

5-1-2014

Indeterminacy, Value Pluralism, and Tragic Cases

David Wolitz

University of Tennessee College of Law

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Law Commons](#), and the [Legal Theory Commons](#)

Recommended Citation

David Wolitz, *Indeterminacy, Value Pluralism, and Tragic Cases*, 62 Buff. L. Rev. 529 (2014).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol62/iss3/2>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

BUFFALO LAW REVIEW

VOLUME 62

MAY 2014

NUMBER 3

Indeterminacy, Value Pluralism, and Tragic Cases

DAVID WOLITZ†

“We are doomed to choose, and every choice may entail an irreparable loss.”¹

INTRODUCTION

Over the past century, the capacity of our legal system to generate determinate and just answers to legal questions has come under sustained skeptical attack. More precisely, the idea that there is a single correct answer to each legal question (the “one right answer” thesis) has been the target of two serious assaults. The most well-known skeptical assault, the thesis of legal indeterminacy first articulated by American Legal Realists in the 1930s, claims that the multiplicity of rules and interpretive techniques available to legal decisionmakers allows them to generate multiple and contradictory legitimate answers to specific legal questions.²

† Associate Professor of Law, University of Tennessee College of Law. I would like to thank Dwight Aarons, John Anderson, Michael Cottone, and Sule Sahin Ceylan for their thoughtful comments and encouragement on this project. Jeremy Pam deserves special thanks for countless enlightening discussions, informative emails, and uplifting messages. And I benefited immensely from the practical wisdom, intellectual acuity, and faithful friendship of Jeffrey Shulman.

1. Isaiah Berlin, *On the Pursuit of the Ideal*, NEW YORK REV. OF BOOKS, Mar. 17, 1988, at 11, 15 [hereinafter Berlin, *On the Pursuit of the Ideal*].

2. BRIAN LEITER, *Legal Realism and Legal Positivism Reconsidered* (2001), reprinted in NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 59, 72 (2007) [hereinafter LEITER, *Legal Realism and Legal Positivism Reconsidered*] (noting the “famous Realist

In some cases, that is, the application of authoritative legal sources to the facts of the case yields a variety of conflicting yet legally valid answers, rather than a single best, or most correct, answer. In such cases, the legal decisionmaker is inevitably left to choose *on non-legal grounds* among a range of valid legal answers.³

One strategy to cope with the indeterminacy problem is to suggest that, in cases where the law has run out and fails to pick out the one right answer, some extra-legal (or quasi-legal) normative theory might be brought to bear to determine the single best answer among the range of legally plausible options.⁴ At this point, the second skeptical assault on the “one right answer” thesis—namely, value pluralism or incommensurability⁵—announces itself by

arguments for indeterminacy which focus on the conflicting, but equally legitimate ways, lawyers have of interpreting statutes and precedents”); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 395 (1950) [hereinafter Llewellyn, *Remarks on the Theory of Appellate Decision*] (“One does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases.”); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1239 (1931) [hereinafter Llewellyn, *Some Realism About Realism*] (“[I]n any case doubtful enough to make litigation respectable the available authoritative premises—*i.e.*, premises legitimate and impeccable under the traditional legal techniques—are at least two, and that the two are mutually contradictory as applied to the case in hand.”).

3. See, *e.g.*, JEROME FRANK, *LAW AND THE MODERN MIND* 111-12 (1936); BRIAN LEITER, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in *NATURALIZING JURISPRUDENCE*, *supra* note 1, at 15, 21, 24 [hereinafter LEITER, *Rethinking Legal Realism*] (noting that the “core claim” of Legal Realism is that “judges respond primarily to the stimulus of facts,” which is to say that “the judge has non-legal reasons . . . for deciding the way she does”) (emphasis omitted).

4. See, *e.g.*, RONALD DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14, 22 (1977) [hereinafter DWORKIN, *The Model of Rules I*] (describing how “principles” determine hard cases that are not determinable according to black-letter rules).

5. Although there are species of value pluralism that reject the incommensurability of values, this Article will use the terms interchangeably. For more detail on the debate among value pluralists over incommensurability, see *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* (Ruth Chang ed., 1997).

denying the possibility that normative theory can offer determinate resolutions to many of the most vexing normative dilemmas. According to the incommensurability thesis, the ultimate values recognized by our community and by our law are irreducibly plural; there is no single value that the legal system aims, or should aim, to satisfy or maximize, nor can the variety of ultimate values be compared to one another along a single scale or metric.⁶ Thus, when a legal dispute implicates two ultimate and incommensurable values, there is no logical method to determine which value to prefer over the other.⁷ The ultimate values at stake may justify two or more conflicting resolutions to the conflict. When the decisionmaker faces such a choice, a choice between or among incommensurable values, the values themselves cannot resolve the choice. Nor can the decisionmaker weigh the values against one another on a scale or metric amenable to both values; no such common scale or metric exists.⁸ In the end, the decisionmaker must choose between two incommensurable goods, knowing that neither choice is the uniquely right answer to the dilemma.

The debates over legal indeterminacy and value pluralism have been the subject of sustained and sophisticated analysis for decades already, and a painstaking review of these debates is beyond the scope of this article.⁹ Nevertheless, I will defend versions of both legal indeterminacy and value incommensurability that have achieved broad (though by no means unanimous) agreement and identify a class of cases—which I call tragic cases—that are both legally indeterminate and shot through with significant value incommensurability. The versions of legal indeterminacy and value pluralism that I defend share

6. See ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 55-59 (1993).

7. *Id.* at 58.

8. *Id.* at 55.

9. For a fair review of the indeterminacy debate, see Lawrence B. Solum, *Indeterminacy*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 488 (Dennis Patterson ed., 1999) [hereinafter Solum, *Indeterminacy*]. For a comprehensive introduction to debates over value pluralism, see INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 5.

an important structural similarity: the claim of both theses is that the available authoritative premises (legal and moral) are themselves plural and irreconcilable and therefore can generate multiple and contradictory resolutions to particular legal disputes. The claim is not the nihilistic view that authoritative and objective sources do not exist; nor is it the relativist claim that there are no objectively better or worse answers to legal or normative questions. Rather, the claim is that there are *too many* authoritative and objective sources, whether legal or moral, to definitively yield a uniquely correct answer in certain cases.¹⁰ Both legal indeterminacy and value pluralism, then, are quintessentially internal critiques;¹¹ they take sources of law and ultimate values as objective¹² and capable of constraining choice, but they also demonstrate that even an earnest commitment to align one's decisions and actions to the demands of law or morality can leave a decisionmaker without conclusive grounds for choosing one course of action over another when there are a range of legally and morally supportable conclusions.

Recognizing that there are some cases that are both legally and ethically indeterminate has several implications for legal theory generally and for theories of adjudication in particular. Broadly speaking, the existence of indeterminacy

10. Even in tragic cases, however, there may be demonstrably wrong answers, answers that the authoritative legal sources and values do not permit.

11. John William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 10 (1984) (“[Indeterminacy] is an internal critique. This is a critique from within, a critique that uses the premises of traditional legal theory against itself.”).

12. Following Isaiah Berlin, the claim of moral objectivity made here is the thesis that there is a range, but not an infinity, of ultimate ends sought by human beings and human societies. See ISAAH BERLIN, *My Intellectual Path*, in THE POWER OF IDEAS 1, 12 (Henry Hardy ed., 2000) [hereinafter BERLIN, *My Intellectual Path*] (“There is not an infinity of them: the number of human values . . . is finite – let us say 74, or perhaps 122, or 26, but finite, whatever it may be.”). It is not an ontological claim that values constitute facts like facts of the physical world. Berlin is not taking a position on the debate over “moral realism” or “moral cognitivism” as those terms are used in moral philosophy. See, e.g., Mark van Roojen, *Moral Cognitivism vs. Non-Cognitivism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 4, 2013), <http://plato.stanford.edu/entries/moral-cognitivism>.

and incommensurability should chasten our ambitions for what normative jurisprudence can provide for our legal system; it cannot provide a determinate procedure for generating uniquely correct answers to all legal cases. Theories that promise such global determinacy are bound to disappoint us, for the indeterminacy and value pluralism endemic in our law is deeply ingrained.¹³ In this sense, the polemicists of the Critical Legal Studies (CLS) movement were correct.¹⁴ Theories that claim that law by itself—or that the sources of law coupled with suitable normative and interpretive theories—can generate decisive reasons for choosing the one best answer in every case are not plausible; they are false hopes, at best, or conscious delusions masking ulterior motives at worst.¹⁵

What legal theory *can do* after the law has run out is help us identify genuinely tragic cases from run-of-the-mill cases or pseudo-tragic cases (the epistemological project) and help us illuminate the legal-systemic and moral stakes at play in genuinely tragic cases (the normative project). The existence of tragic cases—of real indeterminacy and real value pluralism—does not mean that every legal dispute is a tragic case; not even every hard case is a tragic case. Recognition of tragic cases does not imply that legal decisionmakers are absolved from the conventional task of earnestly attempting to find the one right answer to disputes they are responsible for resolving.¹⁶ Though the

13. My claim is not that the very concept of law implies indeterminacy or value pluralism, but only that a legal system as complex and internally diverse as ours will *as a matter of fact* generate legally indeterminate cases.

14. Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM / LEFT CRITIQUE* 178, 191 (Wendy Brown & Janet Halley eds., 2002) [hereinafter Kennedy, *The Critique of Rights in Critical Legal Studies*] (“[W]hatever it is that decides the outcome [of a case], it is not the correct application of legal reasoning under a duty of interpretive fidelity to the materials.”).

15. *See id.*

16. *Cf.* Frederick Schauer, *Instrumental Commensurability*, 146 U. PA. L. REV. 1215, 1230 (1998) [hereinafter Schauer, *Instrumental Commensurability*] (questioning whether legal decisionmakers who believe in value incommensurability might follow a “less thoughtful approach to hard decisions than ought to be the case” because they see more incommensurable choices than actually exist).

existence of tragic cases implies the real possibility that such attempts may fail, a genuine attempt and genuine failure to resolve the case at hand pursuant to conventional legal and normative reasoning is a precondition to identifying tragic cases.¹⁷ Decisionmakers should thus be aware of the possibility of tragic cases, but, just as in everyday life, awareness of the possibility of tragedy need not and should not undermine or downgrade sound decisionmaking processes; rather, it should refine them.

Still, the question remains: when a legal decisionmaker does face a genuinely tragic case, how is she to choose among the range of plausible but contradictory resolutions to the case? Of course, no determinate answer is possible to this question. The decisionmaker must choose among multiple options, all of which are rational from conflicting and valid premises. Deductive logic cannot resolve the case, nor can maximization of a single value or balancing between values. Nevertheless, I will argue that tragic cases, though they lack a single decisive answer, are amenable to reflection and deliberation in the venerable tradition of practical wisdom.¹⁸ Such deliberation must rely on experience and cultivation of the virtues of sensitivity and humility. It may include reflection on which choice coheres best with our particular collective sense of self (our ethos) and with the particular story we want to tell about ourselves. It may also include imagining the different futures likely to result from the choices available and speculating about our relative capacities to endure the different losses of value that would result from each decision. Such deliberation cannot, of course, produce

17. I will not here challenge the conventional view that if the law or some extra-legal norm does provide decisive reasons to choose one right answer, those reasons are *ipso facto* authoritative and should determine the outcome of the case. There is, of course, a profound question in normative jurisprudence about what legal decisionmakers should do when authoritative legal sources determine resolutions to disputes that clash with the judge's own deeply held normative principles, but that debate is beyond the scope of this project. For a sensitive exploration of that issue in the context of antebellum fugitive slave laws, see generally ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

18. See discussion *infra* Part IV.

irrefutable reasons to choose among valid and conflicting options. But processes of reflection and deliberation can help flesh out the specific legal-systemic and normative stakes involved in the particular case at hand and sensitize the decisionmaker to the (incommensurable) advantages and disadvantages of different decisions. At minimum, such processes can minimize the risk of deciding the case without adequately acknowledging a particular value or consequence at stake.

Borrowing from Isaiah Berlin's account of value pluralism, I contend that in tragic cases the decisionmaker must ultimately make a "radical choice"¹⁹ among incommensurable options and that this choice is tragic—tragic because some ultimate value must be sacrificed to honor another ultimate value, and no decisive reason can be given to determine which value shall be sacrificed and which honored.²⁰ The loss suffered in tragic cases is thus not redeemable by reference to a greater good.

Recognizing the necessity of radical choices in tragic cases might plausibly lead to two very different dispositions: on the one hand, decisionmakers might experience radical choice as liberating, as a rare chance to exercise personal preference, creativity, or imagination. Like a young student told that there is no wrong answer, the liberated judge might feel free to go with her gut and move on. On the other hand, decisionmakers might experience radical choice as paralyzing or depressing. Without a rational basis to choose one plausible option over another, the paralyzed or depressed judge may not be able to close the case; he dwells on the inevitable and irredeemable loss of value his decision will bring about, and he continues fretting over the case even after formally issuing an opinion. He cannot move on. In the face of tragic cases, neither disposition is more rational than the other, but I endeavor to describe why a

19. See JOHN GRAY, ISAIAH BERLIN 23 (1996) ("Such choice is, for Berlin, choice among goods that are not only distinct and rivalrous but sometimes incommensurable: it is radical choice, ungoverned by reason.").

20. See BERLIN, *My Intellectual Path*, *supra* note 12, at 23 (noting that not all ultimate values can be obtained, "choices must be made, sometimes tragic losses accepted").

tragic sensibility—so long as it falls short of outright paralysis—is most consonant with the nature of radical choice and more likely to engender the kind of sensitivity and humility most appropriate to cases involving irredeemable loss.

In Part I, I review and defend the moderate version of legal indeterminacy articulated by Karl Llewellyn and other Legal Realists while rejecting the radical version of legal indeterminacy articulated by some CLS scholars. Part II then describes the main contours of value pluralism, primarily as expounded by Isaiah Berlin in a series of essays beginning with his famous lecture *Two Concepts of Liberty*. In Part III, I explain why moderate legal indeterminacy and the thesis of value pluralism together have profound implications for normative jurisprudence in general and theories of adjudication in particular. Finally, in Part IV, I explore how legal decisionmakers ought to approach tragic cases and to what extent cultivation of the traditional virtue of practical wisdom (or prudence) can provide useful guidance to decisionmakers facing such cases.

I. INDETERMINACY

The debate over legal determinacy dominated law school-based jurisprudence in the United States in the 1980s and 1990s and continues to be a serious source of debate.²¹ Though the CLS movement embraced a diverse array of projects and claims, the indeterminacy thesis became the most salient element of its critique of conventional legal practices, and it in turn became a lightning rod for mainstream liberal and conservative criticism of CLS.²² The upshot was a surge of interest in the questions of whether legal adjudication can or does (or

21. Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 679 (1990) (describing the legal academy's "continuing pre-occupation with the indeterminacy debate").

22. For a sophisticated discussion of the place of the indeterminacy thesis in the Critical Legal Studies movement and the reaction to it, see ROBIN WEST, *NORMATIVE JURISPRUDENCE* 157-66 (2011).

cannot and does not) provide rationally determinate resolutions to specific legal disputes. The far poles of the debate are relatively easy to describe. On the one end, the thesis of global indeterminacy²³ holds that law cannot ever provide rationally determinate resolutions to specific legal disputes.²⁴ On the other end, the thesis of global determinacy holds that law always can provide rationally determinate resolutions to specific legal disputes.²⁵ Neither pole in the debate is plausible for reasons I articulate below, and, given the passion and rhetorical high pitch of the debate, what is perhaps more striking is how few theorists actually reside or ever resided on either pole. The real action in the indeterminacy debate has always been between the poles—arguments about the sources, frequency, and implications of indeterminacy (and determinacy).²⁶

Fundamentally, proponents of indeterminacy have located its source in three basic areas: (1) the general vagueness or plasticity of language;²⁷ (2) conflicting norms and doctrines within authoritative sources of law;²⁸ and (3)

23. The indeterminacy thesis I discuss in this section is what Brian Leiter calls rational indeterminacy, or indeterminacy as to reason, as opposed to causal indeterminacy. BRIAN LEITER, *A Note on Legal Indeterminacy*, in NATURALIZING JURISPRUDENCE, *supra* note 2, 9, 9-10 [hereinafter LEITER, *A Note on Legal Indeterminacy*]; *see also* Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 560-61 (1993).

24. *See, e.g.*, Winter, *supra* note 21.

25. RONALD DWORKIN, A MATTER OF PRINCIPLE 143 (1985) [hereinafter DWORKIN, A MATTER OF PRINCIPLE] (describing the existence of indeterminate cases as “so rare as to be exotic”); Ronald Dworkin, *No Right Answer?*, in LAW, MORALITY, AND SOCIETY 58, 84 (P. Hacker & J. Raz eds., 1977) [hereinafter Dworkin, *No Right Answer?*] (“For all practical purposes, there will always be a right answer in the seamless web of our law.”); *see also* LEITER, *A Note on Legal Indeterminacy*, *supra* note 23, at 11 (arguing that Ronald Dworkin “can be understood” to embrace global determinacy). Nobody to my knowledge tries to defend the position that actually existing legal decisionmakers and institutions in fact always articulate, or arrive at, the correct rationally determinate resolutions to legal disputes.

