-independent *dependent* reasons because they are relevant to the justification of authority, and they are to be distinguished from the reason that a justified authoritative directive provides. When legitimate, an authoritative directive pre-empts the dependent reasons and provides a content-independent *protected* reason. When we are considering whether the normal justification thesis is satisfied, we are considering the balance of *dependent* reasons, including content-dependent reasons and content-independent reasons, the reasons which apply to us directly. Once the normal justification thesis is satisfied, and the authority is therefore legitimate, the addition of the directive provides a content-independent *protected* reason. It is a reason to act as directed for the reason that someone in a legitimate authority said so and its content could have been otherwise.

If authority is to perform its service of enabling us to better conform to reason, it must be possible to identify its content without resort to the dependent reasons that are content-dependent.[32] But in order to know whether the content-

[32] Richard Friedman, 'On the Concept of Authority in Political Philosophy' in Richard E Flathman (ed), *Concepts in Social and Political Philosophy* (Macmillan 1973) 132; Raz, 'Authority, Law, and Morality' (n 13) 219.

independent protected reason actually defeats the conflicting dependent reasons (and hence whether we should act as the directive requires), we need to consider the balance of all the dependent reasons, including the content-dependent reasons, in determining whether the normal justification thesis is satisfied. So, to continue with the example from the last paragraph, in order to know whether the authority is legitimate and hence whether to follow its directive, which favours security over liberty, it is necessary to show that the normal justification thesis is satisfied—and hence whether we would better conform with dependent reasons if we act as directed—by taking into account the dependent reasons that derive from the value of liberty and security, as well as the dependent reasons that are content-independent in the sense that they are concerned with, say, the expertise or the democratic or coordinative credentials of the authority.

One suggestion from Raz's argument that protected reasons are exclusionary is that either we conform better to the balance of the dependent reasons if we comply with the directive—in which case the authority is legitimate and we should not act on the dependent reasons that conflict with the directive from consideration—or we conform better to the balance of reasons if we act on our own judgment of the balance of dependent reasons directly, in which case the authority lacks legitimacy. There is a danger that this gives the impression that the reasons must be conclusive either way, such that we either conform better to dependent reasons by following the directive or by not doing so. Yet as others have pointed out this does not exhaust the possibilities.[33] It may

[33] Another possibility, in addition to the one I will go on to outline in the text, is that authoritative directives can act as what Stephen Perry calls 'reweighting' reasons, but it is not necessary to

be indeterminate whether the authority is justified, and this indeterminacy may arise from incommensurability among the dependent reasons. We may conform better to the dependent reasons in some respects but not others if we accept the directive as binding. In so far as we conform better to the dependent reasons (say, reasons that derive from the value of democracy and the value of security) if we accept the directive as binding, the directive provides a protected reason to follow the directive and not to act for some conflicting reasons. In so far as we conform better to the dependent reasons (say, reasons that derive from the value of liberty) if we act on those reasons directly, we may have a reason not to follow the directive. The possibility that Raz does not make clear, as far as I can see, is the possibility that these reasons may be incommensurable. If we conform better to dependent reasons in some respects by following authority, and we conform better to dependent reasons in other respects by not following authority, it is possible that neither may be better overall, and yet they are not equal or roughly equal. Thus there may be an undefeated reason to follow authority and an undefeated reason not to follow authority. Raz's theory of authority may well be correct to rule out the idea that the directives of a legitimate authority can be outweighed by the conflicting dependent reasons. But does Raz also rule out the possibility that the conflicting dependent reasons may be incommensurable?

It is true that Raz explicitly acknowledges the possibility that the reasons for and against following authority may be incommensurate. But the way in which Raz says that incommensurability can arise in this context is not—or at

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accept Perry's argument in order to accept my argument. See Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (n 20) 913.

least not explicitly—based on the notion that the dependent reasons may be incommensurate, including both the content-independent and content-dependent reasons. Raz believes that incommensurability can arise in this context because the normal justification thesis is a necessary but not a sufficient condition for a complete justification of authority.[34] There is another necessary condition, which he calls the independence or autonomy condition: 'the matters regarding which the [normal justification condition] is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority'.[35] To illustrate when the independence condition might not be satisfied, Raz uses the example of parents allowing their children to decide for themselves on an increasing range of matters, in order to cultivate their ability to be self-reliant, even though following their parents' decisions would ensure they better conform to reason. It is in this context that Raz argues that sometimes

> the two concerns, one satisfied by conformity with reasons, the other by acting on one's own judgment, may be radically different, and the cases for conformity or independence may be incommensurate, with the (uncomfortable) result that whether one is then subject to authority is undetermined.[36]

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[34] Raz, *The Morality of Freedom* (n 12) 56–57: 'a complete justification of authority has to … establish that there are no reasons against its acceptance which defeat the reasons for authority.'

[35] Raz, 'The Problem of Authority' (n 24) 1014.

[36] ibid 1016.

It is slightly misleading to talk of a conflict between 'conforming with reason' and 'deciding for oneself', because—and this is what Raz actually means—there are *reasons* to decide for oneself (in the parenting example, the reason is to cultivate the child's ability to be self-reliant). The correct way to frame the distinction, as Raz elsewhere makes clear, is therefore to talk of a conflict between, on the one hand, the reasons for following authority and, on the other, the reasons against following authority.[37] In Raz's discussion, however, such conflicts are limited, in essence, to two kinds of cases: one kind of case is those involving conflicting authoritative directives (as when both parents make conflicting demands of a child); and the other kind is those where an authoritative directive conflicts with either the instrumental desirability of deciding for oneself (as when, to continue the example, a parent is cultivating the child's self-reliance) or with the intrinsic desirability of deciding for oneself (as when one is choosing one's friends).[38] What is missing is the possibility that there may be incommensurability within the normal justification thesis, when the dependent reasons, including content-dependent dependent reasons, themselves give rise to undefeated reasons to follow and not to follow authority.

Before exploring that missing aspect, let's consider cases of conflicting authoritative directives, involving conflicting protected reasons. In their essay on the nature of reasons and practical reasoning, John Gardner and Timothy Macklem argue that the ordinary effect of incommensurability is reversed when we are faced with two or more incommensurable protected reasons: 'Rather than

[37] Raz, *The Morality of Freedom* (n 12) 56–57.

[38] ibid 57; Raz, 'The Problem of Authority' (n 24) 1015–16.

offering us more than one justified way forward, incommensurability here denies us any justified way forward'.[39] This claim calls into question my claim that incommensurability is best understood as a range of reasonableness. Their argument here is that the exclusionary reason that accompanies each protected reason defeats the other protected reason: as they put it, '[e]ach excludes the other from consideration.'[40] The question is therefore whether one exclusionary reason defeats the other exclusionary reason, a question which is determined by their weight. But, they ask, what if the exclusionary reasons are themselves incommensurable? They explain:

> In that case neither [exclusionary reason] defeats the other. Thus neither prevents the other from exerting its exclusionary force. Thus both of the reasons for action are defeated by being excluded. Thus there is no way to act for an undefeated reason. This is the core case of what is colloquially known as a moral dilemma.[41]

The claim here is that incommensurable exclusionary reasons present us with undefeated reasons not to act for some reasons, but that our reasons for action are defeated. In my view, however, that claim is not quite correct.

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[39] John Gardner and Timothy Macklem, 'Reasons' in Jules L Coleman and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 473.

[40] ibid 473.

[41] ibid 473.

When we have conflicting directives of a legitimate authority, we have conflicting protected reasons—that is, conflicting sets of content-independent reasons for action and reasons not to act for some conflicting reasons. If these protected reasons are incommensurable, does it not follow that both the reasons for action and the reasons not to act on those reasons are incommensurable? In that case, it may be appropriate to decide on the basis of the balance of the dependent reasons, [42] although those reasons may themselves be incommensurable. In any case, with incommensurable protected reasons, although whatever we do will be wrong, in view of the exclusionary components of the protected reasons, it would also be reasonable to decide either way, in view of the fact that protected reasons are also reasons for action. Thus it seems to me that Gardner and Macklem were incorrect to say that incommensurability in this context 'denies us any justified way forward' (that is, any reasonable way forward). In this context we have undefeated reasons for action, and hence it is reasonable to act either way, even though we also have undefeated reasons not to act on those reasons, and hence it is therefore also *unreasonable* to act either way. This combination of reasonableness and unreasonableness seems to me to be a plausible consequence of conflict between plural, irreconcilable, and incommensurable values that give rise to requirements and duties or obligations. To recognise the reasonableness of the choice does make the situation any less morally significant, any less of a moral dilemma, or any less of a moral tragedy.

[42] cf Raz, 'The Problem of Authority' (n 24) 1024–25: 'not infrequently in different rules of law conflicts, the law does contain the resources to resolve the conflict. It is indeterminate regarding the issue, usually leaving such decisions to the discretion of judges, i.e., to their judgment about the real merit of the different rules, a judgment that goes beyond what the law determines.'

But it would entail that authoritative reasons are not exclusionary reasons in the way that Gardner and Macklem suggest. I think that it still makes sense to say that the reasons that arise from the directives of a legitimate authority are protected reasons, containing reasons not to act on some conflicting reasons, even although they do not defeat those conflicting reasons.

My claim is that a reason that conflicts with a protected reason should be understood as a defeated reason only if, by treating the directive as binding, we conform better to the balance of dependent reasons overall. The balance of dependent reasons—that is, all the content-independent and content-dependent reasons that apply to the subject directly—may make it incommensurable whether we conform better to reason by doing so. In that case, we still have a protected reason, but it does not defeat conflicting dependent reasons. The clearest case in which this arises is where a content-independent dependent reason conflicts with other dependent reasons. Whether the conflicting dependent reasons are defeated depends on whether the content-independent dependent reason outweighs those conflicting reasons. When it does so, it can be right to do what would otherwise be wrong. It can also create a conclusive reason to choose an option that would otherwise be incommensurate with another option, by giving such a strong additional reason for choosing that option that the option ceases to be one among others in a range of reasonableness, and becomes the uniquely correct option. But—and here is the most important point for our purposes—the content-independent dependent reason may not strengthen one of the options to a sufficient extent. That, as we saw, is the mark of incommensurability. In that case, there can be an undefeated reason to follow authority and an undefeated reason not to follow authority, even although the underlying content-dependent dependent reasons were incommensurable.

It is worth pausing here to consider the objections from those who do not share this account's emphasis on content-independence. Since in my view an authoritative reason can be defeated by a conflicting content-dependent dependent reason, the question may arise: does this show that an authoritative reason is not really content-independent after all?[43] Consider the version of this objection that is central to Ronald Dworkin's theory of law. Dworkin argues that law, whatever it is, is something that there is a general moral obligation to obey, an obligation rooted in a conception of community.[44] His argument creates a challenge to my implicit assumption that there are two separate questions: first, what is the content of the directive and, second, should one follow the directive? On the whole Dworkin proceeds on the opposite assumption that, at least in normal circumstances, there is really only one question here: what is the content of the authoritative source, such that one has an obligation to obey it?[45] His

[43] For criticisms of the idea that authoritative legal reasons are content-independent reasons, see Paul Markwick, 'Law and Content-Independent Reasons' (2000) 20 OJLS 579; Paul Markwick, 'Independent of Content' (2003) 9 Legal Theory 43.

[44] Ronald Dworkin, *Law's Empire* (Fontana Press 1986) 206–16; Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 317–24. It is not necessary here to explore Dworkin's argument for an 'associative' justification of political obligation. For critical discussion, see Leslie Green, 'Associative Obligations and the State' in Justine Burley (ed), *Dworkin and His Critics* (Blackwell 2008); Stephen Perry, 'Associative Obligations and the Obligation to Obey the Law' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2008).

[45] Dworkin concedes that there may be two separate questions, and the obligation to obey may be defeated, but he believes that this will occur in rare, exceptional circumstances: see Dworkin, *Law's Empire* (n 44) 109–11; Dworkin, *Justice for Hedgehogs* (n 44). Some who share Dworkin's general approach to legal theory suggest that even this limited concession was not justified: see eg TRS, Allan, 'Law, Justice and Integrity: The Paradox of Wicked Laws' (2009) 29 OJLS 705; TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013) 162–66.

argument, in essence, is that, in view of the obligation to obey, the content of the law is whatever provides the best justification for the state's coercion. The sources will play an important role in determining what the content of the law is—the best justification must 'fit' the existing sources, and the extent to which they fit the sources will inform the best justification—but, nonetheless, the sources only partly determine the content of law, which is a matter of the best justification for the state's coercion. Now, whether or not Dworkin's use of the concept of law is correct, or even plausible, is for our purposes not important.[46] For our purposes the important point relates to how Dworkin views authority.

In Dworkin's theory of law as integrity, political obligation becomes 'a more protestant idea' than the idea of obeying past decisions: it becomes a question of fidelity, not to authoritative directives, but 'to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme.'[47] In Dworkin's account, therefore, the values that give rise to content-independent reasons—and the possible conflicts between those reasons and substantive or content-dependent reasons—are largely left out of the picture. It seems to me that this omission is primarily attributable to his belief in the unity of value.[48] I do not think Dworkin's argument can recover from the

[46] More precisely, the question of whether we describe the outcome of our moral reasoning as law or whether we instead limit the term to the *sources* of law, excluding moral reasoning, is for present purposes irrelevant. This question is relevant to the debate between so-called inclusive and exclusive legal positivists. For a suggestion that the inclusive–exclusive debate is 'a fruitless demarcation dispute' on which 'nothing important turns', see, respectively, John Finnis, 'On the Incoherence of Legal Positivism' (1999) 75 Notre Dame L Rev 1597, 1603; Ronald Dworkin, *Justice in Robes* (Belknap Press 2006) 238. See also Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism' (2011) 31 OJLS 663.

[47] Dworkin, *Law's Empire* (n 44) 190.

[48] See Dale Smith, 'Law, Justice and the Unity of Value' (2012) 32 OJLS 383.

early criticisms that he failed to appreciate the reasons for creating and applying rules whose authority is attributable to their source, not their content, and that he also failed to appreciate that the dimension of 'fit' with existing sources may sometimes conflict incommensurably with other moral reasons.[49] Whereas Raz mistakenly thought that the content-independent protected reasons for following authority must also exclude—that is, necessarily defeat—the underlying content-dependent reasons, Dworkin's theory encourages the opposite, but equally mistaken, idea the content-dependent reasons remove any substantial independent role for content-independent reasons. I have sought to defend the idea that, the content-independent protected reasons do not necessarily defeat the conflicting content-dependent dependent reasons, and vice versa.

According to one version of the Dworkinian view, there can only be a genuine content-independent reason to defer to authority when the options are incommensurable. This view is evident, for example, in TRS Allan's critique of the doctrine of deference to public authorities in judicial review. With regard to this doctrine, Allan writes:

> It requires a court to set off against its own appraisal of the arguments for and against an infringement of rights a wider range of competing considerations, relating to characteristics of the decision-maker or its procedures rather than the intrinsic quality of its decision. Yet these external considerations are not

[49] Mackie, 'The Third Theory of Law' (n 3) 9; Finnis, 'On Reason and Authority in *Law's Empire*' (n 3) 372–75, 379–80.

> commensurable with the reasons that determine the justice of the substantive outcome. They operate on different scales of assessment.[50]

By 'external' considerations, I take it Allan means content-independent reasons. To rely on both content-dependent and content-independent reasons at the same time, according to Allan, is impractical, 'because the separate analyses would often pull in different directions', and incoherent, because the reliance on content-independent reasons turns the so-called substantive inquiry into 'a meaningless abstraction'.[51] He argues that the substantive, or content-dependent, reasons should have priority, so that the content-independent reasons only become relevant when the former have run out. I have sought to show that this account is flawed: the reliance on content-independent reasons does not render the substantive inquiry into content-dependent reasons a meaningless abstraction; and there is nothing unusual about reasons often pulling in different directions if those reasons are based on irreducibly plural and incommensurable values.

This section has attempted to explain, in outline, a plausible account of the difference that authoritative directives can make to practical reasoning, especially in cases involving incommensurable options. It is an account that

[50] TRS Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65 CLJ 671, 688. It should be noted that Allan is not here referring to incommensurability in the way that I understand it; rather, he means, presumably, that both sets of reasons cannot simultaneously be present in one's reasoning.

[51] TRS Allan, 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory' (2011) 127 LQR 96, 100.

treats authority as capable of providing content-independent protected reasons to act as the authority directed and not to act on some of the reasons that conflict with acting as the authority directed. Indeed, this protected reason may defeat those conflicting reasons. To that extent, I am in agreement with Raz. Where I disagree is with the assumption that the protected reasons necessarily defeat those conflicting reasons. We may conform better with dependent reasons in some ways if we treat the directive as a protected reason, but not in others. With these preliminary clarifications about the nature of authority, the rest of this chapter will explore the possibility that the content-independent reasons we have for following authority may sometimes be incommensurate with the underlying content-dependent reasons, even when those content-independent reasons are themselves incommensurable. I will explore that possibility with respect to three kinds of reasons for following authority: epistemic, democratic, and coordinative.

III. EPISTEMIC AUTHORITY

There may be a conclusive reason to follow the authority's decision if we think that its decision is more likely to be correct, even though we might have reached a different decision if left to our own devices. Since this justification for authority depends on whether the authority's decision is more likely to be correct, it may be unclear whether it provides a conclusive reason. And it will not provide a conclusive reason—indeed, will not provide any reason at all—when we are convinced that our decision is right, whether our decision is that the considerations underlying our decision are commensurable or incommensurable. The problem with this account of epistemic authority is in answering the question: Can there be expertise in moral reasoning? And if there can be expertise in moral reasoning, how would we know who has greater expertise? Perhaps the question is not so much whether the authority has greater expertise, but whether the authority is better able to take into account all the relevant considerations, and better able to deliberate. Nonetheless, regardless of how it is framed, the idea of epistemic authority in moral reasoning is problematic. It is a problem to which Isaiah Berlin regularly alluded, for instance when he wrote:

> Where ends are agreed, the only questions left are those of means, and these are not political but technical, that is to say, capable of being settled by experts or machines, like arguments between engineers or doctors. That is why those who put their faith in some immense, world-transforming phenomenon, like the final triumph of reason or the proletarian revolution, must believe that all political and moral problems can thereby be turned into technological ones.[52]

Berlin's fear was that the belief in monism—the belief that one could, through one's own reasoning, discover the single correct way of life, or the single correct answer to any problem—would lead to the end of political conflict over equally

[52] Isaiah Berlin, 'Two Concepts of Liberty' in *Liberty: Incorporating 'Four Essays on Liberty'* (OUP 2002) 166.

ultimate ends, leaving the door wide open a nightmarish ‘rule of experts’.[53] This fear is arguably borne out in a certain human-rights discourse that transforms moral reasoning, including choices among incommensurable values, into a form of balancing by technically competent experts.[54] It might therefore seem that the corollary, on this account, is that value pluralism entails a rejection of expertise in moral reasoning in relation to incommensurable values.[55] But I do not think that that follows.

The Possibility of Moral Expertise

The idea that there is no such thing as moral expertise, an idea which was especially popular among philosophers in the middle of the twentieth century,[56] would be deeply problematic if it failed to acknowledge the fact that some people are better at moral reasoning than others. To acknowledge the fact that some people are better at moral reasoning is not necessarily to accept the idea that there can be moral expertise that justifies authority. There may be a plausible argument for thinking that it is only our own assessment of the content

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[53] ibid 198.

[54] See eg Pieter van Dijk and GJF van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer 1990) 601: ‘only the Strasbourg organs are competent to conduct the weighing of interests involved in the Convention’. cf Martti Koskenniemi, ‘The Effect of Rights on Political Culture’ in Philip Alston (ed), *The EU and Human Rights* (OUP 1999) 114.

[55] See Scott Veitch, *Moral Conflict and Legal Reasoning* (Hart Publishing 1999) 95–104. For a similar argument in relation to expertise in legal reasoning, see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2002) 485–86; Martti Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) 70 MLR 1.

[56] See eg AJ Ayer, ‘The Analysis of Moral Judgments’ in AJ Ayer, *Philosophical Essays* (Macmillan 1954); CD Broad, *Ethics and the History of Philosophy* (Taylor & Francis Group 1952); Gilbert Ryle, ‘On Forgetting the Difference between Right and Wrong’ in AI Melden (ed), *Essays in Moral Philosophy* (University of Washington Press 1958).

of someone else's moral reasoning (rather than our assessment of the source of that reasoning) that makes us think that that person is a better moralist than someone else. On this view, we can only think that someone is a good moralist if we are convinced by his or her arguments. We need not think that that person is a better moralist than us and therefore is a moral expert. And if we were not convinced by those arguments, then we would not regard that person as a good moralist.

To show that there is such a thing as moral expertise justifying authority, it must be possible to show that we should sometimes follow someone else's decision merely on account of the decision's source and not on account of the decision's content or substance. This is where critics of the idea of moral expertise claim that moral questions differ from technical questions. With regard to technical questions, it is often necessary to defer to the decision of a technical expert merely because we lack the necessary training to know whether or not the decision is sound or convincing. With regard to moral questions, by contrast, critics of moral expertise argue that, unless we are convinced by someone's decision on a moral question, it is never appropriate to defer to someone else's moral decision if that entails accepting it without knowing whether it is sound or convincing. Yet this distinction is difficult to sustain. Just as we may defer to someone else on technical questions because, for example, we lack their training, so we may defer to someone else on moral questions because, for example, we lack the time and resources to properly consider the matter ourselves.[57] In each

[57] See eg Peter Singer, 'Moral Experts' (1972) 32 Analysis 115, 116–17: 'Someone familiar with moral concepts and with moral arguments, who has ample time to gather information and think about it, may reasonably be expected to reach a soundly based conclusion more often than

case the reason for deferring will be defeated if we have a good reason to believe that the alleged expert's answer to the technical or moral question was wrong. Expertise makes a difference to our reasoning to the extent that we have an undefeated reason to be convinced by the expert's decision merely because of who made the decision or how it was made, rather than what the decision was.

So we can concede, at least for the sake of argument, that there can be such a thing as moral expertise. But I tend to think that the circumstances in which moral expertise might exist and be relevant will be quite rare. It will arise, in my view, only when we are uncertain and we believe that there are other people with good judgment or practical wisdom, what Aristotle called *phronesis*, or that there are 'more cultivated minds', as John Stuart Mill described the expertise of moral philosophers,[58] whom we think are better placed to make good moral judgments and, importantly, among whom there is no disagreement on the relevant questions.[59] If these circumstances arise, then these more cultivated minds can convince us that there is a correct answer when we had thought (but had been unsure) that the options were incommensurable, just as they can convince us that we had been wrong to think that one option was probably better than the other. Of course, there are times when we are uncertain and have no reason to believe that someone else, even someone else with a more cultivated mind, knows any better. This moral fallibilism may, as we shall see, form part of

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someone who is unfamiliar with moral concepts and moral arguments and has little time. So moral expertise would seem to be possible.'

[58] John Stuart Mill, 'Spirit of the Age' in *Collected Works of John Stuart Mill* (Ann P Robson and John M Robson ed, Routledge 1986) 244.

[59] See Sarah McGrath, 'Moral Disagreement and Moral Expertise' in Russ Shafer-Landau (ed), *Oxford Studies in Metaethics: Volume 3* (OUP 2008).

the justification of democratic authority. But we can concede that, if there is a reason to believe that someone else knows better, then there is a reason to defer to that person's judgment. If, however, there is disagreement or we are already convinced of the truth of our moral view, then putative expertise is irrelevant: it is highly unlikely that anything other than persuasive substantive argument could convince us that we were wrong.

Law and Moral Expertise

Assuming that moral expertise is sometimes possible, what are the implications for law and judicial reasoning? If there are moral experts on an issue, then they have epistemic authority and we have a reason to defer to them on that issue. From the attribution of authority to moral experts, however, it does not necessarily follow that we have a conclusive reason to follow them. It may be that following the decisions of moral experts would undermine other values that are more important, such as democracy.[60] Nevertheless, moral expertise, if such a thing exists, may be one reason, albeit not necessarily a conclusive reason, to defer to authority.

Some legal philosophers have sought to make stronger claims about the relationship between moral expertise and judicial reasoning, arguing that one institution is better than another at moral reasoning generally. According to one

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[60] See Leslie Green, 'Law, Legitimacy, and Consent' (1989) 62 S Cal L Rev 795, 804. For a Rawlsian argument along similar lines, see Martha C Nussbaum, 'Moral Expertise? Constitutional Narratives and Philosophical Argument' (2002) 33 Metaphilosophy 502, arguing that moral expertise exists, but that moral experts should not give expert testimony in cases concerned with what Rawls termed 'constitutional essentials' and 'matters of basic justice', because doing so would threaten the mutual respect for divergent comprehensive doctrines that lies at the core of political liberalism.

view, judges are better than legislators at moral reasoning because judicial reasoning is more principled than the partisan reasoning found in legislatures. Legislators, on this view, are subject to pressures and sectarian pressures that do not affect judges, or at least do not affect them to the same degree.[61] Ronald Dworkin, one of best-known proponents of this view, argues that judicial reasoning 'insures that the most fundamental issues of political morality will be finally set out and debated as issues of principle and not political power alone.'[62] Proponents of this view tend to draw attention to the court's closer sensitivity to the particular, concrete case, arguing that this is a reason to think that they are better at moral reasoning than legislators.[63]

There are two ways of criticising this view. One way is to argue that neither judges nor legislators are, in general, better at moral reasoning. I think that is correct and will return to it in a moment. The other way is to argue that legislators are generally better than judges at moral reasoning. That argument can be found in the work of Jeremy Waldron, notwithstanding his argument that the question of whether or not there are objective moral truths is irrelevant to law

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[61] Ronald Dworkin, *A Matter of Principle* (Harvard UP 1985) 25; Joseph Raz, 'Disagreement in Politics' (1998) 43 Am J Juris 25, 46.

[62] Dworkin, *A Matter of Principle* (n 61) 70.

[63] See eg Michael S Moore, 'Law as a Functional Kind' in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Clarendon Press 1992) 230: 'One might well think that moral insight is best generated at the level of particular cases, giving judicial beliefs greater epistemic authority than that possessed by legislative beliefs on the same subjects.' For another argument for judges having greater expertise on some issues, based on the distinction between thick and thin moral concepts, see James E Penner, 'Legal Reasoning and the Authority of Law' in Lukas H Meyer, Stanley L Paulson, and Thomas W Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP 2003). cf Leslie Green, 'Three Themes from Raz' (2005) 25 OJLS 503, 513–16.

and adjudication.[64] Though I think it is mistaken, Waldron's argument that legislatures may in general be more conducive to moral reasoning is instructive. Key to that argument is the fact that legislatures are unencumbered by the sources—the doctrines, statutes, precedents, and other texts—that judges must take into account and that to some extent constrains judicial reasoning. Waldron argues that the moral part of judicial reasoning cannot be separated from the non-moral part, and, therefore, judicial reasoning is 'a mélange of reasoning—across the board—which, in its richness and texture, differs considerably from pure moral reasoning as well as from the pure version of black-letter legal reasoning that certain naïve positivists might imagine.'[65] Judges are therefore said to be inferior moral reasoners, because the doctrinal considerations in judicial reasoning are, according to Waldron, irrelevant to 'pure moral reasoning'. Assuming that such doctrinal considerations are authoritative reasons that ought to figure in judicial reasoning, Waldron's argument must be that the absence of such authoritative reasons from legislative decision-making makes legislators better moral reasoners than judges.

I doubt whether legislators really are superior at moral reasoning, at least for that reason. If judges should reason according to rules laid down in authoritative sources, it may be because they are morally required to do so.[66]

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[64] Jeremy Waldron, 'The Irrelevance of Moral Objectivity' in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Clarendon Press 1992); Jeremy Waldron, 'Moral Truth and Judicial Review' (1998) 43 Am J Juris 75.

[65] Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 ICON 2, 12.

[66] Indeed, Waldron defends the application of rules partly on the grounds of this technique furthers the moral task that law has to perform in a pluralistic society: ibid 13, citing Finnis, 'Natural Law and Legal Reasoning' (n 5) 141–42.

Although there are many instances where an over-reliance on rules may hinder good judgment,[67] it is also possible for people to exercise good judgment in the application of determinate rules, knowing when to follow the determinate rule and when to discard it. And herein lies the problem for Waldron's argument.

Judges are usually concerned with different questions from legislators—in the same way that judges are usually concerned with different questions from those in previous cases, in which a precedent had not yet been established. Legislators may have to take into account the state of the existing law, but they are not constrained to the extent that judges are. The reasons for following the authority of a precedent or the ordinary meaning of an existing statutory provision will be fewer for the legislator than for the judge. But the fact that legislators and judges are concerned with different questions does not make them better or worse at moral reasoning. They are merely using moral reasoning to answer different questions. Waldron, of course, anticipates this objection, but he offers only a brief and, as it seems to me, inadequate response. His response is that the doctrinal considerations in judicial reasoning 'are such importantly complicated moral reasons as to create—in a sense—a normative world of their own, and their distinctiveness may render any operational comparison with our familiar ideals of moral reasoning inapposite.'[68] To illustrate his argument,

[67] It has been argued that in cooking, for example, good judgment can be taken to be judging without scales. See Julian Baggini, 'The Tyranny of Recipes' *Prospect* (London, February 2014) 55, arguing that relying on determinate rules in cooking impairs the ability to hone one's judgment of 'how much of any ingredient to add without needing to consult a list or even get out the scales', adding that this is 'but one instance of a more general truth: codification is the death of judgement.' See also Barry Schwartz and Kenneth Sharpe, *Practical Wisdom: The Right Way to Do the Right Thing* (Riverhead 2010).

[68] Waldron, 'Judges as Moral Reasoners' (n 65) 14.

Waldron notes the difference in moral reasoning on the issue of abortion between the legislative discussion in the House of Commons in 1966 and the judicial discussion in the US Supreme Court in *Roe v Wade*. As Waldron rightly points out, most of the Supreme Court's judgment in that case is taken up with doctrinal analysis, and the few paragraphs that deal with the moral issues at stake were mostly taken up with showing the diversity of opinion on the issue. Waldron also rightly points out that 'it is not fair to castigate the Court for this lopsided balance between legalistic argument and pure moral argument.'[69] Its reasoning would have been different had it been asked to consider the issue afresh, without taking into account any reasons for deferring to another institution's decision or to its own previous decisions.

But is there any reason to think, not that judges should defer to the legislature on account of democratic or coordinative values, but that legislators are *better able* to decide moral questions, to decide whether or not the alternatives are of incommensurable value, or to decide what to do in the face of incommensurability? Waldron's concern, it turns out, is less with judges' ability to answer moral questions, and more with the fact that moral questions are all too often presented as questions of the interpretation of bills of rights.[70] This is an argument against framing moral questions in this legalistic way, pretending that the answer can be found through the interpretation of bills of rights. Not only may there be conflict between what the text requires and what morality requires; there may also be indeterminacy in the text. Our conclusion should surely be that

[69] ibid 20.

[70] ibid 22–23. See also Jeremy Waldron, *Law and Disagreement* (OUP 1999) 290.

the judges' analyses should not begin and end with the text. When a fresh judgment on the merits without reference to authority is called for, judges should not look to the text or other historical sources, and should not assume that the morally right answer (or answers) can be reconciled with textual considerations. Judges should be able to separate their determination of what the sources require from their determination of what morality requires (if it conflicts with the sources). It is surely unfair to say, as Waldron says, that the moral reasoning of judges is '*wholly* compromised by their simultaneous attention to texts, doctrines, precedents, and decisions by others.'[71]

We can properly assess whether judges or legislators are better at moral reasoning only when we make like-for-like comparisons, that is, when we compare instances in which judges and legislators are both asked to make a fresh judgment without taking into account reasons of deference and integrity. When such a comparison is made, there is, in my view, no reason to think that either legislators or judges are *generally* better at moral reasoning, although perhaps there may be some particular kinds of moral judgments that are better suited to legislatures and others that are better suited to courts. One's moral fallibilism might lead one to think that an institution with many, diverse members has some epistemic authority.[72] But there are limits to the extent to which greater numbers and diversity can lead to greater knowledge. There may be times when judges are better placed to make a moral decision, perhaps because of their greater attention

[71] Jeremy Waldron, 'Refining the Question about Judges' Moral Capacity' (2009) 7 ICON 69, 74 (emphasis added).

[72] See eg Adrian Vermeule, *Law and the Limits of Reason* (OUP 2008); David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton UP 2008).

to particular cases and changing circumstances. This is sometimes recognised by the legislature when it adopts general standards such as 'reasonableness', which leave the moral issues to be determined in the particular cases by the courts, in order to forestall the over- and under-inclusiveness of rigid rules.[73] My point is merely that, in general, neither legislators nor judges are better at moral reasoning. But when, if ever, legislators are better at moral reasoning, their epistemic authority can provide a conclusive reason for judges to follow their decision.

IV. Democratic Authority

Why might we think that the democratic credentials of legislatures make them better institutions for deciding between incommensurable options? If the options are incommensurable—with the result that, whichever option is chosen, the choice is reasonable (as well as arbitrary)—why would it be better for the arbitrary choice to be made by a more democratic institution? Although a democratic legislature can claim to represent the view of a greater number of people, why does it matter that the majority makes the choice if the choice is arbitrary regardless of who makes it? The answer is that it matters (if and to the extent that it does matter) because, as we saw, the normal justification thesis is about conforming better to the balance of dependent reasons, and these include

[73] On the over- and under-inclusiveness of rules, see eg Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 1991). cf Wojciech Sadurski, 'Rights and Moral Reasoning: An Unstated Assumption—A Comment on Jeremy Waldron's "Judges as Moral Reasoners"' (2009) 7 ICON 25, 38.

not only content-dependent reasons, which may be incommensurable, but also content-independent reasons. [74] As well as any instrumental values that democratic procedures may secure—such as getting the right answer, as discussed in the previous section, or securing coordination, as discussed in the next section—democracy may have a certain intrinsic value. There are different conceptions of democracy and there is much controversy over whether or not democracy has intrinsic value, and if so how it can be explained. It will not be possible to defend the idea that democracy has intrinsic value. Instead, I will largely proceed on the assumption that it does, and that there is therefore intrinsic value in allowing subjects to participate in political authority through majoritarian decision procedures. This is controversial, but it is not my purpose to defend that value. I merely wish to explore the consequences that such a value would have on our practical reasoning, especially when the decision that the majority reaches is a choice among incommensurables.

The Value in Democratic Procedures

The argument for the intrinsic value of democracy—which, to repeat once more, I do not aim to defend—may stem from the fairness in treating everyone equally, from autonomy, self-determination, popular sovereignty, and so forth. The one that I am going to focus on is the argument that democratic procedures tread people with equal dignity and respect. As Waldron summarises, a majority

[74] Raz believes that democratic values can be incorporated into the normal justification thesis: see Raz, 'The Problem of Authority' (n 24) 1030–31. See also David Enoch, 'Authority and Reason-Giving' (2012) Philosophy and Phenomenological Research 1. cf Hershovitz, 'Legitimacy, Democracy, and Razian Authority' (n 31) 218–19, arguing that the normal justification thesis does not adequately take into account the value of democratic procedures.

decision rule is superior to any other procedure because it 'is neutral as between the contested outcomes, treats participants equally, and gives each expressed opinion the greatest weight possible compatible with giving equal weight to all opinions.'[75] It might be objected that we could accord equal weight to people's views by throwing everyone's opinion into a giant barrel and picking one at random. As Waldron counters, however, 'majority-decision differs from the coin-tossing method in giving positive decisional weight to the fact that a given individual member of the group holds a certain view.'[76] The claim, on this account, is that equal respect for people's views provides a reason to favour majority decision procedures over resorting to lottery or chance. But even if this is correct, one immediate question arises: why should we accord equal weight to good and bad arguments?

