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Natural Law and Legal Reasoning

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NATURAL LAW AND LEGAL REASONING*

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I

Legal reasoning is, broadly speaking, practical reasoning. Practical reasoning moves from reasons for action to choices (and actions) guided by those reasons.[1] A natural law theory is nothing other than a theory of good reasons for choice (and action).

"Reasons", "choices" and "action" are words afflicted with a fundamental ambiguity. Its principal source is that we are animals, but intelligent. All our actions have an emotional motivation, involve our feelings and imagination and other aspects of our bodiliness; and all can be observed (if only, in some cases, by introspection) as pieces of behaviour. But rationally motivated actions also have an intelligent motivation, and seek to realize (protect, promote) an intelligible good. So our purposes, the states of affairs which we seek to bring about, have a double aspect: the goal which we imagine and which engages our feelings, and the intelligible benefit which appeals to our rationality by promising to instantiate, either immediately or instrumentally, some basic human good. The word "reason" is often used loosely to refer to one's purposes, without distinguishing between a purpose motivated ultimately by nothing more than feeling and a purpose motivated by one's understanding of a basic human good. I shall be using the word "reason", except where the context shows otherwise, to refer only to reason in the latter sense.[2]

An account of basic reasons for action should not be exclusively rationalistic. It should not portray human flourishing in terms only of the exercise of our capacities to reason. We are organic substances, animals, and part of our genuine well-being is our bodily life, maintained in health,

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* The text of Professor Finnis's article has been retained in the form in which it was circulated to other contributors to this symposium. The author has subsequently added seven new footnotes, explaining or qualifying the text. These additional notes are signalled by being enclosed in square brackets.

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[1] [This statement about practical reasoning takes as the paradigmatic locus of practical reasoning the third of the four orders identified in part III below. And it takes only the central case; not all practical reasoning issues in choice, and choice (in the strong sense of "choice") is not characteristically guided by all the reasons considered in deliberation, for choice is characteristically between rationally (even if not reasonably) open alternative options, and so the reasons for the option(s) rejected in choice do not "guide the choice."]

[2] For my use here of "purpose," "goal," "feeling," "benefit," "motivated" and "basic human good," *see* Grisez, Boyle, & Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS. 99-151 (1987) [hereinafter Grisez, Boyle and Finnis].

vigour and safety, and transmitted to new human beings. To regard human life as a basic reason for action is to understand it as a good in which indefinitely many beings can participate in indefinitely many occasions and ways, going far beyond any goal or purpose which anyone could envisage and pursue, but making sense of indefinitely many goals.[3] And this sense of "reason for action" is common to all the other basic goods: knowledge of reality (including aesthetic appreciations of it); excellence in work and play whereby one transforms natural realities to express meanings and serve purposes; harmony between and amongst individuals and groups of persons (peace, neighbourliness and friendship); harmony between one's own feelings and one's judgments and choices (inner peace); harmony between one's choices and one's judgments and behaviour (peace of conscience and authenticity in the sense of consistency between one's self and its expression); and harmony between oneself and the wider reaches of reality including the reality that the world has some more-than-human source of meaning and value.

To state the basic human goods is of course to propose an account of human nature.[4] But it is not an attempt to deduce reasons for action from some pre-existing theoretical account of human nature in defiance of the logical truth (well known to the ancients) that you cannot deduce an "ought" from an "is"—since you cannot find in the conclusion to a syllogism what is not in the premises. Rather, a full account of human nature can only be given by one who understands the human goods practically, i.e., *as* reasons for choice and action, making full sense of feelings, spontaneities and behaviour. (So Aristotle's principal treatise on human nature is his *Ethics* which is from beginning to end an attempt to identify the human good, and is, according to Aristotle himself, from beginning to end an effort of *practical* understanding; the *Ethics* is not derivative from some prior treatise on human nature.)

So one begins to see the sense of the term "natural law": reasons for actions which will instantiate and express human nature precisely because they participate in and realize human goods.

II.