26. *See* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 186-87 (2010).

27. I will refer to this as the Linguistic Argument.

28. I will refer to this as the Internal Contradictions Argument.

conflicting interpretative and legal reasoning techniques available to legal decisionmakers.²⁹ There are radical and moderate versions of each argument. In their radical or global versions, arguments for indeterminacy claim that indeterminacy is pervasive throughout the law and fatal to all (or almost all) attempts to reach a single correct answer to legal questions. In more moderate versions, arguments for indeterminacy claim that indeterminacy arises only episodically in the law and that some legal questions do have single correct answers while others do not.

A. *The Linguistic Argument*

The linguistic argument for radical indeterminacy holds that, because legal sources are composed in language and because language is inherently contingent, artificial, and manipulable, there can be no sense in which one interpretation or application of the language of legal sources is better than any other.³⁰ Rather, the language of any legal source can map onto the world (or the facts of a case) in an infinite variety of ways, none more or less correct than any other.³¹ There are no facts in the world that determine—make it necessary—that any instance of language means one thing rather than another; therefore, there are no facts in the world that determine—make it necessary—that any instance of legal language (such as a rule) means one thing

29. I will refer to this as the Interpretive Argument. Legal Realists and others also articulated a fourth source of indeterminacy, namely how facts in the world (even when undisputed) can be legitimately described in different ways, resulting in different legal classifications and implications. *See, e.g.*, FRANK, *supra* note 3, at 102-05.

30. *See* Coleman & Leiter, *supra* note 23, at 568 (“The core of semantic skepticism is the claim that there are no facts that constitute or determine a sentence’s meaning, so that language is indeterminate at the most basic level: there are no *objective* facts that make it the case that language means one thing rather than another.”).

31. To put this in structuralist terms, there is no necessary connection between signifiers and signifieds—between words, phrases, utterances, and other signs on the one hand, and the things those words purport to represent. *See generally* FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 65-67 (Perry Meisel & Haun Saussy eds., Wade Baskin trans., Columbia Univ. Press 2011).

rather than another. Global legal indeterminacy, on this account, is just a function of global semantic indeterminacy, an indeterminacy besetting all communication by language.³²

The problem with this version of indeterminacy, then, is that the claim that there are no objective facts in the world which determine the meaning of words does not mean that words can never have determinate meaning, only that what makes the meaning of words determinate are not facts in the world. Rather, the meaning of words can be determined by the conventions of a linguistic community—its practices, behaviors, dispositions, and understandings.³³ One can concede, in other words, that the meaning of linguistic expression is a question of convention, not of physical fact, without conceding that meaning is necessarily indeterminate. The conventions of a linguistic community may be sufficiently clear that the meaning of certain expressions can be contextually fixed, or determined, for that linguistic community at that time. Of course, the conceptual possibility of determinate meaning affixed to linguistic expression does not tell us whether or how much the meaning of expressions actually are determined, but it does defeat the claim that such determinacy is impossible.³⁴ And if one admits that language is capable of generating determinate meanings, then one can no longer argue that law is globally indeterminate because it is expressed in language.

A more moderate and plausible version of linguistic indeterminacy is the one promoted by H.L.A. Hart in his classic book *The Concept of Law*.³⁵ There, Hart argues that

32. Coleman & Leiter, *supra* note 23, at 571 (“If language itself is indeterminate, then legal language is indeterminate a fortiori.”).

33. *Id.* (“Meaning is not radically indeterminate; instead meaning is public—fixed by public behavior, beliefs, and understandings. There is no reason to assume that such conventions cannot fix the meanings of terms determinately.”).

34. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 531 (1988) [hereinafter Schauer, *Formalism*] (“We have seen that, as a descriptive and conceptual matter, rules can generate determinate outcomes . . .”).

35. H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012) (1961).

words are inherently “open-textured”—they have both a core meaning and a penumbra.³⁶ The core meaning of words consists of the clear, uncontroversial, and paradigmatic meanings of those words pursuant to the linguistic convention of the relevant linguistic community.³⁷ But words also have penumbral edges to their meanings—areas of disputed meaning within which reasonable arguments may be made both in favor and against including that area within the word’s meaning. Hart argued that when legal norms use words, determinate application to specific cases is possible where the facts of the case fall within the core meanings of the relevant words (or clearly outside the meaning of the relevant words), but indeterminacy arises when the facts of the case fall within the penumbral meanings of the relevant words.³⁸ According to this picture, many, perhaps most, legal cases have determinate answers, but some remaining, perhaps peripheral, class of legal cases exists for which no determinate answers exist because of the open texture of language itself. Over time, of course, words used in legal norms may attain clearer and clearer meanings—i.e., their penumbral areas will recede through conventional evolutions and authoritative decisionmaking—and the amount of legal indeterminacy traceable to a word’s penumbral meaning may decline. But the world continually throws up novel factual scenarios that lie in the penumbra of a word’s meaning, so debates about a word’s meaning are never completely closed, and a once-and-for-all total defeat of legal indeterminacy is thus not possible.³⁹

B. *The Internal Contradictions Argument*

The second major strand of radical indeterminacy claims that legal indeterminacy derives from pervasive

36. *See id.* at 128.

37. *Id.* at 123. For instance, a motorized car being driven would constitute a “vehicle” in our linguistic community because that is the core meaning of vehicle today in our linguistic community. *See id.* at 128, 130.

38. *Id.* at 273 (describing “hard cases” as those “where the existing law fails to dictate any decision as the correct one”).

39. *Id.*

contradictions in legal sources. The gist of the claim is that every domain of American law, of whatever substantive category and at every level of generality, is shot through with normative contradictions making it impossible to generate a single correct description of the law or a single correct application of the law to a concrete legal dispute.⁴⁰ Most famously, Duncan Kennedy once argued that all of American law, perhaps all liberal law, suffers from a fundamental contradiction between our need for others and our need to be free from others.⁴¹ But the “internal contradictions” argument for pervasive indeterminacy does not always go as far as positing a single fundamental contradiction at play in all instances of law. It usually claims that normative contradictions (plural) are pervasive throughout the law, making it impossible to determine a single correct way to interpret or apply the law.⁴² Indeed, much of CLS scholarship consisted of demonstrating the normative contradictions endemic to field after field of American law.⁴³ The general claim is that the law governing any domain includes conflicting values which, in turn,

40. ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 117-20 (1990) (describing the “patchwork thesis” of CLS).

41. Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 *BUFF. L. REV.* 205, 213 (1979) [hereinafter Kennedy, *The Structure of Blackstone’s Commentaries*]; see also Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685, 1766 (1976) [hereinafter Kennedy, *Form and Substance*] (“Every occasion for lawmaking will raise the fundamental conflict of individualism and altruism, on both a substantive and a formal level.”). In 1984, Kennedy announced that he no longer put any stock in the fundamental contradiction thesis. See Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 *STAN. L. REV.* 1, 15-16 (1984) (“First of all, I renounce the fundamental contradiction. I recant it, and I also recant the whole idea of individualism and altruism, and the idea of legal consciousness, . . . I really see the fundamental contradiction these days as a lifeless slogan . . .”).

42. See, e.g., Richard S. Markovits, *Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions*, 74 *CHI.-KENT L. REV.* 415, 442 (1999) (“Some members of the Critical Legal Studies movement also try to justify their conclusion that there are no internally-right answers to legal-rights questions by arguing that the usefulness of liberal legalism . . . is destroyed by its internal contradictions (antinomies).”).

43. See Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 *FLA. ST. U. L. REV.* 195, 198 (1987).

reflect conflicting interests at work in the larger society.⁴⁴ Rather than solve conflicts determinately, the law on this account *reflects and contains* the very underlying conflicts which give rise to legal disputes in the first place. The legal decisionmaker thus has available within the law multiple and conflicting norms (pitched at the level of principle, policy, standard, or rule) which allow him or her to decide any given case for the plaintiff or for the defendant. Robert Gordon, for instance, argued that contract law contains within it both a set of formal arms-length transaction norms and a conflicting set of informal mutual reliance norms.⁴⁵ The upshot is that “the doctrines of contract law in fact make available to parties in *all* cases—including cases that appear . . . to require a single clearly correct outcome—a multiplicity of regulatory regimes, some rooted in individualist, and others in cooperative, solidary, visions of economic life.”⁴⁶

The more moderate version of the internal contradictions thesis was offered by many of the Legal Realist thinkers of the 1930s.⁴⁷ The Realists were not, of course, the first to discover that in some areas of law the authoritative sources of law—precedents, statutes, etc.—sometimes contain conflicting prescriptions. Nor were they the first to recognize that some cases leave the judge discretion because of a gap or silence in the existing law.⁴⁸ Indeed, even the archetypal formalists of the late

44. *See id.*

45. *Id.* at 215.

46. *Id.*

47. *See, e.g., id.* at 197.

48. In terms of their determinacy, there is really no difference between a case in which two relevant authorities conflict (conflicting precedents) and a case in which no authority dictates a particular result (a gap). In both cases, the extant authorities allow for multiple and contradictory rulings. In both cases, that is, the law is *underdeterminate*. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) [hereinafter Solum, *On the Indeterminacy Crisis*]. The law may rationally rule out some dispositions of the case, but does not prescribe a single correct resolution. *See id.* (“The law is *underdeterminate* with respect to a given case if and only if the set of results in the case that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results.”).

nineteenth century recognized that some precedent cases could not be reconciled with other equally authoritative decisions and that some cases involved issues of first impression.⁴⁹ In the case of conflicting precedents, the formalist solution to this phenomenon was to simply dismiss one of the conflicting precedents as itself erroneous or an outlier and then to craft from the remaining “correct” cases a unitary doctrine capable (they believed) of yielding uniquely correct results.⁵⁰ Formalists could perform this move because they believed that the common law was in some sense discovered by judges, not made, and that doctrine therefore was something other than the mere record of legal decisions. The legal decisions were evidence of the doctrine, not its creators.

Realists, however, abandoned the idea that the common law was anything other than the record of decided cases and the conventions related to them, so they could not dismiss conflicting precedents by declaring one precedent correct and another a deviation from the true common law.⁵¹ The Realists insisted that conflicting precedents were nothing more than different decisions by different judges reflecting different choices about what the law is or *should* be.⁵² A judge’s choice among available authorities, many Realists argued, was due to some underlying normative view or

49. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 174 (1993) [hereinafter KRONMAN, *THE LOST LAWYER*] (explaining how the Langdellian System could recognize and accommodate cases of first impression).

50. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 14-15 (1992) (noting that the “identification of anomalies was a central part of the task of legal integration after 1870”). For cases of alleged gaps in the law, formalists were confident that existing doctrine could be abstracted, analogized, or deduced as necessary to determinately solve the novel case. See KRONMAN, *THE LOST LAWYER*, *supra* note 49, at 174. Of course, a formalist need not believe that every jurist will agree on the right disposition of a novel case, only that there exists a single correct answer. *Id.*

51. Marin Roger Scordato, *Post-Realist Blues: Formalism, Instrumentalism, and the Hybrid Nature of Common Law Jurisprudence*, 7 *NEV. L.J.* 263, 271-77 (2007) (describing shift from formalist to realist view of common law).

52. *Id.*

disposition of the judge, whether conscious or not. For Realists, the existence of conflicting authorities implied that judges inevitably have discretion to choose among authorities and thus to craft multiple, contradictory resolutions of the case.

The Realist version of the “internal contradiction” argument is thus distinct from the radical argument of some CLS authors in two crucial respects—first, in its account of where contradictions are found and second, in its account of the pervasiveness of such contradictions. While Realist authors focused on conflicts at the level of legal doctrine, CLS authors claimed that the important contradictions are manifest at even deeper levels of norms and interests. For CLS thinkers, the doctrinal contradictions of law are not superficial blemishes on an otherwise coherent jurisprudence; the contradictions go all the way down to the normative foundations of the doctrine and the competing social interests behind them. Consequently, according to the CLS view, these deeply-rooted contradictions are pervasive throughout the law and will defeat any attempt to render the law as coherent or univocal. For Realists, because the contradictions that mattered were those at the level of doctrine, projects to rationalize and harmonize doctrine were seen as worthwhile and capable of significant success, though Realists understood that the increasing complexity of law in a regulatory state would continually yield new doctrinal conflicts.⁵³ In short, the radical version sees contradiction as ineradicable, global, and baked into the law’s very foundations, while the moderate version views doctrinal contradictions as a real and enduring phenomenon of a sprawling legal system, but not necessarily a global feature of all law. For the moderate version, one need only accept the proposition that generations of lawyers have accepted as

53. See TAMANAHA, *supra* note 26, at 94 (“The various goals of the realists were to increase the certainty and predictability of law, to train better lawyers, to advance legal justice, and to reform the law to better serve social needs.”).

a truism—that authoritative legal doctrine sometimes contains conflicts.⁵⁴

C. *The Interpretive Argument*

Finally, the Realists bolstered their moderate argument for indeterminacy with a novel critique of the interpretive techniques available to legal decisionmakers. This argument, most associated with Karl Llewellyn, begins from the premise that the content of legal rules⁵⁵ articulated in legal authorities, such as cases and statutes, are not always self-evident, but instead must be interpreted or construed by judges faced with applying legal authorities to specific cases.⁵⁶ According to Llewellyn, however, there are a variety of orthodox modes of interpreting precedent cases and statutes, and these modes of interpretation often work at cross-purposes.⁵⁷ With respect to cases, Llewellyn argued that judges often have great latitude to interpret the rules of precedent cases narrowly or broadly, such that the rule in the precedent case either demands one outcome or

54. This moderate version of the internal contradictions argument for indeterminacy does not, of course, answer the question of the *extent* of indeterminacy. In principle, the extent of indeterminacy is a simple function of the frequency with which cases are subject to conflicting legal authorities, and it is an empirical question how many legal disputes in fact call forth genuinely conflicting legal authorities. The Realists who first made this argument emphasized how often legal cases, especially cases at the appellate level, do in fact implicate conflicting precedents. Since the 1930s, very few academics or judges have disputed the Realist argument that conflicting legal authority, and thus indeterminacy, exists in some subset of cases. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 410-11 (1985) [hereinafter Schauer, *Easy Cases*]. But there is a rough split of opinion between those who think such indeterminacy exists in most, or a relatively large percentage, of legal disputes and those who think such indeterminacy is confined to a relatively small number of cases. LEITER, *Legal Realism and Legal Positivism Reconsidered*, *supra* note 2, at 78 (noting real disagreement between H.L.A. Hart and Legal Realists over “range of cases” in which indeterminacy adheres).

55. In this section, I am using the term rules to refer to rules, standards, and other prescriptive formulations of law.

56. See generally Llewellyn, *Remarks on the Theory of Appellate Decision*, *supra* note 2, at 395.

57. *Id.*

another.⁵⁸ With respect to legislation, Llewellyn famously claimed that each canon of statutory interpretation is opposed by a corresponding counter-canon such that the judge can legitimately apply “opposing canons” in interpreting a statute “on almost every point.”⁵⁹ In sum, “in any case doubtful enough to make litigation respectable the available authoritative premises . . . are at least two, and that the two are mutually contradictory as applied to the case in hand.”⁶⁰

Today, of course, Llewellyn’s arguments about the malleability of precedent and the multiplicity of opposing canons of construction are commonplace even in first-year law school classrooms. But the key for Llewellyn is that each of the opposing interpretive techniques is equally legitimate, and thus each of the potential resolutions of a case generated by these techniques is an equally legitimate legal outcome.⁶¹ Note, also, that this argument for indeterminacy does not depend on explicit contradictions within the authoritative legal sources themselves; there need be no clashing precedents or contradictory legislation.⁶² Even if there is only a single legal authority applicable to a case, the multiplicity of legitimate interpretive techniques allows the legal decisionmaker to generate multiple constructions of the applicable rule and thus generate multiple resolutions to the case.

58. *Id.* at 395-96.

59. *Id.* at 401.

60. Llewellyn, *Some Realism About Realism*, *supra* note 2, at 1239.

61. This moderate Interpretive Argument has obvious parallels to the linguistic argument discussed above, as both point to the multiplicity of interpretations available with respect to a single piece of language. But the Interpretive Argument is not an argument about the nature of language as such; it is an argument about the conventions of legal interpretation in particular. It does not make any claims about legitimate interpretation of language in general; the claim is, rather, that there are specific and identifiable orthodox modes of interpreting legal authorities and that these modes can and do lead to opposing resolutions to legal disputes.

62. Of course, caselaw and legislation are not the only sources of law in our system. But Llewellyn’s discussion of interpretive techniques with respect to cases and statutes can easily be extended to other sources of law, e.g., to the variety of Constitutional, regulatory, or treaty interpretation techniques.