One possible answer might be that views should be treated equally because we reasonably disagree about the issue to be decided. But, as many have pointed out, the existence of disagreement does not by itself provide a reason to defer to the majority. We may disagree but think that the majority is wrong, unless it is tied to a belief in value pluralism and the incommensurability of the options, and hence to intra- as well as interpersonal conflict.[77] In addition to this moral pluralist explanation for reasonable disagreement, however, there is also a

[75] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346, 1388.

[76] Waldron, *Law and Disagreement* (n 70) 113. See also Bruce Ackerman, *Social Justice in the Liberal State* (Yale University Press 1980), 287, arguing that coin-flipping does not give each individual judgment that 'minimal decisiveness' that accompanies majority decision making.

[77] See John Gray, 'Reply to Critics' in John Horton and Glen Newey (eds), *The Political Theory of John Gray* (Routledge 2007) 224.

moral fallibilist explanation: when we disagree with each other we are sometimes uncertain about which of us is in error, acknowledging the fallibility of one's judgment. Thus, it is not the existence of moral disagreement as such but rather the existence of moral pluralism and moral fallibility that could ground the equal treatment of everyone's opinions and that could provide a reason for deferring to the decision of the majority, not because the majority is more likely to be correct, but simply because it is the majority.[78] These two possible grounds—moral pluralism and moral fallibility—are distinct, and as we shall see they provide different reasons for treating everyone's opinion equally and deferring to the majority.

Moral pluralism is commonly invoked as a general justification for the equal respect enabled by majority decision procedures.[79] On some accounts, the argument from pluralism becomes something like a 'fallback position', whereby moral pluralism counts in favour of democratic procedures regardless of whether or not there is in fact a correct decision.[80] But the fact that not every issue is subject to reasonable disagreement over incommensurable options makes this justification problematic and patchy. When pluralism is invoked as a general, non-patchy justification, I suspect that what is actually being invoked is not

[78] Andrei Marmor, 'Authority, Equality, and Democracy' in his *Law in the Age of Pluralism* (OUP 2007) 87: 'if the criteria for the soundness of an authoritative result are in serious doubt, it may become more important to have a fair decision procedure than a sound result.'

[79] See eg Wojciech Sadurski, 'Law's Legitimacy and "Democracy-Plus"' (2006) 26 OJLS 377, 407–9. cf David Estlund, 'Waldron on Law and Disagreement' (2000) 99 Philosophical Studies 111.

[80] Marmor, 'Authority, Equality, and Democracy' (n 78) 67.

moral pluralism at all, but moral fallibility. Nonetheless, is pluralism successful even as a patchy justification?

There may be a justification based on moral pluralism if we appeal to the distinction of the sort that Dworkin draws between 'choice-sensitive' issues—such as the decision whether to build a new sports centre or a new road system—'whose correct solution, as a matter of justice, depends essentially on the character and distribution of preferences within the political community', and 'choice-insensitive' issues—such as the decision whether to outlaw racial discrimination in employment—whose correct solution does not depend on how many people want it.[81] The argument from pluralism might lead us to think that there are more 'choice-sensitive' issues than Dworkin thought, leading to larger patches in which majority decision procedures are justified. But it seems to me that Dworkin's argument about choice-sensitive issues does provide a justification for those issues that he regards as choice-sensitive: it says that a majority decision rule is justified when the correct answer depends on how many people want something, regardless of which option they want. If the options were incommensurable prior to the majority's decision, then in this context—though perhaps, I will explain, not in others—the options become commensurable once the majority has decided, because it is known from the

[81] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 204. Though Dworkin does not make the comparison here, this notion of 'choice-sensitive' issues is reminiscent of Rawls's notion of 'pure procedural justice', which 'obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed': John Rawls, *A Theory of Justice* (Harvard UP 1971) 86.

outset that the distribution of preferences within the political community provides a common standard for the correct decision.

The choice-sensitive issues that Dworkin discusses, however, are to be contrasted with choice-sensitive issues involving other incommensurable goods, where it is not known from the outset that the correct decision depends on the distribution of preferences. Because the correct decision does not depend of the distribution of preferences, it may seem that, as Marmor says, to resolve these choice-sensitive issues, 'a lottery decision procedure would be just as fair as voting.'[82] But if there is a plausible argument for according positive decisional weight to people views, as Waldron puts it, can it give a conclusive reason to follow the majority's views in the face of incommensurables? It is hard to see how it could, unless the alleged intrinsic value in majoritarian procedures entails from the outset that we would conform better to reason by treating the majority's decision as binding than if we act on either of the two incommensurable options. If there is intrinsic value, it may well derive at least in part from the fact that the options were incommensurable, but in my view, contrary to a suggestion from Raz,[83] it is difficult to see how the fact of incommensurability *by itself* provides a reason to follow the majority's arbitrary choice, rather than our own or someone else's arbitrary choice.

[82] Marmor, 'Authority, Equality, and Democracy' (n 78) 84 n 54. cf Joseph Raz, 'Liberalism, Skepticism, and Democracy' in Raz, *Ethics in the Public Domain* (n 4) 116: 'Some decisions concern a choice among goods, where there is no reason, independent of the subjective tastes and inclinations of the population, to prefer one to the others. In such cases it is proper to choose in accordance with people's tastes.'

[83] cf Raz, 'Liberalism, Skepticism, and Democracy' (n 82) 116: 'Some decisions concern a choice among goods, where there is no reason, independent of the subjective tastes and inclinations of the population, to prefer one to the others. In such cases it is proper to choose in accordance with people's tastes.'

Perhaps moral fallibility, not moral pluralism, is a more plausible foundation for democracy's alleged intrinsic value.[84] When John Stuart Mill in *On Liberty* emphasised the fallibility of moral judgments, he used it to justify freedom of speech.[85] For Mill, this was essentially an instrumental, or indirect-utilitarian, justification: by allowing free discussion, we are able to improve our knowledge and get to the truth. People's thoughts should not be silenced, unless they cause harm to others, because silencing them makes us more likely to err.[86] It is worth emphasising that moral fallibilism is not the belief that there are no moral truths; it is merely the belief that there may be no *final* moral truths, because all moral truths are corrigible by experience and further rational reflection and deliberation. Corrigible truths are truths, or the closest approximation to truths that we can have, at least in the meantime. So moral fallibilism is compatible with believing that one's view is correct, having considered the contrary arguments that are available at that time.[87]

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[84] It is, in my view, slightly surprising that Waldron should at times downplay the importance of moral fallibilism, arguing that the respect due to each other's beliefs and to majority decision procedures is not 'just a point about fallibility', but is rather the point 'that, whatever the state of my confidence about the correctness of my own view, I must understand that … it is not unexpected, not unnatural, not irrational to think that reasonable people would differ': Waldron, *Law and Disagreement* (n 70) 111–12.

[85] John Stuart Mill, *On Liberty* (first published 1859, Alfred A Knopf 1906) ch 2. See also John Stuart Mill, *Considerations on Representative Government* (Harper & Brothers 1869) 180: 'One of the two, as the wiser or better man, has a claim to superior weight: the difficulty is in ascertaining which of the two it is.'

[86] Mill, *On Liberty* (n 85) 21: 'There is the greatest difference between presuming an opinion to be true, because with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation.'

[87] See further Leslie Green, 'The Nature of Limited Government' in John Keown and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 201–2; Rawls, *Political Liberalism* (n xxx) 56. cf Joseph Raz, 'Facing Diversity: The Case of Epistemic Abstinence' in his *Ethics in the Public Domain* (n 4).

If moral fallibilism is to justify democratic decision procedures, it may seem that it can provide only an instrumental, epistemic justification for democratic authority—what David Estlund calls 'epistemic proceduralism'.[88] Being merely an extension of the epistemic arguments considered in the previous section, democratic authority would seem to be limited to the extent that it enables us to act on better knowledge. If democratic authority has an intrinsic value that distinguishes it from epistemic authority, the difference must be partly justified by the mere fact that it is the majority's decision, irrespective of whether it is more likely to reach the right decision. That is not to say that moral fallibilism does not support democracy's intrinsic value. According to Waldron, although democratic procedures may at times be the best procedures for reaching the correct substantive outcome,[89] one of his main arguments in support of the intrinsic value of participation is that, since in his view we are without an uncontroversial moral epistemology, we should reject as question-begging a results-driven approach to questions of democracy and rights.[90]

Yet even if it does have intrinsic value, on these or other grounds, we must be careful not to exaggerate its importance. It is one thing to argue for an equal opportunity to 'influence' the decision, through participating in free discussion; it is another thing to argue for an equal opportunity to have an

[88] David M Estlund, *Democratic Authority: A Philosophical Framework* (Princeton UP 2008).

[89] See also Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 OJLS 18, 40: 'we value participation not just as an end in itself, but also because we think that this is one way to ensure that each person gets what is hers by right.'

[90] Waldron, *Law and Disagreement* (n 70) 254.

'impact' on the decision, through an equal share of voting power.[91] According to Dworkin, the majoritarian emphasis on equality of impact is 'a dangerous fetish'.[92] He argues that the equality relevant to democracy should be 'a matter of attitude, not mathematics'.[93] But the equality of impact would be a dangerous fetish only if it were always taken to be of paramount importance. It may be that defences of democracy's intrinsic value such as Waldron's put too much weight on this argument, giving it an overriding importance that it does not in fact have. The intrinsic value of participation may provide justification for putting up with some shortfalls in the outcomes, in the balance of content-dependent reasons. But this depends on weighing the reasons for democratic procedures or participation against the content-dependent reasons, and asking whether the former justifies compromising the latter.[94]

Since democracy's value may give rise to a conclusive protected reason for action to treat the authority's directive as binding, even if we regard the content of its directive as unsound, the intuition that we should follow the democratic authority's choice among incommensurable options is especially strong. If the majority's choice is within the range of reasonableness, could there possibly be a good reason not to follow that choice? The strong intuition makes

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[91] On the distinction between 'influence' and 'impact', see Dworkin, *Sovereign Virtue* (n 81) 204; Dworkin, *Justice for Hedgehogs* (n 44) ch 18. I think it is also perhaps worth noting that what is important here is equality *of opportunity* of influence and impact: see Marmor, 'Authority, Equality, and Democracy' (n 76) 74–75.

[92] Dworkin, *Justice for Hedgehogs* (n 44) 392.

[93] ibid 388.

[94] See further Raz, 'Liberty, Skepticism, and Democracy' (n 82) 117. cf Hershovitz, 'Legitimacy, Democracy, and Razian Authority' (n 31) 218–19.

it difficult to think of a plausible affirmative answer. But I want to suggest that there is a plausible argument for thinking that democratic institutions might not always be able to commensurate the incommensurable in this way. To sustain this argument, we must first put the incommensurability issue to one side for one moment, and defend the claim that the majority's decision can sometimes be defeated. For if the majority's decision provides a reason that defeats all others, and can therefore never be defeated by any competing considerations, then there is little point in attempting to argue that there are sometimes undefeated reasons not to follow the majority's decision when the options are incommensurable.

Counter-Majoritarian Values

We should begin by conceding that the proposition that I aim to defend here—that the intrinsic value of equality of concern and respect secured by majoritarian democracy will not always be the overriding value, and may be overridden by other values—is not at all obvious. If democratic authorities do have intrinsic value, it is tempting to think that it is better for democratic majorities to decide moral questions, and this would seem to apply to all moral questions, including the question of whether there are values that outweigh the intrinsic value in democratic procedures. This would lead to the conclusion that there can be no such thing as counter-majoritarian values. But this would be a mistake, based on the false assumption that the value of democracy is supreme. As was just noted, Waldron is especially notable among contemporary legal and political philosophers for making this claim of supremacy. While deciding all moral questions by majority is intrinsically valuable, I do not think that this is the supreme value, capable of defeating all other values. As Waldron's critics rightly insist, the value of democracy has to be 'balanced' against other values.[95] In order to defend this proposition, it is necessary to explore which values, if any, can be more important than the intrinsic value in democratic procedures.

Now, to accept democracy's intrinsic value, as I noted, is to accept the risk of some unreasonableness in the outcome. The reasons for following the decision of the democratic majority alter the weight of the options, providing an additional reason in favour of one option, and thus making that option stronger than it otherwise would have been. In this way, democratic procedures can make us conform to reason by doing what would otherwise be unreasonable. We should not depart from the decision of a democratic majority merely because we regard its decision as unreasonable. But the reason for following a democratic majority might not alter the weight of one of the options to a sufficient extent. The majority's decision might be too unreasonable, in which case the value of democracy is outweighed. It is in the search for what might make the decision so unreasonable that we might find counter-majoritarian values.

There is, in my view, nothing particularly distinctive about the values that may be counter-majoritarian. Everything depends on the concrete situation. But it is important to be clear about what is happening when, for example, the courts enforce certain values notwithstanding the majority's view to the contrary. For there is tendency, as Alexander Bickel recognised, to downplay the 'counter-

[95] See eg Raz, 'Disagreement in Politics' (n 61); Thomas Christiano, 'Waldron on Law and Disagreement' (2000) 19 Law & Phil 524, 538; Estlund, 'Waldron on Law and Disagreement' (n 77); Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 33 Law & Phil 451; Aileen Kavanagh, 'Constitutional Review, the Courts, and Democratic Scepticism' (2009) 62 CLP 102, 112.

majoritarian difficulty', which is the problem that judicial review of legislation runs counter to the will of the democratic majority, said to be the 'distinguishing characteristic' of the democratic system.[96] We find this tendency, for example, in John Hart Ely's claim that judicial review can help to augment the majoritarian aspect of democracy, by ensuring that the political process is open and representative.[97] While it may be true that other values besides majoritarian rule may be integral to a healthy democracy, including freedom of speech, freedom of the press, and freedom of assembly,[98] we should not pretend that there is no conflict between these values. There is a very real conflict when, say, the majority decides to curb free speech. That there may be several values that are integral to democracy may entail that democracy is a 'mixed-value good',[99] but as I argued in Chapter 2 this does not mean that conflicts among the component values are always commensurable (although nor does it entail that they are always incommensurable).[100] That is, it may well be that democracy can thus be described as a matter of both process and substance, with the majoritarian aspect of democracy competing with other aspects.[101]

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[96] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1962) 16, 19.

[97] The most influential account of the judiciary's role in securing process values in the political system is John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard UP 1980).

[98] Robert A Dahl, *Democracy and Its Critics* (Yale UP 1991) 170–71.

[99] On the idea of 'mixed-value goods', see Joseph Raz, 'Mixing Values' (1991) 65 Proceedings of the Aristotelian Society 83.

[100] See Timothy Macklem, 'Choice and Value' (2001) 7 Legal Theory 1, 8.

[101] If this is correct, then it follows that, as between what Dworkin describes as the 'majoritarian' conception of democracy (which 'defines democracy only procedurally') and the 'partnership' conception (which 'ties democracy to the substantive constraints of legitimacy'), we should

The existence of conflicts between the different democratic values goes some way to explaining how the value of democratic procedures can be overridden. The recognition of other values integral to democracy does not always favour a majority decision procedure, perhaps because the majority may favour a substantive outcome that does not give individuals equal respect.[102] I do not want to suggest that the only values capable of outweighing the value of majoritarian processes are those that can be viewed as integral to democracy. There is, in my view, nothing distinctive about the values that can outweigh the value of democratic procedures. If it is possible the value of democratic procedures may be outweighed, it seems plausible that the value in correcting an unsound or immoral decision may be incommensurate with the value in following it. Perhaps one option is better in terms of democratic procedures, but the other option is better for free speech. In this way, the majority's decision can actually create value incommensurability where it had not previously existed.

The Limits of Democracy's Commensuration

But does democracy have an intrinsic value that necessarily creates an overriding or conclusive reason to decide in favour of the majority's decision when the options were previously incommensurable? Or can the options remain incommensurable notwithstanding that a democratic authority has issued a

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choose the latter: Dworkin, *Justice for Hedgehogs* (n 44) 384. However, on my reading Dworkin does not fully grasp the potential for conflict between the procedural and substantive values integral to democracy. See also Stephen Macedo, 'Against Majoritarianism: Democratic Values and Institutional Design' (2010) 90 BU L Rev 1029.

[102] Charles R Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton UP 1989) 64.

directive favouring one of the options? The argument that the options can remain incommensurable in the face of a democratic choice is, in part, simply an implication of the point that democratic values may compete with other values. As William Galston says,

> If there are good reasons to take value pluralism seriously, then it becomes more difficult to accord democracy the unquestioned normative priority it typically enjoys in both ordinary and philosophical discourse. Not only is the scope of democratic political authority restricted; certain alternatives to democracy within the sphere of politics must be taken more seriously than they usually are.[103]

But there is nonetheless a strong intuition that needs to be dispelled in order to sustain the argument that democracy does not have normative priority when the other options are incommensurate with each other.

The belief that democracy can commensurate the incommensurable may reflect the belief that the value of participation is some sort of 'covering value'—a common standard that renders the two options commensurable.[104] Consider two incommensurable options, one promoting liberty and the other promoting

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[103] William A Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory* (CUP 2002) 81.

[104] On the idea of covering values see Ruth Chang, 'Introduction' in Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (n 4). cf Macklem, 'Choice and Value' (n 100).

equality. Suppose that a democratic authority chooses the equality-enhancing option over the liberty-enhancing option. The value of participation gives us a reason to act in accordance with the directive. The authority seems to satisfy the normal justification thesis in that we conform better to the dependent reasons favouring participation in democratic procedures. But we do not conform better to the dependent reasons that are content-dependent. The question, it seems to me, is whether the addition of the value of participation on the side of the equality-enhancing option is sufficient to make the uniquely correct option. But since I have defended a conception of value incommensurability that treats it as a range of reasonableness, the value of participation may not be sufficient to remove one option from the range of reasonableness and identify it as uniquely correct. There is no reason to think that the value of participation must be a covering value, unless our purpose from the outset was to choose the option that best promotes that value. If the liberty-enhancing option is able to outweigh the value of participation, then why would participation provide a common standard any more than liberty provided a common standard? We cannot assume away the problem of incommensurability by assuming that our purpose is to promote the value of participation. As Macklem says, 'there is no reason to choose the choice value that avoids incommensurability. Absent a belief in commensurability, to do so is just another way of being arbitrary.'[105]

Democratic procedures can commensurate the incommensurable in the above example only if the value of participation, combined with the value of equality, outweighs the value of liberty. The main point is that we should comply

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[105] Macklem, 'Choice and Value' (n 100) 9.

with democratic authority only if reason requires us to do so, and reason requires us to comply with democracy only if doing so is more valuable than the alternatives. The intuition that we should always follow the democratic decision when, prior to that decision, the options were incommensurable may be a strong one, but it is dispelled by further reflection. The options may remain incommensurable even after the democratic authority has exercised its choice.

V. Coordinative Authority

Having seen that expertise and democracy will not always provide a conclusive reason to follow authority when the options are incommensurable, it is time, finally, to turn to what is perhaps the most promising reason to do so: the coordinative function of authority. Is the mere fact that there is an antecedent settlement sufficient to justify following authority? One of the most important justifications for political authority is that it enables peaceful coexistence in the face of conflict. It does this, as modern legal and political philosophers put it, through its identification and settlement of coordination problems.[106] A coordination problem arises when we face multiple eligible and conflicting—and possibly incommensurable—options, and it is better for us to coordinate on a common solution than to each try to reach a solution on our own.[107] We need

[106] For recent explanations see eg John Finnis, *Natural Law and Natural Rights* (first published 1980, 2nd edn, Clarendon Press 2011) 246; Raz, *The Morality of Freedom* (n 11) 56; Gerald J Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 J Leg Stud 165; Scott Shapiro, *Legality* (Belknap Press 2011) 170.

[107] The game-theoretical idea of 'pure coordination problems', in which we would prefer to coordinate but are indifferent as to which solution we settle on, is often thought to be not readily applicable to law and politics, where we are usually not indifferent and sometimes may well not

authority to settle coordination problems when other ways of settling them are impossible or undesirable. As Raz points out, we may also need authority to identify whether a coordination problem exists in the first place, since the question of whether there is a coordination problem is determined by right reason.[108] The need for a common decision in the face of disagreement is what Waldron describes as 'the circumstances of politics'.[109] Authoritative rules can allow for agreement over a decision procedure in the face of disagreement over whether the rule's content is justified.[110] The rule may be considered immoral in comparison with another possible solution, but nevertheless its authority is justified because coordination is best overall. For sure, each side may remain committed to their desired solution and they may seek to bring about their desired solution by reforming the authoritative rule; but, for the time being, they will be willing to accept that the solution has been authoritatively chosen. Since we are justified in following coordinative solutions only if our reason for

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have a shared interest in coordination at all. On coordination problems in game theory, see eg Thomas C Shelling, *The Strategy of Conflict* (Harvard UP 1960). cf John Finnis, 'Law as Coordination' (1989) 2 Ratio Juris 97, 99–100: 'In short, the Co-ordination Problem model, as understood in game theory, takes things too easily to be of assistance in legal theory. … [T]he model departs widely from the reality that many participants in the life of any complex community would, in relation to many particular "problems," prefer "no solution" to any of the proposed solutions.' See also Edna Ullmann-Margalit, *The Emergence of Norms* (OUP 1977) 78. In legal and political theory, the term 'partial-conflict coordination problems' is usually preferred, describing situations in which people have conflicting desired solutions but would prefer coordination on either solution to no solution at all. See Waldron, *Law and Disagreement* (n 70) 102–105; Jeremy Waldron, '*Lex Satis Iusta*' (2000) 75 Notre Dame L Rev 1829.

[108] Joseph Raz, 'Facing Up: A Reply' (1989) 62 S Cal L Rev 1153, 1190–94.

[109] Waldron, *Law and Disagreement* (n 70) 102.

[110] Raz, *The Morality of Freedom* (n 12) 58; Joseph Raz, 'Reasoning with Rules' (2001) 54 CLP 1, 18. See also Cass Sunstein, *Legal Reasoning and Political Conflict* (OUP 1996).

coordination outweighs valid reasons to act on a competing solution,[111] we would be justified in rejecting the authoritative solution if we believe that our own preferred competing solution outweighs the benefits of coordination, and therefore that non-coordination would have been better.

Can there be a reason to reopen a coordination solution when the solution reflects a choice between incommensurable options? Before answering that question, consider the following objection. Whereas the reopening of settled choices among incommensurables may be generally accepted in the context of legislative decision-making, there is much more reluctance to accept this conclusion in the context of judicial decision-making. This perceived difference is not merely that the intrinsic value in democratic procedures provides a reason to defer to democratic legislatures even when they act irrationally. Waldron raises an additional argument against unsettling coordination solutions. He invokes what Henry Hart and Albert Sacks, in their materials on the legal process, called the 'principle of institutional settlement'.[112] This principle, Waldron explains, provides reasons for officials to accept and put into effect the decisions on matters of common concern that, having been duly arrived at through publicly recognised procedures, can effectively secure coordination among citizens.[113] He says:

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[111] See Green, *The Authority of the State* (n 20) 115; Leslie Green, 'Positivism and Conventionalism' (1999) 12 CJLJ 35, 51; Green, 'Three Themes from Raz' (n 63) 511. See also Regan, 'Authority and Value' (n 20) 1023.

[112] Henry M Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (WN Eskridge and PP Frickey eds, Foundation Press 1994).

[113] Jeremy Waldron, 'Authority for Officials' in Meyer, Paulson, and Pogge (eds), *Rights, Culture, and the Law* (n 63) 52.

> Once an official directive has been issued that holds a fair chance of securing coordination among the citizens, other officials ought to be prepared to swallow hard and refrain from issuing contrary directives, even when they are convinced (perhaps rightly) that it would be better for the citizens to coordinate on their directive than on the basis of the one that has already been issued.[114]

Now, as Waldron points out, this principle may apply to legislatures as much as courts: if the publicly recognised procedures give the Supreme Court the final decision on a matter of common concern, and its decision will likely secure coordination, then, on the basis of this principle, legislators should defer to the Supreme Court's decision, regardless of their view of the merits. One point that would seem to follow, but which Waldron does not discuss, is that the value of coordination may be in conflict with the value of democracy, and a choice may have to be made.[115] If coordination is therefore not an overriding value, but can be outweighed by (or can be incommensurate with) other values, can there be other values that justify a court setting aside a decision, notwithstanding the fact

[114] ibid 69.

[115] For a discussion of this in the context of a plurality of authorities, see eg NW Barber, 'Legal Realism, Pluralism, and Their Challengers' in Ulla Neergaard and Ruth Nielsen (eds), *European Legal Method: Towards a New European Legal Realism* (DJØF Publishing 2013), arguing two points: first, that there may be a conflict between democratic values and coordinative values—that is, the values achieved through coordination may require decisions to be made at a higher institutional level governing a larger unit, whereas the values achieved through democracy may require decisions to be made at a lower level governing a smaller unit—and, secondly, that these values may be incommensurable. See also Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (OUP 2013).

that the decision that it sets aside is a valuable solution to a genuine coordination problem?

To answer these questions, it is necessary to consider further the inter-personal nature of coordination. If we lose sight of its inter-personal nature, it becomes all too easy to think that, like the choices that one makes in one's personal life, a political authority's choice between two option may create a conclusive reason to pick the chosen option in the future.[116] Through one's personal choices, one may create a way of life that gives rise to agent-relative reasons for sticking with the chosen option. Of course, faced with the same options again there is then a different choice: stick with the chosen option or reopen the choice. But agent-relative reasons are, in some circumstances, capable of outweighing the option not chosen. In these circumstances, the options cease to be incommensurable for oneself —thereby effectively 'commensurating the incommensurable'—even though, for others, the options may remain incommensurable. Yet it is not clear that the choices of a political authority are able to give rise to conclusive reasons in the same way. When a political authority, in the name of a political community, makes a choice between incommensurable options, there may be no conclusive reason for the political authority to make the same choice when confronted with those options in the future. Although we may accept the necessity and justification for coordination on matters of common concern, this does not preclude us from working to reform the coordinative solution in order to make it conform to our own preferred solution. In such circumstances, to the extent that the necessity of

[116] See eg Webber, 'Rights and the Rule of Law in the Balance' (n 8) 415.

coordination provides a reason not to reopen what has already been settled, it is usually because it is bound up with associated goods, besides the mere value of coordination.

One good that is associated with coordination and is particularly relevant to conflict between incommensurables is the good of *modus vivendi*—a compromise or balance of power—between the incommensurable goods that are reflected in the different choices made by those subject to authority, or (as some value pluralists prefer to say) between incommensurable ways of life.[117] The pursuit of *modus vivendi*, as Gray says, is a 'reasonable implication' of value pluralism, acknowledging as it does that incommensurable ways of life have 'reason to seek terms of coexistence with others in which their distinctive goods are preserved.'[118] The point is that it is not merely coordination that is important, but also the terms of that coordination. The pursuit of *modus vivendi* is the pursuit of a solution in which there is a compromise between the competing goods that respects the values of those subject to it. Although reason requires us to seek a compromise, or *modus vivendi*, it may not determine what amounts to an appropriate compromise—for, if it were to determine what amounts to a reasonable compromise, then the options would not be incommensurable, unless there were different compromises that were themselves incommensurable. But the important point is that there is a difference between, on the one hand, the alternative goods that are the object of the choice and, on the other hand, the

[117] See Gray, *Enlightenment's Wake* (n 1) chs 8 and 9.

[118] John Gray, 'Where Pluralists and Liberals Part Company' (1998) International Journal of Philosophical Studies 17, 32.

alternative compromises between incommensurable ways of life. The reasonableness of a compromise depends on the preferences of people who have made individual choices between incommensurable goods. One implication of this difference is that in some circumstances there may be a reason for following the coordinative solution because it is necessary to coordinate on a matter of common concern and the solution is a choice between one of two incommensurate goods, and yet—at the same time—there may be a reason not to follow the coordinative solution because that solution is not a reasonable compromise between incommensurable ways of life. From the perspective of right reason, following the authority's coordination solution would be reasonable, perhaps even fully justified, and yet the fact that people have certain interests and have made certain choices between incommensurable goods in their personal lives may create a reason to depart from the coordinative solution in order to reach a more reasonable compromise.

It is in the nature of a *modus vivendi* that it is a temporary compromise and is therefore inherently unstable, changing over time. As Rawls pointed out in his distinction between 'an overlapping consensus' and 'a mere *modus vivendi*', the latter 'rests on self- and group-interests alone' and is therefore 'dependent on a fortuitous conjunction of contingencies.'[119] But the truth is that the fact of value pluralism, which Rawls acknowledged, excludes the possibility of an overlapping consensus of the sort that Rawls imagined, dependent as it is on a distinction between the right and the good, and the belief that a unitary conception of justice is possible among a plurality of comprehensive moral

[119] John Rawls, 'The Idea of an Overlapping Consensus' (1987) 7 OJLS 1, 1.

doctrines. In the absence of any good reason for thinking that the good can be divorced from the right, however, the permanent and inescapable conflicts over incommensurable goods lead to the conclusion that a 'mere' *modus vivendi* may be the best that that we can hope for.[120] This more modest model is able to accept the fact that the compromises that enable peaceful coexistence are contingent. It is contingent because it derives from interests that make certain goods the right ones (from the point of view of right reason) for certain individuals, even though, generally speaking, those goods are incommensurable, with the inevitable result that a different community, faced with different individual interests, might reasonably have reached a different decision.

Even if an authoritative rule secures a *modus vivendi*, there is no reason to assume that the compromise reflected in the authoritative rule will be consistent with the changing conditions for securing a *modus vivendi* in the future. Once the conditions have changed, the authoritative rule may well achieve coordination on matters of common concern, and this solution may well be better than no coordination at all, but it may be coordination on the wrong terms. It may not be a *modus vivendi* that respects and preserves the distinctive goods. Consider the following example: a legislature might face a choice between, on the one hand, protecting freedom of expression by allowing a certain kind of hate speech, thereby limiting equality, and, on the other, protecting equality by prohibiting a certain kind of hateful speech, thereby limiting freedom of expression. Suppose that this is a matter of common concern on which a coordination solution is needed. Suppose, moreover, that the options

[120] John Gray, *Two Faces of Liberalism* (Polity 2000) ch 4.

are incommensurable and the legislature chooses to protect freedom of expression, which is a reasonable choice, albeit not a uniquely correct one. Now, it might be that protecting freedom of expression in this way is, under the circumstances, a *modus vivendi*, enabling peaceful coexistence by reaching a compromise among partially shared and partially diverging interests. Under these circumstances, let us say, those against whom the hateful speech is directed should concede the right of their opponents to express their thoughts freely, if only to defeat them in argument. As a result, the value in coordination and the value in *modus vivendi* may here be in agreement. But the situation might be different: although protecting freedom of expression in this way is a reasonable choice between incommensurable goods, it might be that doing so is, under the circumstances, an obstacle to a *modus vivendi* and peaceful coexistence. Perhaps those who are expressing their hateful thoughts have become too intolerable, too powerful, wielding too much influence in the community. Under these circumstances, the value in peaceful coexistence may give rise to a reason to depart from the law's coordination solution, by modifying it or at least creating an exception to it. This is in part because preventing hate speech has now become more important or more valuable than it would have been in a different context. Its increased value is attributable to fact that limiting freedom of expression has become more congenial to a *modus vivendi*. And this will be temporary, since the conditions for securing a *modus vivendi* may change again.

Yet it does not follow that when preventing hate speech would better secure a *modus vivendi*, it is more important or more valuable than protecting free speech. There may still be a failure of transitivity between the options—the mark of incommensurability, lest we forget—notwithstanding the fact that one of the options has become more valuable. In the extensive literature about the implications of value pluralism for peaceful coexistence, much has been written about the suggestion that a value pluralist theory of *modus vivendi* is inconsistent because it treats peaceful coexistence as an overriding value.[121] Gray's response is, in part, to say that the pursuit of a *modus vivendi* is not an overriding value, but rather is 'a commitment to common institutions in which the claims of rival values can be reconciled.'[122] This is a somewhat evasive response. It echoes a point Waldron makes, from a different perspective, in the following passage:

> To say that view Y, which we think unjust, should prevail because it has greater political support, is not to rank political or procedural considerations ahead of justice on some single dimension of moral importance. It is to come at the issue from a different direction. When we say that a view which we think incorrect should prevail on political grounds, we approach it not in terms of intrinsic importance or priority, but in light of the basic circumstances of politics—that even on the matters we think *most* important, a common decision may be necessary despite the existence of disagreement about what that decision should be.[123]

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[121] See eg George Crowder, *Liberalism and Value Pluralism* (Continuum 2002) 121; George Crowder, *Isaiah Berlin: Liberty, Pluralism and Liberalism* (Polity 2004) 153.

[122] Gray, *Two Faces of Liberalism* (n 120) 25. cf John Horton, 'John Gray and the Political Theory of *Modus Vivendi*' (2006) 9 Critical Review of Social and Political Philosophy 155, 166–67.

[123] Waldron, *Law and Disagreement* (n 70) 160–61.

For Waldron, this need for a common decision procedure does not override a reasonable substantive principle, because we disagree about what counts as a reasonable substantive principle and, since he thinks that we cannot beg the question in favour of one's own position in that disagreement, we need a common decision procedure to determine what counts as a reasonable substantive principle.[124] But the fact of disagreement cannot work in the way that Waldron suggests if we accept, as I argued in Chapter 2 we should, that there are objective moral truths. Gray, at least, does not make that mistake. The denial that *modus vivendi* is an overriding value must, therefore, entail not merely that it is a commitment to 'reconciling' rival values, but in some circumstances other values may outweigh the need for peaceful coexistence or be incommensurable with it.[125] Among such values might be freedom of expression: we may have an undefeated reason to protect free speech even though that would harm peaceful coexistence, which we may also have an undefeated reason to pursue.

Should we say, however, that there is something distinctive about the legal process that creates a shared interest and moral reason to collaborate with the law's coordination solutions? Finnis, for example, argues that the fairness of the legal process creates that shared interest.[126] This may be partly because, if one accepts the benefits of the legal system, one should also go along with its

[124] ibid 161, 195–98, 243–49.

[125] See Gray, 'Reply to Critics' (n 77) 333–34.

[126] Finnis, 'Law as Coordination' (n 107) 100–2.

burdens when one's interests are on the losing side.[127] But more importantly for present purposes, by providing coordinative solutions, the application of authoritative rules in the legal process is said to fulfil the principle of fairness by ensuring that litigants will be treated impartially. As Finnis writes,

> It is [the requirement of impartiality] above all, I believe, that drives the law towards the artificial, the *techne* rationality of laying down and following a set of positive norms identifiable as far as possible simply by their "sources" (i.e. by the fact of their enactment or other constitutive event) and applied so far as possible according to their publicly stipulated meaning, itself elucidated with as little as possible appeal to considerations which, because not controlled by facts about sources (constitutive events), are inherently likely to be appealed to differently by different judges.[128]

These are important points to bear in mind. There is indeed a great danger in legal and political theory that underestimates the value that authoritative sources can bring, providing relatively determinate bases for judicial decision making that do not rely on controversial value judgments. But accepting this value in authoritative sources should not lead one to accept Finnis's claim that '[s]uch

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[127] John Finnis, 'The Authority of Law in the Predicament of Contemporary Social Theory' (1984) 1 Notre Dame Journal of Law, Ethics & Public Policy 115, 119. cf Joseph Raz, 'The Obligation to Obey: Revision and Tradition' in his *Ethics in the Public Domain* (n 4).

[128] Finnis, 'Natural Law and Legal Reasoning' (n 5) 150.

sources, so far as they are clear, and respect the few absolute moral rights and duties, are to be respected as the only reasonable basis for judicial reasoning and decision'.[129] If my argument in this section is sound, the fact that the values of coordination, fairness, and impartiality secured by means of determinate authoritative sources can conflict with different values implies that there is no reason to restrict judicial decision making to the former. The implication is not simply that there are some circumstances in which we should settle on solutions *ad hoc*, rather than through general rules laid down in advance.[130] It is that even when there is value in coordinating on an authoritative rule in advance, that good can be outweighed by—or can be incommensurate with—other goods, even when the decision that the rule was supposed to settle was a choice between incommensurables.