Just here a sound theory of practical reasoning, and therefore of legal reasoning, will part company from many theories on the market. It parts company, for example, from the denial that there are any objective human goods save, perhaps, freedom of choice—a denial which lies at the heart of Critical Legal Studies, as its foundational texts make plain. Of the four (bad) reasons offered by Roberto Unger for denying that there are objective human goods, the one most dear to his heart, I think, is that to affirm that there are such goods "denies any significance to choice other than

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[3] *See* J. FINNIS, J. BOYLE & G. GRISEZ, NUCLEAR DETERRENCE, MORALITY AND REALISM 277-8 (1987); J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 84-5, 100 (1980) [hereinafter NATURAL LAW].

[4] *See* J. FINNIS, FUNDAMENTALS OF ETHICS 20-22 (1983).

the passive acceptance or rejection of independent truths . . . [and] disregards the significance of choice as an expression of personality."[5]

On the contrary, it is the diversity of *rationally* appealing human goods which makes free choice both possible and frequently necessary—the choice between rationally appealing and incompatible alternative options, such that nothing but the choosing itself settles which option is chosen and pursued.[6] I shall be arguing that many aspects of individual and social life—and many individual and social obligations—are structured by choice between rationally appealing options whose rational appeal can be explained only in terms, ultimately, of basic human opportunities understood to be objectively good.

But if the basic human goods open up so much to rational choice, where are we to find the concept of choices which, though rational, ought to be rejected—are unreasonable, wrongful, immoral?

Moral thought is simply practically rational thought at full stretch, integrating emotions and feelings but *undeflected* by them. The fundamental principle of practical rationality is: Take as a premise at least one of the basic reasons for action and follow through to the point at which you somehow instantiate that good in action—do not act pointlessly. The fundamental principle of *moral* thought is simply the demand to be fully rational: In so far as it is in your power, allow nothing but the basic reasons for action to shape your practical thinking as you find, develop, and use your opportunities to pursue human flourishing through your chosen actions—be entirely reasonable.[7] Aristotle's phrase *orthos logos*, and his later followers' *recta ratio*, right reason, should simply be understood as "unfettered reason", reason undeflected by emotions and feelings. Undeflected reason will be guided by the ideal of integral human fulfillment, i.e. by the ideal of the instantiation of all the basic human goods in all human persons and communities.

Emotion may make one wish to destroy or damage the good of life in someone one hates, or the good of knowledge; so one kills or injures, or deceives that person, just out of feelings of aversion. That is a simple, paradigmatic form of immorality. We can say that hereabouts there is a general, so to speak methodological moral principle, intermediate between the basic principles of practical reason (the basic goods or reasons for action) and particular moral norms against killing or lying: this intermediate moral principle, which some call a mode of responsibility,[8] will exclude meeting injury with injury, or responding to one's own weakness or setbacks with self-destructiveness.

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[5] R. UNGER, KNOWLEDGE AND POLITICS 77 (1975). On this and the other bad reasons see Finnis, *The Critical Legal Studies Movement* in J. EEKELAAR AND J. BELL, OXFORD ESSAYS IN JURISPRUDENCE: THIRD SERIES 144-165 at 16-35 (1987) [hereinafter *Critical Legal Studies*]; or in 30 AM. J. JURIS. 21-42 at 40-42 (1985).

[6] On free choice and its conditions, *see, e.g.*, Grisez, Boyle and Finnis, *supra* note 2, at 256-60; J. BOYLE, G. GRISEZ & O. TOLLEFSEN, FREE CHOICE: A SELF-REFERENTIAL ARGUMENT (1976).

[7] *See* Grisez, Boyle and Finnis, *supra* note 2, at 119-25.

[8] Thus Grisez, Boyle and Finnis, *supra* note 2, at 284-7; in NATURAL LAW AND NATURAL RIGHTS, I call them "basic requirements of practical reasonableness" NATURAL LAW, *supra* note 3, at 100-33, and in FUNDAMENTALS OF ETHICS, I call them "intermediate moral principles", *supra* note 4, at 69-70, 74-6.