Llewellyn's argument about interpretive techniques was seized upon by some CLS authors in the 1980s and expanded into another radical critique of legal reasoning.⁶³ Llewellyn's cagey claim was that indeterminacy existed "in any case doubtful enough to make litigation respectable."⁶⁴ The implication was that there exist many cases for which the relevant legal authorities and legitimate methods of legal interpretation do provide a single correct answer, namely those cases for which litigation is not respectable.⁶⁵ But for some CLS authors, there was no universe of cases or legal disputes for which existing legal premises could determine a single correct outcome; the malleability of interpretation, on this radical account, renders all legal disputes indeterminate.⁶⁶ Any authority can be made to yield any holding because there is no rational limit to the spin lawyers and judges can put on pre-existing rules. As Mark Tushnet once put it, "the acceptable techniques of legal reasoning—distinguishing on the basis of the facts, analogizing to other areas of law where cognate problems arise, and the like—are so flexible that they allow us to assemble diverse precedents into whatever pattern we choose."⁶⁷

Once again, then, there is a split between a moderate version and a radical version of indeterminacy. For Llewellyn and other moderates, some legal rules relevant to some legal cases are vulnerable to equally legitimate and conflicting interpretations due to the multiplicity of legitimate interpretive techniques. But for moderates, how

63. See Gordon, *supra* note 43, at 197 (describing CLS rediscovery of and radicalization of Legal Realist approaches to law).

64. Llewellyn, *Some Realism About Realism*, *supra* note 2, at 1239.

65. See, e.g., Schauer, *Easy Cases*, *supra* note 54, at 410-11.

66. See generally MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

67. See *id.* Duncan Kennedy has argued that there simply is no such thing as a distinctive mode of legal reasoning. "Teachers teach nonsense," he wrote, "when they persuade students that legal reasoning is distinct as a method for reaching correct results from ethical or political discourse in general." Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 598 (1982) [hereinafter Kennedy, *Legal Education*].

many cases actually are indeterminate due to the existence of conflicting modes of interpretation is, in principle, an empirical question. One has to actually reason through the universe of cases to see which ones are amenable to multiple conflicting answers and which ones are amenable to only a single correct legal answer. For radicals, on the other hand, all legal rules are vulnerable to multiple and conflicting interpretations in every case, and thus every case can generate multiple and conflicting resolutions.

D. *Arriving at Moderate Indeterminacy*

The above tour of the indeterminacy debate does not purport to exhaust the topic, but rather to describe the strongest sets of arguments in favor of legal indeterminacy and to delineate moderate indeterminacy from radical indeterminacy. Based on my descriptions, it should come as no surprise that I think the moderate versions of all three major arguments for indeterminacy are persuasive, while the radical versions of those arguments are not. More tellingly, when one reviews the state of the debate on indeterminacy, there is a striking congruence of views around the moderate versions of indeterminacy. Both those who pose as defenders of determinacy and those who pose as proponents of indeterminacy converge on moderate indeterminacy.⁶⁸ Where they differ, of course, is in their assessment of how marginal or how pervasive the phenomenon of indeterminacy actually is in the American legal system.

From CLS authors, like Duncan Kennedy, one now hears that “[j]udges are, to a significant extent, practically ‘bound’ by law and often, often, often declare and apply rules that they would never vote for if they were legislators.”⁶⁹ John William Singer, in one of the most cited CLS articles, wrote that “[i]t is easy to create completely

68. Brian Tamanaha makes a similar point about the broad consensus of views among judges and jurists with respect to realism and formalism. TAMANAHA, *supra* note 26, at 186-87.

69. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 275 (1997).

determinate legal rules and arguments.”⁷⁰ Of course, Kennedy and Singer continue to argue that the scope of indeterminacy in our legal system is, in fact, quite pervasive for the reasons detailed above.⁷¹ But they do not appear to be arguing that indeterminacy is a global or necessary feature of legal systems in general or of the American legal system in particular.

On the other side, those who have most vociferously criticized global indeterminacy—Owen Fiss, Frederick Schauer, Andrew Altman, Brian Leiter, Ken Kress, Larry Solum, and others—all admit that the law is sometimes indeterminate. Owen Fiss, for example, argues that judges are “constrained in their judgment” by the “disciplining rules” of the institutionally rooted practice of judging.⁷² But he freely admits that the law and associated disciplining rules “constrain, not determine, judgment.”⁷³ Frederick Schauer has done more than anyone to intellectually revive the reputation of (a certain kind of) formalism and to argue against the thesis of global legal indeterminacy.⁷⁴ Yet he too unashamedly agrees with H.L.A. Hart’s view that, because of the open texture of words and concepts, legal norms have both uncontroversial core application and indeterminate fringe applications.⁷⁵ Thus, he is comfortable with the idea that “cases at the margin” exist for which more than one resolution is legitimate.⁷⁶ Andrew Altman wrote a book-

70. Singer, *supra* note 11, at 11.

71. See, e.g., *id.* at 14 (“Legal doctrine is far more indeterminate than traditional theorists realize it is. If traditional legal theorists are correct about the importance of determinacy to the rule of law, then—by their own criteria—the rule of law has never existed anywhere. This is the real bite of the critique.”).

72. Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 11 (1986).

73. *Id.*

74. See, e.g., Schauer, *Formalism*, *supra* note 34.

75. *Id.* at 514.

76. Schauer, *Easy Cases*, *supra* note 54, at 423. Schauer, of course, maintains that “cases at the margin are but a small percentage of the full domain of legal events.” *Id.* And he takes pains to emphasize that, even in such marginal cases, legal language “drastically reduces the field of possible solutions, even if it never reduces that field to one.” *Id.* at 427.

length critique of CLS, including a critique of what he called radical indeterminacy, but he admits the reality of “moderate” legal indeterminacy, all the while arguing that it does not undermine the foundations of legal liberalism.⁷⁷ Brian Leiter has written several scathing attacks on “global indeterminacy” but writes sympathetically about both Hart’s moderate linguistic argument for indeterminacy⁷⁸ and Llewellyn’s moderate interpretive argument for indeterminacy.⁷⁹ Ken Kress and Larry Solum take the same tack—arguing forcefully against radical indeterminacy while admitting that law is moderately indeterminate or, in Solum’s phrase, underdeterminate.⁸⁰ Brian Tamanaha argues that almost all influential legal thinkers of the past century and a half have converged on what he calls “balanced realism”—the recognition that legal rules can rationally determine a single correct answer in many cases, but fail to do so in many other cases.⁸¹ As far as I can tell, no

77. ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* 20, 48 (1990) (describing “theoretical premises” of moderate wing of CLS as “basically sound” and admitting that “there are a number of potential sources of legal indeterminacy in the system and . . . indeterminacy is a significant phenomenon in our legal culture.”).

78. LEITER, *Legal Realism and Legal Positivism Reconsidered*, *supra* note 2, at 74 (“I think we can agree with Hart (and I would venture, with common-sense) that legal rules must necessarily be indeterminate in some measure given the indeterminacy of language itself, and that this type of indeterminacy resides ‘at the margin of rules.’”); *see also* Brian Leiter, *Legal Indeterminacy*, 1 *LEGAL THEORY* 481, 488 (1995) [hereinafter Leiter, *Legal Indeterminacy*] (arguing that attacks on “global indeterminacy” do nothing to disprove “local rational indeterminacy”).

79. LEITER, *Legal Realism and Legal Positivism Reconsidered*, *supra* note 2, at 75-76 (“Note that . . . the Realists have now given us an *additional* reason (beyond Hart’s) to expect indeterminacy in law.”).

80. Kenneth Kress, *Legal Indeterminacy*, 77 *CALIF. L. REV.* 283, 283 (1989) (“I defend the claim that the indeterminacy [of law] is no more than moderate and reject critical legal scholars’ arguments for radical indeterminacy.”); Solum, *On the Indeterminacy Crisis*, *supra* note 48, at 503 (admitting the existence of “underdeterminacy,” defined as the view that some cases lack a uniquely correct legal resolution, while rejecting “indeterminacy” defined as the view that legal rules fail to constrain decisionmaking at all).

81. TAMANAHA, *supra* note 26, at 186 (“Beneath the attacks on sham opponents that infect the discussion, a balanced realism is what most jurists have been saying about judging all along.”).

contemporary legal theorist, apart from the late Ronald Dworkin, has affirmatively argued for the global determinacy of law.⁸²

Many of these authors distinguish between easy cases and hard cases on this basis. Easy cases are those for which a single correct legal answer is rationally determinable by existing legal authorities and legitimate interpretive techniques.⁸³ Hard cases are those for which there is no single correct legal answer rationally dictated by legal authorities and legitimate interpretive techniques.⁸⁴ The debates among these authors are really about the relative size of the class of hard cases and easy cases.

In sum, a large and diverse class of theorists has converged on the thesis of moderate legal indeterminacy. Moderate legal indeterminacy holds that there are some legal questions, deemed “hard cases,” for which the law fails to provide a uniquely correct answer because in such cases, (a) the semantic meaning of the relevant words of the applicable legal authority are genuinely open-textured, (b) the applicable legal authorities are multiple and conflicting, and/or (c) the legitimate legal interpretive techniques that can be applied to the relevant legal authority are multiple and conflicting when applied to the case at hand. According to moderate indeterminacy, the indeterminacy that exists in our legal system is not a necessary feature of all law, but is

82. Dworkin, *No Right Answer?*, *supra* note 25, at 84 (“For all practical purposes, there will always be a right answer in the seamless web of our law.”).

83. See William Lucy, *Adjudication*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 206, 208-20 (Jules Coleman & Scott Shapiro eds., 2002) (describing various articulations of the difference between easy cases and hard cases and related debates). Note that easy cases are not necessarily easy, trouble-free, or painless to solve; their resolution may require significant legal skill and effort to identify the correct legal authorities and then to interpret and apply them correctly.

84. Some commentators have noted that another source of indeterminacy in law—and thus another reason for the existences of hard cases—comes from the multiple legitimate ways that exist to characterize the legally significant facts of a case. See LEITER, *A Note on Legal Indeterminacy*, *supra* note 23, at 9. Simply put, the facts of a case may be amenable to different but equally legitimate descriptions, which will in turn trigger the application of different rules or different interpretive techniques.

an empirical fact about our legal system—and presumably of any legal system of sufficient complexity. Moreover, the existence of indeterminate “hard cases” does not mean that law is globally indeterminate; to the contrary, moderate indeterminacy accepts that in some significant number of cases, the relevant legal authorities and relevant legal conventions do, in fact, determine a single correct outcome. There are, in other words, “easy cases.” What really divides legal theorists then is their estimate of the ratio of easy cases to hard cases. Traditionalists suspect that most cases are easy, while skeptics suspect that most cases are hard. Either way, there is broad agreement that some cases are truly indeterminate; some cases have no single correct answer.

II. VALUE PLURALISM

Over the past half-century, value pluralism has become the locus of significant debate across a range of disciplines, including law,⁸⁵ moral philosophy,⁸⁶ economics,⁸⁷ and

85. See, e.g., Gregory S. Alexander, *Pluralism and Property*, 80 *FORDHAM L. REV.* 1017 (2011) (arguing for a value pluralist view of social obligation property theory); Larry Alexander, *Introduction to the 2009 Editors' Symposium: Isaiah Berlin, Value Pluralism, and the Law*, 47 *SAN DIEGO L. REV.* 753 (2009) (introducing 10-essay symposium issue on the theme of Isaiah Berlin, value pluralism, and the law); Hanoeh Dagan, *Pluralism and Perfectionism in Private Law*, 112 *COLUM. L. REV.* 1409 (2012) (calling for theoretical approaches to private law that take into account value pluralism); Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 *GEO. MASON L. REV.* 329 (2007) (arguing that Isaiah Berlin's theory of value pluralism provides “an excellent framework” for thinking about tort law rationales); Robert D. Sloane, *Human Rights for Hedgehogs?: Global Value Pluralism, International Law, and Some Reservations of the Fox*, 90 *B.U. L. REV.* 975 (2010) (arguing that value pluralism offers a better basis for thinking about international human rights law than monism); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 *MICH. L. REV.* 779 (1994) (analyzing implication of value pluralism for various legal and policy issues); Leon Trakman, *Pluralism in Contract Law*, 58 *BUFF. L. REV.* 1031 (2010) (explicating a value pluralist approach to contract law).

86. See, e.g., *INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON*, *supra* note 5.

87. See, e.g., ANDERSON, *supra* note 6, at 55-59.

political theory.⁸⁸ And though the recent academic literature on value pluralism is itself diverse, complex, and increasingly technical, much of it can be traced back to the writings of Isaiah Berlin. Probably more than any other person, Berlin deserves credit for drawing attention to value pluralism as a distinct normative position and for articulating its main contours.⁸⁹ And it is primarily Berlin's version of value pluralism that I will describe here.

Berlin never wrote a dedicated argument or defense of value pluralism.⁹⁰ His vision of value pluralism, like much of his substantive philosophy, came out obliquely in a variety of essays he wrote primarily on the history of ideas. Berlin traced back the idea of value pluralism to the Renaissance figure Niccolò Machiavelli and to the Counter-Enlightenment writers Johann Gottfried von Herder and Giambattista Vico, among others.⁹¹ And through Berlin's

88. See, e.g., George Crowder, *Pluralism and Liberalism*, 42 POL. STUD. 293 (1994).

89. See Robinette, *supra* note 85, at 330 ("Perhaps no thinker is as closely identified with the concept of pluralism as the late English philosopher, Sir Isaiah Berlin."). This is not to say that all or even most contemporary value pluralists would sign on to all of Berlin's thoughts on value pluralism. But it was Berlin's articulation of value pluralism that sparked scholarly interest in the subject. See Maimon Schwarzschild, *Pluralism, Conversation, and Judicial Restraint*, 95 NW. U. L. REV. 961, 966 (2001) (noting that value pluralism is today "most closely identified with the work of Sir Isaiah Berlin").

90. The closest any of his essays comes to an explicit defense or argument in favor of value pluralism is his short 1968 essay *On the Pursuit of the Ideal*. Berlin, *On the Pursuit of the Ideal*, *supra* note 1.

91. See ISAIAH BERLIN, *The Originality of Machiavelli*, in AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS 25, 68 (Henry Hardy ed., 1979) [hereinafter BERLIN, *The Originality of Machiavelli*]; ISAIAH BERLIN, THREE CRITICS OF THE ENLIGHTENMENT: VICO, HAMANN, HERDER 176-77 (Henry Hardy ed., 2000); ISAIAH BERLIN, *Vico and the Ideal of Enlightenment*, in AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS 120, 128-29. Berlin was particularly interested in European and Russian intellectuals who resisted the universalism and rationalism of the Enlightenment and instead reveled in the particularist, organic, and contingent aspects of human life. Berlin was not himself in any sense a foe of the Enlightenment or rational thinking, but he saw in Counter-Enlightenment thinkers a valid recognition of the excesses of rationalism and universalism and the powerful appeal of the particular and communal. ISAIAH BERLIN & RAMIN JAHANBEGLOO, CONVERSATIONS WITH ISAIAH BERLIN 70-71 (1991) ("I am interested in the views of the opposition [to the Enlightenment],

discussion of these thinkers and others, a clear picture of Berlin's own value pluralism emerged. In this Part, I will describe the major outlines of Berlin's value pluralism, including some particular implications of, and ambiguities in, his view.

A. *Berlin's Vision*

Berlin argued that the traditional philosophical project of determining the ultimate good, the ultimate value, in human life was bound to fail—not because there is no such thing as an ultimate good (a good in and of itself), but because there are multiple ultimate goods and not only one.⁹² On this account, the ultimate ends of human life are irreducibly plural. We value—and we are right to value—a number of goods: e.g., “liberty *and* equality, spontaneity *and* security, happiness *and* knowledge, mercy *and* justice.”⁹³ And these are all intrinsic goods, goods in their own right, not goods instrumental to some other good. There is no single meta-value to which each of these values can be reduced.⁹⁴ Nor is there any common scale or metric by which we can rank or measure or weigh these goods against one another. There is, colloquially speaking, no common currency of value making cross-value trade-offs and comparisons possible.⁹⁵ When confronted with two distinct ultimate goods, such as liberty and equality, we cannot say that one is of greater value than the other, that one is of

because . . . clever and gifted enemies often pinpoint fallacies or shallow analyses in the thought of the Enlightenment . . . and exposed [some of its political implications] as inadequate and, at times, disastrous.”)

92. Berlin, *My Intellectual Path*, *supra* note 12, at 11 (“I came to the conclusion that there is a plurality of ideals . . .”).

93. *Id.* at 23 (emphasis added).

94. See ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 171 (1970) [hereinafter BERLIN, *Two Concepts of Liberty*] (“To assume that all values can be graded on one scale . . . seems to me to falsify our knowledge that men are free agents . . .”).