VI. CONCLUSION

In sum, moral reasoning often leaves one with a choice among incommensurables, even when there is an authoritative solution settling the issue. That includes the moral reasoning of judges when applying authoritative legal sources. As in moral reasoning generally, in judicial reasoning there is often no escape from choosing between incommensurable options. These

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[129] ibid 151.

[130] On the importance of these two 'techniques' for law, see eg HLA Hart, *The Concept of Law* (3rd edn, Clarendon Press 2012) 130–32; Jeremy Waldron, 'Vagueness in Law and Language: Some Philosophical Issues' (1994) 82 Cal L Rev 509, 539; Andrei Marmor, 'Should Like Cases Be Treated Alike?' (2005) 11 Legal Theory 27, 33–35; Timothy AO Endicott, 'The Value of Vagueness' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011) 25.

choices, arising from the requirements of morality, arise in judicial reasoning and decision making not only when the law is indeterminate, but also when the law is determinate. And when the law is determinate, choices between incommensurables arise not only when moral reasoning provides a uniquely correct answer that conflicts with the law's answer, but also when moral reasoning leaves us with a choice between incommensurable options. The law's authoritative sources may fail to commensurate the incommensurable, despite its best efforts.

4

Rights in the Balance

Let us turn to consider some implications of the incommensurability thesis for the court's enforcement of human rights. It is worth recalling that incommensurability is not a problem that is unique to human-rights adjudication. But it does raise distinctive questions about human rights and their enforcement that are worth pursuing. In this chapter, I shall partially defend the use of the proportionality principle in human-rights adjudication, albeit with the caveat that proportionality, like moral reasoning more broadly, will be of limited use to the extent that there is incommensurability. It is a consequence of value pluralism, I shall suggest, that there should be what is often called a two-step process of human rights adjudication: first, the moral evaluation necessary for the definition (the concretisation or specification) of the right and, secondly, the moral evaluation necessary for determining whether or not the right has been justifiably infringed. Once defined, rights—or the values underpinning rights—may conflict with, may be outweighed by, may be incommensurate with, other values.

I. THE PRINCIPLE OF PROPORTIONALITY

Proportionality seems to have become the 'one big thing' for many human-rights lawyers. Since, on most accounts, the principle of proportionality requires balancing between conflicting values, a critique of proportionality may be thought to follow inexorably from an acceptance of value pluralism and incommensurability, that is, the absence of a common scale with which to assess the conflicting values. On the other hand, the principle of proportionality, when used to assess whether or not a right has been justifiably infringed, looks positively pluralist when contrasted with the theory of rights according to which it is in the very nature of rights that they are moral absolutes that cannot conflict with, or be balanced against, different interests or values. This theory of rights may be based on the idea that values, but not rights, can conflict, or it may be based on a thoroughly monistic approach to value in general. In this chapter I shall argue that neither the critique of proportionality based on value pluralism and incommensurability, nor the critique based on the nature of rights, is successful. It is true that rights can and should sometimes be specified in ways that avoid conflict with other values, and it is true that a proportionality analysis is sometimes impossible due to the incommensurability of values. But neither the nature of rights nor the possibility of incommensurability among values is fatal to proportionality as such. They only serve to highlight the limits of proportionality.

The increasing volume of writings on proportionality has brought with it increasingly nuanced conceptions of proportionality and its role in moral and legal reasoning. The perceived merit of the principle of proportionality is often said to be its ability to make reasoning more structured and principled than other, supposedly more arbitrary, forms of reasoning. One proponent of proportionality describes it as a 'universal criterion of constitutionality'.[1] Not surprisingly, then, much attention has been devoted to defining the structure of proportionality. Although others would formulate the principle differently, the following four-part structure, which reflects the dominant understanding of proportionality's main requirements, will suffice for our purposes:

1. The exercise of public power must be in pursuit of a legitimate objective;
2. The exercise of public power must be a suitable means for (that is, it must be capable of) achieving that legitimate objective;
3. The exercise of public power must infringe the right no more than is necessary to achieve the legitimate objective; and
4. The gain in the value that justifies the legitimate objective must be worth the loss in the values justifying the right impaired. This fourth requirement is sometimes referred to as 'proportionality stricto sensu' or 'proportionality in the narrow sense'.

[1] David M Beatty, *The Ultimate Rule of Law* (OUP 2005) 162.

Lord Hoffmann once described the academic fixation with the structure of proportionality as 'no better than train spotting'.[2] It is true that proponents of proportionality have sometimes exaggerated the structural advantages of proportionality in comparison with standard approaches to reasonableness review in administrative law. Although there may be something to be said for the greater analytical clarity that comes with the structured proportionality test—at least when compared with some traditional justifications for judicial decision-making—the four stages arguably reflect the established common-law principles of judicial review.[3] The first and second stages essentially reflect the principle that exercises of public power must not pursue improper purposes (where the proper purposes are understood to be more than merely the purposes expressed or implied in the enabling legislation). And although, by themselves, the third and fourth stages appear to require the courts to go beyond what the common law traditionally required, once it is understood that these stages should be accompanied by appropriate principles of deference to authority, it seems to me that they become merely one part (albeit, perhaps, a more clearly articulated part) of the traditional principles of review for reasonableness.[4]

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[2] Lord Hoffmann, 'The Influence of the European Principle of Proportionality upon UK Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 113.

[3] This makes it largely irrelevant to discuss the question of whether proportionality is applicable only to rights adjudication or is instead a more general ground of review. On this question, see eg Murray Hunt, 'Against Bifurcation' in David Dyzenhaus, Murray Hunt, and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing 2009); Paul Craig, 'Proportionality, Rationality, and Review' [2010] NZ L Rev 265.

[4] cf *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, in which the European Court of Human Rights held that the Court of Appeal had not provided an effective remedy, because its application of *Wednesbury* unreasonableness required the domestic court to assess whether the measure was reasonable rather than whether it was necessary.

The feature of proportionality analysis on which I shall concentrate is the fourth stage, understood as a requirement to consider the relative weight of rights and competing values. Some accounts of proportionality attempt to leave out this fourth stage altogether. For a while, the British courts in human rights cases adopted a proportionality test in which there was no explicit requirement to balance conflicting values,[5] until Lord Bingham eventually made clear that the test included a 'fair balance' requirement.[6] The reluctance to include the language of balancing in the analysis of proportionality can still be found in the work of many theorists.[7] John Finnis, for example, draws attention to a more historical conception of proportionality, which does not include a balancing requirement. The historic principle of proportionality, John Finnis says, was launched by Aquinas's 'double effect' argument, which he used in distinguishing between murder and self-defence. Aquinas's argument was that an act done with a good intention can be rendered morally bad by being disproportionate to its end, so that it is morally wrong to use more violence than is necessary to defend one's own life.[8] Based on the distinction between intended and unintended consequences, the core of the principle of double effect is that any harm that is

[5] See *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, citing Lord Clyde in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, in which Lord Clyde adopted from South African and Canadian case law the following questions: 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

[6] *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 [20] (Lord Bingham); *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 [19] (Lord Bingham). See also *R v Oakes* [1986] 1 SCR 103, 139 (Dickson CJ).

[7] See eg Beatty, *The Ultimate Rule of Law* (n 1) 171.

[8] Thomas Aquinas, *Summa Theologica* (Benziger Brothers, Inc, 1947) II-II, q 64 a 7 c.

done must not have been intended, but must be a side effect—or an unintended consequence—of the means necessary to secure the intended good end. And so an action done in self-defence that results in the death of one's assailant will be morally justified only if the death of one's assailant was not intended, but was merely a side effect of using necessary means to achieve the end of self-defence. As Finnis explains:

> the proportionality in question is no more than the proportion of a specific means to a specific end: if stunning one's assailant will suffice for self-defence, one must not shoot him through the heart; that would not be 'proportionate', and the choice to inflict needless harm would be immoral. There is here no trace of any doctrine that it is morally permissible to kill when one considers that the good to be attained by killing outweighs (is proportionately greater than) the harms created overall by killing and the goods to be attained overall by not killing.[9]

Drawing on this 'lost meaning' of proportionality, Martin Luterán claims that 'proportionality as balancing' invites arbitrary decision making, in contrast with the focal or lost meaning of proportionality ('proportionality between means and ends'), which he says is a more principled form of reasoning. However, this historic conception of proportionality cannot escape balancing completely. For, even on this conception, not only must the intended action be necessary, but

[9] John Finnis, *Fundamentals of Ethics* (Clarendon Press 1983) 85.

there is a further requirement that 'the negative side effect must not be disproportionate in the given circumstances'.[10] Proponents of this historic conception insist that it does not involve a balance between conflicting values[11] But this is incorrect, for this sort of balancing is often unavoidable. If killing is necessary for self-defence—so that there is a straightforward choice between losing one's own life and taking the action that is necessary to save one's life, which could reasonably be expected to have as its side effect the loss of the assailant's life—the conclusion that killing is justified must surely be based on the judgment that one's own life is either more valuable than or (what is more probable) of equal value to or incommensurable with the assailant's life. And this sort of evaluation is precisely what is involved in the fourth stage of proportionality analysis, at least to the extent that the values are commensurable.[12]

Thus, we should proceed on the basis that the principle of proportionality does require the values that justify rights to be balanced against competing values. This is where the principle of proportionality meets the objection that it misunderstands the special moral significance of rights, which entails that rights, by their very nature, cannot be balanced. According to this view, balancing

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[10] Martin Luterán, 'The Lost Meaning of Proportionality' in Grant Huscroft, Bradley W Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 30.

[11] ibid 30 n 30.

[12] Interestingly, Luterán goes on to suggest that the evaluation of whether the negative side effects are acceptable will always involve incommensurables, because in such evaluations reason runs out and a choice is required. He argues that if 'balancing' is understood to mean choosing in this sense, then 'there is no harm in admitting that in this limited sense, the proportionality test requires balancing.' This claim is highly surprising given that he criticises the balancing approach because 'it embeds arbitrariness into the structure of judicial reasoning.' See ibid 35–36.

cannot do justice to the special moral force of rights. I shall suggest, however, that we should not think that the balancing requirement necessarily leads to the view that rights have no special moral significance. In the next section I shall address the question of whether or not the special moral significance of human rights is compatible with balancing rights, or at least the values justifying rights, against conflicting values. My argument is that human rights have a special moral force even though they can be justifiably infringed. This raises an obvious question about the specification of human rights: why should we specify rights in a way that entails that they can conflict with, and may be outweighed by, other values? Does that not do violence to the special normative force of rights? As I shall argue in sections III and IV, the two-step process in rights adjudication—first, the moral evaluation that concretises or specifies the right, and then, secondly, the moral evaluation that determines whether the right was justifiably infringed—is an important consequence of the plurality of values. It is worth stressing at this stage that the right that is defined—concretised or specified—at the first stage is a moral right. Just as we have to concretise or specify values in general moral reasoning, so we have to define moral rights through concretisation or specification. This definition, through moral reasoning, determines the extent to which a right, or the values that underpin a right, conflict with another value. There is then a further question of whether the conflicting value is capable of outweighing the right. Having sought to defend proportionality analysis from the critique based on the nature of rights, the final section of this chapter will explore the extent to which the incommensurability of values presents a problem for the principle of proportionality.

II. THE FORCE OF RIGHTS

Do human rights, in the moral as opposed to legal sense, have a special normative force? Among those who think that they do, it is sometimes thought that any talk of proportionality or balancing, with their connotations of utilitarianism, cannot account for the special status and force of rights. Some utilitarians, notably David Hume, John Stuart Mill, Henry Sidgwick, and, more recently, RM Hare, famously fought back against this allegation. They developed what have become known as 'indirect' forms of utilitarianism. The central feature of this indirect view is the apparently paradoxical idea that the principle of utility is sometimes best satisfied by imposing constraints on the utilitarian calculation. In its indirect form, the utilitarian assessment is not a decision procedure for resolving every specific practical dilemma. Instead, it is a foundational principle that may justify holding certain precepts to be immune from the constant threat of the utilitarian calculation. In this way indirect utilitarian theory can allow for the possibility that human rights should constrain the pursuit of the general welfare. The constraint comes from the individual right's status as a weighty moral value, ordinarily indefeasible by considerations of the general welfare.[13] Indirect utilitarians therefore accept that human rights have a special normative force and attempt to explain how this special force nevertheless derives from the ultimate commensurability of the principle of

[13] See John Gray, 'Indirect Utility and Fundamental Rights' (1984) 1 Social Philosophy and Policy 73, 86.

utility.[14] I think their attempt is misguided but that something along these lines explains how human rights get their force.

There is, however, a group of scholars who broadly accept the notion that rights have no special status, no special importance, no special normative force.[15] Although ultimately mistaken, there is some plausibility in this idea if one accepts the need to balance rights and competing values. The idea here, to use Roscoe Pound's formulation, is that when weighing or valuing competing claims, 'we must be careful to compare them on the same plane', for if we think of one claim as a right and another as an interest, 'our way of stating the question may leave nothing to decide.'[16] Often, however, those who claim that rights have no special force acknowledge that they are talking about 'prima facie' or 'abstract' rights. This is in contrast with 'definite' or 'concrete' rights, which do not conflict with other values, but are interdependent with those values.[17] I shall return to this distinction in the next section, but here it is worth noting that it points to an important clarification. When we talk about rights being balanced

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[14] cf HLA Hart, 'Between Utility and Rights' in his *Essays in Jurisprudence and Philosophy* (OUP 1983) 222.

[15] For some recent examples of this viewpoint, see Robert Alexy, *A Theory of Constitutional Rights* (Julan Rivers tr, OUP 2002) 48–49; Beatty, *The Ultimate Rule of Law* (n 1) 160, 170–71; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012) 40; Mattias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlakos (ed), *Law, Rights, and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007) 151; Kai Möller, 'Proportionality and Rights Inflation' in Huscroft, Miller, and Webber (eds), *Proportionality and the Rule of Law* (n 10) 156.

[16] Roscoe Pound, 'A Survey of Social Interests' (1943) 57 Harv L Rev 1, 2. See also Möller, 'Proportionality and Rights Inflation' (n 15) 156: 'rights operate on the same plane as … policy considerations'.

[17] Richard H Fallon, Jr, 'Individual Rights and the Powers of Government' (1993) 27 Ga L Rev 343; Richard H Fallon, Jr, 'Further Reflections on Rights and Interests: A Reply' (1993) 27 Ga L Rev 489, 493.

against other values, what we are really talking about are the values underlying rights being balanced against other values.

The main problem with these arguments is that they do not adequately capture the special moral importance or force of rights, the idea that by their very nature rights defeat some other considerations. Critics of the balancing approach to rights adjudication feel the need, therefore, to argue that rights matter and should be taken seriously, and they insist that the principle of proportionality relegates rights to a position of 'inconsequence' and so 'fails to capture the moral priority of rights'.[18] The whole point of appealing to rights, it is argued, is that rights have peremptory force. The arguments against balancing in rights adjudication are sometimes presented in the guise of 'hierarchical incommensurability' or 'weak incommensurability'—'weak' because, instead of balancing, there is an 'ordering' between the conflicting values, so that one of the values necessarily wins over the other, regardless of their weight.[19] Leaving aside for the moment the question of whether this idea properly understands the nature of value incommensurability,[20] the idea here is simply that there are some interests that are necessarily defeated by rights: there is in a sense no real contest.

[18] Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2009) 116; Grégoire Webber, 'On the Loss of Rights' in Huscroft, Miller, and Webber (eds), *Proportionality and the Rule of Law* (n 10) 125–26. cf Frederick Schauer, 'A Comment on the Structure of Rights' (1993) 27 Ga L Rev 415, 415: 'Rights matter, but rights are not all that matter.' Schauer better encapsulates the essential problem.

[19] For 'weak incommensurability', see Jeremy Waldron, 'Fake Incommensurability: A Response to Professor Schauer' (1994) 45 Hastings LJ 813, 816. On 'hierarchical incommensurability', see Richard H Pildes and Elizabeth Richard H Pildes, 'Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics' (1990) 90 Colum L Rev 2121; Richard H Pildes, 'Conceptions of Value in Legal Thought' (1992) 90 Mich L Rev 1520.

[20] In my view, weak or hierarchical incommensurability is based on a misunderstanding of value incommensurability. It follows that, as I see it, value incommensurability should be understood as what Waldron calls 'strong' incommensurability.

'Their lack of commensurability,' Jeremy Waldron says, 'refers only to the absence of a common dimension of measurement that would allow trade-offs between them in either direction.'[21] Thus, for Richard Pildes, the idea of 'balancing' rights with competing interests 'on the same plane' is an attack on the incommensurability of values, replacing what he calls the 'qualitative' distinction between rights and competing public policy interests (the latter being subordinate to the former) with 'a quantitative weighing of clashing, equally legitimate, interests.'[22] This is not how I understand incommensurability. Rather, it best understood as an argument against balancing rights against values based on the alleged greater ordinal importance of rights, which gives them a special peremptory force.

Some of the most well-known arguments for this special peremptory force of rights include Ronald Dworkin's argument for 'rights as trumps', Robert Nozick's argument for rights as 'side constraints', and John Rawls's argument for the 'lexical priority' of certain rights.[23] Another popular argument against the balancing approach is that rights are correlative with duties, and that duties are

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[21] Waldron, 'Fake Incommensurability' (n 19) 817.

[22] Pildes, 'Conceptions of Value in Legal Thought' (n 19) 1532. See also Richard H Pildes, 'Against Balancing: The Role of Exclusionary Reasons in Constitutional Law' (1994) 45 Hastings LJ 711. For similar arguments, see Julan Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174, 180 (claiming that 'the conception of proportionality that predominates in continental European contexts is rooted in an assumption that rights and other interests are formally indistinguishable'); Stavros Tsakyrakis, 'Proprortionality: An Assault on Human Rights?' (2009) 7 ICON 468, 474 (criticising the principle of proportionality for pretending that human rights and public interests 'compete on a par').

[23] Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1977); Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974); John Rawls, *A Theory of Justice* (Harvard UP 1971).

'exclusionary reasons'.[24] All these accounts of rights share the thesis that rights, by their very nature, cannot be balanced with at least some other interests: a right does not outweigh other interests but rather it *overrides* them by virtue of being of a higher order.[25] Some believe that there is a significant difference between understanding rights as trumps and understanding rights as exclusionary reasons. Pildes, for example, claims that whereas Dworkin understood individual rights as trumps against the demands of the common good, we ought instead to see rights as constraints on the kinds of reasons that the government may legitimately act on.[26] But Dworkin's idea of trumps is best understood as an attempt to capture the idea that there are certain reasons that should be excluded from practical reasoning, because they have been trumped by (rather than balanced with) rights.[27] On this account, rights can be 'balanced' against competing, non-excluded reasons. Within the scope of the right, according to Dworkin, there can be no balancing against excluded reasons, although the right, or at least the values justifying the right, may be balanced against competing claims of right or

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[24] On the idea of an 'exclusionary reason', see Joseph Raz, *Practical Reason and Norms* (first published 1975, 2nd edn, Clarendon Press 1990). The idea of exclusionary reasons was considered in more detail in Chapter 2, when I considered the nature of authority and the implications of value incommensurability for authority.

[25] See Waldron, 'Fake Incommensurability' (n 19) 818; Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (n 22) 473; Grégoire CN Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 CJLJ 179, 201.

[26] Pildes, 'Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law' (n 22); Richard H Pildes, 'Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism' (1998) 27 JLS 725.

[27] Jeremy Waldron, 'Pildes on Dworkin's Theory of Rights' (2000) 29 JLS 301, 303: 'the idea [that Dworkin defends] is that certain reasons are to be excluded from politics, and the term *trumps* simply expresses a determination not to let such excluded reasons back in.' See further Paul Yowell, 'A Critical Examination of Dworkin's Theory of Rights' (2007) 52 Am J Juris 93.

against non-excluded reasons of the public interest.[28] In other words, the permissibility of balancing, on this account, depends on the moral judgment of which reasons are excluded and which are not.[29] Or, to put it another way, rights on this view are seen as rebuttable presumptions, shields or suits of armour against some considerations but not others.[30] According to Frederick Schauer, the existence of a presumption against limiting a right is what makes the language of proportionality different from the language of balancing, in which, he says, the cost-benefit analysis eschews such a presumption.[31] However, it is not clear why the existence of a presumption in rights adjudication is incompatible with weighing and balancing. Given that balancing and commensurability are metaphors, what is wrong with using it to describe the situation in which rights defeat some competing considerations?[32] If a right trumps another value, is it not because the right is more important than the other value, which is to say, it outweighs it?

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[28] Dworkin, *Taking Rights Seriously* (n 23) 199–200. For example, a right might be overridden by the public interest in an emergency, when 'the trump gets trumped not by an ordinary justification but by a higher trump': Ronald Dworkin, *Justice for Hegehogs* (Belknap Press 2011) 473 n 1.

[29] See Jeremy Waldron, 'Rights in Conflict' (1989) 99 Ethics 503, 516–19. cf Denise Meyerson, 'Why Courts Should Not Balance Rights against the Public Interest' (2007) 31 Mebourne U L Rev 873, arguing that we should 'overprotect' rights.

[30] Frederick Schauer, 'Proportionality and the Question of Weight' in Huscroft, Miller, and Webber (eds), *Proportionality and the Rule of Law* (n 10); Frederick Schauer, 'Can Rights Be Abused?' (1981) 31 Phil Q 227; Schauer, 'A Comment on the Structure of Rights' (n 18) 429.

[31] Schauer, 'Proportionality and the Question of Weight' (n 30).

[32] See Joseph Raz, 'Professor Dworkin's Theory of Rights' (1979) 26 Pol Stud 123, 126: 'almost always Dworkin sounds as if he meant to say something much more far-reaching than these truisms.'

In view of considerations such as these, the argument for treating rights as trumps or rebuttable presumptions against excluded (or insufficiently compelling) reasons has been criticised for neglecting the force of rights. This criticism was powerfully formulated in John Finnis's 1985 Maccabean lecture.[33] In criticising the idea that the presumptive priority of individual rights can be rebutted whenever the threat to the collective welfare is sufficiently great, Finnis argues that '[g]enuine, carefully specified rights are not mere fair-weather friends.'[34] Rather, he insists, rights and their correlative duties are inviolable. Some theorists have sought to distinguish between 'infringement' and 'violation' of rights, arguing that it is possible to infringe a right without that infringement being wrong and hence without the infringement being a violation of the right.[35] For Finnis, however, every infringement is a wrongful violation. To defend this account of the inviolability of rights, he draws on the distinction between what one chooses or intends and what one accepts as the unintended consequences or side effects of one's choice. As Finnis explains:

[33] John Finnis, 'A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence' (1985) 71 Proceedings of the British Academy 303, reprinted as 'Human Rights and Their Enforcement' in John Finnis, *Human Rights and the Common Good: Collected Essays Volume III* (OUP 2011). All references are to the reprinted version.

[34] Finnis, 'Human Rights and Their Enforcement' (n 33) 34–35.

[35] See Judith J Thomson, 'Self-Defense and Rights' in her *Rights, Restitution, and Risk: Essays in Moral Theory* (William Parent ed, Harvard UP 1996) 40, criticizing 'the view that rights are absolute in the sense … that every infringing of a right is a violating of a right.' See also Alan Gewirth, 'Are There Any Absolute Rights?' (1981) 31 Phil Q 1, 1 n 1. cf John Oberdiek, 'Lost in Moral Space: On the Infringing/Violating Distinction and its Place in the Theory of Rights' (2004) 23 Law & Phil 325. For my purposes it does not matter whether we say that there has been a justified infringement or a justified violation.

> For if there are truly inviolable rights which, when precisely specified, do trump, and not merely presumptively, *all* competing considerations, that is because the correlative wrong (or breach of duty) is the *choosing* to destroy, damage, or impede some basic aspect of a human person—which is always wrong.'[36]

Presumably, on this argument, a right will not have been violated when the damage done to some basic aspect of a human person is merely the unintended side effect of the pursuit of some other common good. But even if one accepts the use of the distinction between intended and unintended consequences on which this argument turns, the argument is not convincing. It is difficult to see what is gained by saying that the right and the correlative duty have not been violated when its ostensible infringement is an unintended side effect rather than an intended, though regretted, means to a good end. In any case it is difficult to distinguish between harmful effects that are regretfully intended and those that are regretfully foreseen but unintended. Moreover, on Finnis's account, the unintended side effect must be proportionate, and, as I mentioned earlier, even the 'lost meaning' of proportionality requires a balance to be struck between the competing considerations. Unless we accept what I think no one should accept—namely, that all rights are necessarily absolute, such that the intended or

[36] Finnis, 'Human Rights and Their Enforcement' (n 33) 35.

unintended impediment of the right is always wrong—then no plausible theory of rights can escape the problem of balancing competing considerations.[37]

The objection to the notion that there can be justified interferences with rights is grounded in the belief that any 'balancing' among competing values takes place before the right is specified or concretised—something which, as I have already intimated, proponents of balancing often acknowledge. According to Finnis and others, we misunderstand the nature of rights when we say that rights can be justifiably infringed. When, for example, the European Convention on Human Rights lists grounds—such as 'national security', 'public safety', 'prevention of disorder or crime', and 'protection of health or morals'—on which an interference can be justified, Finnis points out that we should understand these limitations as part of the right's definition, because they specify the limits of the right.[38] In rights adjudication, on this view, legislatures and courts are *defining* or *specifying* rights, not determining whether their infringement is justified: the limitations on rights that are usually taken to be justified 'interferences' with the right are, in fact, limitations that specify the limits of the right.[39] But this view, which will be explored in the next section, leads to the conclusion that rights are absolute: as one proponent of this view

[37] Gray, 'Indirect Utility and Fundamental Rights' (n 13) 89. cf Gewirth, 'Are There Any Absolute Rights?' (n 35), arguing that rights can be, but are not necessarily, absolute.

[38] Finnis, 'Human Rights and Their Enforcement' (n 33) 40. See also Webber, *The Negotiable Constitution* (n 18) esp ch 4.

[39] Finnis, 'Human Rights and Their Enforcement' (n 33) 40; Webber, *The Negotiable Constitution* (n 18) ch 4.

says, '[r]ights, once properly specified, can never be justifiably infringed; they are either complied with or violated—there is no in-between.'[40]

Against this view, however, is it possible that there may be considerations that outweigh—or may be incommensurate with—properly specified rights? Is it possible that, although rights, or the values underpinning rights, override some values—in a way that can be said to give them special normative force—other values override those rights, so that it makes sense to say that rights can be justifiably infringed? Is it possible, in other words, that legislatures and courts should both define or specify rights *and* determine whether their infringement was justified? In my view, these questions should be answered in the affirmative. The wide-spread understanding of rights adjudication is correct to view it as a two-stage process: first, the court must determine the scope of the right and whether the right was infringed, and second, the court must determine whether the infringement was justified.[41] If the right has been infringed, then at the second stage of rights adjudication the court should apply the proportionality test that I set out at the beginning of this chapter. So not only is value incommensurability possible at the stage of specification; it is also possible at the stage of deciding whether an infringement of a right is justified. That is the claim I wish to defend, but first it is necessary to defend this two-step process of rights adjudication.

[40] Webber, *The Negotiable Constitution* (n 18) 124. It should be noted Webber's remarks ignore the terminological distinction, adopted by other theorists, between 'infringing' and 'violating' a right: see Thomson, 'Self-Defense and Rights' (n 35) 40.

[41] See also Charles-Maxime Panaccio, 'In Defence of Two-Step Balancing and Proportionality in Rights Adjudication' (2011) 24 CJLJ 109.

An adequate theory of rights requires us to move beyond the two extremes of, on the one hand, those who think that human rights have no special force and, on the other, those who think that human rights are inviolable or can never be justifiably infringed. While we should always be reluctant to make the clichéd and often false statement that the truth lies somewhere in between, here the truth does lie somewhere in between. I therefore propose what could be described as a middle way.[42] The common mistake that both the two extreme positions of this debate make is in failing to understand that the normative force of rights is determined by their specification. While there may not be anything of special importance about rights per se, the rights that are generally recognised as human rights get their special moral importance from the values underlying them. Given that rights get their force once they have been specified, the special normative force of rights is relevant only at the second stage of rights adjudication, when the principle of proportionality can be used to determine whether the infringement was justified. There is no reason to think that the right's special normative force is necessarily absolute, but likewise there is no reason to think that this normative force is on a par with the competing considerations. By remaining open to the possibility of genuine conflicts among fully specified rights and competing considerations, the two-stage structure of rights adjudication offers a theory of rights that is most conducive to value pluralism. The next two sections will defend these propositions, before the final

[42] For different attempts to reconcile the absolutist and balancing approaches, see eg John Hart Ely, 'Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis' (1975) 88 Harv L Rev 1482, 1500–02; James E Flemming, 'Securing Deliberative Democracy' (2004) 72 Fordham L Rev 1435.

section explores further the implications of value pluralism for the principle of proportionality.

III. THE SPECIFICATION OF RIGHTS

The first stage of rights adjudication, which involves the definition or specification of moral rights, requires moral reasoning just as much as the second stage. If, as a result of this moral reasoning, it is clear that one value is more important or weighty than the other, or they are of equal value, then this moral reasoning can aptly be described using the metaphor of balancing. Moreover, the resulting definition is not a once-and-for-all conclusion. Even if it were possible to clearly define the right, it may sometimes be undesirable if it leads to the over- and under-inclusiveness that comes with defining rigid rules in advance of particular circumstances. This explains why Bills of Rights do not contain clearly defined rights, but rather leave the rights to be defined at the point of application. The provisions of Bills of Rights, like other statutory provisions that make reference to standards of reasonableness, direct law-appliers to engage in moral reasoning, not to enforce clearly defined rights. This feature led John Griffith to describe the provisions in Bills of Rights as 'the statement of a political conflict pretending to be a resolution of it.'[43] However, given that one of the aims of Bills of Rights is to leave open the question of their application, it would be a mistake to think that they even purport to resolve conflict over what each right requires. The provisions in Bills of Rights seek to protect certain

[43] JAG Griffith, 'The Political Constitution' (1979) 42 MLR 1, 14.

rights, but these remain unspecified: the task of the legislature and judiciary is to define and delimit those rights through moral–political reasoning.[44] And if the two-stage process of rights adjudication is adopted, then it requires moral reasoning in two ways: first to specify the rights, and then to determine whether the right has been justifiably infringed.

Those who believe that rights can be justifiably infringed often make the mistake of overlooking, or at least downplaying, the requirement of specification at the first stage. Proponents and critics of the proportionality test sometimes argue that the proportionality itself implies or necessitates 'rights inflation' and 'definitional generosity'.[45] As one enthusiast for rights inflation puts it, 'Proportionality and rights inflation are two sides of the same coin'.[46] Once balancing is accepted, on this account, there becomes 'no obvious reasons for defining narrowly the scope of interests protected as a right'.[47] This in part explains why some proponents of balancing argue that rights have no special force. For if rights are defined too broadly, the occasions for their justified infringement would inevitably increase and it would seem obvious that rights are merely one consideration like any other to be put in the balance. That is not to say, of course, that those who reject balancing in favour of a theory of absolute

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[44] Dworkin, *Taking Rights Seriously* (n 23) 197: 'It is part of the job of governing to "define" moral rights through statutes and judicial decisions, that is, to declare officially the extent that moral rights will be taken to have in law.'

[45] Möller. 'Proportionality and Rights Inflation' (n 15) 155; Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (n 22) 480.

[46] Möller, 'Proportionality and Rights Inflation' (n 15) 159.

[47] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 Law & Ethics of Human Rights 140, 151.

rights are not at themselves sometimes guilty of rights inflation and definitional generosity. Take, for example, the case of *Lochner v New York*, in which the US Supreme Court defined broadly the scope of the Fourteenth Amendment, which forbids states to 'deprive any person of life, liberty or property without due process of law', to strike down a state statute that limited the working hours of bakery employees.[48] In his dissent, Oliver Wendell Holmes criticised the combination of absolutism and definitional generosity. Holmes argued that the majority had overlooked the fact that general propositions, such as the right to liberty, do not determine concrete cases, and that rights must be specified or concretised before it is possible to decide whether or not they have been infringed.

Notwithstanding the occasional emphasis on definitional generosity, however, few would deny the need for rights to be specified. The critical question, over which there is much disagreement, is not whether rights need to be specified, but how they should be specified and what this specification entails. Which interests or values do rights override, outweigh, or exclude? What does the right, properly defined, require? Although it has been argued that the specification of rights does not involve any balancing,[49] Holmes was right to say that the specification of rights depends on a moral judgment of the relative weight of competing considerations—a judgment or choice that, notwithstanding the imagery of balancing, is really 'some attitude of yours upon a matter not

[48] *Lochner v New York* (1905) 198 US 45, 53, 56 (Peckham J).

[49] T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale LJ 943, 951–52.

capable of exact quantitative measurement, and therefore not capable of exact logical conclusions.'[50]

But even if we accept that specification of rights requires some sort of moral reasoning that can sensibly be described as balancing, there is much disagreement over whether the specification of a right is a conclusion of practical reasoning, such that the right is absolute and not a defeasible value to be weighed against competing considerations. For some, once we acknowledge the need to specify rights, it seems to follow inevitably that specified rights are conclusions to practical reasoning. 'The specified conception of rights,' says John Oberdiek, 'identifies the content of a right *in light of* and indeed *in response to* what is justifiable to do under the circumstances.'[51] On this account, then, once a right has been specified, no further moral reasoning or balancing is required. This conception of specified right is, in my view, mistaken. A specified right does not reflect the conclusion of practical reasoning, but merely an intermediate conclusion of practical reasoning, namely, the conclusion of the limited part of practical reasoning that is concerned with specifying the right. Rights specification is a process like any other concretisation of value, and it is a prelude to the question of whether or not there is a conflict between the right and another value.

The moral judgment required for the specification of the content and force of a right is divorced from the descriptive analysis of the nature of rights in

[50] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harv L Rev 457, 466.

[51] John Oberdiek, 'Specifying Rights Out of Necessity' (2008) 28 OJLS 127, 128 (emphasis in original).

general. In terms of the latter, I accept the conventional view that any plausible descriptive analysis of the nature of rights must include a feature explained by one of Wesley Hohfeld's correlatives: one's right entails another's duty. The Hohfeldian analysis of rights transforms two-term relations (for example, that people have the right to free expression) into specific three-term relations (for example, that a particular set of people have the right to free speech in these particular circumstances, which entails a correlative duty on the part of another person or set of persons).[52] It might be a single duty that is correlative with a right or it may be what Waldron describes as 'successive waves' of duties.[53] The important point is that A's right to ϕ is correlative to a duty or duties on the part of others to protect or respect A's ability to ϕ.[54] It is no part of the descriptive analysis of rights, however, that rights and their correlative duties must be indefeasible. That is to say, there is no conceptual necessity for rights to be absolute, even if there is a connection between 'right' and the classical idea of '*jus*' (or '*ius*').[55] I will leave open the question of whether the central case of a right can be entirely described in morally neutral terms. But the question of the content and force (in short, the value) of a right can only be answered through

52 WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale UP 1919).

53 Waldron, 'Rights in Conflict' (n 29) 509–12.

54 For the argument that rights ground duties, see Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986).

55 cf Webber, 'On the Loss of Rights' (n 18) 126, arguing that there is a 'conceptual' relationship between rights and justice, a concept 'with an undeniable claim to conclusiveness and peremptory status'. See also John M Finnis, 'Aquinas on *ius* and Hart on Rights: A Response to Tierney' (2002) 64 Review of Politics 407.

moral reasoning. And there is nothing inevitable about moral reasoning requiring indefeasible, absolute rights and conclusive, peremptory duties.