More immediately relevant to political and legal theory is the mode of responsibility, or intermediate moral principle, requiring that one act fairly: that one not limit one's concern for basic human goods simply by one's feelings of self-preference or preference for those who are near and dear. Fairness does not exclude treating different persons differently; it requires only that the differential treatment be justified either by *inevitable* limits on one's action or by intelligible requirements of the basic human goods themselves. I shall have more to say about the legitimate role of feelings in making fair choices in which one prioritizes goods by one's feelings without prioritizing persons simply by feelings.

There are other intermediate moral principles. Very important to the structuring of legal thought is the principle which excludes acting against a basic reason by choosing to destroy or damage any basic human good in any of its instantiations in any human person. The basic reasons for action, as the phrase suggests, present one with many reasons *for* choice and action, and since one is finite, one's choice of any purpose, however far-reaching, will inevitably have as side-effect the non-realisation of other possible instantiations of that and of other basic human goods. In *that* sense, every choice is "against some basic reason". But only as a side-effect. The choices which are excluded by the present mode of responsibility are those in which the damaging or destruction of an instantiation of a basic human good is chosen, as a means. The mode of responsibility which I first mentioned excludes making such damage or destruction one's end; the present mode excludes making it one's means. The concepts of ends and means come together in the conception so fundamental to our law: intention.[9]

III.

At this point, one begins to notice how a theory of natural law cannot be a theory only of human goods as principles of practical reasoning. Practical reasoning must take into account, and a theory of practical reason must accommodate within its account certain features of our world. world.

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[9] On the analysis of human action here sketched, see Grisez, Boyle and Finnis, *supra* note 2, at 288-90; on the mode of responsibility which excludes choosing to destroy, damage or impede a basic human good, *see id.* at 286-7. The ultimate intelligibility of this mode—the mode which is the principal source of the *absolute* specific moral norms identified in Judaeo-Christian tradition—is this (stated very summarily, and without the further clarifications which readers may well desire): A basic human good always is a reason for action and always gives a reason *not* to do what would destroy, damage or impede some instantiation of that good; but since the instantiations of human good at stake in any morally significant choice are not rationally commensurable, there can never be a sufficient reason not to act on the first-mentioned reason—only emotional factors such as desire or aversion could motivate a choice to reject the first-mentioned reason by choosing to destroy, damage or impede that instantiation of a basic human good.

The distinction between what is chosen as end or means, i.e. intended, and what is foreseen and accepted as a side-effect (i.e. an unintended effect) is a feature of the human situation which is more or less spontaneously and more or less clearly understood in unreflective practical reasoning, but which must be brought to full clarity in a reflective ethical, political or legal theory. The reality of freedom of choice, and the significance of choices as lasting in the character of the chooser beyond the time of the behavior which executes the choice—this too is a reality which ethical and political theory must attend to and accommodate.

Other similarly significant features of our situation include such basic facts as that which Robert Nozick overlooked when he declared that everything, or virtually everything comes into the world already attached to someone having an entitlement over it—the reality being, on the contrary, that the natural resources from which everything made has been made pre-exist all entitlements and came into the world attached to nobody in particular, so that the resources of the world are fundamentally *common* and no theory of entitlements can rightly appropriate any resource to one person so absolutely as to negate that original communality of the world's stock.[10] (Here one will think of the principle of eminent domain, or of the way in which laws of insolvency, while quite reasonably varying from country to country, are all structured around some principle of equality amongst creditors or within ranks of creditors.[11])

One further feature of the world to be accommodated by a sound theory of natural law is the distinction between the orders of reality with which human reason is concerned. There is the order which we can understand but which is in no way established by human understanding—the order of nature as investigated by the natural sciences, and reflected upon by metaphysicians. There is the order which one can bring into one's own inquiries, understanding and reasoning—the order studied by logic, methodology and epistemology. There is the order which one can bring into one's own dispositions, choices and actions—one's *praxis*, one's doing—the order studied by some parts of psychology, by biography and the history of human affairs, and by moral and political philosophy. And there is the order one can bring into matter which is subject to our power so as to make objects such as phonemes, words, poems, boats, computer programmes, ballistic missiles and their inbuilt trajectories—the order of *poiesis*, of making—studied in the arts and technologies, and in linguistics and rhetoric.[12]