95. One cannot say, for instance, that x amount of liberty is greater or lesser or equal to y amount of equality.

lesser value than the other, *or* that they are of equal value.⁹⁶ If they are truly distinct ultimate goods, one simply cannot make the relative comparison. There is no hierarchy or transitive relation between them. In this sense, our ultimate values are incommensurable.⁹⁷

Incommensurability matters to our moral lives because ultimate values are not all compatible with each other; they do not all hang together in a harmonious whole.⁹⁸ Precisely because they are irreducibly distinct, ultimate values sometimes come into conflict, forcing individual and public decisionmakers to choose between these incommensurable goods.⁹⁹ True moral dilemmas are those in which the individual or a group must choose between two (or more) incommensurable goods. No algorithm or mechanical decision procedure is even theoretically possible when facing such a choice, for there is simply no way to quantify or rank the distinct goods at stake. By way of contrast, a utilitarian faced with a difficult choice could and would always ask herself which choice would maximize happiness, even knowing that precise quantification may not be possible. On Berlin's value pluralist view, however, there is no single value such as happiness that can function either as the one *summum bonum* (highest good) or even as a tool by which to measure other goods. In such cases, the individual or group must ultimately make a "radical choice" between the available ultimate ends.¹⁰⁰

96. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 322 (1986) [hereinafter RAZ, *THE MORALITY OF FREEDOM*] ("A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value.").

97. In the philosophical literature, there is an important ongoing debate about what incommensurability means and in particular whether it implies incomparability. Compare *id.* (using incommensurability and incompatibility interchangeably), with Ruth Chang, *Introduction* to *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON*, *supra* note 5 (distinguishing sharply between the two concepts of incommensurability and incompatibility).

98. As Berlin wrote, "Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience." BERLIN, *Two Concepts of Liberty*, *supra* note 94, at 125.

99. *Id.* at 167 ("[C]onflicts of values may be an intrinsic, irremovable element of human life.").

100. See GRAY, *supra* note 19, at 23.

According to Berlin, true moral dilemmas are tragic because they inevitably result in the eclipse or sacrifice of one ultimate value in favor of another.¹⁰¹ Because the values are ultimate and incommensurable, the loss of one good is not—cannot be—made up for by the realization of the other.¹⁰² There is no justification or vindication of a radical choice. Moral dilemmas are tragic, then, not because one may make the wrong choice, but because *whichever choice one makes, some ultimate good is lost or sacrificed*. The word sacrifice here, it should be clear, does not imply that the value sacrificed was worth less than the value realized. The sacrifice in a tragic choice is not an instrumental price one has to pay for a higher good.¹⁰³ Berlin's point is that choices are tragic precisely when there is no higher good or lower good, but rather conflicting and incommensurable ultimate goods.¹⁰⁴ In a tragic choice, there is real and unjustifiable loss no matter which good is ultimately chosen; the realization of the chosen good does not in any sense *redeem* the loss.¹⁰⁵ Inevitable and irredeemable loss is what makes tragic choices tragic.

While Berlin never fully worked out his vision of value pluralism as a comprehensive meta-ethical theory—thus leaving himself open to many of the criticisms discussed below—he was quite clear about the view of ethical life he was criticizing: namely, monism.¹⁰⁶ Ethical monism, for Berlin, was the belief (really, the illusion) that all moral

101. See BERLIN, *Two Concepts of Liberty*, *supra* note 94, at 169 (“If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict—and of tragedy—can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.”).

102. *Id.* at 125.

103. *Id.* at 125.

104. *Id.* at 168-69.

105. *Id.* at 125 (“[A] sacrifice is not an increase in what is being sacrificed . . .”).

106. BERLIN, *My Intellectual Path*, *supra* note 12, at 14 (“The enemy of pluralism is monism – the ancient belief that there is a single harmony of truths into which everything, if it is genuine, in the end must fit.”).

questions have a single correct answer, that we can eventually come to know these right answers, and that these right answers all cohere with one another.¹⁰⁷ The monist moral universe is harmonious, intelligible, and ultimately unitary.¹⁰⁸ Berlin rejected each element of monism as false and, moreover, argued that monism (conscious or not) leads in practice to inhuman results.¹⁰⁹ Those who believe that there is one ultimate value, he suggested, are less constrained in sacrificing other values in their quest to realize the one ultimate good.¹¹⁰

107. *Id.* at 5; see also Joshua Cherniss & Henry Hardy, *Isaiah Berlin*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY Ch. 4.1 (May 25, 2010), <http://plato.stanford.edu/archives/fall2010/entries/berlin>.

108. Note here how closely ethical monism resembles Langdellian formalism: There is one right answer to each question, we can know the answer, and all of the answers hang together in a coherent system. See KRONMAN, *THE LOST LAWYER*, *supra* note 49, at 174.

109. See BERLIN, *Two Concepts of Liberty*, *supra* note 94, at 171 (arguing that pluralism is “more humane” than monism because pluralism, unlike monism, “does not . . . deprive men, in the name of some remote, or incoherent, ideal, of much that they have found to be indispensable to their life as unpredictably self-transforming human beings”).

110. *Id.* at 167. Berlin was, of course, most concerned with monism in politics and characterized monism as the heart of totalitarianism. Those who seek utopia, he believed, would be willing to pay any moral price to get there, for after all, the achievement of utopia would redeem the means. “[Monism] is responsible for the slaughter of individuals on the altars of the great historical ideals—justice or progress or happiness of future generations, or the sacred mission or emancipation of a nation or race or class, or even liberty itself . . .” *Id.* Berlin made the point even more starkly in *On the Pursuit of the Ideal*:

The possibility of a final solution – even if we forget the terrible sense that these words acquired in Hitler’s day – turns out to be an illusion; and a very dangerous one. For if one really believes that such a solution is possible, then surely no cost would be too high to obtain it: to make mankind just and happy and creative and harmonious for ever – what could be too high a price to pay for that? To make such an omelette, there is surely no limit to the number of eggs that should be broken – that was the faith of Lenin, of Trotsky, of Mao, for all I know, of Pol Pot. Since I know the only true path to the ultimate solution of the problem of society, I know which way to drive the human caravan; and since you are ignorant of what I know, you cannot be allowed to have liberty of choice even within the narrowest limits, if the goal is to be reached.

Berlin, *On the Pursuit of the Ideal*, *supra* note 1, at 16.

Berlin criticized utilitarianism's focus on a single value (happiness) and on a single ultimate standard of conduct (maximize happiness) both because utilitarianism fails to capture the irreducible plurality of ultimate values and because, he argued, it would lead utilitarians to disregard, indeed to trample on, ultimate values outside their narrow calculus with morally catastrophic results.¹¹¹ Berlin was, of course, hardly alone in criticizing utilitarianism for its potential to justify immoral means in the pursuit of maximizing ends.¹¹² The key point of Berlin's pluralist critique of utilitarianism was that the latter fails to take into account values other than happiness (or utility, however defined).¹¹³ This fundamental error in moral ontology leads utilitarians to misconceive of moral deliberation as essentially a form of calculus or computation. Berlin's pluralism was equally critical of any monistic normative theory, be it the Kantian insistence on a categorical imperative or the Aristotelian theory of the "unity of the virtues."¹¹⁴ It was Berlin's rejection of these major traditions of Western meta-ethics—and the monist project in its entirety—that makes him a radical thinker.¹¹⁵

111. For a discussion of Berlin's criticisms of utilitarianism in an unpublished essay called "Utilitarianism," see JOSHUA L. CHERNISS, *A MIND AND ITS TIME: THE DEVELOPMENT OF ISAIAH BERLIN'S POLITICAL THOUGHT* 10 (2013), and see also URSULA K. LE GUIN, *The Ones Who Walk Away from Omelas*, in *THE WIND'S TWELVE QUARTERS* 275, 282 (1975) (story of utopian town whose good fortune requires torture of one unlucky child).

112. See, e.g., J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 77-150 (1973) (Williams's criticisms of utilitarianism).

113. Or, to put it another way, utilitarianism falsely holds that all values can be reduced ultimately to happiness.

114. See GRAY, *supra* note 19, at 43. For discussion of Ancient Greek philosophical views on the unity of the virtues, see Edward Halper, *The Unity of the Virtues in Aristotle*, 17 *OXFORD STUD. IN ANCIENT PHIL.* 115, 115 (David Sedley ed., 1999); Terry Penner, *The Unity of Virtue*, 82 *PHIL. REV.* 35 (1973).

115. See GRAY, *supra* note 19, at 43 ("Berlin rejects this foundational Western commitment. He denies that genuine goods, or authentic virtues, are, necessarily, or as a matter of fact, such that peaceful coexistence among them is a possible state of human life."). To call Berlin radical strikes some people as counter-intuitive because he cultivated an air of respectability and, indeed, often defended the status quo Anglo-American small-l liberalism. I agree with John Gray, however, that Berlin's pluralism (even if not wholly original) marked

Berlin's dedication to moral pluralism should not, however, be misinterpreted as an endorsement of subjectivism or relativism.¹¹⁶ Berlin never argued that moral evaluation is impossible across the board or that all asserted values are as good as any other. For Berlin, the ultimate ends of human life are multiple, but finite.¹¹⁷ There is a common "human horizon" of ultimate values that makes moral communication possible and moral praise and condemnation credible.¹¹⁸ Some ends that people espouse—e.g., racial supremacy—are not in fact real human values at all.¹¹⁹ And some goods that people seek are valuable only instrumentally—material wealth, for instance. Still other values are, in fact, reducible or describable in terms of more fundamental ends. Value pluralism is not a license to moral apathy or indifference; some courses of action are morally better than others, and thinking through moral choices can help us identify better and worse options. Value pluralism is not meant to short-circuit genuine reflection when faced with difficult choices. Indeed, reflection and deliberation are necessary to determine as a threshold matter whether one in fact faces a true moral dilemma or not, for on Berlin's account, not every choice is a tragic choice.¹²⁰ Sometimes,

him as a radical thinker vis-à-vis the conventional ethical theories of his day. *See id.*

116. BERLIN, *My Intellectual Path*, *supra* note 12, at 11 ("I am not a relativist."). For a contrary reading of Berlin, one arguing that his value pluralism is ultimately indistinguishable from ethical relativism, see Leo Strauss, "Relativism," in *RELATIVISM AND THE STUDY OF MAN* (Helmut Schoeck and James W. Wiggins eds., 1961).

117. Berlin, *On the Pursuit of the Ideal*, *supra* note 1, at 15.

118. *Id.* ("Ends, moral principles, are many. But not infinitely many: they must be within the human horizon. If they are not, then they are outside the human sphere.")

119. *See* BERLIN, *My Intellectual Path*, *supra* note 12, at 11 ("I do not say 'I like my coffee with milk and you like it without; I am in favour of kindness and you prefer concentration camps . . .'").

120. Berlin, *On the Pursuit of the Ideal*, *supra* note 1, at 16 ("It is true that some problems can be solved, some ills cured, in both the individual and social life.")

there is one right answer.¹²¹ In short, Berlin's value pluralism is consistent with a view that morality is objective and that there is a finite core set of values common to all of humanity, despite difference in their manifestations across cultures and time.¹²² Berlin referred to his own view as "objective pluralism."¹²³

Crucially, Berlin believed that communication about values was possible even among those who made different moral choices. Although ultimate values are incommensurable, and there is no common currency between them, human beings are capable of understanding and assessing the value choices of others, even of foreign or historical cultures.¹²⁴ Respecting pluralism at the individual or social level does not entail blanket non-judgmentalism, according to Berlin.¹²⁵ Rather, respecting pluralism entails recognizing the variety, but not the infinity, of legitimate choices available to individuals and groups navigating the world.¹²⁶ Thus, even those who disagree about a particular

121. *See id.* Note the parallel to moderate indeterminacy in law: some cases and dilemmas lack a single correct answer, but some cases and dilemmas do have a single correct answer.

122. BERLIN, *My Intellectual Path*, *supra* note 12, at 12 ("I think these values are objective – that is to say, their nature, the pursuit of them, is part of what it is to be a human being, and this is an objective given.").

123. Henry Hardy, *Berlin's Big Idea*, PHILOSOPHERS' MAG., Summer 2000, at 15-16 ("That is why Berlin himself sometimes described his view as 'objective pluralism', to make clear that it occupied a genuine third position between monism and relativism.").

124. Berlin, *On the Pursuit of the Ideal*, *supra* note 1, at 15. Berlin stated:

I am not blind to what the Greeks valued – their values may not be mine, but I can grasp what it would be like to live by their light, I can admire and respect them, and even imagine myself as pursuing them, although I do not – and do not wish to, and perhaps could not if I wished.

Id. Such mutual understanding also made Berlin's brand of intellectual history possible.

125. BERLIN, *My Intellectual Path*, *supra* note 12, at 11-12 ("I do not say 'I like my coffee with milk and you like it without; I am in favour of kindness and you prefer concentration camps' – each of us with his own values I find Nazi values detestable . . .").

126. *Id.* at 12 ("I do believe that there is a plurality of values which men can and do seek, and that these values differ. There is not an infinity of them . . .").

choice between legitimate ultimate ends—e.g., between liberty and security—can understand the concerns and claims of the other as legitimate moral claims.¹²⁷ The moral stakes will be mutually intelligible. We may not choose to follow the way somebody else, or some other society, prioritizes ultimate values, but Berlin argues that our common “human horizon” allows us to understand the legitimate moral motivations at play on the other side.¹²⁸ Indeed, we may even come to change our own moral or political choices through exposure to, or communication with, other moral agents and other ways of life.

It bears emphasizing in this Article that Berlin’s insistence on plural values comes primarily in the context of political and social choices, not only in personal ethical decisions.¹²⁹ In fact, Berlin located the emergence of value pluralism as a distinctive idea in Niccolo Machiavelli’s political treatise *The Prince*.¹³⁰ Machiavelli’s key insight, according to Berlin, was in recognizing the irreconcilability between Christian morality and the values of prudent statecraft.¹³¹ On Berlin’s account, Machiavelli did not argue that one set of morals was better than another, only that they could not both be realized together, and a political leader must choose between them.¹³² Likewise, Berlin’s first sustained discussion of value pluralism comes in his celebrated essay, *Two Concepts of Liberty*, and it is

127. *Id.* at 12-13 (“[O]f course, if I pursue one set of values I may detest another . . . I may even – in extreme cases – have to go to war against it. But I still recognise it as a human pursuit.”).

128. Berlin, *On the Pursuit of the Ideal*, *supra* note 1, at 15. Of course, Berlin’s version of objective pluralism also authorizes us to criticize and condemn other people and other societies when they stray from genuine ultimate values. And vice versa.

129. Berlin conceived of political theory as a branch of moral philosophy. BERLIN, *Two Concepts of Liberty*, *supra* note 94, at 120 (“[P]olitical theory is a branch of moral philosophy . . .”).

130. BERLIN, *The Originality of Machiavelli*, *supra* note 91, at 68 (arguing that it was “Machiavelli who lit the fatal fuse” of the pluralist revolt against monism).

131. *Id.* at 71.

132. *Id.* at 75.

explicitly about the irreducible multiplicity of political values.¹³³ Although that essay is often misread as a brief in favor of negative liberty above other values, Berlin writes that “neither political equality nor efficient organization nor social justice is compatible with more than a modicum of individual liberty, and certainly not with unrestricted *laissez-faire*.”¹³⁴ The thrust of Berlin’s argument is not that negative liberty is the *only* value worth respecting in public life, but rather that negative liberty should not be subsumed into, or confused with, other legitimate political values—values like equality, efficiency, or social justice.¹³⁵ Berlin’s chief target in *Two Concepts* was political ideology such as scientific Marxism that purported to resolve once and for all the ends of social life and turn politics into a technical process of achieving a preordained end.¹³⁶ Berlin’s defense of liberalism rested chiefly on liberalism’s acceptance that disagreement about ends forms a natural part of human and political life.¹³⁷ Liberalism’s virtue, according to Berlin, is that it seeks to manage disagreements about values in a peaceful manner and affords individuals a considerable zone of freedom within which to make choices about their ends; it does not dream of any “final solution”¹³⁸ to value conflicts.¹³⁹

133. See BERLIN, *Two Concepts of Liberty*, *supra* note 94, at 118.

134. *Id.* at 167.

135. *Id.*

136. *Id.* at 118.

137. *Id.* at 171-72.

138. Berlin, *On the Pursuit of the Ideal*, *supra* note 1, at 16 (“[T]he very notion of a final solution is not only impracticable but, if I am right, and some values cannot but clash, incoherent also.”).

139. BERLIN, *The Originality of Machiavelli*, *supra* note 91, at 171-72. Berlin’s thoughts on the relationship between value pluralism and political liberalism have sparked considerable debate. Compare GRAY, *supra* note 19, at 141-68 (arguing against any necessary connection between pluralism and liberalism), with WILLIAM A. GALSTON, LIBERAL PLURALISM 48-64 (2002) (defending Berlin’s argument of a connection between pluralism and liberalism), and GEORGE CROWDER, ISAAH BERLIN: LIBERTY AND PLURALISM (2004) (same).

B. *Ambiguities and Criticisms*

As Berlin's thesis of value pluralism has become the object of academic study over the past two or three decades, scholars have pointed to a number of ambiguities and perceived shortcomings in his account.¹⁴⁰ Berlin's vision of pluralism is clear in its outlines, but leaves many key details blank or ambiguous. Most obviously, Berlin never filled in his portrait of pluralism with a conclusive list of ultimate values. Though Berlin identified a number of core human values, such as equality and liberty, among others, he never tried to provide anything like a definitive pantheon of ultimate values.¹⁴¹ This gap in Berlin's theory is troubling if one wants it to serve as a comprehensive account of human morality, but it was never Berlin's aim to provide a fully elaborated substantive theory of ultimate human goods. Nor is such detail necessary to make the case that ultimate human values are diverse, incommensurable, and not always harmonious.