The conception of specified rights as conclusions to practical reasoning blurs the line between the conceptual or descriptive analysis of rights and the moral reasoning necessary to specify the force and content of a right. This can be seen in Frederick Schauer's definition of a right: 'the right to ϕ is not a right *to* ϕ, but rather a right not to have the ability to ϕ infringed without the provision of a justification of special strength.'[56] As a reason in favour of this definition, Schauer highlights its ability to make sense of our feeling that, when a state justifiably restricts our ability to ϕ, the state has not violated the right and so need not feel remorse or provide compensation, because the state has given us all to which the right entitled us.[57] This view naturally leads to the conclusion that rights are inviolable, because any justified interference with the *ability* to ϕ is not a violation of the *right* to ϕ. And yet many who find Schauer's account of the structure of rights plausible would not want to defend the conclusion that rights are inviolable—including, I think, Schauer himself, who says that 'rights, like shields, can be thought of as having genuine force even though they may not be absolute.'[58] Moreover, there are many who would argue that the right (and not merely the ability) to ϕ can be justifiably infringed, with the result that there

[56] Schauer, 'A Comment on the Structure of Rights' (n 18) 428.

[57] ibid 429.

[58] ibid 429.

should sometimes be feelings of remorse and compensation for the justified interference of the right.[59]

To get a clearer account of the specification of rights, we should reflect on the important distinction between what is of value and what one has a right to. The distinction is too often overlooked in human-rights discourse.[60] Values do not necessarily give rise to rights, if they do not require a corresponding duty in others. But what does it mean to distinguish between rights and the values that those rights protect and promote? We have to consider the underlying values in order to specify rights. The underlying values will sometimes conflict and may need to be balanced. But recall a point made in chapter 2: before the underlying values can conflict and may need to be balanced, those values themselves have to be specified or concretised. Critics of balancing in rights adjudication sometimes argue that values can be balanced, but that rights, being conclusions to practical reasoning, can only ever be adjusted or specified.[61] Yet if values have to be specified as well as balanced, might it also be the case that rights have to be balanced as well as specified?

Consider the right to freedom of expression. When does the value of free expression become a right to free expression? One answer is that it becomes a right to free expression when the value of free expression is not outweighed by

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[59] Thomson, 'Self-Defense and Rights' (n 35) 40–41.

[60] For the criticism that this distinction is too often overlooked, see eg John Finnis, *Natural Law and Natural Rights* (first published 1980, Clarendon Press 2011) 214; Joseph Raz, 'Human Rights without Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010).

[61] TM Scanlon, 'Adjusting Rights and Balancing Values' (2004) 72 Fordham L Rev 1477, 1478. See also John Rawls, *Political Liberalism* (Columbia UP 1993) 325.

any conflicting values. This answer goes something like this: When the value of free expression has been outweighed by a competing value, we should say not that the right has been overridden, but instead that in these circumstances there is no right to free expression and no correlative duty to protect free expression. The fact that there is a conflict between the value of free expression and another value does not entail that there is a conflict between the right to free expression and another value. To know whether there is such a right, we need to arrive at a conclusion as to which of the conflicting values overrides the other. If the value of free expression is overridden, then there is no right, because properly defined the right does not extend as far as was claimed. That, at least, is one answer to the question of how we specify the right to free expression from its underlying values. It is the answer implied in the argument that only values, but not rights, can be balanced.

I do not find that to be a plausible answer. A more plausible answer, I suggest, is that the value of free expression becomes a right to free expression when that value requires someone else to be under a duty to protect free expression. This answer is more attentive to another important distinction: that between concrete values and abstract values. For as I said the value of free expression must be concretised or specified in order for us to understand whether, and if so how, it conflicts with other values. It would be a mistake to think that concrete values equate to concrete rights. That would entail that we have a right to everything that is valuable—or, more precisely, a concrete right to everything that is of concrete value. With the human-rights proliferation that this would entail, the language of rights would then become redundant. We need some way of explaining how it is that a concrete value does not necessarily give rise to a concrete right. We should, however, be cautious about one explanation according to which there is a limited range of values that can provide foundations for rights.[62] In my view it is better to recognise that, as John Tasioulas persuasively argues, a plurality of values plays a role in grounding human rights.[63] Fortunately there is a better way of understanding the distinction between something that is of value and something to which we have a right.

A concrete value gives rise to a concrete right only when, in the particular circumstances, the concrete value requires that there be a right with a correlative duty. Once the value has been specified as requiring a right, the normative force of the right and the correlative duty is partly determined by the underlying values and partly determined by considering how any conflict between the right and any conflicting values should be resolved. The special normative force of the right comes from the fact that the value of free expression carries great weight, sufficient to outweigh some competing values. But there are some values that can outweigh free expression. Just as a value that is outweighed by another value does not cease to be a value, so a right that is outweighed by another value, or another right, does not cease to be a right. When the conflicting values outweigh the right, we should, on this account, say that there is a right but that it has been justifiably infringed, whereas the alternative explanation would prompt us to say that there was no right in the first place.

[62] James Griffin, for example, has suggested that only the values of personhood can justify human rights: James Griffin, *On Human Rights* (OUP 2008).

[63] John Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 CLJ 1, 26.

Should we say that the rights that can be justifiably infringed are not really rights, but merely prima facie rights? The view that a justifiably infringed right is merely a prima facie right is quite widespread. Raz, for example, says that '[a]ssertions of rights are typically intermediate conclusions in arguments from ultimate values to duties', and that a general right is 'only a prima facie ground for the existence of a particular right in circumstances to which it applies.'[64] We have already seen that, among those who claim that rights have no special force and should be generously defined, there is an awareness of the need to distinguish between prima facie rights and 'definite' rights.[65] It turns out that, on their account, it is merely prima facie rights that should be given a generous or inflated definition and subject to proportionality analysis, not definite or actual rights. The latter, it is conceded, are conclusions to practical reason and have conclusive force. But I do not think that the rights that can be justifiably infringed are merely prima facie rights.[66] In my view, the claim that a right has conclusive or inviolable force follows not from the fact that it is definitely or actually a right, but from our conclusion that the definite or concrete right has not been justifiably infringed, so that the right becomes a conclusive right in the particular circumstances. In other words, definite or concrete rights do not necessarily have conclusive force.

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[64] Raz, *The Morality of Freedom* (n 54) 181, 184. On prima facie rights, see also D Ross, *The Right and the Good* (OUP 1930) 28; J Searle, 'Prima Facie Obligations' in Joseph Raz (ed), *Practical Reasoning* (OUP 1978) 81.

[65] Alexy, *Theory of Constitutional Rights* (n 15) 60; Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 134; Möller, 'Proportionality and Rights Inflation' (n 15) 168

[66] This is also Aharon Barak's view: see Barak, *Proportionality* (n 15) 37–42. See also Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (OUP 2007) 60.

Once it is recognised that the first stage of two-stage rights adjudication involves the definition or specification of a right—and not a mere prima facie right—many of the criticisms of the two-stage approach lose their force. Take, for example, Grégoire Webber's criticisms of this approach, which he calls the 'received approach'. Webber says that the received approach confuses a right with a claim of right. He suggests that, if we must understand rights adjudication as involving a two-stage analysis, then it is a mistake to think of the first stage as involving an evaluation of one's right, because 'the only matter evaluated at the first stage is a claimant's defeasible *claim* of right.'[67] He insists that we can only say that the claimant actually has a right once the analysis in the second stage is concluded. While there may be a defeasible claim of right, there can, he says, be no such thing as a defeasible right. Since on his account a right can never be justifiably infringed, he says that the second stage is not about determining whether the infringement of a right is justified, but rather about determining whether the *claim* of right has been defeated. If the claim of right is defeated, then the claimant has no right. In this way Webber tries to reformulate the two-stage approach: the two stages become a complete analysis of the specification of the right. Webber, however, thinks that this two-stage approach—reformulated in this way—is inadequate, because it specifies what rights require only through their violation. It only allows for the possibility of two alternatives: either the claimant has no right or the right has been unjustifiably infringed. It misses out a third alternative, which is that the claimant has a right and it has

[67] Webber, 'On the Loss of Rights' (n 18) 143 (emphasis added).

been respected.[68] But there is something slippery about this argument. Webber loses sight of the fact that it is not the received approach but his own reframing of the received approach that misses out this supposed alternative.[69] When we remove Webber's reframing of it, we see that the conventional understanding of rights adjudication holds that the first stage of analysis involves the specification of the right. Therefore, there will often be no need to proceed beyond the first stage because the right, *once defined or specified*, may not have been infringed. Webber, of course, cannot accept such an account of rights adjudication, because he believes that, once a right has been specified, the answer to the question of whether the right has been infringed will be conclusive: if the right has been infringed, it cannot be justified and no further stage of analysis is necessary.

Although theorists such as Webber claim that one's rights cannot conflict with another's rights or with other requirements of justice,[70] these theorists often suggest that the underlying values that go into specifying rights involve incommensurables. This is somewhat confusing, although it is based on a sound insight. It is true that pointing out the plurality of the good, and therefore of the common good, is an important part of the challenge to the mistaken belief that human rights are fundamentally opposed to the general welfare. Ronald Dworkin made this mistake when he suggested that the whole point of recognising rights is that rights cannot be balanced away for the sake of the common good. In

[68] ibid 145.

[69] I say 'supposed' alternative because I am not sure how this third alternative, which is that the claimant had a right that has not been infringed, differs from the first alternative, which is the possibility that the claimant did not have the right that he claimed was infringed. It seems to me that these are two ways of saying the same thing.

[70] Webber, 'On the Loss of Rights' (n 18) 128.

Dworkin's theory, a claim of right is successful if it would be wrong for the government to deny someone the right 'even though it would be in the general interest to do so.'[71] His logic is that, since a right cannot be defeated by considerations of the general interest, any reason that *can* be defeated by considerations of the general interest is not a right. Though Dworkin would deny it, to all intents and purposes there is a balancing or weighing between the claimed right and collective goals in order to determine the existence of a right.[72] Finnis and Raz successfully argue that human rights cannot be conceived as opposed to the common good and that, properly understood, rights actually serve the common good.[73] Given the plural nature of common goods, there may be occasional conflict between individual wellbeing and other aspects of the common good. But there is nothing necessary about this conflict.[74]

There is no reason to think that the specification of rights must involve incommensurables. If the specification of a right is said to involve a conflict between incommensurable values (a conflict must be between values that are already defined), so that a rationally underdetermined choice is necessary, then it would seem that the definition of rights does not always involve moral

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[71] Dworkin, *Taking Rights Seriously* (n 23) 269.

[72] cf Waldron, 'Rights in Conflict' (n 29) 516: 'We do not stare at the utility calculus and then stare at the rights, and discover that the second is sufficiently important to 'trump' the importance of the first. Instead, our sense of an internal connection between the two establishes the order of priorities.' Contrast this with Waldron's later statement: Waldron, 'Fake Incommensurability' (n 19) 821: 'the reasoned articulation of our moral principles and priorities inescapably involves what ordinary people might regard as weighing and balancing.'

[73] Raz, *The Morality of Freedom* (n 54) 254–55; Joseph Raz, 'Rights and Individual Well-Being' in his *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 39.

[74] Raz, 'Rights and Individual Well-Being' (n 73) 58–59.

reasoning, for moral reasoning will have run out before the right is defined. Perhaps, you may say, it is a mistake to think that rights can only be defined when moral reasoning provides a uniquely correct answer to the question of how the right should be defined. If that is the case, then when we encounter incommensurability before the right has been defined, it will take an exercise of choice to define the right and, after that exercise of choice, there will be no further question of whether the right has been justifiably infringed in the particular case. However, in these circumstances it would make more sense to say that there is no moral right as such, because moral reasons ran out before they could specify the right.[75] Or, at least, there would only be a moral right to the extent that there are separate moral reasons to apply the law,[76] reasons which can hardly be described as giving rise to anything resembling a moral absolute. That is, rights would not have any special moral force: their force would depend entirely on the more general reasons for applying the law.

IV. THE INFRINGEMENT OF RIGHTS

To acknowledge that rights can be justifiably infringed is to acknowledge value pluralism. Once the first stage of rights adjudication has specified the right and has shown whether or not the right has been infringed, the second stage of rights adjudication asks whether any infringement of the right is justified. If we recall the distinction mentioned earlier between prima facie rights and definite rights, it

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[75] See further Tom Hickman, 'Negotiable Rights, What Rights?' (2012) 75 MLR 437.

[76] See eg Frederick Schauer, 'Rights as Rules' (1987) 5 Law & Phil 115, 118.

is worth remembering that the question of the justification of the infringement involves definite rights. It might be argued that the second stage is not really about infringement, but about re-specification. But that would be a mistake. It is true that specification is not a once-and-for-all process. As Waldron says, in view of the circumstances of human life, we constantly have 'to balance various considerations in order to arrive at an order of priorities—a form of weak commensurability—that will serve for the time being.'[77] His point is that, on an ongoing basis, we find ourselves having to do the sort of weighing and balancing that weak incommensurability and the principles of ordering—trumping, side constraints, lexical priority—are commonly thought to preclude, specifying and re-specifying rights, for the time being.[78] There is therefore no clear-cut distinction between 'definitional balancing' and 'ad hoc balancing'.[79] While some may object that 'ad hoc balancing may undermine the development of stable, knowable principles of law',[80] and that it may shift responsibility from legislatures to courts,[81] stability, knowability, and legislative supremacy are not

[77] Waldron, 'Fake Incommensurability' (n 19) 822.

[78] ibid 824.

[79] On the distinction between definitional balancing and ad hoc balancing, see Melville B Nimmer, 'The Right to Speak from *Times* to *Time*: First Amendment Theory Applied and Misapplied to Privacy' (1968) 56 Cal L Rev 935. See also Andrew S Butler, 'Limiting Rights' in David Carter and Matthew Palmer (eds), *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria UP 2002) 117.

[80] Aleinikoff, 'Constitutional Law in the Age of Balancing' (n 49) 948. See generally Francisco J Urbina, 'A Critique of Proportionality' (2012) 57 Am J Juris 49.

[81] Aleinikoff, 'Constitutional Law in the Age of Balancing' (n 49) 984–86; Finnis, 'Human Rights and Their Enforcement' (n 33) 40. It should be noted that others have argued that the principle of proportionality, by shifting responsibility to the courts, can be defended on pragmatic or institutional grounds if it increases overall rights compliance: see eg Dimitrios Kyritsis, 'Whatever Works: Proportionality as a Constitutional Doctrine' (2014) 34 OJLS 395.

all that we value. The need for this ongoing specification and re-specification of rights is in part due to value pluralism, as well as disagreement, uncertainty, unpredictability, and so forth. But this is all included in the first stage of rights adjudication. From the point of view of value pluralism, it is important to recognise the distinctiveness of the second stage, involving the justification of infringing a specified right.

Like the first stage, the proportionality test at the second stage of rights adjudication involves moral reasoning. It is sometimes thought that proportionality pretends to be a neutral, amoral, and apolitical form of reasoning.[82] It may sometimes be easier for judges to hide behind the technique of balancing, rather than explicitly acknowledging the moral and political reasoning that goes into rights adjudication. Critics of proportionality argue that it unsuccessfully purports 'to turn the moral and political evaluations involved in delimiting a right into technical questions of weight and balance'.[83] But the requirement to act proportionately, like the requirement to act reasonably, is meaningless without engaging fully in moral reasoning. Apart from involving different considerations—namely, fully specified rights as well as the underlying values—the balancing involved at the second stage is essentially the same as at the first stage: balancing is a metaphor for the complexity involved in moral reasoning. Richard Ekins, however, has argued against treating the

[82] cf Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (n 22) 474–75, arguing that proportionality pretends to be 'totally extraneous to any moral reasoning', that proportionality 'tends to neglect any moral reasoning', and 'risks neglecting the complexity of moral evaluation'.

[83] Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (n 25) 191.

proportionality test as calling for moral reasoning: proportionality, he says, does not do justice to the complexity of morally sound reasoning towards the specification of rights in the face of incommensurables.[84] That is to say, proportionality is liable to mislead in the specification of rights, which involves a rationally underdetermined choice among incommensurable values. This is mistaken in two ways. First, as I said, it is not true that the specification of rights must involve incommensurables. And secondly, even if we concede that proportionality may mislead where the considerations are incommensurable, it seems to me that, in other circumstances, where the considerations are commensurable, proportionality and balancing are apt to describe, albeit in simple terms, the moral reasoning that is involved in determining which consideration is more important than the other.

Despite their acceptance of the incommensurability thesis, the anti-balancing theories of rights presented by Finnis, Webber, Ekins and others bear a striking resemblance to Dworkin's argument against value pluralism. Although they say that the specification of a right may be a matter of choice among incommensurable alternatives, they insist that there cannot be a genuine moral conflict between rights and other values, because rights have a moral priority over other values. They believe that moral reasoning ends with the definition or specification of a right and that it is a mistake to talk about engaging in moral reasoning in order to determine whether the right was justifiably infringed. They believe that rights do not conflict with other values because, properly defined,

[84] Richard Ekins, 'Legislating Proportionately' in Huscroft, Miller, and Webber (eds), *Proportionality and the Rule of Law* (n 10).

rights trump the conflicting value. This is essentially the form of argument adopted in Dworkin's argument against moral pluralism. As we saw in chapter 2, Dworkin's argument trades on a perfectly sound point: namely that, while values often appear to conflict in the abstract, they may not conflict once they have been concretised. But Dworkin takes that point too far, by suggesting that, once concretised, there are no genuine conflicts among values.[85] This is not quite the same as the arguments made by Finnis and Webber, who both accept that there may be conflicts among concrete values instantiated in incommensurable options. But they nonetheless accept that there are no genuine moral conflicts in cases where a properly defined right is at stake. Like Dworkin, they trade on the sound point that, while the rights set out in Bills of Rights often appear to create moral conflicts in the abstract, these rights need to be concretised and, once concretised, the conflict may disappear. And like Dworkin, they take this sound point and extend it beyond its defensible limits.

V. PROPORTIONALITY AND INCOMMENSURABILITY

The discussion so far has focussed on the force of rights and the intelligibility of thinking of rights adjudication in terms of a two-step process. It is now time to reflect further on the proportionality test and in particular the implications of value incommensurability for proportionality.[86] We have already encountered the

[85] See Ronald Dworkin, 'Moral Pluralism' in his *Justice in Robes* (Belknap Press 2006); Dworkin, *Justice for Hedgehogs* (n 28).

[86] Mattias Kumm and Alec Walen, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing' in Huscroft, Miller, and Webber (eds), *Proportionality and the Rule of Law* (n 10).

argument against balancing in terms of incommensurability from Finnis and others.[87] That argument was about the lack of a common scale for weighing the different aspects of the common good in the specification of rights. While it is important not to exaggerate the extent of value incommensurability, it is true that value incommensurability is a problem for rights adjudication—both in specifying rights and in applying the principle of proportionality to determine whether or not an infringement with a right is justified. It is worth remembering that the problem here is not merely one of vagueness.[88] There certainly is a problem of vagueness, of not being able to measure how important one of the right is or not being able to specify the value that is said to conflict with the right. But the problem of vagueness is separate from the problem of incommensurability, which can arise even when there is no vagueness and the right and the competing values have been fully specified. When I refer to incommensurability, I am referring to what Waldron calls 'strong incommensurability'—the form of incommensurability according to which there is no common scale with which to weigh the options and therefore no reason to favour one option over the other. The possibility of value incommensurability creates limits to the principle of proportionality, but what is the extent of those limits?

[87] See also Aleinikoff, 'Constitutional Law in the Age of Balancing' (n 49) 972–76; John Alder, 'The Sublime and the Beautiful: Incommensurability and Human Rights' [2006] PL 697; Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (n 22).

[88] cf Timothy Endicott, 'Proportionality and Incommensurability' in Huscroft, Miller, and Webber (eds), *Proportionality and the Rule of Law* (n 10) 319–22.

Even among those who accept, in principle, the possibility of value incommensurability, there have been some attempts to argue that value incommensurability does not present a problem for proportionality. Kai Möller argues that there are different meanings of 'balancing'. He contrasts what he calls 'interest balancing'—where rights or interests are measured and placed on a set of scales—with what he calls 'balancing as reasoning', which is really 'just a way of saying that we have to make a moral argument as to which of the competing interests takes priority in the case at hand'.[89] He therefore argues that this gets round the incommensurability thesis.[90] Some theorists, indeed, assume that, once balancing is viewed as requiring moral reasoning, the incommensurability thesis is no longer a problem.[91] This implies that we should think about balancing in terms of ordinal ranking rather than cardinal ranking.[92] But, as I argued in the chapter 2, this distinction between ordinal and cardinal ranking cannot be sustained in this context. Balancing is simply a metaphor for any moral reasoning that results in the conclusion that one option is more or less valuable or important than another, or that they are of equal value or importance. And incommensurability, on the other hand, is simply a metaphor for any moral

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[89] Kai Möller, 'Proportionality: Challenging the Critics' (2012) 10 ICON 709, 715.

[90] ibid 719–24.

[91] See eg Mattias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 62: 'if the moral discourse is integrated (as it is in the concept of proportionality's external justification), then there is no way to demonstrate that values are incommensurable. We can conclude therefore that … proportionality and balancing allow for a common metric qua moral reasoning.'

[92] On the cardinal–ordinal distinction, see eg Ruth Chang, 'Introduction' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard UP 1997) 2; Virgilio Alfonso da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31 OJLS 273.

reasoning that results in the conclusion that the options cannot be ranked in any way, whether cardinally or ordinally.

There have been many attempts to circumvent the consequences of value incommensurability in rights adjudication through a number of creative, but ultimately misconceived, solutions. One particularly influential attempt can be found in Robert Alexy's argument for what he calls the 'Law of Balancing', which he frames as follows: 'The greater the non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.'[93] Alexy's argument relates to the structure of the balancing exercise that should be performed in rights adjudication. First, the court should place the intensity of the interference with the right on a scale of light, moderate, and serious. Secondly, the court should place the importance of satisfying the competing principle on a scale of light, moderate, and serious. And thirdly, the court must compare the intensity of the infringement with the importance of satisfying the competing principle. If it is seriously important to satisfy the competing principle, the satisfaction of which would only result in a light interference with the right, then the infringement of the right will be justified. On Alexy's account, then, we are therefore not balancing the right against competing values; rather, we are balancing the intensity of the interference with the right and the importance of satisfying the competing principle, according to the common scale of light, moderate, and serious.

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[93] Alexy, *A Theory of Constitutional Rights* (n 15) 102. See also Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 131.

But there are a number of problems with Alexy's argument. One problem is that it is not clear why we should evaluate the intensity of the interference with the right, rather than the importance of the right. I find it puzzling that Alexy argues that we should evaluate the importance of satisfying the competing principle, but not the importance of satisfying the right. The argument that both the importance of satisfying the right and the competing principle should be evaluated can be found in Aharon Barak's argument that 'a common base for comparison exists, namely the social marginal importance.'[94] This common scale, Barak says, entails that we can balance the marginal social importance of fulfilling one principle with the marginal social importance of fulfilling another principle, even though the competing principles may otherwise have appeared to be incommensurable. That raises the question of how it is possible that social importance can provide a single criterion. It is difficult to see how the considerations could be rendered commensurable in this way. It is as if we were to say that the common good provides a single criterion, without realising that the common good is itself made up of a plurality of often irreconcilable and incommensurable goods. Likewise, what is of social importance is itself plural and often incommensurable, with the result that it cannot provide a single criterion or covering value with which to weigh the importance of one option with the importance of another. This is also a problem for Alexy's claim that the grounds of rights adjudication are always commensurable because they can be

[94] Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4 Law & Ethics of Human Rights 1, 15–16; Barak, *Proportionality* (n 15) 483–84.

compared in terms of 'their importance for the constitution'.[95] The constitution is said to provide both a common point of view and a common scale. 'Once commensurability is created by point of view and scale,' Alexy writes, 'the question of how the third step of balancing can be carried out proves to be easy.'[96] It is difficult to imagine, however, how the constitution could provide a common point of view or a common criterion or covering value, capable of rendering otherwise incommensurable options commensurable. The problem of incommensurability is not a problem that can be solved by 'creating' commensurability, as Alexy puts it. Even if the constitution were able to create a shared preference for one option over the other—which is a doubtful proposition, to put it mildly—that would not entail that there is a rational basis for the choice of one option over the other. Incommensurability arises when reasons run out and we are left with a rationally underdetermined choice, regardless of whether that choice is determined by our preferences. To show that there is a common point of view, therefore, is not to show that the options are commensurable or that a rationally determined decision is possible.

Nonetheless, it is perhaps possible, but still misconceived, to defend apects of Alexy's or Barak's arguments on balancing and incommensurability, without subscribing to his belief that the constitution provides a common scale. Bruce Chapman, for example, makes a similar argument in order to claim that

[95] Robert Alexy, 'On Balance and Subsumption: A Structural Comparison' (2003) 16 Ratio Juris 433, 442. See also David Copp, *Morality, Normativity, and Society* (OUP 1995) 197: 'The morally pluralistic societies with which we are familiar are not deeply and persuasively pluralistic. Their members tend to share moral attitudes towards the central features of the criminal law, for example, and they share moral attitudes toward the central political features of their society, such as its democratic constitution.'

[96] Alexy, 'On Balance and Subsumption' (n 95) 442.

proportionality, far from requiring a common measure, is in fact conducive to value incommensurability. 'What is required in the accommodation of plural values,' Chapman writes, 'is a method of aggregation that *preserves* that plurality of values.'[97] Chapman argues that the principle of proportionality provides just such a method of aggregation. Drawing on the work of the economist and game theorist John Nash,[98] Chapman identifies a 'social choice rule' according to which we should choose 'to maximise the equal proportional satisfaction of the different values.'[99] His argument is difficult to pin down, but I think it can be summarised as follows. Each individual value has its own internal scale: at one end of that scale is the complete realisation of the value and at the other end is the non-realisation of the value. Although different values may be incommensurable, so that we cannot say that one is better than the other or that they are of equal value, we can nonetheless make an assessment of proportionality based on the internal scales of the different values.[100] According to Chapman's argument for maximising the equal proportional satisfaction of the different values, we should aim to ensure that each value is satisfied in equal (or roughly equal) proportion. For the sake of argument, let's concede that it is

[97] Bruce Chapman, 'Preference, Pluralism, and Proportionality' (2010) 60 UTLJ 177, 188 (emphasis in original).

[98] John F Nash, 'The Bargaining Problem' (1950) 18 Econometrica 155. A similar point was made by Brian Barry, *Political Argument* (Routledge & Kegan Paul 1965), ch. 1. See also David Luban, 'Incommensurable Values, Rational Choice and Moral Absolutes' (1990) 38 Clev St L Rev 65, 71.

[99] Bruce Chapman, 'Incommensurability, Proportionality, and Defeasibility' (2013) 12 Law, Probability and Risk 259.

[100] Chapman, 'Preference, Pluralism, and Proportionality' (n 97) 191–93. This argument is made at greater length by one of Chapman's students: Paul-Erik N Veel, 'Incommensurability, Proportionality, and Rational Decision-Making' (2010) 4 Law & Ethics of Human Rights 177.

always possible to establish internal scales for each value and that these can be used to determine what proportion of the value is instantiated in a particular option.[101] This seems doubtful to me, but it is not what I would to concentrate on and so let's simply concede it. Even if this were true, it would not follow that it is possible to make a reasoned decision about which proportion of which value is better or about whether they are equal. Chapman's insistence that there must be *equal* proportional satisfaction of the different values would make sense only if the values were equally important, and so his social choice rule turns out to be a rather convoluted way of assuming the commensurability of values. As Finnis says, the argument from incommensurability does not deny that commensurability and uniquely right answers are available *if enough assumptions are made*, but '[m]aking such "assumptions" is *making a choice*'.[102] That is to say, commensurability may be possible after the choice is made, but this does not make the alternatives commensurable prior to the choice.

The result of all this is that, if the options are incommensurable, the principle of proportionality cannot make them commensurate or require judges to commensurate them. Just as moral reasoning can run out, so can the usefulness of the principle of proportionality. The proportionality principle directs us to engage in moral reasoning, and in turn moral reasoning may result in conflicts between incommensurable values.[103] This points to the limits of

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[101] This is conceding quite a lot, but I do not think it is important for my argument. For criticisms of the idea that the value of rights can be quantified in this way, see eg Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (n 22) 485–88.

[102] John Finnis, 'Concluding Reflections' (1990) 38 Clev St L Rev 231, 238–39.

[103] Denise Reaume was therefore right to suggest that the proportionality test works better to diagnose conflict than it does to resolve it: see Denise Réaume, 'Limitations on Constitutional

proportionality, but it does not substantiate a general critique of proportionality. Moreover, the principle of proportionality may, as Endicott suggests, involve certain pathologies.[104] But these pathologies are not unique to the proportionality principle. They present a problem for practical reasoning generally.

Rights: The Logic of Proportionality' (2009) Oxford Legal Studies Research Paper 26/2009 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463853> accessed 21 May 2014.

[104] Endicott, 'Proportionality and Incommensurability' (n 88) 327–40, in which he sets out three pairs of pathologies, namely, balancing considerations that should not be balanced, uncertainty, and deference.

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Legal Reasoning and Choice

We have seen that the authority of law can resolve choices among incommensurable options only in some circumstances; that, when authority is justified, it can sometimes give us a conclusive reason to follow it when the underlying reasons were incommensurable; but sometimes authority merely replaces one choice among incommensurables with another, namely, a choice between following authority and not following authority. This chapter examines some implications of this claim for judicial reasoning in the context of the two main types of legal authority found in modern legal systems: precedents and statutes. Although drawing heavily on the laws of the United Kingdom, my aim in this chapter is to explain some general, non-jurisdiction-specific features of law. But it places greater emphasis on explaining the practical implications of the features of authority in general, and the authority of law in particular, that were discussed in Chapter 3. The main focus is on using particular legal examples to help explain general features of law, but I will also use these general features of law to explain (and, at times, to explain what is wrong with) what lawyers and judges are doing. It is also worth noting that at times I have focussed on the cases in which value incommensurability is most readily apparent or explicitly discussed, but this should not be taken to imply that these are the only cases in which it arises. It is hoped that this chapter will also give some sense of the pervasiveness of value incommensurability in legal reasoning.

I. THE COMMON LAW

The conflict between the authority of the past and the reason of the present is perhaps most obvious in the development of the common law. There are many good reasons for and against following the authority of precedent. Our main concern here is with the question: what reasons do we have for following precedent when the underlying reasons give rise to incommensurable options? Is it true that, when faced with incommensurable values, judges should decide consistently with what was decided before, thereby at least following the principle of equality or 'formal justice', the principle that like cases should be treated alike? Some philosophers seem to think that it is obvious that this is what judges should do. Thus we find Joseph Raz saying that an 'artificial system of reasoning', based on doctrine and coherence, is needed to 'help determine cases where natural reason runs out, thus assuring the public that decisions are no mere expression of personal preferences on the part of the judges.'[1] By contrast, Andrei Marmor has defended the contrary view that 'courts should be allowed, at least in certain cases, to reach different preferences amongst otherwise

[1] See Joseph Raz, 'On the Autonomy of Legal Reasoning' in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 339.

incommensurable values. The uniformity of decisions that is dictated by the principle of treating like cases alike seriously undermines the courts' ability to respond to the needs of diversity and pluralism.'[2] I think Marmor is right to say that we should not necessarily treat like cases alike in cases involving a choice between incommensurable values. But I think he offers inadequate reasons in support of his conclusion. The reason that he offers—that the value of experimentation can sometimes be more important than the value of predictability—is no doubt a good one in some cases, and the values of experimentation and predictability may themselves be incommensurable in some other cases. But there is more to it than Marmor suggests. When, aside from the reasons for following authority, the considerations relevant to the decision are incommensurable, the reasons for following the authority of precedent (such as the values of predictability and consistency) may be insufficient to outweigh not only the value of experimentation, but also what in Chapter 3 I called the content-dependent reasons. In order to explore this claim, I will consider an area of law that is predominantly a matter of common-law development: the law of tort or delict.

The Duty of Care

The notion of value incommensurability is sometimes acknowledged in the development of the modern doctrine of the duty of care in tort law. Value pluralism makes it very implausible that there is a single value (say, corrective

[2] Andrei Marmor, 'Should Like Cases be Treated Alike?' in Andrei Marmor, *Law in the Age of Pluralism* (OUP 2007) 192.

justice) that underpins and justifies tort law, or the whole of private law,[3] just as it is implausible that there is a single value that underpins and justifies law in general. In developing the doctrine of the duty of care, the courts often face choices between incommensurables—for example, considerations of distributive justice may conflict with considerations of corrective justice—with the result that reasonable decisions can be made either way.[4] Tort law is sometimes said to be a 'patchwork' of corrective and distributive justice: the courts must choose between applying existing legal rights and duties (a matter of corrective justice) and overriding or extending existing legal rights and duties (a matter of distributive justice).[5]

Using tort law as an example of the implications of value incommensurability in common law reasoning, my concern in this section is with the normative question of how, in view of value pluralism and incommensurability, the courts should approach the development of the duty of care in tort law. I am not primarily concerned with the descriptive question of

[3] For an extreme example of someone who defends a monistic, corrective-justice justification of private law, see Ernest Weinrib, *The Idea of Private Law* (Harvard UP 1995). See also David Daube, 'The Scales of Justice' (1951) 63 Jur Rev 109, 127.

[4] See Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) 251–54, discussing value incommensurability in the context of *Donoghue v Stevenson* [1932] AC 562. Like MacCormick, Raz argues that, in the setting of standards of care in negligence law, there may be a range of standards of care that are good, but none that is better than all others: Raz, 'On the Autonomy of Legal Reasoning' (n 1) 339. See also Richard Mullender, 'The Reasonable Person, the Pursuit of Justice, and Negligence Law' (2005) 68 MLR 681, 690.

[5] On the role of distributive justice and corrective justice in tort law, see eg Stephen R Perry, 'The Distributive Turn: Mischief, Misfortune and Tort Law' (1996) 16 QLR 315; Stephen R Perry, 'On the Relationship between Corrective and Distributive Justice' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (4th series, OUP 2000); Hanoch Dagan, 'The Distributive Foundation of Corrective Justice' (1999) 98 Mich L Rev 138; Peter Cane, 'Distributive Justice and Tort Law' [2001] NZ L Rev 401; John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 1 Law and Philosophy 30; John Gardner, 'What is Tort Law For? Part 2: The Place of Distributive Justice' (2013) Oxford Legal Studies Research Paper 62/2013 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269615> accessed 8 July 2013.

how the courts in a particular legal system happen to approach it at a particular time. However, since I aim to show that there are problems with what the courts are doing, it is necessary to say something about the descriptive question first. While different legal systems approach tort law in different ways, there is a significant degree of cross-fertilisation from which it is perhaps possible to distil two broad approaches. John Salmond captured the essential difference between these approaches when he wrote:

> Does the law of torts consist of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility?[6]

Both these approaches—one requiring the court to determine whether or not there is a justification or excuse for departing from a general principle, and the other requiring the court to determine whether or not the existing specific rules ought to be extended to cover the present case—entail a determination of the boundaries of the duty of care. They have each been used from time to time in the United Kingdom. And, it seems to me, they each have significant flaws as ways of understanding the development of tort law.

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[6] John Salmond, *The Law of Torts* (first published 1907, 6th edn, Sweet & Maxwell 1924) 9–10.