Scholars have also considered Berlin's views about the *objectivity* of ultimate values. It is unclear whether Berlin believed that values can be derived from some universal feature(s) of human nature or human experience or if they are simply human-created and artificial but nevertheless gain objectivity due to near-universal allegiance.¹⁴² At times, Berlin suggested that there is a "common horizon"¹⁴³ of

140. For a taste of these debates, see THE LEGACY OF ISAIAH BERLIN (Ronald Dworkin et al. eds., 2001).

141. Berlin wrote regarding values: "There is not an infinity of them: the number of human values . . . is finite – let us say 74, or perhaps 122, or 26, but finite, whatever it may be." BERLIN, *My Intellectual Path*, *supra* note 12, at 12; *cf.* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 85-90 (1980) (describing a finite list of "basic forms of human good" from a natural law perspective); JOHN RAWLS, A THEORY OF JUSTICE 433 (1971) [hereinafter RAWLS, A THEORY OF JUSTICE] (describing "liberty and opportunity, income and wealth, and above all self-respect" as the "primary goods . . . necessary for the framing and the execution of a rational plan of life").

142. GRAY, *supra* note 19, at 66-70 (discussing ambiguities in Berlin's account of human nature and its relation to ultimate values). Berlin's agnosticism seems to preclude any commitment to a divine or supernatural source of morality.

143. BERLIN & JAHANBEGLOO, *supra* note 91, at 108.

human experience that gives rise to common human ends,¹⁴⁴ but at other points, he appeared sympathetic to the view that there is no stable human nature and only a collection of different ways of being human.¹⁴⁵ Berlin specialists and metaphysicians may find these questions pressing, but for our purposes, it matters very little exactly what Berlin's views were on the mutability of human nature or the nature of moral objectivity.

The key is to distinguish Berlin's pluralism from moral nihilism or relativism, for Berlin was clearly a moral realist of some kind—for him, values really exist¹⁴⁶—and rejected the idea that ultimate values were relative to only a particular person or culture.¹⁴⁷ Berlin believed, contra relativists, that genuine moral disagreement and communication between individuals and peoples was possible. Moral disagreement is not just a question of differing tastes—I like chocolate; you like vanilla; there is

144. ISAIAH BERLIN, CONCEPTS AND CATEGORIES 164-65 (Henry Hardy ed., 1978) [hereinafter BERLIN, CONCEPTS AND CATEGORIES] (“[T]here exist central features of our experience that are invariant and omnipresent, or at least much less variable than the vast variety of its empirical characteristics”); BERLIN, *My Intellectual Path*, *supra* note 12, at 12 (“I think these values are objective – that is to say, their nature, the pursuit of them, is part of what it is to be a human being, and this is an objective given.”); BERLIN, *On the Pursuit of the Ideal*, *supra* note 1, at 15 (“There is a world of objective values.”).

145. John Gray argued that Berlin paradoxically located human nature precisely in man's capacity for self-creation and choice-making, a capacity which inevitably results in great diversity. GRAY, *supra* note 19, at 71-74.

146. BERLIN, *My Intellectual Path*, *supra* note 12, at 12 (“The fact that men are men and women are women and not dogs or cats or tables or chairs is an objective fact; and part of this objective fact is that there are certain values, and only those values, which men, while remaining men, can pursue.”). Berlin was both a value pluralist and an ethical realist, but it is certainly possible to be a value pluralist and a non-realist about value. See Elinor Mason, *Value Pluralism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jul. 29, 2011), <http://plato.stanford.edu/archives/fall2011/entries/value-pluralism> (“One could be a pluralist and an objectivist or realist, and one could also be a pluralist and a non-realist. The question about whether values are plural or monist is a question about the shape of morality—in particular, about how many values moral theory must deal with.”).

147. BERLIN, *My Intellectual Path*, *supra* note 12, at 11 (“I am not a relativist.”). On the other hand, Berlin did believe that some values are confined to only a certain time and society—e.g., sincerity. See *id.* at 13.

nothing more to say¹⁴⁸—for that is not a disagreement at all. For Berlin, there is some common plain of morality upon which people can come to affirm, discuss, and fight over values.¹⁴⁹ The realm of values is not something idiosyncratic to a particular individual or society. Rather, some things have real value for human beings, and others do not—not just relatively speaking, but objectively.¹⁵⁰ Even if it turns out (as it does) that some moral questions have multiple right answers, Berlin believed, human beings can still intelligently deliberate with each other about moral questions and seek right answers. The fact that ultimate values—and thus right answers to specific questions—are plural does not mean that they are infinite.¹⁵¹ “All human beings must have some common values,” Berlin wrote, “or they cease to be human, and also some different values else they cease to differ, as in fact they do.”¹⁵²

148. Berlin expressly rejected moral relativism. *See id.* at 10-11; *see also* BERLIN, *On the Pursuit of the Ideal*, *supra* note 1, at 14 (rejecting “I prefer coffee, you prefer champagne” as a description of his pluralism).

149. Berlin expounded on this theme:

Members of one culture can, by the force of imaginative insight, understand (what Vico called *entrare*) the values, the ideals, the forms of life of another culture or society, even those remote in time or space. They may find these values unacceptable, but if they open their minds sufficiently they can grasp how one might be a full human being, with whom one could communicate, and at the same time live in the light of values widely different from one’s own, but which nevertheless one can see to be values, ends of life, by the realization of which men could be fulfilled.

BERLIN, *On the Pursuit of the Ideal*, *supra* note 1, at 14.

150. *See* BERLIN, *My Intellectual Path*, *supra* note 12, at 12 (“That is why pluralism is not relativism – the multiple values are objective, part of the essence of humanity rather than arbitrary creations of men’s subjective fancies.”).

151. Recall, too, that for Berlin, not all choices are tragic choices, so when somebody chooses to act in accord with no genuine value, moral condemnation is completely appropriate. For example, Berlin’s pluralism would have no problem condemning Camus’ stranger for killing a man on the beach for trivial (or no) reasons. The value of the man’s life is not even plausibly in conflict with some other value that would make killing him a difficult, much less tragic, choice. *Cf.* ALBERT CAMUS, *THE STRANGER* (1946).

152. *See* BERLIN, *My Intellectual Path*, *supra* note 12, at 12.

C. *The Incommensurability Debate*

The central concept of incommensurability has also been the subject of significant philosophical attention in the years since Berlin first articulated his vision of value pluralism.¹⁵³ Incommensurability at its core refers to a lack of a common measure between objects. To say of two values that they are incommensurable is to say that there is no measure common between them. Joseph Raz defines incommensurability thus: “A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value.”¹⁵⁴ Some theorists hold that incommensurability implies incomparability—that a lack of common measure necessarily renders comparison impossible.¹⁵⁵ Others argue that values (or their bearers) may lack a common measure yet still be compared to one another, perhaps in some qualitative or situation-specific manner.¹⁵⁶ Berlin did not set out his views on the precise relationship between incommensurability and incomparability, but for him, the incommensurability of diverse values meant, at minimum, that ranking them in the abstract was not possible and that choosing between them could not be a matter of logic, quantification, or hierarchical ordering.¹⁵⁷ Of course, human beings cannot help but make concrete choices among goods—indeed, that is part of what makes us human¹⁵⁸—but Berlin maintained that when two distinct and ultimate values clash, the lack of common measure implies that the choice between them

153. See, e.g., INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON, *supra* note 5.

154. RAZ, THE MORALITY OF FREEDOM, *supra* note 96, at 322.

155. See, e.g., *id.*

156. See, e.g., Chang, *supra* note 97.

157. See GRAY, *supra* note 19, at 53 (“[N]o hierarchy can be established by any rational procedure among such diverse forms of human flourishing.”).

158. BERLIN, *Two Concepts of Liberty*, *supra* note 94, at 169 (“The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.”).

is, in the abstract at least, fundamentally *arational*.¹⁵⁹ Just as legal indeterminacy posits that the law may simply run out in hard cases, Berlin's pluralism posits that reason may simply run out in the face of genuine moral dilemmas.¹⁶⁰

Finally, Berlin's account of value pluralism leaves open the question of just how pervasive incommensurable choices among values really are in our personal and political lives. For Berlin, the incommensurability of human values is a necessary and constitutive fact about the world, given the diversity of legitimate values; it is not just an empirical or contingent fact. "The very idea of the perfect world in which all good things are realised," he wrote, "is incomprehensible . . . conceptually incoherent . . . not merely unattainable but

159. Cf. RAZ, THE MORALITY OF FREEDOM, *supra* note 96, at 334 ("Incomparability . . . marks the inability of reason to guide our action, not the insignificance of our choice."). Some argue that Berlin endorsed only a moderate incommensurability according to which even incommensurable goods could be rationally compared and ranked in concrete situations. See Robinette, *supra* note 85, at 340; Dag Einar Thorsen, *Value Pluralism and Normative Reasoning* (2004), available at <http://folk.uio.no/daget/Value%20Pluralism%20and%20Normative%20Reasoning.pdf>. If so, Berlin nowhere explained what kind of rational decisionmaking process could be brought to bear in such situations. My own view is that Berlin believed that some kind of "practical reasoning" was possible, but that such reasoning was not a rational process that itself led to one correct answer. See *infra* Part IV. If there were a rational procedure for choosing between two genuine ultimate goods, then value pluralism would lose the tragic sense that pervades Berlin's discussion of pluralism. Value pluralism is tragic, for Berlin, because one cannot reason to a uniquely correct answer in tragic cases. At best, one can take everything into consideration, narrow the choices down to the ones that represent genuine values, and then choose with "eyes wide open."

160. Late in life, Berlin wrote that clashes between incommensurable values cannot be avoided, but may at least be "softened" through some sense of balance or compromise. BERLIN, *On the Pursuit of the Ideal*, *supra* note 1, at 18. "[I]n concrete situations not every claim is of equal force," he wrote, and "[p]riorities . . . must be established." *Id.* As the passive construction implies, Berlin did not provide any suggestion about how to establish priorities or how to know when a decent balance has been struck among ultimate values. Indeed, to the questions "How do we choose between possibilities? What and how much must we sacrifice to what?" he wrote, "There is, it seems to me, no clear reply." *Id.* at 17. In Part IV, I will give an account of what decisionmaking among incommensurable alternatives might consist of, if one accepts Berlin's account of incommensurability. See *infra* Part IV.

inconceivable.”¹⁶¹ At the level of abstract values, then, incommensurability is not just an occasional feature, but part of the very fabric of the moral universe. John Gray argues that Berlin saw incommensurability as “pretty pervasive in human life”—not simply that there are “occasional pockets” of it.¹⁶² Other authors have argued that, at the level of concrete choices, incommensurability is rare or perhaps even non-existent.¹⁶³ Seizing on Berlin’s statement that “[i]n concrete situations not every claim is of equal force,” George Crowder argued that “[r]easoned ranking of plural values is impossible in the abstract, but apparently unproblematic in particular cases. What makes the difference is evidently the presence in particular cases of a concrete context for choice.”¹⁶⁴ But Berlin never suggested that context can *always* determine a single right answer to questions implicating multiple values. Berlin, in other words, rejects both the extreme view that incommensurability renders all or almost-all concrete choices arational and the opposite extreme view that incommensurability has no implications for concrete choices. Berlin believed that deliberation about all context-specific facts, concerns, and consequences had utility to a decisionmaker facing a tragic case.¹⁶⁵ But, at the same time,

161. See BERLIN, *My Intellectual Path*, *supra* note 12, at 23.

162. GRAY, *supra* note 19, at 59; *cf.* GEORGE CROWDER, LIBERALISM AND VALUE PLURALISM 52 (2002).

163. See, e.g., Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367, 1375 (2001) [hereinafter Scharffs, *Adjudication and the Problems of Incommensurability*] (“I argue that incommensurable values and choices that vindicate incommensurable values are ubiquitous. In contrast, choices that are genuinely incomparable are extremely rare.”).

164. George Crowder, *Communications*, 44 POL. STUD. 649, 650 (1996). Crowder is committed to the view that incommensurability does not mean incomparability at the level of particular choices implicating distinct values. CROWDER, *supra* note 162, at 50-60. My own view is that, for Berlin, incommensurability does bleed down from abstract values to concrete choices, but that in making concrete choices in tragic cases, context-specific ‘practical wisdom’ may be brought to bear. See *infra* Part IV. Nevertheless, practical wisdom does not provide a logic or standard demanding one right answer. Due to incommensurability, some concrete choices have multiple right answers.

165. See *infra* Part IV.

he held that context-specific factors may fail in many cases to provide decisive reasons for choosing one valuable course over another. Both choices will lead to irredeemable loss; both choices will vindicate some real good, and there is no measure which can tell us which loss or which good is worth more or less.

III. THE INTERACTION OF INDETERMINACY AND INCOMMENSURABILITY

A. *Tragic Cases and Other Categories*

On a Venn diagram, tragic cases exist where the circles of hard cases and tragic choices overlap. Not every hard case poses a tragic choice, and not every tragic choice makes it to court packaged as a hard case.¹⁶⁶ But, if the versions of legal indeterminacy and value pluralism I have described are true, then significant numbers of cases are both legally indeterminate and require choices among incommensurably different values. Many of the most vexing cases in Constitutional law are tragic cases. The text of the Constitution, the existing authoritative doctrine, and the modalities of Constitutional and precedential interpretation leave open multiple possible resolutions (hence, indeterminacy), and there are weighty and divergent ultimate values at stake whichever way the Court decides the case (hence, incommensurability). Abortion, affirmative action, property rights, federal health care regulation—almost all of the high-profile cases in these areas that reach the Supreme Court could be classed in the category of tragic cases.¹⁶⁷

166. Most tragic choices are simply not legal cases at all.

167. Of course, I would need to be much more specific about why I think the law is indeterminate in the areas listed above and why I think conflicting ultimate values are at stake in order to prove that any particular case is, in fact, a tragic case. But I am relying here on an intuition that the kind of cases which make it to the Supreme Court and incite significant public controversy are likely (though not necessarily) the kind of cases in which neither the law nor morality provide a uniquely correct answer. Tragic cases are, of course, not limited to Constitutional law; they appear in any field any time the law fails to rationally

At the same time, judges are routinely confronted with cases that are ethically tragic but legally determinate. In other words, many legal disputes are easy cases as a matter of law, even though their resolution requires a choice among incommensurable values. This is particularly important to emphasize because, in such cases, the law proves its capacity to determine legal outcomes even in treacherous normative terrain. A legal decisionmaker, after all, screens off many considerations which an all-things-considered sensitive decisionmaker may take into account.¹⁶⁸ Thus, there are cases which really do have only one right legal answer, despite having multiple right answers in the realm of ethics or public policy. The legal system, in those cases, shields off potential resolutions that would be available outside the realm of the law.¹⁶⁹ All of the vexing Constitutional disputes I characterized as tragic above nevertheless become legally determinate after the Supreme Court decides a particular case. For example, each wrenching decision about affirmative action or abortion lays down a precedent that is binding at least on subsequent disputes that fall under the relevant rule for that kind of dispute.¹⁷⁰ The conflicting moral values at stake in

determine the outcome of the case and the available choices manifest clashing ultimate values.

168. Schauer, *Formalism*, *supra* note 34, at 510 (describing one purpose of legal rules as “screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.”).

169. *Id.* at 539 (“Once we understand that rules get in the way, that they gain their ruleness by cutting off access to factors that might lead to the best resolution in a particular case, we see that rules function as impediments to optimally sensitive decisionmaking.”). Obviously, someone who believed in global indeterminacy would not recognize a category of cases which are legally determinate but implicate incommensurable values. But those, like me, who argue for localized indeterminacy, however, must acknowledge that class of cases.

170. Of course, there may continue to be legitimate debates about what constitutes the class of disputes covered by a rule laid down in a Supreme Court decision, but the fact that there may be genuine indeterminacy about whether some particular future cases may be covered by the rule does not mean that there is genuine indeterminacy about whether all future cases are covered by the rule or not. The Court is capable of drafting sufficiently clear rules that some future cases will be covered by the new rule and thereby determined.

subsequent cases remain the same as they were in cases prior to the authoritative opinion of the Court, so the new disputes are just as tragic in the realm of values.¹⁷¹ But the intervening opinion of the Court authoritatively settles the legal question in dispute, so for better or for worse there is a legally determinate answer.¹⁷² As a matter of law, such cases are routine and unproblematic, but as a matter of values, they might best be seen as routine tragedies.¹⁷³

B. *The Sting of Tragic Cases*

At root, both legal indeterminacy and value pluralism are arguments of surfeit, not scarcity: it is not that we have no good reasons for acting; to the contrary, there are *too many compelling reasons for acting*, and thus *too many compelling choices*. The claim of (moderate) legal indeterminacy¹⁷⁴ is that, in hard cases, there exists a surfeit of valid legal authorities and legitimate modes of interpreting and manipulating them. The claim of value pluralism¹⁷⁵ is that, in tragic choices, there exists a surfeit of

171. The very existence of an authoritative opinion might add an extra value—legal stability—on the side of the litigant who claims reliance on the authoritative rule.