While the British courts have generally declined to adopt the first of Salmond's two approaches, otherwise known as the prima facie tort doctrine,[7] there have been times when something like that doctrine has been adopted in English and Scots law.[8] The high-water mark for this approach came in *Anns v Merton London Borough Council*, when Lord Wiblerforce stated that, to establish a duty of care, it was no longer necessary to bring the facts of a case under a specific rule established in previous cases.[9] Lord Wilberforce formulated a two-stage test for establishing a duty of care: first, there must be a sufficient relationship of proximity and reasonable foreseeability, which would give rise to a prima facie duty of care; and second, this prima facie duty of care must be weighed against any competing policy considerations that would limit its application.[10]

The problem with the *Anns* test—apart from its assumption of commensurability in the second stage—was that it gave very little account to the role of previously decided cases. In part for this reason, the courts gradually came to the view that the *Anns* test failed to have regard to all the considerations that are relevant when deciding whether to impose a duty of care.[11] Lord Bridge, in the course of reformulating the test in his lead judgment in *Caparo Industries*

[7] See *Dunlop v Woollahra Municipal Council* [1982] AC 158. See also Johan Steyn, 'Perspectives of Corrective and Distributive Justice in Tort Law' (2002) 37 Irish Jurist 1, 4.

[8] See eg *Donoghue v Stevenson* [1932] AC 562, 579–80 (Lord Atkin); *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1026–27. See also Frederick Pollock, *The Law of Torts* (9th edn, Stevens & Sons 1912) 21, arguing that all harm is actionable unless it falls within a specific and recognised ground of justification or excuse.

[9] *Anns v Merton London Borough Council* [1978] AC 728, 751 (Lord Wilberforce).

[10] *ibid* 752 (Lord Wilberforce).

[11] *Rowling v Takaro Properties Ltd* [1988] AC 473, 501 (Lord Keith).

Plc v Dickman,[12] said that the law of negligence had developed to the point where it was no longer necessary to decide novel cases by applying Lord Wilberforce's two-stage test—that is, by extending a massive prima facie duty of care, limited only by exceptional and indefinable considerations.[13] No single general principle could provide a practical test for determining whether a duty of care should be owed. Instead, Lord Bridge held that previously decided cases had established three requirements to be met before a duty of care would be found to exist: first, the harm must be reasonably foreseeable; secondly, the relationship must be sufficiently proximate; and thirdly, the court must consider it 'fair, just and reasonable' to impose a duty.[14] These requirements, he stressed, were merely convenient labels that could be attached to the features of different specific situations that previously decided cases had recognised, after an examination of 'all the circumstances', as giving rise to a duty of care.[15] New cases ought to be decided, Lord Bridge said, incrementally and by analogy to the particular circumstances of previously decided cases. The *Caparo* test thus affirmed the second of Salmond's two approaches.

It seems to me that neither the *Anns* nor the *Caparo* tests are entirely satisfactory. Under the tripartite test in *Caparo*, everything is incorporated into

[12] *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

[13] ibid (Lord Bridge), citing remarks by Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 43–44.

[14] ibid 617–18 (Lord Bridge). When Bingham LJ (as he then was) formulated this test in the Court of Appeal in the *Caparo* case, he cited with approval Weintraub CJ's remark that the imposition of a duty of care 'involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution': *Caparo Industries Plc v Dickman* [1989] QB 653, 680 (Bingham LJ), citing *Goldberg v Housing Authority of the City of Newark* (1962) 186 A 2d 291, 293.

[15] *Caparo* (n 12) 618 (Lord Bridge).

the definitional element. This aspect of the *Caparo* test is problematic because, as Richard Tur observes, it 'has the effect of embedding and therefore obscuring what are essentially policy decisions in the definitional elements', whereas, in the structure favoured by the *Anns* test, 'the policy issue is always highly visible, rather than hidden.'[16] But it seems to me that the *Anns* test is not quite right either. While it delineates between two dimensions, it misidentifies those dimensions. For it identifies one of the dimensions as a far-reaching general principle that gives rise to a prima facie duty of care, albeit one that can be defeated on the basis of competing policy considerations. Although this is perhaps the right way to reason when the courts are faced with a completely novel situation with no existing law, it is not appropriate when there are previous cases that can be applied (even if only by analogy) to the present case, as Lord Bridge in *Caparo* recognised. In such cases, the first dimension is not a prima facie duty of care, but rather the established rules in previously decided cases.

If, in cases which have been settled in previous cases, the duty of care is established by taking into account the reasons for following authority and the reasons that might outweigh doing so. This is partly a question about defeasibility in tort law. A consideration is defeasible if there are other considerations that sometimes defeat it, that is, which show that it should not be acted on in some circumstances. But the idea of defeasibility can give the impression that the reasons for following a defeasible rule are either defeated or not, and that the defeasible consideration has a certain priority, so that there is a conclusive reason to follow the rule unless it is defeated. This seems to be the

[16] RHS Tur, 'Defeasibilism' (2001) 21 OJLS 355, 365.

assumption behind the efforts of some theorists to combine a plurality of principles into a single understanding of tort law, through what Bruce Chapman calls 'conceptually sequenced argument'.[17] Our concern is with the possibility that, in developing tort law, there may be an undefeated reason to apply the existing rule and an undefeated reason to depart from it. To explain how this can arise, I will discuss at some length three developments in negligence law, concerning psychiatric injury, failed sterilisation, and tortious liability of public authorities.

Psychiatric Injury

The House of Lords in *McLoughlin v O'Brian* extended the duty of care to prevent psychiatric injury, ostensibly on the basis of the principle that like cases should be treated alike.[18] Before the *McLoughlin* case, the English and Scottish courts had held that a duty of care to prevent psychiatric injury arose only in relation to primary victims, that is, people who were within the area of potential physical harm.[19] Applying that established rule—and so applying the principle of corrective justice—to the particular facts of *McLoughlin*, it might be thought that no duty of care was owed. Although Mrs McLoughlin suffered psychiatric injury when she saw the injuries caused to her family in a traffic accident, she was not herself within the area of potential physical harm and so was not a primary

[17] Bruce Chapman, 'Pluralism in Tort and Accident Law: Toward a Reasonable Accommodation' in Gerald J Postema (ed), *Philosophy and the Law of Torts* (CUP 2001).

[18] *McLoughlin v O'Brian* [1983] 1 AC 410.

[19] See *Bourhill v Young* 1942 SC (HL) 78.

victim. Yet the majority in the House of Lords decided that a duty of care was owed to Mrs McLoughlin. The Law Lords were split over the question whether their role should be confined to applying existing legal principles or should encompass considerations of public policy. According to Lord Scarman, 'the policy issue where to draw the line is not justiciable', because '[p]olicy considerations will have to be weighed: but the objective of the judges is the formulation of principle.'[20] This distinction, however, did not find favour among the other Law Lords, with Lord Edmund-Davies rightly saying that it was 'as novel as it is startling.'[21] For the majority, the court needed to decide whether the existing principle, established by precedent, was outweighed by competing considerations.

To complicate matters, both sides in *McLoughlin* could appeal to the principle that like cases should be treated alike. Those who wanted to apply the established principle (and therefore refuse a remedy for Mrs McLoughlin) could argue that, since there was no relevant difference between this case and previous cases in which the courts had limited liability for psychiatric injury to primary victims, the established principle should continue to apply. The other side, however, could argue that the established principle was unjustified because there was no reason to distinguish between primary victims and the situation in which Mrs McLoughlin found herself. Such a distinction would be arbitrary and

[20] *McLaughlin* (n 18) 430 (Lord Scarman). See also *Sidaway v Royal Bethlem Hospital Governors* [1985] AC 871, 887 (Lord Scarman).

[21] ibid 427 (Lord Edmund-Davies). Dworkin of course relied on Lord Scarman's decision to defend his own version of the policy–principle distinction. On Dworkin's misreading of the *McLoughlin* case, see Simon Lee, 'Law's British Empire?' (1988) 8 OJLS 278, 282–84.

unconnected to moral considerations.[22] Both sides seem to underestimate the force of the other side's argument. There are good reasons for deciding in accordance with the established principle and there are good reasons for consistence between the treatment of primary victims and those in Mrs McLoughlin's situation. We may believe that one side is more important than the other, but equally it may be that neither is better than the other, and yet they are not equal or roughly equal. If that is the case, there will be arbitrariness regardless of which option is chosen—whether the decision is to override the established rule, which is undefeated by reason, or to apply the rule in the face of the undefeated competing reason.

The arbitrariness of these distinctions was more or less acknowledged when, after the *McLoughlin* case, the judges tried to constrain the expanded duty of care for psychiatric injury. Particularly important in this regard were two cases arising from the 1989 disaster at Hillsborough football stadium, a disaster caused by the police's negligence in allowing too many fans into one part of the stadium. In the first case, *Alcock*,[23] the bereaved relatives of the victims of the disaster unsuccessfully sought damages for psychiatric injury. In making an exception to the *McLoughlin* precedent, the Law Lords in *Alcock* established new 'control mechanisms' limiting the duty of care and held that the victims' relatives failed to satisfy them. In the second case, *Frost*,[24] police officers who rescued victims at the Hillsbororough disaster sought damages for psychiatric

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[22] Ronald Dworkin, *Law's Empire* (Harvard UP 1986) 242.

[23] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

[24] *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.

injury. As Lord Oliver had mentioned in *Alcock*, rescuers are primary victims and so the control mechanisms established in that case did not apply.[25] However, their Lordships, by a three to two majority, made another exception to the established rule, and held that the police officers were not entitled to damages. The two dissentients, who saw the case from the perspective of corrective justice, would have awarded damages to the officers and thought that to do otherwise would not only be 'a remarkable departure from existing authority', but would erect artificial and arbitrary barriers.[26] For the majority of their Lordships in *Alcock*, however, reasons of distributive justice were decisive.[27] It would be wrong, they thought, to give rescuers, but not bereaved relatives, a right to compensation. To do so, said Lord Hoffmann, would be 'at best not treating like cases alike and, at worst, favouring the less deserving against the more deserving.'[28]

Not surprisingly, these decisions were criticised by academic commentators for being artificial and arbitrary.[29] It has been said that *Alcock* and *Frost* have produced rules that are 'inelegant, irrational, and productive of results which can only be described as bizarre.'[30] Yet coherence in tort law is impossible

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[25] *Alcock* (n 23) 408 (Lord Oliver).

[26] *Frost* (n 24) 486–88 (Lord Goff).

[27] ibid 498 (Lord Steyn), 510 (Lord Hoffmann).

[28] ibid 510 (Lord Hoffmann).

[29] See Jane Stapleton, 'In Restraint of Tort' in Peter Birks (ed.), *Frontiers of Liability* (OUP 1994) 95–96.

[30] Joseph M Thomson, 'Principle or Policy? The Judicial Development of the Law of Delict' (2003) 56 CLP 123, 134.

because of the diversity of its underpinning justifications. The law on compensation for psychiatric injury is, as Lord Steyn rightly saw, 'a patchwork quilt of distinctions which are difficult to justify',[31] although these distinctions are 'arbitrary but not necessarily irrational'.[32] And the distinctions are doubly arbitrary, because they are often applied in an ad hoc manner.[33] In a lecture in November 2001, Lord Steyn recognised the diversity of policy considerations that underpin the law of tort. 'Standing back from the particular instances,' he said, 'the position appears to be that tort is not underpinned by a single overarching rationale. It is a mosaic of interwoven principles of corrective and distributive justice.'[34] The 'mosaic' of principles underpinning the law of tort presents the courts with a choice between incommensurable options. And if this explains the choices in cases such as *Alcock* and *Frost*, then the judges in those cases were in a sense reasonable, even though they were also in a sense arbitrary.

Failed Sterilisation

There was explicit recognition of value incommensurability in a line of cases attempting to tackle the issue of failed sterilisation or wrongful conception, though the courts failed to understand the implications of this incommensurability. In *McFarlane v Tayside Health Board*, the courts had to

[31] *Frost* (n 24) 500 (Lord Steyn).

[32] ibid 493 (Lord Steyn).

[33] See eg *W v Essex County Council* [2001] AC 592, in which foster parents were held to be primary victims of psychiatric injury when one of their foster children sexually abused their other foster children, even though the parents were not in any physical danger.

[34] Steyn, 'Perspectives of Corrective and Distributive Justice in Tort Law' (n 7) 6.

decide whether parents should be able to recover the costs of bringing up a child born following failed sterilisation.[35] The House of Lords rejected the parents' claim. Their Lordships sought a compromise by allowing solatium for pain and suffering during pregnancy and birth, but not for the healthy child's upbringing. The decision was based on two main reasons. First, the cost of bringing up a child was incommensurate with the defender's negligence. This was perhaps the least significant of the two reasons, primarily because the courts do not usually let the pervasive incommensurability in awarding compensation get in their way.[36] The second, and in my view more important, reason was that what the court considered to be the community's sense of distributive justice (in that familiar refrain whereby judges hide their sense of reasonableness behind the 'reasonable person') would, according to the Law Lords, not allow damages to be awarded for bringing up a healthy child.[37] At least some of the judges were refreshingly candid about this second reason. Having rejected what he called 'unrealistic and formalistic propositions which mask the real reasons for their decisions', Lord Steyn said:

> It is possible to view the case simply from the perspective of corrective justice. It requires somebody who has harmed another without justification to indemnify the other. On this approach the parent's claim for the cost of bringing up Catherine must succeed.

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[35] *McFarlane v Tayside Health Board* [2000] 2 AC 59.

[36] See Margaret Jane Radin, 'Compensation and Commensurability' (1993) 43 Duke LJ 56.

[37] *McFarlane* (n 35) 113–14 (Lord Millett).

> But one may also approach the case from the vantage point of distributive justice. It requires a focus on the just distribution of burdens and losses among members of a society. If the matter is approached in this way, it may become relevant to ask commuters on the Underground…[38]

Since tort law is a 'mosaic' of conflicting principles of corrective and distributive justice, Lord Steyn said, 'in situations of uncertainty and difficulty a choice sometimes has to be made between the two approaches.'[39] Once he chose the approach of distributive justice, Lord Steyn (along with the rest of his colleagues) tried to defend his opinion by saying that most 'ordinary men and women' would not award damages for the costs of bringing up a healthy child.[40] As Lord Steyn later said, the emphasis in *McFarlane* 'was squarely on the impossibility of weighing the advantages and disadvantages'.[41]

Now, if the options in *McFarlane* genuinely were incommensurable, then what does that entail when the question arose as to whether the rule in *McFarlane* should be extended in analogous cases? That was the question facing the House of Lords in *Rees v Darlington Memorial Hospital NHS Trust*, in which

[38] ibid 82 (Lord Steyn).

[39] ibid 83 (Lord Steyn).

[40] For criticism of *McFarlane*, see Joe Thomson, 'Abandoning the Law of Delict?' [2000] SLT 43, arguing that the decision is contrary to corrective justice, which he regards as the scope and function of the law of delict. For Lord Steyn's response to Thomson's criticism, see Steyn, 'Perspectives of Corrective and Distributive Justice in Tort Law' (n 7) 12–13.

[41] *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [28] (Lord Steyn). cf *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530 [87]–[91] (Hale LJ), arguing that *Macfarlane* depended on a 'deemed equilibrium' theory. In *Rees*, the Law Lords rejected Hale LJ's interpretation of *Macfarlane*.

the question was whether damages should be recovered for the additional cost of the child's upbringing due to the parent's disability.[42] Was the parent's disability a relevant difference that justified treating the case differently? Shortly before *Rees*, the Court of Appeal had already created an exception to *McFarlane*, holding that it was possible to recover the additional costs caused by the *child's* disability.[43] So the question in *Rees* was really a question of whether a disabled parent bringing up a healthy child was more like the case of a healthy parent bringing up a healthy child or more like the case of a healthy parent bringing up a disabled child. In *Rees*, the Law Lords, sitting in a panel of seven, divided four to three. The three in the minority held that the court ought to create another exception, allowing damages to be recovered when the parent is disabled. Lord Steyn, who was among the minority, accepted that this exception contains 'an element of arbitrariness'; however, he thought that, in a 'truly hard case' such as this, in which there is no right answer, a decision must nonetheless be made, and he was persuaded that the reasons for the exception 'outweighs' those to the contrary.[44]

The four in the majority in *Rees*, however, were unwilling to draw arbitrary lines between cases.[45] Recognising that the parent of a child born

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[42] *Rees* (n 41).

[43] *Parkinson* (n 41).

[44] *Rees* (n 41) [39] (Lord Steyn).

[45] Lord Millett, in the majority, waivered on this point. He was willing to countenance a distinction between the costs of bringing up a healthy child and the additional costs of bringing up a disabled child, based on 'what most people would instinctively feel': ibid [112]. However, he refused to draw the line between a disabled parent and a parent with no disability, which he thought to be 'destructive of the concept of distributive justice' and 'renders the law incoherent and is bound to lead to artificial and indefensible distinctions': ibid [121]. Instead, he argued, the

following a negligently performed sterilisation is the victim of a legal wrong—and putting a generalised 'gloss' on the compromise reached in *Macfarlane*—the judges in the majority decided that a 'conventional award' of £15,000 (which they insisted was non-compensatory) would be awarded in *all* cases of wrongful conception. The majority thus sought to reach a compromise between incommensurable options—a compromise that may be difficult or impossible to justify, but which nevertheless entailed that all cases of failed sterilisation, regardless of any differences among them, would be treated alike. But in establishing this compromise, and setting a precedent to be applied in all future cases, the majority in *Rees* were being just as arbitrary as the minority. The establishment of a general rules did not solve the problem of incommensurability. It exacerbated the problem.

Tortious Liability of Public Authorities

The problems arising from laying down bright-line rules to be applied in all future cases can also be seen if we consider another example, arising from the tortious liability of public authorities. The issue here concerned the risks associated with imposing excessive burdens of tortious liability on public authorities. On the one hand, imposing liability may make public authorities more careful in carrying out their duties; on the other hand, imposing liability may lead to what the courts call a 'detrimentally defensive frame of mind'.[46]

line must be drawn between the costs that result from the characteristics of the child and those that result from the characteristics of the parent: ibid [122].

[46] *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 63 (Lord Keith). The latter interest, the argument from defensive administration, had convinced the Court of Appeals of New York in

With regard to the police function of investigating and suppressing crime, in *Hill v Chief Constable of West Yorkshire* Lord Keith of Kinkel thought that the risks outweighed the benefits.[47] Since it was assumed that the public interest against imposing liability would rarely be counterbalanced, Lord Keith said that the police 'were immune from an action of this kind'.[48] In *X (Minors) v Bedfordshire County Council*, the House of Lords extended this rule against liability to child care professionals who were engaged 'in seeking to protect vulnerable members of society from wrongs done to them by others'.[49]

The judges in *Hill* and *X v Bedfordshire CC* thought that the reasons for and against imposing liability were commensurable, and that the reasons against imposing liability outweighed all other reasons. The problem was that, in establishing a rule against liability, the courts were always going to be faced with arguments that the rule should be defeated, because it was outweighed by competing reasons. Would it be right for the court to stick rigidly to its earlier decision, striking out all countervailing arguments? It would only be right to do so if the countervailing arguments were hopeless, which is far from self-evident. Initially, the European Court of Human Rights held that the 'blanket immunity'

Williams v New York 127 NE 2d 545 (1955), 550, to hold that the state should not be held liable. But the argument initially received strong disapproval from the British courts. Lord Reid famously quipped that 'Her Majesty's servants are made of sterner stuff': *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1033. A recent commentator argued that the defensive administration argument 'was, at best, an unproven hypothesis or, at worst, pure speculation': Jonathan Morgan, 'Policy Reasoning in Tort Law: The Courts, the Law Commission and the Critics' (2009) 125 LQR 215, 220. See also Hanna Wilberg, 'Defensive Practice or Conflict of Duties? Policy Concerns in Public Authority Negligence Claims' (2010) 126 LQR 420.

[47] *Hill* (n 46) 63.

[48] ibid 64. See also *Osman v Ferguson and another* [1993] 4 All ER 344, 353 (McCowan LJ).

[49] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 751 (Lord Browne-Wilkinson).

on the police during the investigation and suppression of crime violated Article 6 of the Convention, because it did not allow for balancing to take place in each case.[50] Following this decision, the British courts defended their approach of deciding against imposing liability on particular *classes* of would-be defendants, after weighing the competing considerations in the balance, and without subsequently having to revisit the balance in each particular case.[51] The European Court later accepted this argument, noting that the House of Lords had balanced the competing reasons 'in the circumstances of the applicants' case.'[52] While there was some confusion about what the European Court's judgment entailed,[53] it is now clear that, once balancing takes place in deciding whether to extend the categories of negligence, no further balancing is necessary. As Lord Hope noted, the European Court chose not to say that the matter of proportionality should be decided on the facts of each case.[54] It was therefore acceptable to reject ad hoc balancing in favour a bright-line rule such as the one

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[50] *Osman v United Kingdom* (2000) 29 EHRR 245 [151].

[51] *Barrett v Enfield LBC* [2001] 2 AC 550, 560 (Lord Browne-Wilkinson).

[52] *Z v United Kingdom* (2002) 34 EHRR 3 [99].

[53] See eg Tom Hickman, 'Tort Law, Public Authorities, and the Human Rights Act 1998' in Duncan Fairgrieve, Mads Andenas, and John Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (BIICL 2002). The Court of Appeal adopted the view that the blanket immunities in *X (Minors)* and *Hill* could not survive the Human Rights Act, and that there would need to be ad hoc balancing: see *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151 [83] (Lord Phillips MR); *Van Colle v Chief Constable of Hertfordshire Police* [2007] EWCA Civ 325; *Smith v Chief Constable of Sussex Police* [2008] EWCA Civ 39. However, this approach was rejected in the House of Lords: see *D v East Berkshire Community NHS Trust* [2005] UKHL 23; *Jain v Trent Strategic Health Authority* [2009] UKHL 4; *Brooks v Commissioner of Police for the Metropolis and others* [2005] UKHL 24 [30] (Lord Steyn); *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 AC 225; *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 1 AC 874.

[54] *Van Colle* (n 53) [70] (Lord Hope).

in *Hill*—which, according to Lord Hope, operated so that the interests of the wider community would prevail over those of the individual.[55]

Yet it is nonetheless true that in each case the courts may have to address the question: should the rule established in the *Hill* line of cases be applied in this particular case, or is that rule outweighed by a competing considerations? Since even blanket rules are defeasible, the courts must, in a sense, engage in 'ad hoc balancing' in every case, in order to determine whether the established rule has been defeated. Of course, if police acts or omissions are deemed to fall outside the core rule in *Hill*, then we are in the penumbra of the rule, where the courts are more willing to impose liability on the police.[56] But the courts should weigh the competing considerations even when the core rule applies. This is not because, as one commentator suggested, 'proportionality pervades the "general rule" applied by the courts'.[57] Rather, it is because there is always the possibility that competing reasons will outweigh the core rule. When the courts say they are not engaging in ad hoc balancing, they are implicitly accepting that the rule has not been defeated, that it still outweighs competing reasons.

Assessing whether the core rule established in *Hill* or *X v Bedfordshire CC* has been defeated will inevitably raise some choices among

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[55] ibid [76] (Lord Hope). See JR Spencer, 'Suing the Police for Negligence: Orthodox Restored' [2009] CLJ 25, 26, arguing that the Law Lords' decision in *Van Colle* can be justified on grounds of 'distributive justice', but contrasting it with the decision in *Ashley v Chief Constable of Sussex* [2008] UKHL 25.

[56] *Swinney v Chief Constable of the Northumbria Police* [1996] 3 All ER 449, 464–65 (Hirst LJ). See also, eg, *Kightley v Johns* [1982] 1 WLR 349; *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242; *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All ER 692.

[57] Giorgio Monti, '*Osman v UK*: Transforming English Negligence Law into French Administrative Law' (1999) 48 ICLQ 757, 761.

incommensurable options. The problem of incommensurability cannot be sidestepped, as some commentators would like, 'by keeping the policy box firmly shut',[58] because it is neither possible nor desirable to distinguish between justiciable matters of principle and non-justiciable matters of policy. Even the more moderate view that distributive justice should act merely as a 'constraining value', rather than as 'the basic criterion for determining liability',[59] fails to appreciate that the constraining value of distributive justice is relevant to (though not quite determinative of) every determination of liability. The judge must decide whether there is a sufficient reason for departing from the established rule, and when the rule is incommensurate with the competing reason, then it is reasonable to decide either way.

The discussion in this section of some recent British developments in negligence law provides good examples of the implications of value incommensurability in common-law reasoning. But one question has lurked in the background of this discussion, and must now be properly addressed. Is the development of the law in these cases really a matter, not of defeasibility, but of interpretation? Perhaps, it might be objected, the development of the common law in these cases is less a conflict between authority-based reasons and competing reasons, and more a matter of the interpretation of (indeterminate) law. In responding to this objection, it will be necessary to look closer at

[58] Robert Stevens, *Torts and Rights* (OUP 2007) 310. cf Carol Harlow, *State Liability: Tort Law and Beyond* (OUP 2004).

[59] François Du Bois, 'Human Rights and the Tort Liability of Public Authorities' (2011) 127 LQR 589, 598. See also Jules Coleman, *Risks and Wrongs* (CUP 1992); Jules Coleman, *The Practice of Principle* (OUP 2001).

interpretation. The question arises not only in the interpretation of precedents, but also—and even more acutely—in the context of interpretation of statutes. It is in that context that I will try to answer that question.

II. The Ordinary Meaning in Statutory Interpretation

In our understanding of statutory interpretation, many of the problems we face stem from uncertainty and disagreement over its very object. The disagreement is over whether an interpretation of a statute should seek to determine the meaning of the text of the statute, or the intentions of the legislature in enacting the statute, or the ideal purpose that would show the statute in its best light, or some other consideration that could plausibly ground statutory interpretation. I will argue that there are two central objects of statutory interpretation: one is the ordinary meaning of the statute, which in the absence of evidence to the contrary can be understood as the legislature's intended meaning; and the other is the ideal meaning of the statute, which the legislature should have intended to enact. This section will concentrate on distinguishing between these meanings and demonstrating the possibility and desirability of acting on the legislature's actual intentions. Having set up this distinction between the two meanings, section III will then explore the conflict that can arise between the option of following the statute's ordinary meaning and the option of following the statute's ideal meaning, and will suggest that judges may occasionally have good, undefeated reasons to act on either option.

Four Modes of Reasoning with Rules

There is an old way of characterising the canons of statutory interpretation, which I think is best left behind. It is commonly said that there are three main canons of statutory interpretation: the literal or plain meaning rule (which, though often oversimplified, is nonetheless far more controversial than it should be), the mischief rule (according to which the interpreter should choose the interpretation that, even if not the plain meaning, best furthers the legislature's purpose), and the golden rule (according to which the interpreter departs from the plain meaning if applying the plain meaning would lead to absurdity or injustice). This way of characterising the canons of interpretation may find some support in the law of particular legal systems. But it is unhelpful primarily because it masks the plurality of values that, in my view, infuses statutory interpretation. I believe that this pluralism can be unmasked by being more explicit about some general features of statutory interpretation, features which are relevant to reasoning with rules universally and not just to the law of any particular legal system.

These general features can be best understood if we distinguish between what I will call four modes of reasoning with rules. The first three modes all assume that our aim is to follow the authoritative rule. First, there are times when the rule's application is clear. This mode is often called 'literal interpretation', but it is more accurately described as literal or ordinary application, for in these circumstances (when we might reach for the idiom, 'there's no two ways about it') no interpretation is required. Interpretation is always a matter of choice, and it arises when the rule's application is unclear, leaving us with a range of eligible interpretations. Among these eligible interpretations, however, there may be one, or some, interpretations that, on further reasoning, turn out to be better than the others. This brings us to the second and third modes of reasoning with rules, both of which assume that our aim is to follow the will of the authority that made the rule. In the second mode, we try to reach the best interpretation by determining what was the authority's will, its intention or purpose. In the third mode, the authority's will is itself unclear, and we must rely on our own moral reasoning to determine the best interpretation of the rule (although, of course, moral reasoning may also leave us with multiple eligible and incommensurable interpretations). The fourth mode is quite different from the first three. Like the third mode, the fourth mode requires our own moral reasoning. But whereas the third mode required moral reasoning because the rule (together with the rule-maker's intention) was indeterminate, the fourth mode requires moral reasoning regardless of whether the rule (and the rule-maker's intention) is determinate or indeterminate. This is the mode in which we are determining whether or not the authoritative rule ought to be followed or not.

When courts are faced with interpreting and applying statutes (especially but not only in Westminster-style systems, based on the legislative supremacy of Parliament), there is often an explicit reluctance to countenance anything like the fourth mode of reasoning with rules (although the British courts have occasionally given some warnings of a possible change on this issue).[60] But that does not entail that the fourth mode does not take place. The explicit conflict may be suppressed, but it continues to exist below the surface, in a different,

[60] See eg *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

subtler, and arguably more problematic form. Thus judges often offer arguments as interpretations in the second or third modes, when in fact they are departing from authority by offering interpretations in the fourth mode. That is, their interpretation departs from authority not because the authority's rule is indeterminate, but in order to, as it were, *expand* the range of eligible interpretations, reaching something that is not really an interpretation of the statute at all, but an interpretation *contra legem*.[61]

The conflation of the four modes of reasoning with rules is one of the most disappointing aspects of most accounts of legal interpretation in general and statutory interpretation in particular. Legal philosophers, lawyers, and judges writing on interpretation may acknowledge a contrast between the first mode, on the one hand, and the second and third modes, on the other—a contrast often framed in terms of literal and purposive methods of interpretation—and there is much recognition of a general trend towards more purposive approaches, although, as Lord Steyn says, the text is the point of departure and 'it would be an over-simplification to say that there has been a homogeneous shift towards a purposive interpretation of all legal texts. Much depends upon the particular text.'[62] Furthermore, there is even some recognition that interpretation always

[61] See John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (5th edn, R Campbell ed, Murray 1885) vol II, 629 (emphasis in original), describing presumptions of intention as 'not *interpretation*, but a process of legislative amendment, or a process of legislative correction.'

[62] Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 Sydney L Rev 5, 7.

involves 'the making of choices between feasible interpretations'.[63] There is no doubt much consensus that, not only is a choice needed when the literal and purposive interpretations are indeterminate, leaving a range of eligible interpretations, but a choice may also be needed when the literal meaning of a text and the purpose of the statute lead to different conclusions, and that it should not be assumed that either a literal or purposive interpretation should necessarily prevail in such a conflict.[64] But the most important choice is left hidden.

The important divide is less between literal and purposive interpretation, and more between interpretations that follow authority and those that depart from authority. The problem is that there is often a lack of clarity on whether the interpretation is based on authority—the intended or ordinary meaning—or whether it is based on other considerations. The main reason for this lack of clarity is the tendency among judges and lawyers to base their interpretations of statutes on ideal intentions or purposes that they then attribute to the legislature, despite the legislature's actual intention to the contrary. This has been a problem in statutory interpretation at least since *Heydon's Case*, one of the earliest formulations of purposive interpretation in English law, in which the Barons of the Exchequer, as reported by Edward Coke, ruled that the court must search for the mischief that the law sought to remedy and the underlying principle of the remedy, the 'true reason of the remedy'.[65] How are we to understand this

[63] ibid 8. See also *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* [2001] 2 AC 349, 398 (Lord Nicholls): 'when interpreting statutory language courts have to strike a balance between conflicting considerations.'

[64] For scepticism of the merits of purposive interpretation, see eg Roderick Munday, '*Fisher v Bell* Revisited: Misjudging the Legislative Craft' (2013) 72 CLJ 50, 63–64.

[65] *Heydon's Case* (1584) 3 Co Rep 7a.

ambiguous phrase, 'the reason of the law'?[66] Is the reason of the law the actual reason of the lawmakers? Or is it the reason on which the law ought to have been based?

In the seventeenth century, one of the most prominent defenders of the former answer was Thomas Hobbes, who believed that statutes must be interpreted according to the reason of the lawmaking authority, lest the interpreter becomes the legislator. Hobbes thought that judges should look beyond the bare words of the statute to the intentions of the lawmaker, and should assume that the authority's intentions are in conformity with morality—which is perhaps an uncontroversial assumption when the authority's intentions are unclear—so that, 'if the words of the law do not fully authorize a reasonable sentence, [the judge ought] to supply it with the law of nature; or if the case be difficult, to respite judgment till he have received more ample authority.'[67] There may be many times when legislative intention is unclear, especially in cases of *casus omissi*, when the legislature omitted to consider the particular circumstances. But Hobbes also thought that when the lawmaker's intention is clear, 'no incommodity can warrant a sentence against the law'.[68] The problem with this account is that, because it requires the judge to stop at what I am calling the third mode of reasoning with rules, and therefore is concerned to apply the presumption in favour of morality under the guise of the legislature's actual intention, there is a risk that it will apply that presumption notwithstanding the

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[66] cf Timothy Endicott, 'The Reason of the Law' (2003) 48 Am J Juris 83.

[67] Thomas Hobbes, *Leviathan* (first published 1651, Noel Malcolm ed, OUP 2012) XXVI 26.

[68] ibid.

legislature's actual intention to the contrary. It may sometimes be reasonable to do so, contrary to what Hobbes thought, but it should not be dressed up as actual legislative intent.

More problematic than Hobbes's account, however, is the idea that the judge must search for the true *legal* meaning of the statute, which can only be discerned by specifically legal methods. This is the idea of the reason of the law that originated in *Heydon's Case* and was later elaborated by Matthew Hale, who, writing shortly after Hobbes's *Dialogue*, responded that when the statutory language is unclear, the judge should turn not to morality, but to a coherent body of common-law doctrine. Whereas Hobbes thought that good judges needed to be, first and foremost, good moral reasoners, Hale argued that those immersed in moral philosophy make the worst judges, because 'they are transported from the Ordinary Measures of right and wrong by their over fine Speculacons [sic] … above the Common Staple of humane Conversations.'[69] Since such judges would end up relying on their own moral beliefs about what the law required, he thought, arbitrariness and instability would inevitably follow. For Hale, then, the good judge should be steeped in 'the reason of the law', the system of principles which Coke thought amounted to an 'artificial perfection of reason, gotten by long study, observation, and of experience'.[70]

This approach lives on in modern legal systems, transmuted into innumerable technical canons of statutory interpretation that purport to provide

[69] Matthew Hale, *Reflections on Mr Hobbes his Dialogue of the Lawe*, in SW Holdsworth (ed), *A History of English Law* (vol V, Methuen 1945) 503.

[70] Edward Coke, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (first published 1628, Francis Hargrave and Charles Butler eds, 15th edn, 1794) 97b.

the true legal meaning. The leading English tome on statutory interpretation states that the first object of statutory interpretation is coherence and 'order',[71] and that, in pursuit of order, there are 'a thousand and one interpretive criteria'.[72] These criteria may not amount to a perfection of reason, but their mastery would certainly require long study. In modern accounts of statutory interpretations, there is greater (if still downplayed) recognition that the myriad canons of interpretation, the aids and rules of thumb, frequently require moral reasoning, especially the presumptions that Parliament did not intend to legislate in certain ways—say, in a way contrary to fundamental rights. Judges often pay lip service to legislative intention, arguing that, since the canons of statutory interpretation form part of the background conventional understandings not only for the judge but also for the legislature, then they surely provide strong presumptions of legislative intent, presumptions which are not easily rebuttable. But, although the courts often try hard to demonstrate that the presumed intention is in fact consistent with the actual intention,[73] the presumptions often give rise to 'strained' interpretations that go beyond Parliament's actual intentions. I will argue in section III that it is better to be honest about this conflict between Parliament's authority and the judge's reason, because only then can we adequately confront the plurality of moral considerations involved when judges interpret statutes, rather than wishing away that plurality in the pursuit of

[71] Francis Bennion, *Statutory Interpretation* (6th edn, LexisNexis Butterworth 2014) 1.

[72] ibid 3.

[73] See eg *A v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534 [61] (Lord Hope).