172. Of course, a lawyer must recognize the possibility that decisions are on occasion overturned, and the substance of the law is not unalterably fixed. Lawyers can and do ask courts to change existing law. But the possibility of a high court overturning a previously authoritative rule does not mean that all cases are rationally indeterminate; it just means that some rules are subject to unpredictable change through the litigation process. To say that a case is rationally determinate is not to say that it is 100% predictable. What a court will actually do is just a different question from what the law requires—another key insight of Legal Realism. Likewise, to say that what courts will do is 100% predictable is different from saying that the law is globally rationally determinate. What courts will actually do might be determined by factors other than law. Llewellyn, *Some Realism About Realism*, *supra* note 2, at 1239; see also Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749 (2013) [hereinafter Schauer, *Legal Realism Untamed*] (giving the example of the gap between the posted speed limits and the actual speeds at which a judge will impose penalties).

173. For a discussion of how law attempts to routinely resolve tragic choices, see GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978).

174. See discussion *supra* Part I.

175. See discussion *supra* Part II.

incommensurable goods to choose from. What makes this overabundance tragic in both law and ethics is the necessity of choice and the fact that each compelling choice requires foregoing other compelling choices. An embarrassment of riches is wonderful when one can gaze upon a room (or universe) full of valuable things and revel in its richness and diversity. It becomes a problem when one must choose among the goods and one wants to do so by proffering reasons for the choice, not mere personal preference.¹⁷⁶ The abstract existence of multiple values, or multiple legal authorities, is not a practical problem—only an intellectual one. But when circumstances demand that we choose among concrete goods bearing conflicting values or between legal disputants both making persuasive and opposing legal arguments, then we are faced with a practical problem—how to choose?

To be sure, an American judge confronting a tragic case has some tools to resist making a decisive choice. Alexander Bickel described the “passive virtues” to point out the various strategies and doctrines judges have available for avoiding substantive choices and to suggest that judges should avail themselves of these doctrines more often.¹⁷⁷ But, even granting Bickel’s argument that the Supreme Court should embrace the passive virtues more often in Constitutional cases, the point of establishing courts of law—and other institutions of dispute resolution—is precisely to lodge decisionmaking authority in some institutional actors. Such institutions would fail their charge if they avoided too many substantive decisions in the name of prudence. Decisionmaking—choosing the right resolution to a dispute—is the judge’s social function.¹⁷⁸

176. For a defense of basing judicial decisions in tragic cases on personal preference, see Eric J. Miller, *Judicial Preference*, 44 HOUS. L. REV. 1275 (2008) [hereinafter Miller, *Judicial Preference*].

177. Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 48-50 (1961) (recommending prudential use of doctrines of avoidance).

178. Delaying or avoiding a substantive decision is, a decision in its own right too. Where there is a dispute or an open question, any response from a designated decisionmaker is *ipso facto* a decision. Somebody (some body)—a

The abundance of legally authoritative and ethically valid reasons to resolve a legal dispute might appear as good news for the judge, at first. She is not faced with a void; there is guidance. There will be a right answer.¹⁷⁹ She can apply the law to the facts and generate an outcome. The problem comes with the realization that there are multiple and conflicting right answers—too much law, too many interpretive techniques, too many ultimate values. In short, there are multiple right answers, and each right answer requires eliding or rejecting or foregoing other right answers, other answers of equivalent or incommensurable validity. Each choice implies irreplaceable loss; indeed, for judges, each choice implies a losing litigant. Moreover, in choosing which party shall lose, the judge has a professional obligation to give reasons, public reasons, for the resolution she chooses.¹⁸⁰ How to rationally justify a particular resolution is precisely the problem of tragic cases for the legal decisionmaker.¹⁸¹

C. *Jurisprudential Implications and the Case of Ronald Dworkin*

The argument up to here can be fairly summarized as follows: if one accepts moderate legal indeterminacy and value pluralism, then there are some legal cases that are both legally indeterminate and require choosing among

person or institutional body—must bear the weight of decisionmaking; hence, the necessity of choice.

179. There is not, however, only one right answer in tragic cases; there are multiple right answers.

180. See Eric J. Miller, *Permissive Justification* 45 (Loyola Law Sch. L.A., Legal Studies Paper No. 2013-29, 2013) [hereinafter Miller, *Permissive Justification*], available at <http://ssrn.com/abstract=2314678> (“What distinguishes judicial decision-making from its lay equivalents is that the judge is, in virtue of her role, peculiarly required to explain how her reasons for decision apply, not only to herself, but to everyone.”). This might be deemed a public relations problem, a problem of how to “sell” a decision. But my interest here is not in the public relations problem, but in the internal decisionmaking problem of a person who is obliged to, and wants to, give reasons for his or her decisions.

181. Cf. *id.* (discussing what kinds of reasons are legitimate in indeterminate cases).

incommensurable values. I call such cases *tragic cases*, as they are simultaneously *hard cases* in a Legal Realist sense and *tragic choices* in a value pluralist sense.

Recognizing tragic cases has some immediate implications for normative jurisprudence.¹⁸² First, and most obviously, it means that the attempt to devise a determinate decisionmaking procedure for judges to apply in all cases is bound to fail. More precisely, it means that global rational determinacy is not possible in the law; the conventional methods of legal analysis cannot provide rational justification in all cases and neither can non-legal norms. In tragic cases, the law and its conventions yield too many answers, and the values at stake are incommensurable. Seen in the light of tragic cases, all attempts to fashion a comprehensive right way to decide cases is conceptually flawed; no such procedure or group of procedures exists.

Berlin once defined monism as the belief that (1) “all genuine questions must have one true answer and one only, all the rest being necessarily errors”; (2) “that there must be a dependable path towards the discovery of these truths”; and (3) “that the true answers, when found, must necessarily be compatible with one another and form a single whole, for one truth cannot be incompatible with another.”¹⁸³ Many of the most prominent jurisprudential projects of the past century—Langdellian formalism,¹⁸⁴ normative law and economics,¹⁸⁵ and rights-based liberal

182. Normative jurisprudence, as I use the term here, means thinking about how legal decisionmakers ought to decide cases. Of course, jurisprudence writ largely includes many other projects and need not be as judge-focused as it tends to be in American law schools. See Robin West, *The Missing Jurisprudence of the Legislated Constitution*, THE CONSTITUTION IN 2020, at 79 (Jack M. Balkin and Reva B. Siegel eds., 2009).

183. Berlin, *On the Pursuit of the Ideal*, *supra* note 1, at 12.

184. See KRONMAN, *THE LOST LAWYER*, *supra* note 49, at 174 (describing the Langdellian System).

185. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 24-25 (7th ed. 2007) (describing efficiency as chief value of analysis in normative law and economics); see also NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 4 (1994) (“The economic approach to legal analysis is cast in terms of a single social goal – resource allocation efficiency.”).

legalism¹⁸⁶—have been monist in precisely this sense; they have taken the “one right answer” thesis as a premise and then go in search of the “dependable path” toward finding that one right answer. If value pluralism is true, then such approaches, at least in their most uncompromising versions, are false.

The CLS movement, to its credit, understood that monistic normative theories of adjudication were dead ends.¹⁸⁷ While some CLS authors flirted with global indeterminacy in law and with complete relativism or subjectivism in ethics—all positions I reject—those radical positions led them to correctly deny the various monistic jurisprudential theories on offer and to reembrace the skepticism of the Legal Realists.¹⁸⁸ To the extent that CLS scholars were characterized by “the purity of their negativism,”¹⁸⁹ as one of their critics put it, it is because CLS authors denied the optimistic premises of monism *tout court*. There is no golden road to legal truth, and the relentless application of reason cannot in the end yield uniquely correct results in some cases. Theories that suggest otherwise are nothing more than false hopes at best and bad-faith *apologias* for an unjust status quo at worst. On this point, the value pluralists and the CLS authors agree: normative jurisprudence must come to grips with indeterminacy and value pluralism. To continue on the monist path is to remain legally and ethically tone-deaf, hearing only one note or pitch when in fact there are many.

The jurisprudence of Ronald Dworkin can serve as a useful foil here, for his response to the problem of hard

186. See, e.g., DWORKIN, A MATTER OF PRINCIPLE, *supra* note 25; TAKING RIGHTS SERIOUSLY, *supra* note 4; JOHN RAWLS, A THEORY OF JUSTICE, *supra* note 141; JOHN RAWLS, POLITICAL LIBERALISM (1993).

187. See generally Kennedy, *The Critique of Rights in Critical Legal Studies*, *supra* note 14, at 178-228 (dismissing all attempts to find determinate normative theory for the resolution of legal disputes).

188. Gordon, *supra* note 43, at 197 (“[W]e discovered a partly buried treasure, the writings of the ‘Legal Realists, a group of legal scholars of the 1920s and 1930s who, like ourselves, devoted much intellectual energy to slaying their fathers”).

189. Fiss, *supra* note 72, at 9.

cases is precisely the opposite of the argument I am advancing. Dworkin understood the claim of moderate legal indeterminacy well, and he did not attempt to deny that, on first impression, there are cases for which application of the existing legal authorities and associated conventions fail to yield a uniquely correct answer.¹⁹⁰ But Dworkin argued that the law contained more than just the surface-level doctrine (rules and standards), but also contained deeper principles.¹⁹¹ Principles, according to Dworkin, are moral values embedded in the law, pitched at a higher level of abstraction than operable doctrine.¹⁹² By correctly appealing to principles and elaborating on them, a legal decisionmaker (granted, a Hercules¹⁹³) will be able to derive an operational rule to determine the outcome of the case at hand.¹⁹⁴ In other words, by recognizing principles as part of the law itself, by expanding the sources of legal authority beyond those conventionally recognized, the problem of indeterminacy can be solved.¹⁹⁵ With the principles of the law to work with, a heroic judge can resolve all legal disputes determinately.

190. DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY*, *supra* note 4, at 81 [hereinafter DWORKIN, *Hard Cases*] (arguing that there is a right answer “even when no settled rule disposes of the case”).

191. DWORKIN, *The Model of Rules I*, *supra* note 4, at 22-28.

192. *Id.* at 22-28 (describing the role of principles, as opposed to rules, in law).

193. DWORKIN, *Hard Cases*, *supra* note 190, at 105 (“I have invented . . . a lawyer of superhuman skill, learning, patience and acumen, whom I shall call Hercules.”).

194. *Id.* at 105-30 (describing how Hercules can decide hard cases). Dworkin’s theory strikes me as an updated version of Langdellian formalism: From existing rules, induce principles. Then deduce new rules from principles. Voila—determinate rules!

195. What is unique about Dworkin’s view is not his appeal to values or principles, but rather his insistence that the appeal to principles is still an appeal to *internal* legal sources. See LEITER, *A Note on Legal Indeterminacy*, *supra* note 23, at 11 (describing Dworkin’s view that “unpedigreed moral principles” count as legal sources). Legal positivists, of course, criticize Dworkin’s insistence that principles (values) without conventional legal pedigree are legal sources themselves. See, e.g., HART, *supra* note 35, at 263-68. Here, my criticism is directed against the *monism* of his account of values, not its anti-positivism.

Value pluralism denies that adding principles (values) to the sources of law, even if legitimate, will make the law globally determinate. The values to which the judge must turn may themselves be multiple, conflicting, and incommensurable. In sum, Dworkin's appeal to principles can only patch up the indeterminacy of conventional legal reasoning if the principles are themselves ultimately unitary or harmonious. And, indeed, Dworkin has argued precisely that all values are ultimately commensurable and harmonious in precisely the way Berlin denied.¹⁹⁶ In short, Dworkin has explicitly revealed himself as a monist about values, and it is his value monism that allows him to work up a theory of global legal determinacy. For Dworkin, cases that appear to be indeterminate at first blush are all revealed to have a uniquely correct answer by appealing to values beyond the conventional sources of law.¹⁹⁷ If value pluralism is correct, however, then the appeal to values cannot eviscerate indeterminacy because the relevant values are themselves plural, conflicting, and incommensurable.¹⁹⁸

D. *A Brief Note on Discretion*

Accepting moderate indeterminacy and value pluralism also implies that in tragic cases judges have discretion to choose among a range of legally and morally plausible options. The debate over judicial discretion—whether it legitimately exists or not—often comes up as part of larger debates between legal realism and legal formalism or

196. RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 1 (2011) (“This book defends a large and old philosophical thesis: the unity of value.”).

197. DWORKIN, *The Model of Rules I*, *supra* note 4, at 44 (“[I]f we treat principles as law we must reject the positivists’ . . . second tenet – the doctrine of judicial discretion . . .”).

198. *See* HART, *supra* note 35, at 204 (“Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer.”).

between positivism and natural law theories.¹⁹⁹ Those who deny legal indeterminacy, such as Dworkin, usually argue that because the law rationally determines one right answer, the judge's duty is to reason to that uniquely correct answer.²⁰⁰ By recognizing that some legal cases are both legally indeterminate and implicate incommensurable values, I am committed to the view that legal decisionmakers in such cases do, necessarily, have discretion to choose among the resolutions that are legally and ethically justifiable. That is to say, because judges in tragic cases have multiple resolutions that are legally and ethically justifiable, they necessarily have discretion among those choices.²⁰¹ To what extent there are better or worse ways of exercising that discretion is the subject of the next section.

IV. WHAT IS A LEGAL DECISIONMAKER TO DO WITH TRAGIC CASES?

A. *The Problem Restated*

In this final section, I endeavor to face head-on the question of how a legal decisionmaker should deal with tragic cases. Assuming that a judge faces a question with no uniquely correct answer as a matter of law or values, how is she to go about choosing among the plausible answers? One might take the view that there really is no problem at all; assuming that the judge has diligently excised all implausible answers—i.e., all answers precluded by law—then any of the remaining choices are *ipso facto* plausible. Indeed, the available options in a genuinely tragic case are

199. For a useful overview of debates regarding discretion, see Lucy, *supra* note 83, at 215-21.

200. In theory, of course, one could be a global determinist with respect to law, but have a view of adjudication that allows for deviation from the rationally determined answer. For instance, jurists who insist that sometimes judges must do what is just despite what the law requires would fit into this category.

201. This is “strong discretion” in Eric Miller’s terms. Miller, *Judicial Preference*, *supra* note 176, at 1287. In a tragic case, the judge has discretion among plausible options and “[r]eason fails to provide a determinate outcome to the legal problem.” *Id.*

all rational in the sense that one can arrive at each option through rational application of the available legal sources or values to the case at hand.²⁰² If rational justification requires only that the final choice be rational in this sense, then the decisionmaker cannot go wrong in choosing any of the tragic options.

Joseph Raz suggests as much when he writes that rational action is “not action for a reason that defeats *all* those which conflict with it,”²⁰³ rather, “[r]ational action is action for a reason that is reasonably thought to be undefeated.”²⁰⁴ In other words, one can be said to be acting (or choosing to act) rationally even when there are still other options that would themselves be rational actions available. The test for rational action is not that one’s choice is the uniquely correct one, for there may be others; the test is whether one’s own choice is rational on its own terms, whether it has been precluded by reasons or not. For Raz, this explains precisely why choices between incommensurable goods can still be rational choices.²⁰⁵

But, of course, the sting of tragic cases in law is that one feels let down by the decisionmaker if he or she gives up on giving reasons as soon as she has narrowed the choices to those that are plausible or rational in the Raz-ian sense. Raz, too, understands that when it comes to legal decisions his defense of rational action in the face of incommensurable choices does not end the matter.²⁰⁶ The problem, as Raz puts it, “arises not from a difficulty of squaring incommensurability of reasons with a theory of rational action or rational choice, but from a principle of political morality, namely the principle of the public accountability of public actions.”²⁰⁷ This principle of public

202. Raz calls these undefeated reasons. See JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 368 (2009) [hereinafter RAZ, BETWEEN AUTHORITY AND INTERPRETATION].

203. *Id.* (emphasis added).

204. *Id.*

205. *Id.*

206. *Id.* at 368-69.

207. *Id.* at 368.

accountability means that judges and other public officials must do more than simply eliminate irrational options when making public decisions; they need to make sure that their decisions among rational choices are not personal, arbitrary, or idiosyncratic.²⁰⁸ While it may be perfectly legitimate for a private person facing a choice between incommensurable goods to ultimately choose one over the other on the basis of “non-rational dispositions or tastes,” public decisionmakers in their public capacities must not do this.²⁰⁹

Raz clearly grasps that his account of rational decisionmaking in the light of incommensurable choices still leaves judges facing such choices with a “problem.”²¹⁰ Raz then turns back to conventional legal doctrine as a way for judges to choose among incommensurable choices; he suggests, in other words, that judges facing incommensurable choices can rely on “formal legal reasoning” as a non-arbitrary, rational method to get them to a single best answer.²¹¹ But, of course, as he admits, this suggestion will be of no help where the conventions of the law are themselves indeterminate with respect to the dispute.²¹² For a truly tragic case, one which we already know is legally indeterminate, formal legal reasoning cannot possibly provide a method to choose among the final incommensurable alternatives. So while Raz, correctly in my view, can provide legal decisionmakers with some comfort that they may still act rationally even when faced with incommensurable choices because either choice is rational, he cannot provide us with any way to decide among incommensurable choices in tragic cases on something other than arbitrary, idiosyncratic acts of will.²¹³ And because judges are public officials rendering public

208. *Id.* at 369.

209. *Id.*

210. *Id.* at 368.

211. *Id.* at 369.

212. *Id.*

213. For an attempt to provide alternative procedures and tie-breaking rules in tragic cases, see Miller, *Permissive Justification*, *supra* note 180, at 44.

decisions, we would like them to do better than arbitrary and idiosyncratic.²¹⁴

I am not interested in the public relations questions of how the judge should sell his or her decision in the articulation of the opinion or in some other fashion. The discomfort I am expressing here is not a fear that the litigants or larger society will not accept a legal decision that appears arbitrary, though that is a legitimate fear. Here, my interest is in exploring what a conscientious judge ought to do once he or she recognizes that he or she faces a tragic case. In a tragic case, recall, the law allows for multiple rational determinations, and the legally legitimate choices implicate conflicting and incommensurable values. This does not mean that all answers are open to the judge; a careful parsing of both the law and values will eliminate many wrong answers, answers that are precluded because conventional legal analysis does not permit them or because superior ethical choices are available. In a tragic case, then, even though the law and values cannot identify a uniquely correct answer, the law and values can and will constrain the choice, whittling down the options to a finite few. The conscientious judge's usual modes of decisionmaking will be appropriate up to this point.²¹⁵ It is the final choice among conflicting yet legally and ethically plausible resolutions that is not amenable to the conventional decisionmaking process.

B. *Practical Wisdom and Its Limits*

It is at this point, when the tragic choice between incommensurable goods can no longer be avoided and the judge can no longer rely on any outcome-determinative logic, that *practical wisdom* and the virtue ethics tradition enter the picture.²¹⁶ Practical wisdom—also called *phronesis*,

214. *Id.* at 45.

215. Of course, the conventional methods of legal decisionmaking in easy cases may themselves be subject to extra-legal normative criticism, but that discussion is beyond the scope of this article.

216. For over a decade, Lawrence Solum has been at the intellectual forefront of the virtue ethics movement in normative jurisprudence. See, e.g., COLIN FARRELLY & LAWRENCE B. SOLUM, *An Introduction to Aristotelian Theories of Law*, in

or prudence—is a concept with a long pedigree going back to Plato and Aristotle.²¹⁷ Like many venerable ethical concepts, it has taken on a variety of meanings over the centuries, but at its heart, practical wisdom is the virtue associated with thinking practically about specific choices, as opposed to thinking universally or theoretically.²¹⁸ Practical wisdom is the faculty that allows its bearer to make wise decisions about how to act in specific circumstances.²¹⁹ But it is not simple means-ends rationality or tactical skill.²²⁰ Practical wisdom includes not only the ability to reason teleologically and with rational rigor but also the ability to deliberate about ends.²²¹ As a type of knowledge, it stands in contrast to theoretical wisdom (or *sophia*), the virtue associated with thinking about universals and necessary truths.²²² The distinction between practical wisdom and theoretical wisdom does not suggest that the two are incompatible; to the contrary, acting with practical wisdom will often require a minimum of theoretical wisdom, and gaining worthwhile

VIRTUE JURISPRUDENCE 1 (Colin Farrelly & Lawrence B. Solum eds., 2008); Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 510-11 (2004-05) [hereinafter Solum, *The Aretaic Turn in Constitutional Theory*]; Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centred Theory of Judging*, 34 METAPHILOSOPHY 178 (2003) [hereinafter Solum, *A Virtue-Centred Theory of Judging*]; Lawrence B. Solum, *Virtue Jurisprudence: Towards an Aretaic Theory of Law*, in ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE AND JUSTICE (Liesbeth Huppés-Cluysenaer et al. eds., 2013) [hereinafter Solum, *Towards an Aretaic Theory of Law*].

217. See ARISTOTLE, NICOMACHEAN ETHICS bk. VI (L.H.G. Greenwood trans., Arno Press 1973) (describing virtue of practical wisdom); PLATO, THE REPUBLIC, bk. IV (Francis MacDonald Cornford trans., Oxford Univ. Press 1961). For a recent popular exposition of the concept, see BARRY SCHWARTZ & KENNETH SHARPE, PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING (2010).

218. See ARISTOTLE, *supra* note 217.

219. Solum, *A Virtue-Centred Theory of Judging*, *supra* note 216, at 192 (“Practical wisdom is the virtue that enables one to make good choices in particular circumstances.”).

220. See HENRY S. RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS (1994).

221. *Id.* at 3-6.

222. See ARISTOTLE, *supra* note 217.

theoretical wisdom will often require practical wisdom.²²³ Rather, the function of the two types of wisdom are different; *phronesis* is concerned with deliberating correctly about how to act, while *sophia* is concerned with thinking correctly about what is true.

Practical wisdom is not a phrase Berlin elucidated explicitly in the context of discussing tragic choices. But a holistic reading of his work reveals that he was not only familiar with the concept but gave it considerable attention. Berlin consistently stressed the importance of the “concrete situation” in judging right action in personal and communal life.²²⁴ In his essay *On Political Judgment*, Berlin explicitly contrasts the “good judgment” of a statesman with the empirical knowledge or deductive logic of a scientist.²²⁵ “Obviously,” he wrote, “what matters is to understand a particular situation in its full uniqueness, the particular men and events and dangers . . . in a particular place at a particular time.”²²⁶ Berlin explained that good judgment (*phronesis*) must draw upon scientific knowledge (*sophia*) to reach successful decisions but that people with good judgment are not necessarily any better about thinking “in general terms” than others; “[t]heir merit is that they grasp the unique combination of characteristics that constitute this particular situation—this and no other.”²²⁷ What people

223. Isaiah Berlin, *On Political Judgment*, NEW YORK REV. OF BOOKS, Oct. 3, 1996, at 26, 30 [hereinafter Berlin, *On Political Judgment*] (“Botany helps gardeners, laws of dietetics may help cooks . . .”).

224. Berlin, *On the Pursuit of the Ideal*, *supra* note 1, at 18 (“The concrete situation is almost everything.”).

225. Berlin, *On Political Judgment*, *supra* note 223, at 30; *see also* Lawrence B. Solum, *Towards an Aretaic Theory of Law*, *supra* note 216, at 24 (“[P]ractical wisdom or *phronēsis*—think of the quality that we describe as ‘good judgment’ or ‘common sense.’”).

226. Berlin, *On Political Judgment*, *supra* note 223, at 27. Berlin is writing here about political judgment, rather than judicial judgment, but that distinction is not crucial in this context.

227. *Id.*; *see also* Jeffrey M. Lipshaw, *The Venn Diagram of Business Lawyering Judgments: Toward a Theory of Practical Metadisciplinarity*, 41 SETON HALL L. REV. 1, 3 (2011) (defining *phronesis* as “the ability to deliberate well, to deal with universal principles as well as particular actions, to assess

who possess practical wisdom have, in other words, is some “exceptional sensitiveness to certain kinds of fact . . . an acute sense of what fits with what, what springs from what, what leads to what . . . a sense for what is qualitative rather than quantitative . . . for synthesis rather than analysis.”²²⁸

Berlin’s description of good judgment can sound a bit mystical,²²⁹ and the very context-specificity that Berlin emphasizes makes it difficult to package practical reason into anything like an operational methodology.²³⁰ Nevertheless, the discussion of practical wisdom bears on the question of how to approach tragic cases, for it confirms that the way forward for a judge who has recognized a tragic case does not lie in further theoretical knowledge (*sophia*). No rational refinement or clever calculation will deliver to the legal decisionmaker the uniquely correct answer in a tragic case. Still, there are certain decisionmaking virtues that a conscientious judge can cultivate in hopes of making wiser, if not provably better, decisions when he has the discretion to do so. Among those traits are (1) relevant experience; (2) sensitivity to the full panoply of facts and values implicated by a case; and (3) a deep sense of humility.

Theorists of practical wisdom stress that, because it is a virtue or disposition,²³¹ practical wisdom must be cultivated

which actions are conducive to ends, to employ sympathetic understanding in the effort to determine what is fair, and to distinguish and abjure mere cleverness in the pursuit of a bad end”).

228. Berlin, *On Political Judgment*, *supra* note 223, at 27-28.

229. Berlin himself was at pains to say that his concept of good judgment was sometimes called “misleadingly, intuition (which dangerously suggests some almost magical faculty).” *Id.* at 28.

230. Indeed, one of the key insights of the practical wisdom tradition is its insistence that not all significant knowledge is explicit or articulable; much important knowledge is tacit and resists formulation. *See, e.g.*, Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245, 2286 (2001) [hereinafter Scharffs, *Law as Craft*].

231. *See* Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567, 1569 (1985) [hereinafter Kronman, *Alexander Bickel’s Philosophy of Prudence*] (“The most important element in Bickel’s political philosophy, and the key to understanding his work as a whole, is his belief in the value of prudence as a political and judicial virtue. By prudence I mean a

through experience.²³² It is not a piece of information or a rule or an operation that can be articulated and transmitted directly from one person to another. It cannot be taught or learned in the way we teach or learn facts or rules. At best, practical wisdom can be identified and modeled by others, but it is not something one memorizes or grasps all of a sudden.²³³ It requires more-or-less conscious cultivation through practice. Berlin analogized good judgment to the “semi-instinctive skill” of a doctor or race-car driver; it improves imperceptibly with constant practice, it manifests itself only in particular circumstances and choices, and it cannot be reduced to abstract explanation.²³⁴ For judges confronting tragic cases, this suggests that while there is no pre-packaged formula they can apply, personal experience with legal decisionmaking, and with tragic cases in particular, might make them better at dealing with such cases in the future.²³⁵ At a minimum, relevant experience

trait or characteristic that is at once an intellectual capacity and a temperamental disposition.”).

232. See Laurie Morin & Louise Howells, *The Reflective Judgment Project*, 9 CLINICAL L. REV. 623, 678 (2003) (“Notions of practical wisdom and creative problem solving by their very nature depend upon life experience.”).

233. Solum, *The Aretaic Turn in Constitutional Theory*, *supra* note 216, at 498 (explaining that “programs of judicial education should aim to cultivate these virtues in those who are already judges.”).

234. See Berlin, *On Political Judgment*, *supra* note 223, at 27.

235. Justice Benjamin Cardozo stressed both the value of judicial experience and the similarity between judicial and legislative virtue:

If you ask how he [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as [a] legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator’s work and his. The choice of methods, the appraisal of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he [the judge] may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art.

Benjamin N. Cardozo, *The Nature of the Judicial Process*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 107, 154 (Margaret E. Hall ed., 1947).

should not be ignored. Experience is an asset. As Holmes once put it in a different context, “[t]he life of the law has not been logic: it has been experience.”²³⁶

What experiences of the right sort might make possible is a kind of extraordinary sensitivity characteristic of good judgment—a flexible capacity to take in and synthesize all relevant facts, identify values at stake, and recognize the implications of choosing among different options. A judge who is attuned only to legally relevant facts, legally relevant authorities, and legitimate modes of legal reasoning may have all the skills she needs to resolve easy cases correctly. But such a judge does not have the proper disposition to resolve tragic cases, for she will fail to sense the full set of facts and values at stake. The practically wise judge will be able to imagine how each potential choice of resolving the case would honor some values and undermine others and how all the people affected by the decision would view the decision and be impacted by it. This demands of legal decisionmakers in tragic cases both empathy—an ability to see the world through the eyes of others²³⁷—and something we might call predictive imagination—an ability to imagine how different potential decisions would actually turn out.²³⁸ These abilities to make educated guesses are themselves not susceptible to formulaic articulation, but nevertheless, we can say that some people have them comparatively more than others and that they are skills worth cultivating.

To be sure, the kind of sensitivity that the practically wise judge has is not any kind of scientific ability to choose the very best possible outcome. Tragic cases are not amenable to that kind of scientific predictability or consequentialist resolution. Rather, sensitivity suggests a capacity to imagine the full panoply of potential real-world

236. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

237. Solum, *The Aretaic Turn in Constitutional Theory*, *supra* note 216, at 515-16 (“Judges should be partial to none, but should possess an appropriate degree of sympathy and empathy with all who appear before them.”).

238. See Berlin, *On Political Judgment*, *supra* note 223, at 28 (“Above all this [good judgment] is an acute sense of what fits with what, what springs from what, what leads to what . . .”).

impacts of the different choices available. Such exploration cannot on its own determine the outcome of the case, but it can illuminate what is really at stake and what is not. A sensitive legal decisionmaker can deliberate, for instance, on which possible outcomes might be more enduring than others or which context-specific factors might tilt in one direction or the other.²³⁹ A judge with a fine sense of his or her own polity's history and social forces might be able to discern which available option would cohere best with the particular institutional and cultural context in which he or she makes the decision and which option best reflects the particular ethos of the polity.²⁴⁰

Finally, practical wisdom implies humility with respect to one's own ability to reach correct decisions and alter real-world outcomes.²⁴¹ Humility in this sense is not about paying obeisance to some other person or authority, nor is it a pose to garner more empathy or understanding. As part of the decisionmaking process, humility is "consciousness of one's *own* limits in solving a problem."²⁴² In tragic cases, recall, the problem is a surfeit of legitimate answers and a lack of a uniquely correct answer. Any decisionmaker who believes that he or she knows the one right answer to a tragic case is not just arrogant; he or she is wrong. There is no single resolution that the law or moral values requires. A decisionmaker who recognizes that reality cannot help but evince some humility about his or her own choice, and he or she will also be humble in criticizing other decisionmakers

239. Cf. Singer, *supra* note 11, at 62 ("Everyone has had the experience of making important, difficult moral decisions. And almost no one does it by applying a formula They do think long and hard about what they want in life; they imagine what their lives would be like if they were to follow one path rather than another").

240. The use of coherence here is not meant to suggest a necessary or objective criterion of choice among incommensurable options. It may be that two practically wise judges can come to different conclusions about which option coheres best with social ethos.

241. Judicial decisions do not always have the real-world effects judges expect them to have.

242. Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems For Constitutional Law*, 125 HARV. L. REV. 1, 62, n.347 (2011).

who come to different but legitimate choices. Dan Kahan employs the term *aporia* to describe a style of expression whose “distinctive feature is acknowledgment of complexity” and “the limited amenability of [a] *problem* to a satisfactory solution, along with apprehension of the same.”²⁴³ While Kahan’s use of the term relates specifically to the *rhetoric* of legal opinions, the “aporetic engagement” he describes dovetails nicely with the kind of humility characteristic of practical wisdom. Rather than assume a “posture of unqualified, *untroubled* confidence,”²⁴⁴ the aporetic or humble judge cannot help but have doubts about his or her final decision in a tragic case, for the nature of the case makes it impossible to have any “*untroubled* confidence” that the judge has picked out the one right answer.²⁴⁵ The humble judge facing a tragic case would recognize the inability of conventional legal analysis to decisively resolve the case, the plurality and incommensurability of the ultimate values at stake, and the resulting multiplicity of legitimate legal answers. He would also recognize that his best guesses about what effect his decision will actually have on individuals and social values may be wrong. In a complex world, there is never a simple line between a judicial or policy decision and a particular outcome.

An emphasis on practical wisdom and its constellation of virtues would doubtless be a salutary step in thinking about tragic cases. Legal decisionmakers would do well to draw upon relevant experience, evince sensitivity to all relevant factors, endeavor to imagine alternate futures, and maintain humility in the face of tragic cases. Nevertheless, recognizing practical wisdom as a virtue, perhaps the master virtue of judging in tragic cases,²⁴⁶ does not mean

243. *Id.* at 62 & n.347.

244. Dan Kahan, *The Aporetic Judge*, CULTURAL COGNITION PROJECT (Oct. 2, 2012, 11:49 PM), <http://www.culturalcognition.net/blog/2012/10/2/the-aporetic-judge.html>.

245. *Id.*

246. One might go so far as to call practical wisdom the master virtue of judging *simpliciter*. It is no surprise that some of our most respected judges—e.g., Oliver Wendell Holmes, Jr., Benjamin Cardozo, and Henry Friendly—are best known for their practical wisdom, not for their technical legal acumen.

that it can be packaged into an operable decisionmaking procedure or evaluative criteria. To the contrary, practical wisdom is a trait that we may be able to recognize and demonstrate without being able to abstract it from the particular decisions in which it manifests itself.²⁴⁷ To paraphrase the old Justice Potter Stewart quote, we might know it when we see it, but we have a hard time defining the necessary and sufficient conditions of good judgment.²⁴⁸ Moreover, intellectual understanding of practical wisdom is not the same as acting with practical wisdom, just as intellectual understanding of how to operate a car is not the same thing as driving well.²⁴⁹ Practical wisdom is thus, at the same time, both an answer to the question of how to approach tragic cases and no answer at all. It correctly points us away from the rationalist (and monist) faith that the application of reason to legal problems will always yield a single right answer, and it correctly points us toward dispositions that allow for reflection and deliberation about a multiplicity of plausible choices. But practical wisdom cannot be bottled and passed out to legal decisionmakers to take in before deciding tragic cases, nor can it be generalized and rendered operable like a legal rule or even a rule of thumb. Indeed, one of its central lessons is to respect the particular circumstances of each unique case

247. Anthony Kronman, even while promoting what he called “a philosophy of prudence” admitted that prudence is a “capacity that is at once so ordinary and ineffable and seemingly resistant to analysis.” Kronman, *Alexander Bickel’s Philosophy of Prudence*, *supra* note 231, at 1615.

248. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Justice Stewart’s reliance on his own eyes, rather than on any particular definition of obscenity, might itself be considered a rare instance of practical wisdom in First Amendment jurisprudence.

249. Berlin put the point colorfully thus:

If I am driving a car in desperate haste, and come to a rickety-looking bridge, and must make up my mind whether it will bear my weight, some knowledge of the principles of engineering would no doubt be useful. But even so I can scarcely afford to stop to survey and calculate. To be useful to me in a crisis such knowledge must have given rise to a semi-instinctive skill—like the ability to read without simultaneous awareness of the rules of the language.

Berlin, *On Political Judgment*, *supra* note 223, at 27.

and resist the impulse to quickly categorize and generalize so as to render the case amenable to abstract rules.

C. *Balancing, Compromise, and Enduring Conflict*

In his essay *On the Pursuit of the Ideal*, Berlin posed the question directly: if ultimate values clash, and reason cannot yield a uniquely correct answer to burning social questions:

[A]s Chernyshevsky and Lenin once asked, "What is to be done?" How do we choose between possibilities? What and how much must we sacrifice to what? There is, it seems to me, no clear reply. But the collisions, even if they cannot be avoided, can be softened. Claims can be balanced, compromises can be reached: in concrete situations not every claim is of equal force—so much liberty and so much equality; so much for sharp moral condemnation, and so much for understanding a given human situation; so much for the full force of the law, and so much for the prerogative of mercy Priorities, never final and absolute, must be established. . . .

So we must engage in what are called tradeoffs—rules, values, principles must yield to each other in varying degrees in specific situations. . . . The best that can be done, as a general rule, is to maintain a precarious equilibrium that will prevent the occurrence of desperate situations, of intolerable choices—that is the first requirement for a decent society A certain humility in these matters is very necessary.²⁵⁰

Berlin seemed to recognize that this response would not satisfy many who yearn for a more certain or inspiring answer. "A little dull, as a solution, you will say? . . . Yet if there is some truth in this view, perhaps that is sufficient."²⁵¹

Berlin's answer to the question "What is to be done?" alludes, of course, to the virtues and dispositions of practical wisdom discussed above.²⁵² To recognize and internalize that there is "no clear reply" is the essence of the humility that

250. Berlin, *On the Pursuit of the Ideal*, *supra* note 1, at 16, 18.

251. *Id.* at 18.

252. See discussion *supra* notes 230-44 and accompanying text (discussing humility and fact-sensitivity).

he deemed “very necessary” in these matters.²⁵³ And there is the characteristic focus on the “concrete situation,” demanding an acute sensitivity to all relevant facts and values implicated by the specific case at hand.²⁵⁴ The part of Berlin’s answer that is more surprising is his suggestion that balancing and compromise are possible and that some “equilibrium” might be established between incommensurable values.²⁵⁵ These suggestions appear in significant tension with the whole thrust of Berlin’s thought on incommensurability, which held that because diverse values lack a common scale, there is no way to balance them against one another, as one can balance, say, a sack of coins and a bag of sugar on a balance scale.²⁵⁶ If equality and liberty are truly incommensurable and truly clash, then in what sense can the clash be balanced or settled in a compromise? How is a policymaker or judge to know that “so much liberty and so much equality”²⁵⁷ and no more or no less is the right balance? Berlin did not, of course, provide any formula or guidance.

One can understand how a purely pragmatic mutual compromise between disputants could be achieved—an outcome in which both parties to a dispute receive less than

253. Berlin, *On the Pursuit of the Ideal*, *supra* note 1, at 16, 18.

254. *Id.* at 18.

255. *See id.* As Duncan Kennedy has perceptively pointed out, explicit balancing has become pervasive in our legal system largely because both sides in many disputes have plausible legal and rights-based claims. Kennedy, *The Critique of Rights in Critical Legal Studies*, *supra* note 14, at 197-98 (“Rights Argument within Legal Reasoning Reduces to Balancing and Therefore to Policy.”). Judges often respond to such tragic cases by self-consciously trying to balance the rights and interests asserted on each side against one another. Kennedy writes that the “balancing depends on the practical context and on nonrights arguments about things like the degree of harm that will flow from different resolutions of the conflict.” *Id.* at 210. For Kennedy, this shows that rights rhetoric ultimately collapses into ordinary policy rhetoric. *Id.* at 197-98. I would add only that a clash of legal and moral rights is just a particular type of tragic case, unamenable to determinate legal or ethical resolution.

256. On the inappropriate use of “balancing” as a metaphor in judicial decisionmaking, see Scharffs, *Adjudication and the Problems of Incommensurability*, *supra* note 163, at 1416-17.

257. Berlin, *On the Pursuit of the Ideal*, *supra* note 1, at 18.

everything they want, but more than nothing. Such compromise might in some cases “soften” the collision between the litigants and between the values at stake, and thus serve the value of peaceful coexistence.²⁵⁸ But compromises cannot eliminate the clash of ultimate values; in a compromise, some values are given short shrift while others are honored. The imperative of peaceful coexistence cannot always tell us which of multiple compromises strikes a better “balance” between clashing values. As Berlin acknowledges, “[p]riorities, never final and absolute, must be established.”²⁵⁹ But how to establish such priorities, even temporarily, remains nebulous.

Berlin’s resort to the language of balancing and equilibrium, I submit, is not meant to suggest anything like a literal weighing of values against one another—impossible given incommensurability—but rather to indicate that all ultimate values must be paid some minimum level of respect within each case and within society as a whole. While the values of equality and liberty, for instance, do clash and are incommensurable, neither value should ever wholly vanquish the other; hence, particular prioritizations of those values in any particular dispute are “never final and absolute.”²⁶⁰ Thus, a compromise leaving both values partially intact is better than a resolution in which one value wins out decisively, for a total lack of one value or the other is simply inhuman.²⁶¹ On a larger scale, Berlin suggested, a society or legal system which always prioritized one value over another would be making a grave error, even though one cannot say with any confidence in any particular case which value should be prioritized.²⁶² The

258. *See id.* at 16, 18 (“[T]he collisions, even if they cannot be avoided, can be softened.”).

259. *Id.* at 18.

260. *Id.*

261. *Id.* at 15 (“[T]otal liberty for wolves is death to the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted.”).

262. *Id.* at 18 (“The best that can be done, as a general rule, is to maintain a precarious equilibrium that will prevent the occurrence of desperate situations, of intolerable choices—that is the first requirement for a decent society . . .”).

upshot of this view is that judges in any particular tragic case ought to be aware of the larger allocation of values in society, taking care that their own decisions will not overly-marginalize any ultimate value.

Here, a brief example from the field of criminal procedure may help elucidate the point. In the law of post-conviction review, the values of accuracy and finality are both legitimate and often clash.²⁶³ We want a system that allows gross miscarriages of justice to be corrected even after a conviction (accuracy), and we also want a system that can decisively dispose of criminal cases (finality). Seen in its best light, our highly complicated and multi-tiered system of post-conviction review tries to honor both of these values, but inevitably in any particular case in which a judge must interpret open-textured law either in favor of accuracy or in favor of finality, one of the two values must be sacrificed. There is no one right way to balance the values, for they are incommensurable, but we *can* strive for some sensible overall equilibrium between the two values. A society which sought to achieve only accuracy without ever honoring finality—or one which sought only finality without ever honoring accuracy—would be a morally deformed society. That insight cannot, of course, determine the answer to any particular tragic case in post-conviction review pitting one value against the other, but it can at least caution a judge to take both values into account and not to wholly slight one value or the other. It is not that judges can turn the dials and somehow reach a fine-tuned equilibrium between the two values; incommensurability makes such fine-tuning impossible. But judges can and should recognize the valid claims of both values and seek to ensure that both values remain vital within the institutional system of post-conviction review.

On the view I am describing, the clash between values that manifests itself in any particular tragic case should be seen as enduring and necessary, even by the decisionmaker who must make a choice between values. The insolubility of tragic cases is not, then, a defect in our legal system, but

263. See David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1054 (2010).

rather a reflection of the system's deepest humanity. "These collisions of values," Berlin wrote, "are of the essence of what they are and what we are."²⁶⁴ It is, for us, inconceivable that our legal system could resolve these collisions once and for all, for the conflict of ultimate values is a necessarily enduring feature of the values themselves and our human attempt to adhere to them.²⁶⁵ Christopher Kutz, drawing on Berlin's pluralism, argued that "ineradicable conflict and divergence in a complex legal system is not a sign that things have gone awry, but that things are going well, that the legal regime is taking seriously plural claims of value."²⁶⁶ For Kutz, it is convergence or unanimity, not divergence, that is "a sign of dysfunction" in a legal system, "[j]ust as a life that revealed no regret about difficult choices" would be a sign of moral atrophy in an individual.²⁶⁷ On a systemic level, then, the conflict generated by tragic cases and the legal decisionmaker's struggle to resolve such cases can be seen as a healthy, appropriate, and necessary component of a legal regime's commitment to the multiple and incommensurable ends of human life.²⁶⁸

264. Berlin, *On the Pursuit of the Ideal*, *supra* note 1, at 15.

265. *Id.* ("If we are told that these contradictions will be solved in some perfect world in which all good things can be harmonized in principle, then we must answer, to those who say this, that the meanings they attach to the names, which for us denote the conflicting values, are not ours. We must say that the world in which what we see as incompatible values are not in conflict is a world altogether beyond our ken . . .").

266. Christopher L. Kutz, Note, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 1028 (1994).

267. *Id.* at 1029.

268. As Kutz reminds us, "Heraclitus wrote that justice is strife[.]" *Id.* In a similar vein, John Alder wrote that, in tragic cases, "dissents may be no less important than concurring speeches fulfilling as they do the role of drawing public attention to incommensurable values and keeping alive choices for the future." John Adler, *Dissents in Courts of Last Resort: Tragic Choices?*, 20 OXFORD J. LEGAL STUD. 221, 224 (2000).

D. *Liberation or Despair*

When we turn back to the individual case, however, systemic optimism about tragic cases is not of much consolation. After all, the legal decisionmaker still faces the choice of abjuring one party's legitimate claim and causing the diminution of an important value, no matter which resolution she chooses. When facing tragic choices, the judge is, as Berlin said we all are, "doomed to choose, and every choice may entail an irreparable loss."²⁶⁹ Recognizing this situation, a decisionmaker may then reasonably adopt or fall into one of two very different attitudes which we might call in shorthand: (1) liberation or (2) despair. A judge who takes the first attitude will emphasize the plausibility of the choices available to her. After all, a decision for either party can be justified as consistent with legal authority and with ultimate values, and either holding is therefore rational in the Raz-ian sense.²⁷⁰ The risk for the liberated judge is that, feeling uninhibited, she may be emboldened to turn to personal preferences or idiosyncratic tastes or gut feelings to choose among the available choices.²⁷¹ She may feel that here (finally!) she can exercise some creativity or imagination. Even a scrupulous judge steeped in the tradition of practical wisdom and appropriately on guard against her own arbitrary proclivities may feel liberated when facing a tragic case. Drawing on the tradition of practical wisdom, such a judge might humbly rely on her experience, endeavor to take all factors into consideration, and do her best to discern the most prudent choice among the plausible alternatives. Then, having made the decision, the liberated judge will be done with the matter and rest

269. Berlin, *On the Pursuit of the Ideal*, *supra* note 1, at 15.

270. See RAZ, BETWEEN AUTHORITY AND INTERPRETATION, *supra* note 202, at 368 (defining rational action not as action for "a reason that defeats *all* those which conflict with it" but rather as "action for a reason that is reasonably thought to be undefeated.") (emphasis added).

271. For a sophisticated defense of the legitimacy of personal preference in deciding some cases, see Miller, *Judicial Preference*, *supra* note 176, at 1335 ("Where legal rules conflict, it is sometimes the case that no tie-breaking rule resolves that conflict. In such circumstances, the judge must rely upon personal preference to choose among the available outcomes.").

easy, knowing that her choice was both legally defensible and the product of a sincere attempt to get it right.

On the other hand, the judge of despair is laid low by the tragic case. He takes the path of law and logic as far as they will go and then, bereft of any objectively demonstrable reason to choose one plausible alternative over another, he is at a psychological loss. He detests such cases, for, despite having proper confidence in his legal acumen, he has no confidence in his ability to choose well without legal standards or decisive ethical imperatives to guide him. He worries that he simply lacks the practical wisdom necessary for this choice. Moreover, he cannot “get over” the loss his decision will inevitably inflict on one value or another and on one litigant or another. Even after he renders a decision, he regrets how he ruled, he worries that one party and value suffered an unjustifiable loss on his account, a loss incommensurable with the gain afforded to the other party and other value(s).

In the face of tragic cases, both attitudes are plausible, and some mixture of the two attitudes is almost certainly appropriate. I sketched the two archetypal dispositions so as to locate the poles on a spectrum; neither pole is an ideal, nor is it likely that many judges sit on either extreme end of the spectrum. Most legal decisionmakers likely fall somewhere in the middle of the spectrum, sometimes more and sometimes less bothered by the phenomenon of tragic cases. We want our judges to struggle seriously with tragic cases, to take care to identify the values at stake, and to deliberate with sensitivity and humility. But, having reflected with sufficient care, we want our judges to have the fortitude to make the hard calls that they cannot avoid and then move on to the next legal dispute calling out for resolution. We would rightly criticize both the judge who decides tragic cases too cavalierly and the judge who cannot bring himself to decide tragic cases at all.²⁷²

272. For an argument that recognizing the incommensurability of values might lead to more cavalier legal decisionmaking than is optimal, see Schauer, *Instrumental Commensurability*, *supra* note 16.

CONCLUSION

The philosopher and rhetorician Chaim Perelman wrote that legitimate disagreement cannot exist where there is only one right answer or where every answer is as good as another.²⁷³ It is only where individuals can choose among a finite range of plausible choices that legitimate disagreement is possible.²⁷⁴ Perelman went further and suggested that free moral decisionmaking (and evaluation) is itself restricted to those realms in which a limited variety of reasonable choices exist.²⁷⁵ There is no freedom, he argued, where logic dictates a single correct answer, for then any choice other than the right one is simply an error.²⁷⁶ And if there are infinite rational choices, then any whimsy will do; there is no moral weight attached to choosing.²⁷⁷ We act with moral freedom and responsibility only when multiple moral options are available, but the options are not infinite. Seen in this Perelman-ian light, tragic cases in the law are simply occasions for judges to act with moral freedom—and bear all of freedom’s attendant responsibility and anxiety.²⁷⁸

Our reaction to the recognition of tragic cases, then, will mirror our larger reactions to the demands of moral freedom in our collective and personal lives. If liberation and despair

273. CHAÏM PERELMAN, *What the Philosopher May Learn From the Study of Law*, in JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING 163, 165-66 (1980).

274. *Id.*

275. *Id.* at 172 (“What is a question of decision cannot be a question of truth. One must yield to truth; there is no room for deciding.”); cf. LEARNED HAND, *The Spirit of Liberty (1944)*, in THE SPIRIT OF LIBERTY 189, 190 (Irving Dilliard ed., 3d ed. 1960) (“[T]he spirit of liberty is the spirit which is not too sure that it is right . . .”).

276. PERELMAN, *supra* note 273, at 172.

277. *Id.* at 166 (“[N]either the legislator nor the judge makes purely arbitrary decisions . . .”).

278. Indeed, Perelman suggested that the skill of lawyers and judges was precisely their ability to make arguments in an arena in which a range of answers is rationally plausible but no single answer is logically dictated. *Id.* at 167 (“The traditional role of law is to organize effectively and in various ways the dialectics of *imperfect* human will and human reason.”).

are the poles of attitudinal reaction, then Berlin is making the case for a tragic sensibility somewhere along the spectrum. We should never fool ourselves that a final solution in which all ultimate values are realized and harmonized is possible.²⁷⁹ Loss of value, irreparable loss, is an inevitable feature of collective and personal decisionmaking and cannot be rationalized or wished away. Nevertheless, making such decisions lies at the core of what it is to live life as a human being, and avoiding such decisions is neither possible nor desirable.²⁸⁰ Recognizing the inevitability of irredeemable loss, the best we can do as human beings and as legal decisionmakers destined to face tragic choices is to cultivate practical wisdom and strive for some sensible equilibrium of ultimate human values.

279. As Berlin put it:

[T]he very notion of a final solution is not only impracticable but, if I am right, and some values cannot but clash, incoherent also. The possibility of a final solution—even if we forget the terrible sense that these words acquired in Hitler's day—turns out to be an illusion; and a very dangerous one.

Berlin, *Pursuit of the Ideal*, *supra* note 1, at 16.

280. See BERLIN, *Two Concepts of Liberty*, *supra* note 94, at 169 (“The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.”).