'order'.[74] Before doing so, however, the very possibility of this conflict in statutory interpretation needs to be defended against some academic writers who argue that parliamentary intention cannot and should not form the basis of statutory interpretation.

The Ordinary and Intended Meanings

A basic feature of any sound understanding of statutory interpretation is, in my view, that the court must ask itself what the legislature actually meant when it enacted the statute, regardless of whether or not this intended meaning ought, in the final analysis, to be followed. In order to determine this intended meaning, the court will have to make inferences from what the legislature actually did, not from what the legislature would have or should have done. Since the main thing that the legislature has done is enact a text, in most circumstances the legislature's intended meaning can be inferred from the statute's ordinary meaning. That is to say, it is often possible to apply the statutory rule without trying to determine specific intentions about how the rule should apply to particular circumstances. In this way, it is possible to follow the legislative intention even when the court is presented with particular circumstances that the legislature did not envisage. In these '*casus omissi*', it would be wrong to assume that the intended meaning has no further role, an assumption which is perhaps attributable to the mistaken belief that the legislative intention is a specification

[74] For a challenge to the widely held ideal of legislative integrity, see Andrei Marmor, 'Should We Value Legislative Integrity?' in Marmor, *Law in the Age of Pluralism* (n 2).

of the particular instances to which the general rule applies.[75] No rule spells out the conditions for its application. For sure, to follow a rule is to know how it applies in the circumstances, but that is not to say that the rule is a set of pictures that determines how it applies. It is in applying the rule to the particular circumstances that we know the legislature's intent, even when the legislature did not envisage those circumstances. At times, the rule's application to the particular circumstances will be clear, in which case interpretation is not required and we follow the rule without doubting how it applies (the first mode). But often the rule's application is not clear, in which case it may be necessary to try to determine whether the legislature did in fact have an intention about how it should apply in the particular circumstances (the second mode).[76]

Thus the first object of statutory interpretation is the text of the statute actually enacted. As Lord Radcliffe put it, 'the paramount rule remains that every statute is to be expounded according to its manifest or expressed intention.'[77] The text of the statute will usually supply the answer, and has 'canonical' status, as Waldron puts it.[78] Some believe that *only* the text should be the object of interpretation, and that the court should disregard any legislative intentions that

[75] This assumption can be found in Max Radin, 'Statutory Interpretation' (1930) 43 Harv L Rev 863, 871–72; William Eskridge, *Dynamic Interpretation* (Harvard UP 1994) chs 1–2. cf Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 254–55.

[76] cf Ekins, *The Nature of Legislative Intent* (n 75) 271, arguing that, although legislative history is 'in principle' relevant to determining legislative intent, interpreters should not take into account statements made about the statute's application, because 'what the legislature does in exercising its authority is to choose means to ends, consisting in universal propositions rather than a series of particular applications.' It seems to me that this distinction between universal meaning and particular application is not relevant in this context.

[77] *Attorney-General for Canada v Hallet & Carey Ltd* [1952] AC 427, 449.

[78] Jeremy Waldron, *Law and Disagreement* (OUP 1999) 145.

may have accompanied its enactment.[79] But the ordinary meaning of the text has only prima facie authoritativeness,[80] such that the ordinary meaning will be defeated when there is a clear legislative intention to the contrary.[81] I will explain this point in a moment. But first, what is the ordinary meaning? It must be the ordinary meaning of the statutory text *in its context*. Thus in order to determine that ordinary meaning, it may be necessary to look beyond the text to determine Parliament's intention from the wider statutory context, especially (but, as we shall see, not only) when the ordinary meaning of the text is indeterminate.

Some people have been sceptical of the existence of a clear ordinary meaning. But once it is appreciated that the ordinary meaning can only be understood in its context, the notion that there can be a clear ordinary meaning should be far less controversial. This is primarily why we need not make any distinction between literal and purposive interpretation, unless the latter is being used as a somewhat misleading label for a departure from the ordinary meaning of the statute in its context. The distinction between literal and purposive methods of interpretation tends to be drawn by those who wish to defend purposive methods against the straw men who favour literal methods. This can be seen from Lon Fuller's defence of purposive interpretation. In his error-filled

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[79] ibid ch 6; Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010) 247.

[80] See Rupert Cross, *Statutory Interpretation* (John Bell and George Engle eds, 3rd edn, Butterworths 1995) 14.

[81] See further Andrei Marmor, 'The Immorality of Textualism' in Marmor, *Law in the Age of Pluralism* (n 2). cf *Black-Clawson International v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL), 613 (Lord Reid): 'We are seeking not what Parliament meant but the true meaning of what they said. In the comparatively few cases where the words of a statutory provision are only capable of having one meaning, that is an end of the matter and no further inquiry is permissible.'

account of (and response to) Hart's analysis of the core and penumbra, Fuller writes that '[i]f a statute seems to have a kind of "core meaning" that we can apply without a too precise inquiry into its exact purpose, this is because we can see that, however one might formulate the precise objective of the statute, *this* case would still come within it.'[82] That is to say, regardless of the precise purpose of the rule against vehicles in the park, we know 'without thinking' that it applies to noisy automobiles.[83] But this is no objection to Hart; indeed, it is precisely Hart's point. The importance of context is often attributed to some insights from the later work of Ludwig Wittgenstein,[84] and here we are justified in saying that we are following the intended meaning, what Fuller called 'the intention of the statute',[85] even though it may not have been in the mind of any legislator. But this just is the ordinary meaning, understood in its context.

This reference to 'statutory context' is obscure, however, and it is important to draw a distinction between evidence from the statutory context that Parliament actually intended a particular meaning, and inferences from the statutory context that Parliament would likely or should have intended a particular meaning. Only the former is relevant to assessing what Parliament actually intended. Richard Ekins thus draws the net too widely when he writes

[82] Lon L Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart' (1958) 71 Harv L Rev 630. 663.

[83] ibid 663.

[84] See eg Lon Fuller, 'Human Purpose and Natural Law' (1956) 53 J Phil 697, 700; Fuller, 'Positivism and Fidelity to Law' (n 82) 668. On the proper application of Wittgenstein's rule-following considerations to legal theory, see Brian Bix, *Law, Language, and Legal Determinacy* (Clarendon Press 1993) ch 2.

[85] Lon L Fuller, *The Morality of Law* (rev edn, Yale UP 1969) 87.

that 'the context of legislation is what is known and salient at the time of enactment'.[86] It is true that the ordinary meaning of a statute can only be determined against a background of presuppositions that are taken for granted, and these background presuppositions include understandings about the statutory context. But if we are looking for Parliament's actual intent, then, although the ordinary meaning is prima facie authoritative, it will be rebutted if it turns out that, on the available evidence, the legislative authority intended a different meaning. The interpreter can follow the ordinary meaning unless it is put on notice that further historical research into the evidence of Parliament's intention is required.[87] So evidence of Parliament's actual intention will be necessary to determine the intended meaning both when the ordinary meaning is unclear, and in order to determine if the ordinary meaning is rebutted by evidence of Parliament's actual intended meaning. Of course, if the available evidence of the intended meaning is unclear, then the interpreter should resolve any uncertainty about the ordinary meaning in favour of the interpretation that the interpreter considers most reasonable (the third mode)—in which case, although it would be misleading and perhaps unhelpful to say (as Hobbes insisted we say) that this interpretation was Parliament's intention, there is nonetheless no conflict between the court's interpretation and the (unclear) legislative intention.

The difference between determining which interpretation was intended and determining which interpretation is reasonable is that the former requires interpreters to be historians, for the intended meaning is an historical meaning.

[86] Ekins, *The Nature of Legislative Intent* (n 75) 258.

[87] cf Cross, *Statutory Interpretation* (n 80) 52.

The most obvious way in which this can be done is by looking at the historical sources prior to enactment, *travaux préparatoires*, such as Hansard reports of the parliamentary record. Since the House of Lords judgment in *Pepper v Hart*, it has been possible for British judges to rely on parliamentary material such as ministerial statements as an aid to interpretation, when doing so helps to throw light on legislation that would otherwise be vague or would lead to absurdity.[88] The House of Lords intended the rule in *Pepper v Hart* to be used when the statutory provision was ambiguous.[89] But some worry that statements made in legislative deliberation may be used to unsettle the clear meaning of a statutory provision.[90] Ekins, for example, argues that we should 'protect reasonable inferences about what, legislative history aside, the legislature seems to intend', because then legislators are forced to reflect carefully on how the statute is likely to be understood.[91] But this worry overlooks the fact that statements derived from legislative history are only relevant when they provide clear evidence of legislative intent, which may be relatively rarely. When there is clear evidence of legislative intent, it seems unreasonable to infer that legislative intent was something else. A slightly different worry is that, since it could create a rule of recognition giving them the status of law,[92] the use of statements derived from

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88 *Pepper v Hart* [1993] AC 593, 634H–H–635B (Lord Browne-Wilkinson).

89 ibid 640 (Lord Browne-Wilkinson).

90 This worry can be found in Ekins, *The Nature of Legislative Intent* (n 75) 270–74.

91 ibid 274. See also JH Baker, 'Statutory Interpretation and Parliamentary Intention' (1993) 52 CLJ 353.

92 For an argument that the use of legislative history has this effect, see Waldron, *Law and Disagreement* (n 78) 145–46.

legislative history could give rise to the phenomenon of '*Pepper v Hart* statements' made by ministers during the legislative process, effectively transferring legislative authority from Parliament to ministers of the Crown.[93] But this worry should not be overstated. The use of legislative history in statutory interpretation is justified provided it is restricted to its proper role as part of the background context in which the statute is enacted, which may be used to help clarify the intended meaning of the statutory provision. When Dworkin asks why judges should attach importance to statements made to an empty chamber (as often happens in the US Senate)[94] but not to the sponsor's statements in a nationally televised speech, the answer is not so much that, as he says, the former are outcomes of the legislative process with canonical status, which must be interpreted with integrity,[95] but rather that they provide better evidence of what the legislature intended.

All this leaves unexplained the critical question: why would we have reason to follow the intended meaning, as distinct from the ordinary meaning or the most reasonable interpretation of the ordinary meaning? If we do indeed have good reasons to follow the intended meaning, those reasons are going to be part of the authority-based reasons we have to follow the statutory provision. But it is a conception of authority that leads Jeremy Waldron to deny that we have good

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[93] Lord Steyn, '*Pepper v Hart*: A Re-examination' (2001) 21 OJLS 59, 64. But see also the refinements of the *Pepper v Hart* rule in *Spath Holme Ltd* (n 63).

[94] See George Packer, 'The Empty Chamber' *The New Yorker* (New York, 9 August 2010).

[95] Dworkin, *Law's Empire* (n 22) 342–43.

reasons for following the purported intentions of the legislature.[96] On the basis of a Razian conception of authority, Waldron argues that the reason for following statutory provisions is that it provides a solution to the 'circumstances of politics', because it provides a single solution in the midst of disagreement. Only the ordinary textual meaning can provide this authority-based reason, he says, because only the text can provide one meaning from a plurality of intentions—'*e pluribus unum*', as he says—and 'legislators are entitled to insist on the authoritativeness of the text *and nothing but the text*'.[97] I do not find this argument convincing. There are many authority-based reasons for following statutory provisions. While Waldron has provided one good reason for following a particular meaning of a statutory provision, there are other reasons—among which the political legitimacy of the legislature is perhaps the most important. Indeed, even the reason that Waldron has identified is not sufficient to rule out reliance on the intended meaning. For evidence of legislative intention from outside the text of the statute may provide *e pluribus unum*—one intention from a plurality of textual meanings.

Of course, I am assuming that it is possible to find the intention of the legislature beyond looking at the text of the statute, which Waldron denies.[98] Although I find persuasive the arguments made by Dworkin, Waldron, and others that the legislature (as opposed to individual legislators) is incapable of

[96] Waldron, *Law and Disagreement* (n 78) 138: 'any reason we have for according Raz-ian authority to the resultant legislation is also a reason for discounting the authority of the views or intentions of particular legislators considered on their own.'

[97] ibid 145 (emphasis added).

[98] ibid 142–43.

forming a shared intention other than through the enacted text, I do not think it follows that the particular understandings of some of the legislators—understandings which form part of the statutory context in which the text was enacted—should be ruled out as evidence for determining which meaning of the text was actually enacted.[99] But I accept that such understandings are only helpful when it is clear to anyone looking at the legislative debates that a particular meaning was generally accepted. That may be quite rare, in which case we can rarely soundly claim to infer that the legislature actually intended a different meaning from the ordinary meaning. It may be rare, but not impossible.

In any case, the important point is that, when we are following the ordinary meaning or a different but clearly intended meaning, we can soundly claim that we are following the authority of the statute. This is not the case, however, when the judge claims to be acting on presumptions of legislative intent but is actually attributing (as Dworkin encouraged) intentions and purposes to an ideal legislator. On this view, legislative intent has little or no normative force of its own. 'Intention', according to MacCormick, 'is a rhetorically effective and legitimate way to frame a conclusion about what is the most reasonable interpretation in context, not a further argument to that effect.'[100] This overlooks the proper role of intention as an anchor for the authority of Parliament. We may sometimes have good reasons not to follow the authority of Parliament, but, as I will now try to show, in such cases we would

[99] For a robust defence of the possibility of legislative intent, see generally Ekins, *The Nature of Legislative Intent* (n 75).

[100] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Interpretation* (OUP 2005) 137.

do better to acknowledge the conflict between authority and competing reasons in statutory interpretation, so that we can understand more clearly the complex moral–political questions to which this conflict gives rise.

III. PRESUMED INTENTIONS AND STRAINED INTERPRETATIONS

The ordinary canons of statutory interpretation have allowed courts to use techniques such as 'reading down' and 'reading in', by which the court will often presume that the legislature intended to legislate in certain ways.[101] Of these common law presumptions, one of the most significant is the presumption (often called the 'principle of legality',[102] and commonly associated with the *Simms* case)[103] that the legislature did not intend to infringe fundamental rights, a presumption that operates even in the absence of ambiguity in the statutory provision, but is rebuttable when there is an express provision authorising such an infringement.[104] The contest between 'original intent' and 'living tree' interpretation is not just a feature of US-style constitutional debate. The purposes

[101] Cross, *Statutory Interpretation* (n 80) 93–103.

[102] *Halsbury's Laws of England* (4th edn, reissue 1996) vol 8(2), para 6.

[103] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 130 (Lord Steyn), 131 (Lord Hoffmann). See also *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, 573–75 (Lord Browne-Wilkinson), 587–90 (Lord Steyn).

[104] Cross, *Statutory Interpretation* (n 80) 165–66; Francis Bennion, *Statutory Interpretation* (5th edn, LexisNexis Butterworths 2008) 823.

of ordinary statutes are also sometimes deemed to be 'always speaking' and changing over time.[105]

There are two possibilities for how we should understand these common law presumptions. One possibility is that the presumption of intention does what it says: it helps the courts to understand what the legislature intended, a presumption which is defeated if Parliament expresses its clear intention to the contrary. Clearly this is only possible if there were such clear and established common law principles at the time that the legislation was being considered, so that the legislature could reasonably be expected to have had those principles (and the court's interpretation of them) in mind. This will not always be the case, which leads to the other possibility: that the presumption applies notwithstanding what the legislature actually intended. But if this is the case, then it is not a presumption of the legislature's intention at all. There has been much opposition to this extension of the range of eligible interpretations, by inventing 'fancied ambiguities' as an excuse for refusing to apply the ordinary meaning because it is considered inexpedient, unjust, or immoral.[106] Through the use of presumed intention, the courts maintain a 'formal veneer' of following the authority of Parliament,[107] a veneer, or 'fairy tale', which Lord Woolf described as

[105] See eg *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 292 (Lord Bingham), 296 (Lord Steyn). See also *In re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289 [25] (Lord Steyn): 'legislation, whether primary or secondary, must be accorded an always-speaking construction, unless the language and structure of the statute reveals an intention to impress on the statute a historic meaning.'

[106] *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157 (Lord Diplock).

[107] Paul Craig, 'Sovereignty of the United Kingdom Parliament after Factortame' (1991) Yearbook of European Law 223, 251.

'harmless', although he argued that in extreme situations it may be necessary to acknowledge limitations on Parliament's legislative supremacy.[108]

The problem is that the court may apply the common law presumptions, such as the *Simms* principle of legality, to depart from the ordinary or intended meaning, but under the guise of parliamentary intention. Jeremy Bentham was notoriously scathing of this judicial tactic. He wrote,

> To interpret has signified entirely different things in the mouth of a lawyer, and in the mouth of another person: to interpret a passage of an author, is to show the meaning which he had in his mind; to interpret a law, in the sense of a Roman lawyer, is to neglect the clearly expressed intention, in order to substitute some other, by presuming that this new sense was the actual intention of the legislator.[109]

When the law is interpreted in this way, Bentham thought, 'everything is arbitrary', giving us the rule of judges, not the rule of legislators, and this arbitrariness could only be avoided by giving effect to the 'literal' meaning.[110]

I will suggest that it may sometimes be reasonable for the court to depart from the ordinary or intended meaning of the statute (leaving to the next chapter the question of what this implies for arbitrariness and the rule of law). But it is

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[108] Lord Woolf, 'Droit Public—English Style' [1995] PL 57, 67–69.

[109] Jeremy Bentham, *Principles of the Civil Code* (Bowring ed, William Tait 1843) 325.

[110] ibid 325.

important to be clear that in doing so judges are offering a 'strained' interpretation—if it can be called an interpretation at all—and that they are doing so against the authority of Parliament.

It is worth stressing that strained interpretation can occur in statute law in general. But I will discuss it with specific reference to section 3 of the Human Rights Act 1998,[111] a section which, as Lord Hoffmann noted in the *Simms* case, expressly enacted the presumption in favour of fundamental rights or principles as a rule of construction.[112] This is a particular good test case, for it seems to provide an acute problem for me. After all, it seems that, when the courts interpret statutory provisions using their power under section 3, there is no conflict with parliamentary authority, because the power is conferred by Parliament. I believe that the section 3 power is more complicated. It is complicated by the existence of two legislative intentions: the intention contained in section 3 and the intention contained in the statutory provision being interpreted. Section 3 is unambiguous in requiring the courts to extend the range of eligible (or 'possible') interpretations beyond the confines of Parliament's actual intention, much as the courts do with the *Marleasing* doctrine in EU law.[113] This much is clear from the government's White Paper

[111] Human Rights Act 1998, s 3: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

[112] *Simms* (n 103) 132 (Lord Hoffmann). cf Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998' (2009) 125 LQR 598, 610, arguing that the principle of legality seeks to give effect to the ordinary, intended meaning, whereas section 3 overrides the ordinary, intended meaning.

[113] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135. Lord Steyn and Lord Rodger drew attention to this parallel in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [45] (Lord Steyn), [118] (Lord Rodger).

accompanying the Human Rights Bill,[114] as well as from the parliamentary debates,[115] In so far as there were any ambiguities in the views of the parliamentary sponsors,[116] the ambiguities can be explained by their efforts to do the impossible and reconcile the requirements of section 3 with its reference to 'interpretation'. The courts have certainly understood Parliament to have intended that section 3 would require strained interpretations, involving the 'reading down' of the statutory text against Parliament's intention when enacting the legislation being interpreted.[117] As many commentators have recognised, by requiring this form of strained interpretation, the Human Rights Act in effect authorises judges to depart from legislative intent and amend primary legislation.[118] So I think that section 3 provides a good example.

The method of interpretation under section 3 proceeds as follows: first, the court determines the ordinary interpretation of the statutory provision; second, the court determines if there is a prima facie incompatibility between the ordinary interpretation and the court's interpretation of human rights; third, the

[114] See Home Office, *Rights Brought Home: The Human Rights Bill* (Cmd 3782, 1997) para 2.7.

[115] See eg Lord Cooke of Thorndon's contribution, in which he said that section 3 would require 'a search for possible meanings as distinct from the true meaning—which has been the traditional approach in the matter of statutory interpretation in the courts': HL Deb 18 November 1997, vol 583, col 533.

[116] On these ambiguities, see Geoffrey Marshall, 'The Lynchpin of Parliamentary Intention: Lost, Stolen, or Strained?' (2003) PL 236, 238–39

[117] *R v A (Sexual Offence: Complainant's Sexual History)* [2001] UKHL 25, [2002] 1 AC 45 [44] (Lord Steyn). See also *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [32] (Lord Nicholls); *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [2005] 2 AC 557 [28] (Lord Bingham): 'the interpretive obligation under section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament.'

[118] See eg Francis Bennion, 'What interpretation is "possible" under section 3(1) of the Human Rights Act' [2000] PL 77, 91; Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 114.

court determines, using section 3, whether it is 'possible' to give the statutory provision a strained interpretation that would be compatible with the court's interpretation of human rights; finally, if there is not, then the court will issue a declaration of incompatibility under section 4 of the Human Rights Act. The implication is that there will be a need for a declaration of incompatibility only if the statutory provision is '*so* clearly incompatible' with the Convention that a section 3 interpretation is impossible.[119]

It is not difficult to notice a glaring problem with this method. If a statutory provision were not so clear that a declaration of incompatibility would be required, then surely there would be no need in the first place for a prima facie interpretation that was in conflict with Convention rights. And if, as we saw in the previous paragraph, section 3 interpretation does not depend on the 'lynchpin' of parliamentary intention,[120] then it surely does not matter whether Parliament's intentions were sufficiently clear or not.[121] This glaring confusion in the method of section 3 interpretation seems to give rise to two inconsistent possibilities: either the lynchpin of parliamentary intention is not, after all, abandoned in section 3 interpretations, in which case the use of section 3 *does* depend on an ambiguity in the statutory provision being interpreted, and therefore does not require strained interpretation; or the use of section 3 does not

[119] Home Office, *Rights Brought Home* (n 114) para 2.7 (emphasis added).

[120] See also John Laws, 'An Overview' in Jack Beatson (ed), *The Human Rights Act and the Criminal Justice and Regulatory Process* (Hart Publishing 1999) xiv: 'section 3 of the Act of 1998, where it applies, will abolish the old lynch-pin of the search for Parliamentary intention.'

[121] Marshall, 'The Lynchpin of Parliamentary Intention' (n 116) 237.

depend on an ambiguity in the statutory provision being 'interpreted', in which case parliamentary intention is not constraining.

We may, however, be able to resolve this problem in the following way. When a statutory provision is interpreted under section 3 for the first time, the clarity of parliamentary intention will not prevent the court from developing the law in a way that is contrary to that intention, which means that the choice between the use of section 3 and section 4 must surely depend, if anything, primarily on the institutional question whether the creation of new Convention-compatible legislation should be left to Parliament or should be carried out by the court.[122] But when, following the court's development of the law under section 3, Parliament chooses to make unambiguous its opposition to the court's development of the law, then, so long as there is a rule of recognition that gives supremacy to Acts of Parliament, the legislative intention will be more constraining, forcing the judges to do no more than make a declaration of incompatibility that does not affect the case before them.

It is important to be clear about what is going on when judges use section 3. The reference in section 3 to 'interpretation' can have the effect of covering up the fact that the courts are overriding statutory provisions by refusing to apply them in the particular case and instead applying a judicially created provision.[123] The fact that the courts are doing so with Parliament's apparent approval is

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[122] Of course, this is not what judges *say* they are doing in choosing between sections 3 and 4. cf *R v A* (n 117) [109] (Lord Hope).

[123] It could also be said that the courts effectively override statutory provisions when issuing declarations of incompatibility under section 4, because Parliament has developed a custom of changing legislation that has been declared incompatible with Convention rights. But section 4 declarations have no effect in the case in which they are made.

significant, but it does not alter the reality. Rather than obfuscate about 'the art of the possible' in section 3 interpretation,[124] it would be better to be clear and honest about what this power amounts to: a judicial power to strike down statutory provisions on the basis of the judges'[125] own interpretation of human rights.

The obfuscation will live on as long as we take section 3 at face value, understanding it to require 'interpretation' in the sense of remaining within the ordinary range of eligible interpretations of a statutory provision. This would be plausible only if it could be shown that somehow, contrary to the above, the object of section 3 interpretations is in fact legislative intention.[126] Philip Sales and Richard Ekins have attempted to show that this is indeed the case, and their argument is worth exploring. They acknowledge that section 3 requires judges to interpret statutes in a way that goes beyond the ordinary meaning of legislation,

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[124] Lord Lester of Herne Hill, 'The Art of the Possible—Interpreting Statutes under the Human Rights Act' (1998) 6 EHRLR 665.

[125] Here I mean domestic judges. This point calls for a short digression. For there is a school of thought according to which, contrary to what I am suggesting, Parliament intended that the domestic courts should follow the authoritative judgments of the European Court of Human Rights on the interpretation of Convention rights, rather than reach their own interpretation, see Philip Sales and Richard Ekins, 'Rights-consistent Interpretation and the Human Rights Act 1998' (2011) 127 LQR 217, 224–25. I do not think that this argument is convincing, especially in view of section 2 of the Human rights Act, which states that the domestic courts should merely 'take into account' any judgments of the European Court of Human Rights. It is true that domestic courts apply the 'mirror principle', on which see *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20] (Lord Bingham): 'The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less.' But, as most strikingly shown in *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373, the domestic courts are not bound by Strasbourg, and there is some suggestion that Parliament did not intend the restrictive *Ullah* reading of section 2. See Lord Irvine of Lairg, 'A British Interpretation of Convention Rights' [2012] PL 237, 243: 'I repeat that it is plain that Parliament intended that the interpretive exercise was a task for the domestic courts, and that they are not bound by Strasbourg's views.' See further Brenda Hale, '*Argentoratum Locutum*: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 HRLR 65.

[126] See eg Lester, 'The Art of the Possible' (n 124).

compounding the problems that rights adjudication creates for rule-of-law values such as certainty.[127] Nonetheless, they are keen to ensure that section 3 interpretations are tethered to legislative intention. This is most difficult with respect to statutory provisions enacted before the Human Rights Act came into force, when Parliament obviously did not have section 3 interpretations in mind. In such cases, Sales and Ekins accept that section 3 does not require interpretation of Parliament's intention 'in the strict sense'[128] (or, we should make clear, in any sense). Yet they maintain that section 3 has the effect of impliedly repealing earlier statutory provisions that are incompatible with Convention rights, thus maintaining the link with legislative intention.[129] But I cannot accept that that is what section 3 does, at least not directly. Instead of impliedly repealing earlier legislation, section 3 impliedly authorises *judges* to repeal earlier statutory provisions on the basis of the judges' own interpretation of Convention rights. This is an important difference. With respect to statutes passed after the Human Rights Act came into force, Sales and Ekins make a similarly obfuscating argument. They maintain that section 3 creates a presumption of legislative intention analogous to the other presumptions in ordinary methods of interpretation.[130] My reason for disagreement here relates not to the continuity that exists between the presumptions in ordinary canons of

[127] Sales and Ekins, 'Rights-consistent Interpretation and the Human Rights Act 1998' (n 125) 223.

[128] ibid 231.

[129] ibid 230–31.

[130] ibid 232.

interpretation and the presumption required under section 3,[131] but to how these presumptions are best understood. Are they used to determine what Parliament actually intended? Or are they used to correct, in the judge's mind, Parliament's intended meaning so as to bring the statute into conformity with fundamental rights or principles? Sales and Ekins favour the former understanding, whereas I think the latter is correct. Whatever they are, the 'presumptions' are not presumptions of actual legislative intent. What, then, are they?

As I see it, once it becomes clear that these are not presumptions of actual legislative intent, it then becomes clear that they are not really presumptions at all. They are departures from authority—in this case, ordinary or intended meaning of a statute—though these departures from authority, which occur in both pre- and post-Human Rights Act methods of interpretation, are sometimes reasonable. But that they are sometimes reasonable should not lead us to think that they are the 'correct' interpretations of the 'true' meaning, which is how Trevor Allan, in his Dworkinian way, understands the common law presumptions.[132] Take Dworkin's favourite case for conveying this point, *Riggs v Palmer*.[133] This is a case in which the ordinary meaning required one thing, but the court presumed (reasonably enough) that the statute would not have been

[131] This continuity is also emphasised by Trevor Allan. See eg TRS Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority' (2004) 63 CLJ 685, 706–07. See also Aileen Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) 26 OJLS 179, 206: 'The [Human Rights] Act certainly brings about changes in the judicial law-making function, but it does not create that function anew.'

[132] Allan, 'Legislative Supremacy and Legislative Intention' (n 131) 695. See also TRS Allan, 'Parliament's Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective' (2006) 59 CLP 27.

[133] *Riggs v Palmer* 115 NY 506 (1889).

intended to apply in those circumstances, had they been considered. Should we say that the decision reached in that case is the 'correct' construction of the statute? Allan believes that we should, though he says: 'It does not matter, for any practical purpose, whether we regard the Statute of Wills as rendered inapplicable by overriding common law principle or whether we treat the statute as containing, on its true construction, an implied exception to its literal terms.'[134] But it does matter, and I think it is better to be as accurate as possible. We should say that the ordinary meaning was overridden by a competing consideration, but that, the legislative intention being unclear, it was reasonable to presume that the intention would have been consistent with this competing consideration, had it been considered. In other words, this is clearly not a case of following authority, even if it is not clear whether or not it was a case of departing from authority,[135] because the authority's intensions about how the statute should apply in this case were unclear. What is problematic about Allan's account, however, is that he almost rules out any conflict between following authority and departing from authority when he writes, for example, that '[t]he true meaning and effect of any provision is the product of constitutional dialogue between the court and our ideal legislator'[136] The interesting question arises when Parliament's intentions were clear, and yet the court nevertheless decides to depart from the ordinary or intended meaning.

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[134] Allan, 'Legislative Supremacy and Legislative Intention' (n 131) 699.

[135] cf Jeffrey Goldsworthy, 'Legislative Intentions, Legislative Supremacy, and Legal Positivism' in Jeffrey Goldsworthy and Tom Campbell (eds), *Legal Interpretation in Democratic States* (Ashgate 2002) 66; Allan, 'Legislative Supremacy and Legislative Intention' (n 131) 702.

[136] Allan, 'Legislative Supremacy and Legislative Intention' (n 131) 704.

In order to explore this conflict between authority and opposing reasons in statutory interpretation, let us take as an example *R (Gillan) v Metropolitan Police Commissioner*.[137] This case has been subject to near universal criticism from both enthusiasts for and sceptics of judicial enforcement of human rights. The *Gillan* case concerned the use of stop-and-search powers authorised by an Assistant Commissioner of the Metropolitan Police in accordance with sections 44 to 47 of the Terrorism Act 2000. Having been stopped and searched by police while protesting at an arms fair in London, the claimants in *Gillan* argued that the Assistant Commissioner's authorisation was unlawful. They argued that the court should construe the statutory provisions as narrowly as possible, adopting an interpretation of the various safeguards that favoured individual liberty. The problem with such an interpretation of the safeguards, however, was that it would have required a strained interpretation. Under section 44, an authorisation 'may be given only if the person giving it considers it expedient for the prevention of acts of terrorism.'[138] And the power of stop and search '(a) may be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism, and (b) may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind.'[139] The claimants argued that, construing these sections in light of the *Simms* principle of legality, a section 44 authorisation may be given only if the decision maker had 'reasonable grounds' for considering that the powers are 'necessary and

[137] *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12, [2006] 2 AC 307.

[138] Terrorism Act 2000, s 44(3).

[139] Terrorism Act 2000, s 45(1).

suitable', in all the circumstances, for the prevention of acts of terrorism. They argued that Parliament could not have intended that the power be used in the absence of reasonable grounds. Furthermore, the claimants drew attention to the fact that the authorisations may be given only for a specified period of time, which may be no greater than twenty-eight days,[140] and the Secretary of State must confirm the authorisation if it is to continue in force for more than forty-eight hours.[141] Since the 2000 Act came into force, the authorization has been renewed by the Metropolitan Police and confirmed by the Secretary of State every twenty-eight days. The claimants argued that this system of rolling authorisation was contrary to Parliament's intention that the power be used only for limited periods.

The House of Lords unanimously rejected these arguments. To its credit (and in contrast with their approach in other cases), the judges did not make any presumptions about parliamentary intent, but sought to determine the meaning of the statutory provisions according to what Parliament *actually* intended. The judges came to the view that Parliament meant what it said, and that 'expedient' was not to be read as 'necessary'.[142] This seems to me to be correct. There was no basis in the legislative intention for the claimant's interpretation, and much to suggest the contrary. Their argument that the court should nevertheless interpret the provisions of the 2000 Act on the presumption that Parliament would not have intended the power to be used in certain rights-interfering ways, an

[140] Terrorism Act 2000, s 46(1) and (2).

[141] Terrorism Act 2000, s 46(3) and (4).

[142] *Gillan* (n 137) [14]–[15] (Lord Bingham).

argument which is shared even by some sceptics of judicial protection of human rights,[143] is not borne out. If we are honest, there is really no doubt: the claimant's preferred interpretation would have involved defeating Parliament's intention to confer extremely broad powers. However, even if the House of Lords was right to interpret Parliament's intention in this way, their Lordships could have developed the law in the way favourable to the claimants, notwithstanding the legislative apparent intention to the contrary. Using the example of *Gillan*, we are now in a position to assess the moral questions that are thrown up by the possibility of developing the law in the context of statutory interpretation.

Equipped with its understanding of what the ordinary and intended meaning of statutory provision, and faced with the claimants' moral–political challenge to the justifiability of that statutory provision, the court should apply a two-stage process. First, the judge must decide whether the statutory provision was justified, which requires an assessment of the reasons that Parliament had for enacting the provision. This moral reasoning, on which the law ought to have been based, may produce options that are commensurable or incommensurable. To put it crudely, Parliament, in enacting sections 44 and 45 of the Terrorism Act 2000, was required to decide between two options, one favouring national security, and the other favouring individual liberty. There are four possibilities. It may be that, in this case, the statutory provisions struck the right balance—either because the gains in security outweighed the loss of liberty (as the House of

[143] See eg Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 UTLJ 1, 12–14.

Lords thought),[144] or because, the two options being roughly equal, we should be indifferent as to which one was chosen (which, of course, is unlikely). In either of these two scenarios, the judge should apply the statute. However, it may be that the reasons for sections 44 and 45 did not fully justify them, either because the loss of liberty outweighed the gain in security (as the European Court of Human Rights thought),[145] or because the two options were incommensurable. In either of these two scenarios, the judge must make a second assessment, with the addition of the authority-based reasons that flow from the fact that the statute has been authoritatively enacted. Here the question is not whether the statutory provision was justified, but whether the judge is justified in following or departing from the statutory provision.

This second assessment is the crucial stage that is all too often overlooked when judges and lawyers appeal to notions of presumed intentions and strained interpretations. If the judge thinks that the loss of liberty outweighed the gain in security, it is not enough simply to presume that this justifies a strained interpretation of the statutory provision. The judge must ask whether the loss of liberty is strong enough to outweigh the authority-based reasons for following the statutory provision—and, it should be noted, with the addition of authority, the reasons in this second assessment may be incommensurable, even though they were commensurable in the first assessment, with authority-based reasons excluded. The court in *Gillan* would have been justified in adopting the

[144] *Gillan* (n 137) [74] (Lord Brown): '[the stop and search powers] can scarcely be said to constitute any very substantial invasion of our fundamental civil liberties.'

[145] *Gillan v United Kingdom* (2010) 50 EHRR 45.

claimants' strained interpretation, *contra legem*, if and only if the loss of liberty provided such a strong reason that it outweighed all others, including authority-based reasons. But if, on the other hand, the judge thought that the loss of liberty was incommensurate with the gain in security, then what are the implications of incommensurability for the judge's reasoning when the authority-based reasons are introduced? In previous chapters, I have tried to explain why we should reject the common assumption that, when the options are incommensurable, the judge should simply follow authority. It may well be that the reasons for following authority outweigh all others; but that will not be true merely because of any incommensurability—as opposed to rough equality—among the other reasons. Just as a loss of liberty may have been incommensurate with a gain in security, so that loss of liberty may be incommensurate with the reason for following authority. To put it differently, while authority may tip the balance in the case of commensurable options, there is no balance for authority to tip in the case of incommensurable options.

These complex moral questions should not be wished away. Judges should not make presumptions, such as *Simms*-style presumptions, when interpreting statutes, thereby taking inadequate account of competing, authority-based reasons. As Geoffrey Marshall put it, the '[p]otential conflict between legislation and rights provisions does not create a need for rights-based, or rights-biased, interpretation.'[146] This rejection of *Simms*-style presumptions, however, is fully compatible with believing that judges may, on occasion, have

[146] Marshall, 'The Lynchpin of Parliamentary Intention' (n 116) 248. See also Geoffrey Marshall, 'Interpreting Interpretation in the Human Rights Act' [1998] PL 167.

an undefeated reason to depart from statutory provisions. The problem is with the blurring of the issues that accompanies strained interpretation, not least the fact that, to the extent they are interpretations, they are interpretations *contra legem*. The idea that there is a distinct category of 'constitutional' adjudication involving fundamental rights, calling for a more 'generous' approach to interpretation than the approach in 'ordinary' cases,[147] should be rejected. In all forms of legal interpretation, there may be times when the judge is justified in departing from authority, and there may be times when there are undefeated reasons to decide either way.

IV. CONCLUSION

The main message in this chapter has been that, in both the development of the common law and statute law, we should not lose sight of the possible conflicts that arise between following authority and departing from authority. There is a serious problem when academics take judges at their word, as Neil Duxbury does when he claims, in his recent study of legislation, 'that judges will sometimes—exceptionally—avoid giving effect to statutory provisions, but that in such instances they will stop short of challenging the authority of Parliament.'[148] My

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[147] For a selection of the many voices supporting a generous approach under constitutional and human-rights adjudication, see eg *Ministry of Home Affairs v Fisher* [1980] AC 319, 328 (Lord Wilberforce); David Pannick, 'Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment' [1998] PL 545, 545–46; Laws, 'An Overview' (n 120) xiv; *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, 375 (Lord Hope); *R v A (No 2)* [2002] 1 AC 45; *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 [11] (Lord Bingham), [33] (Lord Hoffmann); Steyn, 'The Intractable Problem' (n 62) 17; *Ghaidan v Mendoza* [2004] 2 AC 557 [30] (Lord Nicholls).

[148] Neil Duxbury, *Elements of Legislation* (CUP 2013) xii.

argument is that in such instances judges *are* challenging the authority of Parliament, and that only if there is an open acknowledgement of that fact can we have an adequate debate about the possible reasons and justifications for doing so. But sometimes reasons give out, and we are left with a choice between incommensurables. It is the task of the next chapter to explain the implications of the resulting arbitrariness for the ideal of the rule of law.

6

The Ideals of the Rule of Law

The rule of law is an ideal that is usually contrasted with the rule of persons. Since the law can only rule through persons, this is usually taken to mean that the rule of law is opposed to the arbitrary power of persons. In Albert Venn Dicey's oft-cited formulation, the rule of law stands against 'the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint'.[1] As Dicey saw it, people should be 'ruled by law and not by caprice'.[2] In this chapter, I want to consider the question: is the arbitrariness entailed by judicial choices between incommensurable options contrary to the ideal of the rule of law? I will suggest that the rule of law contains many ideals, which are structured by two different, overarching ideals, and that these two different ideals have different consequences for judicial choices among incommensurables. The

[1] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution (10th edn, Macmillan 1964) 188.

[2] ibid 189.

rule of law is best understood as being opposed to decisions that are unconstrained by law, but not necessarily to decisions that are arbitrary.

The two ideals of the rule of law that I will outline can be termed, for brevity, the rule of authority and the rule of reason. As will become all too clear, these terms are not entirely satisfactory. But they help to capture the main difference between the two ideals. It is worth outlining them in brief, before proceeding to explain their nature and implications in more detail. According to one ideal, which is the dominant one among modern legal theorists, the rule of law is presented in the image of authority, the image of existing legal rules constraining the decisions of officials, including judges. It entails that an official's decision should be able to be justified by the application of an existing, authoritative legal rule, without that official having to make a further choice or discretionary judgment. The pursuit of this ideal therefore requires the creation of authoritative legal sources capable of fulfilling the role of justifying the official's decisions. This is where the familiar requirements of this ideal of the rule of law are significant. These requirements are designed to ensure that the authoritative legal rule is capable of ruling, that it is clear, prospective, general, relatively stable and so forth. From this perspective, arbitrary choice is a problem to which the solution is the creation of authoritative legal sources, sources which can provide a determinate answer and prevent the need for an arbitrary choice in the future. That is not to say that arbitrariness is necessarily contrary to this ideal of the rule of law. Not every decision ought to be ruled by the law's authoritative rules. So an arbitrary choice will be contrary to the rule of law only if it ought to be ruled by law. But the very arbitrariness of the choice may well be one reason why it ought to be ruled by law.

According to the other ideal, far from being opposed to arbitrariness, the rule of law will often result in arbitrariness. The rule of law is captured in the image of reason—as Edward Coke put it, the common law 'is nothing else but Reason'—and so the meaning of 'constrained by law' is drastically altered.[3] In this sense, the rule of law is the rule of reason and the ideal requires official decisions to be constrained by reason, rather than merely constrained by antecedent legal rules. When reason leaves us with an arbitrary choice between incommensurable options, is that arbitrary choice contrary to the rule of reason? It might be thought that, since the choice is underdetermined by reason, it is contrary to the rule of law. But such a view rests on a misunderstanding of the nature of such choices. These choices are compatible with the rule of reason, because the choice, although arbitrary, is also reasonable, that is, not contrary to reason. They are not a problem for the rule of reason, even though they are a problem for the ideal of rule of law in the sense of the rule of authority.

Before exploring the possibility that there may be two ideals of the rule of law that can be understood in these ways, a few more preliminary clarifications are necessary. First, there has been much academic debate on the question of how the rule of law is related to the concept of law, and whether the

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[3] Edward Coke, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (first published 1928, Francis Hargrave and Charles Butler eds, 15th edn, 1794) 97b. See also TRS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 LQR 221.

concept of law determines the rule of law or vice versa.[4] One common view is that when a purported law is very deficient in the requirements of the rule of law, it is not law, or at least it is not a central case of law.[5] To the extent that a legal system does not meet those requirements, it is not, as Finnis put it, 'legally in good shape'.[6] I would like to bracket this issue of how the rule of law is linked to the concept of law. My proposed distinction between two ideals of the rule of law presupposes that law can be viewed as authority and as reason, but I will not be able to defend that understanding of law here. However, even if that way of understanding law, and by extension the rule of law, is rejected, then it seems to me that one could just as well leave out the label 'law' and instead simply refer to the rule of authority and the rule of reason. My main concern here is with the underlying values, not with what we call those values.

Second, it is also worth mentioning that different ideals of the rule of law, like the ones I am going to explore, are sometimes presented as rival currents of thought, or rival conceptions of an essentially contested concept.[7] This is not what I mean in referring to different ideals of the rule of law. It is better, in my

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[4] cf Joseph Raz, 'The Rule of Law and its Virtue' in his *The Authority of Law: Essays on Law and Morality* (OUP 1979) 223–24; Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 Ga L Rev 1, 11.

[5] See Lon L Fuller, *The Morality of Law* (rev edn, Yale UP 1969); John Finnis, *Natural Law and Natural Right* (first published 1980, 2nd edn, OUP 2011); Waldron, 'The Concept and the Rule of Law' (n 4) 39.

[6] Finnis, *Natural Law and Natural Rights* (n 5) 270.

[7] On the idea of essentially contested concepts, see WB Gallie, 'Essentially Contested Concepts' (1955–56) 56 Proceedings of the Aristotelian Society 167. On the application of this idea to the rule of law, see Richard Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 Columbia L Rev 1, 6; Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 Law and Philosophy 137, 148–53. cf John Gray, 'Political Power, Social Theory, and Essential Contestability' in David Miller and Larry Siedentop (eds), *The Nature of Political Theory* (Clarendon Press 1983).

view, to understand the ideals of the rule of law as aspects of the nature of the rule of law, not contested ways of interpreting or understanding it. The final point that I would like to clarify is how my argument relates to other presentations of the two sides of the rule of law. There are obvious parallels, but also as we shall see important differences, between the distinction that I draw in this chapter and the distinction that Paul Craig draws, in his influential essay, between formal and substantive conceptions of the rule of law.[8] One problem with other accounts of the rule of law that draw the distinction that I am drawing is that they either treat them as rival conceptions that we must choose between or else they go on to suggest that these ideals are in harmony with each another. In my view, it is important to recognise the tension between the two ideals of the rule of law. Only then can we fully understand the implications of value incommensurability for the rule of law.

I. THE RULE OF AUTHORITY

From Thomas Aquinas to Jeremy Bentham to, among modern theorists, Lon Fuller, John Rawls, Joseph Raz, and John Finnis, many theorists have identified the ideal of the rule of law with the guidance of conduct. On this account, the ideal requires the law to guide conduct through its antecedent, authoritative rules.

[8] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] PL 467, 467. It has been said that the formal side of the ideal is better described as procedural rather than formal: John Gardner, 'On the Supposed Formality of the Rule of Law' in John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 198–204. On the other hand, it has been said that the rule of law is best understood as having two aspects, one formal and the other procedural: Waldron, 'The Concept and the Rule of Law' (n 4) 7.

The idea that, if the law is to rule and be obeyed, it must be capable of guiding behaviour is, according to Raz, 'the basic intuition from which the doctrine of the rule of law derives'.[9] This ideal of the rule of law, which Raz described as a formal one, is said to consist of a number of requirements that aim to ensure that the law is capable of ruling. Among these theorists, there is, perhaps surprisingly, general agreement on the content of the rule of law's requirements. Most of the requirements are concerned with ensuring that the law is general, open, prospective, clear, stable, non-contradictory, complied with or capable of being complied with.[10] However, despite this general agreement on the content of the ideal's requirements, there is much less agreement on its value. Does the rule of law have moral value and, if so, what moral values justify it?

One way of understanding the rule of law is to view it as merely an instrumental value. Raz has been especially prominent in articulating this understanding. The rule of law, he argued, is the 'inherent or specific virtue' of law, in the same way as a knife's sharpness, its ability to cut, is the inherent or specific virtue of a knife. In both cases, the inherent virtue—the knife's sharpness or the law's conformity to the requirements of the rule of law—is an instrumental value: it can be used for bad ends as well as for good.[11] Raz also argued that this instrumental value is a 'negative virtue', which is designed to

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[9] Raz, 'The Rule of Law and its Virtue' (n 4) 214.

[10] See Fuller, *The Morality of Law* (n 5) 46–94; John Rawls, *A Theory of Justice* (Harvard UP 1971) 235–43; Raz, 'The Rule of Law and its Virtue' (n 4) 214–19; Finnis, *Natural Law and Natural Rights* (n 5) 270.

[11] Raz, 'The Rule of Law and its Virtue' (n 4) 225.

minimise the danger of arbitrary power that the law itself creates.[12] These arguments lead Raz to conclude that 'the rule of law is an inherent virtue of the law, but not a moral virtue as such', although he adds that the rule of law 'is virtually always of great moral value.[13] The reduction in arbitrary power that comes with conformity with the rule of law will have moral value only if the law that is being made less arbitrary is in pursuit of good ends. Just as the sharpness of a knife does not have moral value if the knife is used as a murder weapon, so the law's conformity with the requirements of the rule of law does not have moral value if it is used for ill. That, at least, is the crux of Raz's argument.

Other theorists, however, have disputed the argument that the rule of law is merely a means to other ends. Fuller has been especially notable for arguing that, in addition to being means to other ends, law is also an end in itself. The end that he identifies is 'the enterprise of subjecting human conduct to the governance of rules'.[14] This understanding of the ideal of the rule of law is quite popular, but it is not straightforward. It cannot entail that the subjection of human conduct to the governance of rules is a *distinctive* purpose of law, because other enterprises, besides law, can have that purpose. Yet he was surely right to say that it was one of the purposes of the rule of law, albeit not a distinctive one. But is this purpose really a moral ideal, an end in itself? In doubting this, HLA Hart argued that the desiderata of the rule of law could be regarded as amounting to a moral ideal '[o]nly if the purpose of subjecting

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[12] Raz, 'The Rule of Law and its Virtue' (n 4) 224.

[13] ibid 226.

[14] Fuller, *The Morality of Law* (n 5) 96.

human conduct to the governance of rules, no matter what their conduct, were itself … an ultimate value'.[15] To believe that there is a moral ideal of 'playing by the rules', irrespective of the ends that the law pursues, is, on this account, to mistake the means for the end, 'a classic legalist mistake', according to John Gardner.[16] Regardless of whether it is itself an end, the law is a means to other ends, and so it seems plausible to argue that playing by the rules is of moral value only if the ends are worth pursuing. The moral value of the rule of law, in other words, seems to be dependent on the moral value of the ends that the law pursues.

It might be thought that a value pluralist would be drawn to Fuller's argument. A value pluralist, you may say, is in the business of explaining that there is a plurality of values, and so might be expected to argue that the rule of law is an end in itself, or 'ultimate value', as well as being means to other ends. Yet it is not clear what could explain that value. If it is not the subjecting of human conduct to the governance of rules, perhaps it can be found in the idea of freedom under the law. According to some, we value liberty is a good example of a value that is both ultimate and a means to other ends. We value liberty (as an end) from certain interferences, and we value liberty (as a means) to pursue other ends.[17] Just as there is some value in liberty just *qua* liberty, so, it might seem, there is some value in following legal rules just *qua* legal rules. Now, this may

[15] HLA Hart, 'Book Review' (1965) 78 Harv L Rev 1281, 1287.

[16] Gardner, 'On the Supposed Formality of the Rule of Law' (n 8) 212.

[17] On this distinction between 'negative' and 'positive' liberty, see Isaiah Berlin, 'Two Concepts of Liberty' in his *Liberty: Incorporating 'Four Essays on Liberty'* (Henry Hardy ed, OUP 2002).

be a legalist mistake, but the mistake may be limited to thinking that there is some value in conforming to existing laws; it need go on to insist that the value in conformity with the rule of law could never be outweighed by other values. Treating this ideal of the rule of law as an end in itself is compatible with the possibility that it could be outweighed by other values, sometimes quite dramatically. Yet, as I claimed in Chapter 2, these values also have to be concretised or specified. It is not the case that we have liberty to do anything we want: the ideal of liberty has to take some account of the ends that we should be at liberty to pursue.[18] In the case of evil or pointless laws, the value in following the law may be outweighed to such an extent that it seems as if it has no value at all. For in these cases what would the rule of law add? Is the thought that it gives evil laws some redeeming quality: that the law may be evil, but at least it is clearly evil? It seems to me that following antecedent legal rules has value only provided there is a justification for their authority. Provided there is such justification, however, the value in following authoritative legal rules is to be found not only in those justifications, but also in the value of having antecedent legal rules, just *qua* existing legal rules, irrespective of their content. It is from this ideal of the rule of law that we derive the moral ideals of generality, openness, prospectiveness, and stability in law that are so often associated with the rule-of-law ideal.

This ideal of the rule of law can therefore be stated as follows: *if* conduct ought to be guided by authoritative legal rules, then the authoritative legal rules

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[18] cf GA Cohen, *Self-Ownership, Freedom, and Equality* (CUP 1995); Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) ch 17.

ought to be capable of guiding conduct. Notwithstanding the limits of this ideal of the rule of law, it seems to me that this ideal is essentially a liberal one, stressing the notion of freedom under law. It enables us to know where we stand and to make decisions accordingly. The 'freedom of men under government', as John Locke wrote, 'is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where a rule prescribes not, and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man'.[19] This goes some way towards explaining the moral value of the rule of law, when that ideal is understood to be the rule of authoritative legal sources. But we must be careful not to exaggerate the rule of law's ability to produce freedom in this sense. Locke's statement is offered as a definition of freedom 'under government'. Friedrich Hayek was perhaps guilty of exaggerating the importance of this freedom when he praised classical Roman thinkers for their republican ideal of the rule of law. Hayek wrote that, 'during the classical period of Roman law it was fully understood that there is no conflict between law and freedom and that freedom is dependent upon certain attributes of the law, its generality and certainty, and the restrictions it places on the discretion of authority'.[20] Among modern theorists, TRS Allan has been a prominent proponent of a Hayekian version of the rule of law, arguing that '[a]s the basic principle of the British constitution, underpinning its character as a liberal democratic polity, the rule of

[19] John Locke, *Two Treatises of Government* (first published 1690, Peter Laslett ed, CUP 1960) bk II, ch 4, §22.

[20] Friedrich A Hayek, *The Constitution of Liberty* (Routledge & Kegan Paul 1960) 166–67.

law means the sovereignty of the principle of liberty: it upholds the freedom and dignity of those independent citizens who comprise the political community.'[21] Freedom under the law, according to this ideal of the rule of law, is the freedom that comes with the knowability of precise rules laid down in advance of the particular circumstances. It is possible, however, to think of other ways in which freedom might be enhanced: the freedom of not being subject to authority at all, or the freedom of being able to challenge authority.

That is why, in this sense, the ideal of the rule of law entails that *if* there ought to be governmental authority and the authority ought to be followed, it is better, from the point of view of promoting freedom, for governmental authority to adhere to the requirements of the rule of law. Thus the ideal of the rule of law is *premised* on the notion that there should be fidelity to the law, that the authoritative legal rules should be followed. If there should not be fidelity to the law in a particularly case—if the reason for authority is defeated—then in that case the rule of law, in the sense of the rule of authority, will not be a valid ideal. This connection between the requirements of the ideal—which are concerned with ensuring that the law is capable of guiding conduct—and the requirement of fidelity to the law is recognised in Fuller's account, when he presents the officials' duty of fidelity to the law as itself a requirement of the rule of law, or what he calls a desideratum of the inner morality of law. He calls this requirement 'the most complex of all the desiderata', and it is made more complex in my view when it is understood as the underlying justification for,

[21] TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013) 91.

rather than merely the eighth desideratum of, the rule of law.[22] It might seem excessive to argue that the rule of law both requires that the law is capable of guiding conduct and requires that there be fidelity to the law. You might say that only the guidance of conduct is necessary to satisfy the rule of law. The law can guide conduct without there being fidelity to law. For example, the law can guide our conduct when we know what the options are and make an informed choice not to follow the law. As Hart put it, the law is 'a choosing system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways.'[23] To the extent that the rule of law requires fidelity to the law, you may say, it is only officials who have a duty of fidelity to the law, as Fuller's account suggests. In offering this as the 'asymmetric interpretation' of the rule of law, Gardner argues that judges and other officials are often morally bound to follow the law even though the law's subjects are not.[24] On the other hand, it might seem that, if the law's subjects are justified in refusing to follow the law, then the law's officials cannot be justified in imposing the law on them.[25] Since I am primarily concerned with the duty that the rule of law imposes on judges, I will leave this question open. In any case, whether it imposes more onerous requirements on officials than subjects, the core of this ideal of the rule of law—its focal meaning—includes both the guidance of conduct and the requirement of fidelity to the law. On this understanding, all the

[22] Fuller, *The Morality of Law* (n 5) 81.

[23] HLA Hart, 'Legal Responsibility and Excuses' in HLA Hart, *Punishment and Responsibility* (Clarendon Press 1968) 44.

[24] Gardner, 'On the Supposed Formality of the Rule of Law' (n 8) 213.

[25] cf Heidi Hurd, *Moral Combat: The Dilemma of Legal Perspectivalism* (CUP 1999).

requirements of the rule of law are marching towards the end of subjecting conduct to the governance of authoritative legal rules.

When understood as the rule of authority, the ideal of the rule of law is necessarily at odds with arbitrary decisions that are not determined by authoritative legal rules. This claim needs some defending, for there is a school of thought that suggests that not all arbitrariness is contrary to this ideal of the rule of law. There are, it is true, different meanings of arbitrariness. Indeed, there is a sense in which the exercise of moral judgment—as distinct from the application of pre-existing rules—is itself arbitrary by definition. The word 'arbitrary', after all, derives from the Latin word '*arbitrium*', meaning the outcome of a process of choice, the judgment of an arbitrator. Jeremy Waldron has suggested that, in modern jurisprudence, the word 'arbitrary' has three meanings: 'unpredictable', 'unreasoned', and 'without authority or legitimacy'.[26] These meanings are each slightly different: decisions can be unpredictable without being unreasoned, and can be unreasoned without being unpredictable; and decisions can lack authority or legitimacy, even though they are predictable and reasoned. These meanings of arbitrariness may well reflect the various uses of the word 'arbitrary' in jurisprudence, but it seems to me that the second meaning—'unreasoned'—is the odd one out, in that it does not adequately reflect the meaning of arbitrariness that concerns proponents of *this* ideal of the rule of law, namely, the rule of authority. This may sound surprising, because we tend to think, rightly in my view, that an arbitrary decision is a decision that lacks reasoned justification and is a matter of choice, a decision that is

[26] Jeremy Waldron, *Law and Disagreement* (OUP 1999) 167–68.

sometimes said to be reached on the basis of one's 'will' rather than 'reason'. Yet the worry that provides the key rationale for the requirements of the rule of law was not that decisions would be arbitrary because unreasoned, but that they would be arbitrary because they lacked the authority of antecedent rules and the predictability that goes with the application of such rules. Unreasoned decisions, for Bentham and others, were, of course, also arbitrary and a cause for concern, but regardless of whether the decisions were reasoned or unreasoned, they would be contrary to the rule of law unless they predictably applied antecedent rules laid down by authority. There will of course be a judgment needed to create the rules, but that judgment—that *arbitrium*—should, on this account, be made by those in authority, not by those whose duty is to apply the authoritative rules.

Given that the application of rules often calls for moral judgment—either to interpret the rules or to decide whether or not to apply the rules—my account of this ideal of the rule of law may seem unrealistic. But the fact that this ideal has limits should not lead us to seek a different interpretation of it. This is the project that Timothy Endicott has developed in his work on the subject. Endicott argues that arbitrary choice is not necessarily contrary to the rule of law; rather, we need to distinguish between different senses of arbitrariness and designate one sense of arbitrariness as pejorative and contrary to the rule of law. In making this argument, Endicott begins by outlining three ordinary senses of arbitrary government—lack of constraint, lack of consistency, and lack of certainty—and observes that arbitrary government in each of these three senses is often unavoidable. He then reaches the conclusion that arbitrary government in these three senses is unavoidable, but that there is not necessarily anything wrong with arbitrary government in these three senses—and that they are not necessarily arbitrary in the ordinary, pejorative sense of the term. To retain the ideal of the rule of law, he argues, we need a pejorative sense of the arbitrary government, which *is* necessarily opposed to the rule of law: 'Government is arbitrary', in Endicott's pejorative sense, 'if its actions depart from the reason of the law.'[27] The idea of 'the reason of the law' is puzzling. In explaining it, Endicott refers at one point to Raz's 'similar sense of arbitrariness',[28] referring to Raz's claim that an exercise of power will be arbitrary in a way that departs from the rule of law 'only if it was done either with indifference to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them'.[29] But this is hardly much clearer. I will return to Endicott's notion of 'the reason of the law' in the next section. For the moment, suffice it to say that Raz's and Endicott's pejorative senses of arbitrariness seem to be intended to convey the association of arbitrariness with one's 'will' rather than 'reason'. As Raz says, this makes arbitrary power essentially subjective: 'It all depends on the state of mind of the men in power'.[30]

If we accept, as I think we should, that judges should make decisions on the basis of moral judgments, it is important to be careful about the explanation for why arbitrariness, in the sense of an unreasoned decision or a choice without reasoned justification, is contrary to the rule of law. It is contrary to this ideal of

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[27] Timothy AO Endicott, 'The Impossibility of the Rule of Law' (1999) 19 OJLS 1, 3.

[28] ibid 8 n 9, citing Raz, *The Authority of Law* (n 4) 219.

[29] Raz, *The Authority of Law* (n 4) 219.

[30] Raz, *The Authority of Law* (n 4) 219.

the rule of law only because this ideal is premised on the reasons for authority and requires judicial decisions to apply the antecedent rules laid down by authority, regardless of whether they are reasoned or unreasoned. If, contrary to my claim, this ideal of the rule of authority is seen to be open to judges reaching decisions on the basis of their moral reasoning, but also opposed to the arbitrariness that comes with choices between incommensurable options, then there are some dangers. One of the dangers is that it leads to the belief that, when moral reasoning runs out due to the incommensurability of the options, judges should still be able to point to a reason, any old reason, to justify their choice (other than their mere will). Raz, for example, argues that when choosing between incommensurable options judges should rely on an 'artificial system of reasoning which could help determine cases where natural reason runs out, thus assuring the public that the decisions are no mere expression of personal preference on the part of the judges.'[31] I do not find this to be entirely convincing, because I think it confuses the ideals of the rule of law, a point to which I will return.

On the question of what judges should do when faced with choices among incommensurables, let's consider Endicott argument for the pejorative sense of arbitrariness. Here is one of Endicott's clearest expressions of what he means by the pejorative sense of arbitrariness:

[31] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 339. See also ibid 318: 'ordinary rule-of-law considerations come into play. Only by adhering to one coherent policy can the law be made known and its application predictable.' See also Grégoire Webber, 'Rights and the Rule of Law in the Balance' (2013) 129 LQR 399.

> By an 'arbitrary act' we could simply mean, what the actor willingly does, justified (if at all) by the fact that the actor so wills, without any (other) justification of reason. … All government decisionmaking is arbitrary in *that* sense. But I want to keep the word in its ordinary pejorative sense, so let's use it to refer to an unjustified act, a capricious or despotic act that calls for—and lacks—some justification other than the fact that the actor willed it and did it (and potentially calls for control by another authority than the actor). To sustain this pejorative sense it is essential to have criteria for which acts do and do not call for the imposition of a justification other than the mere will of the actor.[32]

The important point here is that arbitrary decisions will be contrary to the rule of law if they 'call for', but lack, a justification other than the mere will of the decision-maker. Now, surely a decision will 'call for' a justification if we think that there *is* a justification. If that is how we understand the rule of law, then a decision may be contrary to the rule of law when it is unjustified, when it is contrary to reason. But if that is how we understand the rule, then it is not the arbitrariness of a choice that is the problem, but the fact that it is contrary to reason. Are we really still talking about the same ideal of the rule of law? The ideal of the rule of law discussed in this section is bound up in the rule of authority and with the reasons for following authority. Even if the substance of

[32] Timothy Endicott, 'The Reason of the Law' (2003) 48 Am J Juris 83, 90.

the decision is a matter involving incommensurability, there may be an independent reason for the rule of authority and its associated rule-of-law requirements. In terms of this ideal, a decision will be arbitrary and contrary to the rule of law if there is a reason for the decision to be made on the basis of antecedent legal rules, perhaps for the reasons that Raz gave: to ensure that judicial decisions are not based on the judges' preferences. This reason exists even if the substantive reasons are incommensurable, and so those reasons do not call for a justification for the choice.

I am not convinced that there was ever any need to carve out a meaning of arbitrariness that could be distinguished from other, supposedly non-pejorative meanings of arbitrariness. Unless it is bound up in the justification for authority, when we say that decisions that lack justification are contrary to the ideal of the rule of law, we are not talking about a different sense of arbitrariness. Rather, we are talking about a different ideal of the rule of law, one that is not necessarily opposed to arbitrary decisions. If you think that there is only one ideal of the rule of law, the one identified in this section as the rule of authority, then you may say that we are not talking about an ideal of the rule of law at all. We are simply talking about something else. You may well be right. But my point is that, if, on the contrary, you want to frame the rule of law as a requirement to provide a reasoned justification other than the mere will of the actor, then it is important to distinguish that very different ideal from the valid moral ideal explored in this section. Before explaining why it is important, let's explore what that different ideal of the rule of law might look like and its implications for arbitrary decision-making.

II. THE RULE OF REASON

The claim that the rule of law is the rule of reason has a long pedigree. With its ancient roots in the Aristotelian notion that '[t]he law is reason unaffected by desire',[33] this ideal is most often associated with natural-law theory, with all the distracting controversies that this association entails. But today it continues to play an important role, a role which extends to all areas of law but which is most easily seen, as a distinctive ideal of the rule of law, in the context of judicial control of administrative action. In English administrative law, the term 'the rule of reason' has its origins in *Rooke's Case*, in which Edward Coke stated that, notwithstanding the fact that discretion had been conferred by authority, discretion 'ought to be limited and bound with the rule of reason and law.'[34] The rule of reason has now become associated with the grounds of review that Lord Greene summarised in the *Wednesbury* case in 1948.[35] According to Sir John Laws, *Wednesbury* 'exemplifies the rule of reason as a fundamental principle of the law'.[36] While the term '*Wednesbury* unreasonableness' is often thought to refer to an extreme sense of unreasonableness—'so unreasonable that no

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[33] Aristotle, *Politics* Book III, 1286, p 78.

[34] *Rooke's Case* (1598) 5 Co Rep 99b.

[35] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[36] Sir John Laws, '*Wednesbury*' in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Clarendon Press 1998) 186. cf Michael Taggart, 'Reinventing Administrative Law' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003) 324: '*Wednesbury* is the antithesis of the rule of reason.'

reasonable authority could ever have come to it',[37] as Lord Greene put it—it is important to note that the rule of reason, or reasonableness review, is not limited to extreme cases. As the authors of one of the leading textbooks on administrative law explain,

> The rule of reason has … become a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category of errors commonly described as "irrelevant considerations", and mistakes and misunderstandings which can be classed as self-misdirection, or addressing oneself to the wrong question.[38]

These constraints that judicial review imposes on administrative discretion are determined not merely by statutory interpretation, but by what the judge thinks is reasonable.[39] This is true notwithstanding Lord Greene's remark that a decision that is unreasonable in his sense 'is not what the court considers unreasonable, a different thing altogether'.[40] Lord Greene formulated the rule of reason in this way partly because he thought that the courts should not interfere in matters on which 'honest and sincere people hold different views.'[41] In these passages, Lord

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[37] *Wednesbury* (n 35) 230.

[38] William Wade and Christopher Forsyth, *Administrative Law* (10th edn, OUP 2009) 303–4 (footnotes omitted).

[39] Laws, '*Wednesbury*' (n 36) 194.

[40] ibid 230.

[41] ibid 230.

Greene was referring to reasonable disagreement, or interpersonal conflict. But although judges may be right to take into account a range of reasonableness associated with reasonable disagreement (bearing in mind that it is the judge who must decide when disagreement counts as reasonable), the idea of a range of reasonableness is more significant if it is associated with value pluralism and incommensurability. Lord Greene's account of judicial review for reasonableness is therefore best understood as the idea that a judge should only interfere with an administrative decision when the administrative decision maker acted outside the range of reasonableness, taking into account the widening of the range of reasonableness that comes not only with an acknowledgment of disagreement about what is reasonable, but also with an acknowledgment of value pluralism. Lord Greene's formulation of the rule of reason can also be partly explained by the justifications for judges deferring to the decisions of a public authority, including decisions that the judges would otherwise consider to be the unreasonable. So for a judge to intervene, on this account, the public authority's decision must not only be so unreasonable that it is outside the bounds of reasonableness (taking into account value pluralism), but also so unreasonable that its unreasonableness outweighs the reasons for deference to authority.

This discussion of reasonableness review in modern administrative law captures the most salient features of the ideal of the rule of reason. It entails a significantly different meaning of government under law. The question becomes not whether the government's action was authorised by the rules laid down in advance, but whether the government's action was reasonable. In cases of judicial review of administrative action, it will be the judge's idea of what is reasonable that will determine whether or not the administrative action was lawful. It is worth pointing out once again, however, that the ideal of the rule of reason is not limited to administrative law. The notion of reasonableness is pervasive in law, especially, as we saw in the previous Chapter, tort law,[42] and in my view it is a fundamental part of law in general.

A feature of this ideal of the rule of law that for most theorists would probably count against it is that it seems to be equivalent to the rule of the good law. 'If the rule of law is the rule of the good law,' Joseph Raz warned, 'then to explain its nature is to propound a complete social philosophy.'[43] Regardless of whether he was right or wrong to treat this as a reason against it, Raz was right to say that, if the rule of law is taken to be the rule of reason, then explaining its nature and content requires some conception of the good. This is something that is not recognised often enough among most defenders of this ideal of the rule of law. TRS Allan's interpretation of the rule of law as the rule of reason provides a good example. Allan argues that an account of the rule of law must enable us 'to agree in criticising governmental action as being contrary to the rule of law even when we may disagree about the merits of rival conceptions of justice.'[44] However, Allan then goes on to argue that '[a]t the heart of the ideal of the rule of law, properly understood, is a principle requiring governmental action to be

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[42] See Tom R Hickman, 'The Reasonableness Principle: Reassessing its Place in the Public Sphere' (2004) 63 CLJ 166.

[43] Raz, 'The Rule of Law and its Virtue' (n 4) 211.

[44] Allan, 'The Rule of Law as the Rule of Reason' (n 3) 221.

rationally justified in terms of some conception of the public good.'[45] The idea here is that the rule of law does not require any particular conception of justice or the good, but it does require some justification in terms of a conception of justice or the good, irrespective of what that justification is. This brings us back to the idea that the rule of law requires decisions to be justified on the basis of a reason, regardless of what that reason is, rather than arbitrary will. That justification may be controversial, it may even be wrong; but, on this account, so long as it is a justification based on a conception of justice or the public good and is open to public scrutiny and debate, it will satisfy the rule of law. This theory does, however, make some stipulations of which conceptions are appropriate. Much as John Rawls argued with regard to his theory of justice, Allan argues that the conceptions of the public good and justice, on the basis of which governmental decisions are justified, must aim to be 'appropriate for a pluralistic society' and capable of being endorsed by everyone.[46] And although this theory of the rule of law insists that the rule of law does not require a particular conception of the public good, it gives a special role to the common law, which is thought to embody a conception of the common good, the common reason of the community, consistently applied, open to scrutiny, and with the judiciary as its exemplar.[47]

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[45] ibid 231.

[46] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 289.

[47] ibid 291. See also Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press 1992) 450; William Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765–69). On the idea of the Supreme Court as 'the exemplar of public reason', see John Rawls, *Political Liberalism* (Columbia UP 1993) 236–37.

I think that this theory of the rule of law is unconvincing, for at least two reasons. First, it is a mistake to believe that the rule of reason is the rule of a common-law reason that seeks to reflect a consensus among competing moral viewpoints. This belief is premised on a mistaken notion of what is 'appropriate for a pluralistic society'. Value pluralism does not entail that, since we reasonably disagree with each other, we should seek a rational justification that all can endorse, by limiting as much as possible reliance on contested conceptions of the good. It entails, by contrast, that we are sometimes faced with choices for which there can be no rational justification. The existence of disagreement should not count against a justification. The importance of value pluralism is that sometimes, irrespective of disagreement, there is no justification to be found. But if the reason to which the rule of reason refers is not a special form of public reason, which everyone can agree with, then the question arises: whose reason is it? The answer that I would like to defend is that it is simply reason as an objective moral truth—which, as I claimed in Chapter 2, can only be determined from one's own internal point of view. This answer gives rise to some scepticism as to whether this can intelligibly be offered as a model of the rule of law. After all, if the rule of law is, in a sense, merely the rule of reason—which we should take to mean one's own reason—then does it not cease to have any independent content? What is the point of invoking the rule of law simply to be told that the rule of law is whatever one thinks is reasonable? And, more importantly, why should one's own reason—which, in legal disputes, in effect means the *judge's* own reason—rule?

These questions bring me to the second problem for understanding the rule of reason in the way that Allan does. As I mentioned, Allan argues that the rule of reason does not require any particular conception of the public good, but merely that there is a justification on the basis of some coherent conception of the public good. It is of course true that people, including different judges, will often express rival conceptions of the good. But should we be satisfied by the mere fact that a decision has been justified in terms of such a conception, unless we think that the justification was correct? The rule of reason, in my view, is not subjective, satisfied by the fact that the decision maker acted as if he was following the requirements of reason and not his will; rather, the rule of reason is a matter of objective moral truths, satisfied by the fact that the decision maker actually was following the requirements of reason. Different people will come to different answers to the question of whether the decision was in accordance with reason. But that does not make it subjective. It is simply a result of the fact that one must rely on one's own reasoning to determine what the rule of reason requires.

The reluctance to accept this as a possible meaning of the rule of law also explains Endicott's account of 'the reason of the law'. Endicott's argument, let us recall, is that governmental action is arbitrary in a pejorative sense, a sense contrary to the rule of law, when it is contrary to the reason of the law. The idea of 'the reason of the law' can also be found in Jeremy Bentham's argument that the principle of utility provides a 'natural' arrangement for the exposition of law.[48] But that is not what Endicott means. According to Endicott, the ideal of the rule of law is achieved when the law controls what it ought to control, what it is good at regulating, a question that he acknowledges requires a moral judgment.[49] And yet, on his account, 'it still makes sense to distinguish between the rule of law and the rule of good law.'[50] It makes sense because, for Endicott, the relevant moral judgment is taken to be a judgment 'from the legal point of view', restricted by 'the general principles of the law of a community'—which is what he means by the reason of the law.[51] Thus a decision will be arbitrary in the pejorative sense of contrary to the rule of law when the decision is inconsistent with the principles of the law, with the reason of the law. But the reason *of the law* can be, from one's own moral point of view, 'more or less reasonable but also more or less unreasonable'.[52] And so, on Endicott's account, although the content of the rule of law requires a moral judgment, the decisions that the rule of law treats as arbitrary—that is, in his special pejorative sense of contrary to the reason of the law—might not be the same as the decisions that one's own moral judgment treats as contrary to reason.

This is not, in my view, the best way to understand the rule of reason. If there is indeed an ideal of the rule of law as the rule of reason, it is best

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[48] *A Comment on the Commentaries and A Fragment on Government* (JH Burns and HLA Hart eds, Clarendon Press 1977) 416. See David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (CUP 1989) 263–64, 282.

[49] Endicott, 'The Reason of the Law' (n 32) 86.

[50] Endicott, 'The Impossibility of the Rule of Law' (n 27) 11 n 12. cf Endicott, 'The Reason of the Law' (n 32) 105: 'there is no such thing as a "formal conception of the rule of law"'.

[51] Endicott, 'The Impossibility of the Rule of Law' (n 27) 11–12.

[52] Endicott, 'The Reason of the Law' (n 32) 106.

understood as the rule of reason in the sense of our own judgment about what is in accordance with right reason. It is possible to recognise this as an ideal of the rule of law and nonetheless maintain a distinction between the rule of law and the rule of good law. There may be a content-independent justification to follow an authoritative legal rule even although the content of the legal rule is morally deficient in some way. But if the rule of reason is a distinct ideal of the rule of law, then it must entail that sometimes judges should decide cases on the basis of what is in accordance with right reason, irrespective of what the authoritative legal rule says. You may say that reason should rule in adjudication anyway, regardless of whether this requirement can be dressed up as an ideal of the rule of law. And you would be right. Perhaps there is even something misleading about dressing the rule of reason up as the rule of law. But perhaps, on the other hand, it helps to reinforce the idea that there are certain rights and duties that the courts ought to enforce even though they are not instantiated in rules laid down in advance. Or perhaps the question of which considerations relevant to judicial decision-making we call 'law' is just not as important as legal philosophers have made out: as long as we are clear about when judges are applying authoritative rules laid down in advance and when they are applying their own standards of reasonableness, does it really matter which premises in judicial reasoning we call law?[53] That question cannot be answered here. My point is simply that, *if* the rule of law can be understood as the rule of reason, then the most satisfactory account of it is the rule of our judgment about what right reason requires. This judgment

[53] For a similar point, see Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism' (2011) 31 OJLS 663. See also Timothy Endicott, 'Adjudication and the Law' (2007) 27 OJLS 311.

includes content-independent reasons for following authority as well as content-dependent reasons that go to the substance of the decision.

This last point entails that the rule of reason is a broad ideal that includes—indeed, will usually require—the rule of authority. There is therefore no inevitable conflict between these two ideals. When a judge ignores an authoritative legal rule that ought to have been followed, and instead decides on the basis of his or her own reasoning irrespective of the authoritative rule, the judge is acting contrary to the rule of law in every sense: the decision is contrary to authority and contrary to reason. This scenario highlights the importance of understanding the rule of reason, not as the rule of a special kind of legal reason, but as our own judgment about what right reason requires. If, as we saw Endicott argued, the rule of reason is the reason of the law, understood from the legal point of view, then we get a skewed account of whether or not the rule of law has been violated in this scenario. For although we may think that the judge's decision was contrary to authority and contrary to reason, Endicott suggests that in these circumstances the judge's decision is not necessarily arbitrary in a pejorative sense, because it is taken on the basis of what the *judge* regarded as valid reasons, rather than on the basis of the judge's personal whims or caprice.[54] Although in this scenario the judge acted on reasons that we regard as having been outweighed by the reasons for following authority, Endicott argues that the judge is not acting arbitrarily because he honestly reached a decision that was, from his point of view, required by reason. This argument has some plausibility as an account of arbitrariness, but I find it ultimately unconvincing as an

[54] Timothy Endicott, 'Arbitrariness' (2014) 27 CJLJ 49, 67.

intelligible account of the rule of law. Although the decision is not arbitrary in the sense that the judge did not base his or her decision subjective whims or preferences, it is contrary to authority—and so is contrary to the dominant understanding of the rule of law—and is also contrary to reason, since reason in this scenario demanded conformity to authority. It is wholly irrelevant that *from the point of view of the judge* the decision was required by reason. What matters is our own judgment that the judge was mistaken—the reasons that applied to the judge did not justify a departure from authority.

The two ideals will not always point in the same direction, however. The rule of reason is a distinct ideal with a distinct relationship to arbitrariness. Arbitrariness may be incompatible with the ideal of the rule of authority in circumstances where it is not incompatible with the rule of reason. A decision is arbitrary if it lacks reason, but an arbitrary decision is not necessarily contrary to reason. A choice between incommensurable options is an example of an arbitrary decision that lacks reason but is not contrary to reason. Thus a judicial choice between incommensurable options will be arbitrary, in the sense of lacking reason, but may not be contrary to reason, if there are undefeated reasons against following authority. In other words, it will not be contrary to reason if there was an undefeated reason for the judge to make the choice.

The idea that reason can require a judge to make an arbitrary choice between incommensurables is also emphasised in Endicott's account of the rule of law. 'Resolution is a basic requirement of the rule of law,' he writes. 'It is important when it is indeterminate what justice or the law requires, and when the various incommensurable requirements of good judicial decision-making conflict with each other, and even when there is no just outcome'.[55] Endicott seems to suggest that resolution is a general requirement, but I am not sure whether that is what he intended to suggest.[56] For there may be some issues that should be left unresolved in judicial disputes, perhaps because those issues are better resolved by other people.[57] But Endicott also writes that the need for resolution in judicial disputes is a special responsibility of judges, because 'the need for resolution never overrides the need for justice and the need for legality.'[58] This is far from clear, however, as Endicott himself acknowledges when he writes that 'it seems as if legality and justice do not matter' in cases in which there is 'no legal or moral reason to choose one resolution rather than another'.[59] Nonetheless, judges will often be required by reason to resolve disputes between incommensurable options.[60] In doing so, they inevitably act arbitrarily, but not in a way that causes a problem for the rule of law in the sense of the rule of reason.[61] But if the reasons that apply to the judge also call for an authoritative legal rule—even

[55] Endicott, 'The Impossibility of the Rule of Law' (n 27) 13–14.

[56] ibid 15. cf Scott Veitch, *Moral Conflict and Legal Reasoning* (Hart Publishing 1999) 164 (emphasis in original): 'as the case gets harder, it becomes *less rational* to decide it.'

[57] I think Scott Veitch exaggerates the extent to which judges should leave issues unresolved: see Veitch, *Moral Conflict and Legal Reasoning* (n 56) 169–71.

[58] Endicott, 'The Impossibility of the Rule of Law' (n 27) 16.

[59] ibid 16.

[60] As Endicott says, this idea is well captured in Aristotle, *Politics* III.16: 'Where it seems that the law cannot draw a boundary, it would seem impossible for a human being to identify one. Yet the law trains officials for that very purpose, and appoints them to judge and to regulate that which leaves undetermined, as rightly as they can.'

[61] cf Endicott, 'The Impossibility of the Rule of Law' (n 27) 16: 'It will not be arbitrary in our fourth sense of abandoning the reason of the law, because the need for resolution is itself a general legal reason to resolve disputes, and there is no conclusive reason against the resolution in question.'

though no such rule may currently exist—then in those circumstances the arbitrary choice will be contrary to the ideal of the rule of law as the rule of authority.

The compatibility between arbitrariness and the rule of reason suggests that, if two options really are incommensurable, then it may not be contrary to the rule of reason for the judge to choose between them by flipping a coin. As we shall see, there is a reason for judges to avoid flipping coins; however, perhaps surprisingly, I do not think that the reason is because of an inherent injustice in flipping coins to decide legal disputes. It is not as easy as it might intuitively seem to find anything wrong with a judge, faced with a dispute between incommensurable options, using the quintessentially impartial device of flipping a coin.[62] Indeed, a coin flip or something similar would have the merit of explicitly acknowledging the lack of justification.[63] Endicott argues that the following is a conclusive reason against judges flipping coins in these situations—'a need for judicial discipline … a discipline against corruption and prejudice and wilfulness'.[64] This is not entirely convincing, however, for surely flipping a coin would sometimes be quite a good way of preventing corruption, prejudice, and wilfulness. Yet there is a reason against flipping coins, which may well be conclusive. The main risk with flipping coins when the options are

[62] For a more wide-ranging account of random approaches to judicial decision-making, see Neil Duxbury, *Random Justice: On Lotteries and Legal Decision-Making* (OUP 2002).

[63] Frank I Michelman, 'Dilemmas of Belonging: Moral Truth, Human Rights, and Why We Might Not Want a Representative Judiciary' (2000) 47 UCLA L Rev 1221, 1244. See also Johan van der Walt: 'The self-conscious arbitrariness of flipping a coin is significant for reconciliation because of the way self-conscious arbitrariness undermines arbitration, because of the way it concedes the inexhaustible undecidability of what is being decided.'

[64] Endicott, 'The Impossibility of the Rule of Law' (n 27) 16–17.

incommensurable is that a judge might adopt this approach even when the options are commensurable and the decision is determined by reason. Indeed, there have been instances in which judges, and juries, have done just that.[65] While our unease with judges flipping coins is most often explained by pointing to our dislike of decisions being made randomly or irrationally,[66] some degree of randomness and irrationality is unavoidable in circumstances where there are incommensurable options. It is only reasonable to resist the practice of flipping coins in such circumstances because the practice may spill over into other circumstances. It is for this reason that judges ought not to get into the habit of flipping coins, even when reason does not require a decision either way. When reason runs out, all that the rule of reason requires is for judges to be candid about the reasons for each option and the absence of reasons for the choice between them.[67]

Judges act in the way that any other decision maker would act when making a choice between incommensurable options. There are no 'characteristic judicial virtues', as HLA Hart thought, which can distinguish judicial decision making from the kind of choice exercised by legislators. Among the supposedly characteristic judicial virtues, Hart listed: '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 as a

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[65] See eg *International Herald Tribune* (New York, 30 September 1991) 6, cited in Brian Bix, *Law, Language, and Legal Determinacy* (Clarendon Press 1993) 106.

[66] Bix, *Law, Language, and Legal Determinacy* (n 65) 106.

[67] See Scott Altman, 'Beyond Candor' (1990) 86 Mich L Rev 296.

reasoned basis for decision'.[68] Not only are these not distinctively judicial characteristics, but also it is not clear how these virtues are supposed to assist the judge when the considerations are incommensurable. While Hart acknowledges that morality might not provide a right answer when the sources of law fail to determine the outcome, he insists that judges may be able to make an impartial choice through 'the "weighing" and "balancing" characteristic of the effort to do justice between competing interests.'[69] It is true that judicial reasoning will often be different from other types of reasoning, because judges have to contend with certain moral duties, such as the defeasible obligation to apply the authoritative legal rules, which do not apply, or do not apply with equal force, to other decision makers, especially in the legislature. When the legal sources are indeterminate, judges may face a choice that is, in essence, the same as a legislator's choice. The same is true when the requirements of reason conflict incommensurably. You might think that when one of the reasons that conflicts incommensurably is the reason for applying an existing legal rule, then certain constitutive features of the judicial role makes this choice different from other kinds of choices, because the judicial role is, by its very nature, about applying legal rules laid down in advance. But this is not so. Though the reasons that

[68] HLA Hart, *The Concept of Law* (first published 1961, 3rd edn, Clarendon Press 2012) 205. It is worth noting here that, in this passage and elsewhere, Hart thought that, in general (i.e. not merely judicial) reasoning, discretion in cases not guided by principles—and presumably in cases involving incommensurable options—should not be described as an arbitrary choice: see also HLA Hart, 'Discretion' (2013) 127 Harvard L Rev 652, 665.

[69] Hart, *The Concept of Law* (n 68) 205. cf Bix, *Law, Language, and Legal Determinacy* (n 65) 105: 'the underlying idea is that there is more than one right answer in some legal cases only because the law requires or offers only a limited set of sources, principles, and duties; with the addition of other moral principles, policy considerations, or perhaps aesthetic considerations, there might yet be unique right answers.'

judges must contend with may differ, the way in which reasons must be assessed does not.

III. THE PLURALITY OF THE IDEALS

Although many others have drawn attention to the two sides of the rule of law, the conventional wisdom is that the two sides can always be reconciled. 'Though the two conceptions compete as ideals of the legal process (because … they recommend different theories of adjudication),' Dworkin writes, 'they are nevertheless compatible as more general ideals for a just society.'[70] Most theorists who draw attention to the two aspects of the rule of law argue that the ideal is an interpretative enterprise along the lines of Dworkin's conception of law as integrity. They tend to argue that the rule of law aims 'at coherence and consistency',[71] and that 'with sensitivity to context' its competing values may be resolved in a way that eliminates any conflict.[72] On this account, conflicts can be resolved by reasons implicit in the corpus of common law and statute, so that '[t]he judge has no discretion, in the sense of scope for exercising will or choice'.[73] This is thought to provide a distinctively judicial standard of impartiality, to which, according to Allan, other officials should adhere as closely as possible: an official's decision 'must be not only *authorized*, falling

[70] Ronald Dworkin, *A Matter of Principle* (Harvard UP 1985) 12.

[71] Mark D Walters, 'Legality as Reason: Dicey, Rand, and the Rule of Law' (2010) 55 McGill LJ 563, 585.

[72] Allan, *The Sovereignty of Law* (n 21) 99.

[73] ibid 107.

within the scope of its jurisdiction, but *fair and reasonable*.'[74] The perceived coherence of the rule of authority and the rule of reason, unified by a theory of interpretation, is thought to be crucial to maintaining the two aspects of the rule of law, conceived as a distinctively judicial ideal. But the problem with this account is that it pays insufficient attention to situations in which an official's decision is authorised but not otherwise fair and reasonable, or in which an official's decision is fair and reasonable but not authorised.

I am not suggesting that the two ideals of the rule of law are never reconcilable. Indeed, I accept that, in an important way, the rule of reason is the ultimate ideal. In most contexts, judges reasonably apply authoritative legal rules and, in these contexts, the two ideals require the same thing. But there is a danger in drawing the conclusion that, as Sir John Laws says, 'the rule of reasonableness is the condition of all legality':

> [T]he voice that says public authority must obey the statute insists in the same breath that public authority has to bring a reasonable mind to bear upon its duties. There is in the end no distinction between these imperatives. To acknowledge the limits of one's power set by Parliament *is* to bring a reasonable mind to bear upon its exercise.[75]

[74] ibid 108 (emphasis in original).

[75] Laws, '*Wednesbury*' (n 36) 195.

Although we should acknowledge that the rule of authority is an ideal only to the extent that it is reasonable for the authority to rule, we should also acknowledge the distinctiveness of the two ideals. The rule of reason can sometimes require the rule of authority, but at the same time it can also require the contrary. We should not be duped into thinking that the rule of reason can control the interpretation of authority so that the two ideals of the rule of law do not really conflict.

Once we understand that the two ideals are distinct, it is not difficult to see that a lack of conformity with the ideal of the rule of law as the rule of authority, though a matter for some regret, may be a good thing, all things considered. The rule of law, as Raz puts it, 'has always to be balanced against competing claims of other values. … Conformity to the rule of law is a matter of degree, and though, other things being equal, the greater the conformity the better—other things are rarely equal.'[76] Fuller makes the same point when he says that one of the most obvious demands of the rule of law—the demand 'that a rule passed today should govern what happens tomorrow, not what happened yesterday'—can sometimes conflict with other values and, if treated as absolute, would 'disserve the cause of legality.'[77] Opponents of judicial activism have sought to use this account of the rule of law as the rule of authority to argue against the inevitable increase in judicial power and ad hocism that comes with vague criteria such as doctrines of reasonableness and proportionality.[78] But

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[76] Raz, *The Authority of Law* (n 4) 228.

[77] Fuller, *The Morality of Law* (n 5) 44.

[78] See eg Webber, 'Rights and the Rule of Law in the Balance' (n 31) 400.

Fuller rightly saw the problem of judicial empowerment as one of degree: his main concern—what he described as the first route to disaster for a system of law—was 'a failure to achieve rules *at all*, so that *every* issue must be decided on an ad hoc basis'.[79] He understood that a 'utopia' of legality, in which his eight desiderata are perfectly satisfied, 'is not actually a useful target for guiding the impulse toward legality'.[80]

This sensible, pluralistic approach to the rule of law is not something that depends on restricting the rule of law to the rule of authority. That said, I think it is striking, though you may say not especially surprising, that most proponents of the rule of reason as an ideal of the rule of law have been value monists. Against the sensible view of Raz and Fuller, monistic exponents of the rule of law find the idea of choosing between the rule of law and other values 'bewildering', arguing that 'the ideal of the rule of law precludes making any sacrifices of it.'[81] This is not merely an overvaluation of the rule of law. It betrays a profound misunderstanding of the nature of the ideal. From the sound insight that the rule of law is more than the requirements necessary for the rule of authority, these theorists adopt an overly interpretative approach that seeks coherence among the different meanings of the rule of law. The resulting unity, in their eyes, entails that the officials' duty of fidelity to law is almost absolute, with the law being interpreted in a way that, as far as possible, is in accordance with morality.

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[79] Fuller, *The Morality of Law* (n 5) 39.

[80] See eg ibid 41.

[81] David Dyzenhaus, 'The Legitimacy of the Rule of Law' in David Dyzenhaus, Murray Hunt, and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing 2009) 40, 42.

This unifying approach to the rule of law can be seen in an essay on the rule of law by Michael Oakeshott, in which he drew attention to two sides of the rule of law: the side that emphasises formal requirements of 'authenticity' ('*lex*') and the side that emphasises substantive requirements of 'rightness' ('*jus*'). Oakeshott conflated these two sides, arguing that they could be unified by the notion of rendering justice according to law (the '*jus* of *lex*'). The substantive requirements of rightness, he says, are determined by arguing about the meaning of an authoritative legal rule in respect of its application in a particular case, not by considering what is in the public interest or what is right or just.[82] Oakeshott says that the *jus* of *lex* is not merely a matter of faithfulness to the formal character of law, but also invokes 'the negative and limited consideration that the prescriptions of the law should not conflict with a prevailing educated moral sensibility' capable of determining the kind of conditions that should be imposed by law.[83] But although *jus* and *lex* are to be distinguished, the rule of law on this account is about the rule of *lex* and about the *jus* inherent in *lex*, not about the rule of *jus* in the sense of the rule of reason that I set out in the previous section.[84]

One particularly striking feature of some monistic accounts of the rule of law is the suggestion that judges should not change the law. While most theorists who make this claim accept that judges often make political judgments when

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[82] Michael Oakeshott, 'The Rule of Law' in his *On History and Other Essays* (Liberty Fund 1999) 159.

[83] ibid 173–74.

[84] ibid 168–69.

interpreting the law, they argue that, in doing so, judges do not (or at least should not) make decisions that are inconsistent with the law laid down in advance. Nigel Simmonds makes a particularly strong version of this argument when he argues that judges cannot have a power to modify the law, because if they did, the 'rule-as-modified' would be 'applied in the very case that gave rise to the modification, so that all such cases would have to be regarded as the most serious departures from the rule of law.'[85] When judges conform to the rule of reason and apply standards not found in the authoritative sources, the monistic account seeks to hold judges to the same requirements as those associated with the ideal of the rule of authority and freedom under the law. 'If legality is related to the idea of freedom as independence,' Allan writes, 'we must suppose that the content of common law rules is, in principle, knowable in advance of action that might infringe them: we should not have to await retrospective judicial pronouncement.'[86] For Allan, the requirement of knowability can be satisfied because, although a court's justification for its decision may at times be politically contentious, the rule of reason can be based on shared criteria of justice.[87]

There is much at stake in disputes over the meaning of rule of law. What is at stake is nothing less—and quite a lot more—than the questions of how

[85] Nigel Simmonds, *Law as a Moral Idea* (OUP 2007) 162.

[86] Allan, *The Sovereignty of Law* (n 21) 122.

[87] Allan, 'The Rule of Law as the Rule of Reason' (n 3) 241, citing Hayek, *Law, Legislation and Liberty* (n xxx) 118: 'Only if one believes that all law is an expression of the will of a legislator and has been invented by him, rather than an expression of the principles required by the exigencies of an ongoing order, does it seem that previous announcement is an indispensible condition of knowledge of the law.'

judges should decide cases, of how to understand what judges do when they decide cases, and of the implications of value pluralism for judicial reasoning and decision-making. But it would be a mistake to think that one could not have a sound understanding of adjudication if one thought that the rule of reason should not be included within the meaning of the rule of law. This is a mistake that Dworkin made when he wrote, somewhat confusingly, that '[t]hough the two conceptions [of the rule of law], as general political ideals, may both have a place in a full political theory, it makes a great difference which is taken to be the ideal of *law* because it is that ideal which governs our attitudes about adjudication.' [88] The main problem with Dworkin's account is that, in distinguishing between the 'rule-book' and the 'rights' conceptions of the rule of law, he treated these ideals as alternative ways of viewing the ideal of the rule of law. Only those who adopt the latter view, he argued, are capable of accepting that the courts should enforce the moral rights that the parties actually have. Arguing that we should reject the rule-book conception, Dworkin acknowledged that that the rules laid down in advance exert an influence on the question of what moral rights the parties have.[89] But that influence, he maintained, is not merely one value among others: rather, it frames the moral rights that the parties have, so that any moral principles that are inconsistent with the rule book have no place in adjudication.[90]

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[88] Dworkin, *A Matter of Principle* (n 70) 13 (emphasis in original).

[89] ibid 16–17.

[90] ibid 17.

For Dworkin and other like-minded theorists, then, it is not the case that there are sometimes competing ideals of the rule of law that must be weighed in the balance when deciding what to do. Rather, there is one true conception of the rule of law, according to which, properly understood, the two sides of the rule of law—the requirement that the law's authoritative sources be applied and the requirement that the parties' moral rights be enforced by the court—are consistent with one another. It seems to me, however, that since the different meanings of the rule of law are in fact distinct ideals, rather than distinct conceptions of a single ideal, the choice between them cannot be wished away by claiming that one of them is based on a mistaken theory of law and adjudication. The ideals may be consistent with each other in some circumstances, but, if we reject the unity of value, we must accept that there will be circumstances in which the two ideals of the rule of law are irreconcilable and incommensurable.

The argument that I have been criticising is not surprising when it comes from those who reject the incommensurability thesis. But more surprising is the apparent assumption of commensurability in the writings of some of those who accept the incommensurability thesis. I think that Raz, for example, made such an assumption, despite his explicit intention to expound an account of the rule of law appropriate to a pluralistic society. In an essay entitled 'The Politics of the Rule of Law', Raz made a slight shift towards embracing something like the rule of reason as an ideal of the rule of law, arguing that the rule of law sets limits on the will of the legislature: 'It requires principled, as well as faithful, adjudication.'[91] That much I think is right. But Raz then appears to make two contradictory arguments: on the one hand, he criticises the idea of common law reason, arguing that it gives too much power to the common law courts and is therefore not suitable for a pluralistic society; on the other hand, he argues that the principled adjudication that the rule of law requires is based on the 'common values and shared practices of the legal culture'.[92] Raz insists that these arguments are not contradictory, because the common legal culture is shaped by legislation as much as by judicial practices. However, he goes on to say that 'the function of the rule of law is to facilitate the integration of particular pieces of legislation with the underlying doctrines of the legal system.'[93]

The assumption of commensurability in the ideals of the rule of law among those who accept the incommensurability thesis can also be seen in Endicott's account of the rule of law. He argues that, although the rule of law may seem to require precision, 'we cannot give a coherent account of the rule of law as requiring precision, because vagueness cannot be eliminated.'[94] Endicott's argument here is that some norms, such as the prohibition on torture, cannot be made more precise without defeating the purpose of having those norms. A norm that stated precisely what does and does not constitute torture could not be used to guide conduct, the argument goes, because people 'could not take it as a guide

[91] Joseph Raz, 'The Politics of the Rule of Law' in his *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev. edn, Clarendon Press 1994) 374.

[92] ibid 375.

[93] ibid 375.

[94] Endicott, 'The Impossibility of the Rule of Law' (n 27) 6.

for their conduct—so it would be no advance towards the rule of law.'[95] The attractiveness of this argument is attributable not only to the belief that a precise rule is impossible, that vagueness is inevitable, and that therefore we ought not to have impossible ideals. It is also attributable to the belief that precise rules, even when they are possible, are often over-inclusive and under-inclusive, and in this way the increase in precision in the law can often lead to an increase in arbitrariness. For Endicott, this arbitrariness is pejorative, going against the reason of the law.[96] Even if it is not arbitrariness that is the problem, there seems to be a problem with precise rules stemming from our revulsion to what Oliver Wendell Holmes described as the 'bad man', who wants a precise definition of torture so that he knows precisely what he can get away with, without actually crossing the line.[97] These problems with precise rules lend support to the idea that, when we want reason and not authoritative legal rules to rule, we do not compromise the ideal of the rule of law.

But what I think Endicott does not adequately acknowledge is the possibility that, although we may not compromise the rule of law in the sense of the rule of reason, we do compromise the rule of law if by that we mean the rule of authority. Law may well be necessarily vague, but from the point of view of the ideal of the rule of law as the rule of authority and hence of antecedent legal rules, vagueness is a problem that ought to be remedied by precise rules. The

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[95] ibid 6.

[96] ibid 8–9.

[97] See Jeremy Waldron, 'Torture, Suicide and *Determinatio*' (2010) 55 Am J Juris 1, 12. On the 'bad-man' attitude, see Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard L Rev 457

arbitrariness of precise laws may well be a loss for the rule of reason, but precise laws are a gain for the rule of authority. The reverse is also true: the arbitrariness of vague standards is a loss for the rule of authority, but vague standards are a gain for the rule of reason. You may say that the rule of reason determines whether or not precise laws are justified and that, in Endicott's example of defining torture, a precise rule is not justified. But even in these situations it is possible to think of opposing values at stake in the question of whether to determine precise standards.[98] In general, provided there ought to be an authoritative legal rule and it ought to followed, the value in ensuring that the rule is determinate is rarely reduced to zero. Often it will outweigh competing values; often it will not; and sometimes the competing values will be incommensurable.

In recognising two different ideals of the rule of law, then, we can see that they not only have different implications for arbitrariness, but also may conflict with one another in other ways: one ideal demands determinate and authoritative legal rules that have a high degree of certainty to their application in particular circumstances; the other ideal is more concerned with whether the decision in the particular circumstances is in accordance with right reason. If we bracket the jurisprudential debate about whether law can include things other than authoritative sources, then you could accept the main arguments of this chapter and yet believe that the rule of authority is the only ideal of the rule of law. But as soon as you start to talk about the rule of law along the lines of the

[98] cf Waldron, 'Torture, Suicide and *Determinatio*' (n 97) 25; John Finnis, 'Nationality, Alienage and Constitutional Principle' (2007) 123 LQR 417, 429 n 58.

rule of reason, it is important not to lose sight of the plurality of the ideals that go to make up the rule of law. The rule of law may not be, as some suggest, 'an impossible ideal'.[99] But it is a complex cluster of ideals, which are often irreconcilable.

[99] Martin Loughlin, *Foundations of Public Law* (OUP 2010) 337.

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Conclusion

My claim has been that judges can face inevitable choices among alternatives that are of incommensurable value, and that the options may continue to be incommensurable for the judge even when there is an authoritative legal rule that favours one option over the other. This is contrary to the claim made by John Finnis and others, who argue that the whole point of law is, in part, to settle choices among incommensurables. Although authoritative rules may be able to provide a conclusive reason in the face of incommensurables in some—perhaps most—cases, it is not guaranteed to do so: value incommensurability can affect legal reasoning when the sources are determinative, as well as when there are gaps in the law.

The claim that there are any incommensurable values must be defended on the basis of substantive arguments in moral and political philosophy. It is not a merely conceptual claim. But we should not assume that, as Ronald Dworkin argues, 'the direction of our thought is toward unity, not fragmentation.'[1] The argument that there are incommensurable values derives from the reasons we

[1] Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 119.

have for thinking that there is not always a right answer to moral dilemmas. This is not an argument from moral scepticism, moral disagreement, or moral uncertainty. Rather, it argues that it is a moral truth that in some cases neither of two alternatives may be more valuable than the other, and yet—because we are right not to be indifferent about which is chosen—they are not equal or roughly equal. To the extent that there are incommensurable values, I have argued that value incommensurability is best understood as entailing a range of reasonableness, in which it is reasonable to decide either way. This range is wider than the notion of rough equality suggests, and so options may remain within a range of reasonableness even after there has been a large improvement to one of the options. That is not to say, however, that one incommensurable option could not be improved to such a significant extent that it becomes the uniquely correct option. The point is merely that, in the absence of a sufficient improvement to one option, neither is better than the other, and a large improvement to one may still not make that option better.

The incommensurability thesis has profound implications for the justifiability of judicial decisions. Although rational action is action for an undefeated reason, and not necessarily action for a reason that defeats all others,[2] there seems to be something problematic about judges deciding in favour of one party, when they also had an undefeated reason to decide in favour of the other party and therefore no conclusive justification to choose either. Yet if reason underdetermines the decision, due to incommensurability, judges have no choice but to decide arbitrarily. The worry that judges may therefore be deciding on the

[2] Joseph Raz, *The Morality of Freedom* (OUP 1986) 339.

basis of their personal whims makes it tempting to think that we should therefore limit the extent to which judges engage in moral reasoning—or at least moral reasoning in which judges have to consider the relative merits of conflicting options. That worry has been especially prominent in the literature on the proportionality principle in human-rights adjudication. Moreover, for many theorists, especially John Finnis, the use of proportionality reasoning in rights adjudication fails to do justice to the absoluteness of genuine specified rights.[3] But all values have to be specified, which, pace Dworkin, does not entail that they cannot conflict. The fact that rights have to be specified does not entail that rights, or rather the values justifying rights, may conflict with competing values—which, I have argued, make it appropriate to apply the proportionality principle and assess whether the infringement is justified. But the proportionality test cannot help judges find a right answer when the relevant values are incommensurable. Judges cannot help engaging in moral reasoning—reason requires them to do so—but moral reasoning may not always identify a uniquely correct answer.

Perhaps my most surprising claim has been that judges may have to decide between incommensurable options even in the face of an authoritative legal rule that purportedly settles the issue. That initially seems implausible. There is an intuitive plausibility in the claim that, as Trevor Allan puts it, insofar as there is reasonable disagreement, 'the court must affirm the legality of the

[3] John Finnis, 'Human Rights and Their Enforcement' in his *Human Rights and the Common Good: Collective Essays Volume III* (OUP 2011) 34–35.

measure impugned.'[4] In the course of defending my contrary claim, I suggested a revision to Joseph Raz's account of the nature of authority. I agreed with Raz that, when authority is justified, the authoritative directive pre-empts some of the reasons that would have applied to the subject directly, in the absence of the directive. But there may be some circumstances in which following authority, although valuable, is nonetheless not sufficiently valuable. We may conform better to the reasons that apply to us in some ways by following authority, but not in others, and neither may be better overall. In that case, the judge is left with an undefeated reason to follow authority and an undefeated reason to choose the alternative. If that is correct, the authority of law can commensurate the incommensurable only to the extent that the reasons for authority are sufficient to take one of the alternatives out of the range of reasonableness. I canvassed some reasons why this might be true in the case of the three main justifications for legal and political authority, justifications based on epistemic, democratic, and coordinative reasons for deferring to authority. My claim—that these justifications may fail to take one of the options out of a range of reasonableness—entails that judges may be reasonable to act contrary to clear legal authority even though they act arbitrarily in doing so. That argument seems to give judges an implausibly large degree of power. However, we should not exaggerate the claim that is being made. No doubt the vast majority of cases would be resolved by following the clear legal rules established in the authoritative sources. But we should not rule out the possibility that

[4] TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013) 279.

incommensurability in the underlying reasons can render rationally indeterminate the question of whether the court should follow authority.

It might be thought that there is a separate question about the constitutional role of the courts. I have focused on the reasons for and against following authority from the internal point of view of the judge. But of course there is much disagreement about the existence and strength of reasons for action. Given that there is disagreement, constitutional theorists often worry about empowering judges to make decisions on the basis of their moral–political reasoning, to say nothing of decisions based on a rationally underdetermined choice. This worry may give rise to a belief that the important issue cannot be what reasons apply to judges, because those are controversial. However, if there are genuine reasons against empowering the courts to make controversial moral decisions, then, in my view, these are questions of authority that a judge can answer only on the basis of his or her moral reasoning. We must place ourselves in the point of view of the judge and ask: if we were confronted with these sorts of cases, how should we decide them? I do not think that a separate question can arise from what might be considered to be an external point of view in constitutional theory. The mere fact of political disagreement, unless tied to a reason for seeking coordination on a common settlement, can provide no reason to take decisions away from the courts. Aside from this point about the relationship between the courts and other institutions, the incommensurability thesis may be thought to raise questions about the composition of courts. According to one English Court of Appeal judge, Lord Justice Etherton, given that hard cases are determined by each judge's personal outlook, there is a reason for greater diversity in the composition of the senior judiciary.[5] I will leave that question open—except to say that, as it seems to me, there is value in diversity and equality of opportunity regardless of the truth of value pluralism and incommensurability.

As well as being reasonable, choices among incommensurable options are also arbitrary. They are arbitrary, I have argued, in a way that is necessarily contrary to the ideal of the rule of law, at least on the dominant understanding of that ideal, which treats it as a set of requirements for the rule of authority. But I have also suggested that there may be a different ideal of the rule of law, the rule of reason, according to which arbitrary choices are not necessarily contrary to the rule of law. But even if it is contrary to the rule of law, when reason requires a decision to be made, it is right for judges to make that decision notwithstanding its arbitrariness. From the point of view of the dominant understanding of the rule of law, there is something unfortunate when judges are faced with incommensurable options. But in those circumstances judges have no alternative but to judge without scales.

[5] Terence Etherton, 'Liberty, the Archetype and Diversity: A Philosophy of Judging' [2010] PL 727.

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