The four orders are simply illustrated in any interesting human state of affairs. Consider, for example, a seminar: You hear the *sounds* produced by my vocal chords: first order; you hear my *expositions, arguments and explanations*, and bring your understanding into line with mine (if only to judge my propositions mistaken): second order; you hear *me*, each of

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[10] R. NOZICK, ANARCHY, STATE AND UTOPIA 160 (1974); NATURAL LAW, *supra* note 3, at 187.

[11] *See* NATURAL LAW, *supra* note 3, at 188-93.

[12] On the four orders, see *id.* at 136-8, 157.

us sitting here disposed to speak and listen by our free choices to engage in this human activity and relationship of participation in a seminar: third order; and finally you hear the *English language* and statements ordered by an expository technique, each of us making and decoding the formalized symbols of a language and the less formalized but still conventional symbols, signs and expressions of a cultural form: fourth order. Thus, four irreducibly distinct senses of "hearing."

Legal rationality, I suggest, has its distinctiveness, and its peculiar elusiveness, because, in the service of a third-order purpose—the chosen purpose of living together in a just order of fair and right relationships—there has been and is being constructed a fourth order object, "the law" as in "the law of Ohio," a vastly complex cultural object, comprising a vocabulary with artfully assigned meanings, rules identifying permitted and excluded arguments and decisions, and correspondingly very many series of processes (such as pleading, trial, conveyance of property, etc.) constituted and regulated according to those formulae, their assigned meanings, and the rules of argument and decision.

This cultural object, constructed or posited by creative human decision, is an instrument which we adopt for a moral purpose, and which we adopt because we have no other way of agreeing amongst ourselves over significant spans of time about precisely *how* to pursue our moral project *well*. Political authority in all its manifestations, including legal institutions, is a technique for doing without unanimity in making social choices—where unanimity would almost always be unattainable or temporary—in order to secure practical unanimity about how to coordinate our actions with each other, which, given authority, we do simply by conforming to the patterns authoritatively chosen.[13]

Legal reasoning, indeed, is technical reasoning, at least in large part—not moral reasoning. Like all technical reasoning, it is concerned to achieve a particular purpose, a definite state of affairs which can be achieved by efficient disposition of means to end. The particular end here is the resolution of disputes by the provision of a directive sufficiently definite and specific to identify one party to the dispute as right (in-the-right) and the other as wrong (not-in-the-right).

Hence the law's distinctive devices: defining terms, and specifying rules, with sufficient and necessarily artificial clarity and definiteness to establish the "bright lines" which make so many real-life legal questions *easy questions*. Legal definitions and rules are designed to provide the citizen, the legal adviser and the judge with an algorithm for deciding as many questions as possible—in principle every question—Yes (or No), this course of action would (or would not) be lawful; this arrangement is valid; this contract is at an end; these losses are compensable in damages and those are not; and so forth. As far as it can, the law seeks to provide sources of reasoning—statutes and statute-based rules, common law

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[13] *See also id.* at 231-7; Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 J. LAW AND PUB. POL. 115-37 (1984).

rules, and customs—capable of ranking (commensurating) alternative dispute resolutions as right or wrong, and *thus* better and worse.

Lawyers' tools of trade—their ability to find and use the authoritative sources—are means in the service of a purpose sufficiently definite to constitute a technique, a mode of technical reasoning: the purpose, again, is the unequivocal resolution of every dispute that can in some way be foreseen and provided for. Still, this quest for certainty, for a complete set of uniquely correct answers, is itself in the service of a wider good which like all basic human goods is not reducible to a definite goal but is rather an open-ended good in which persons and their communities can participate without ever capturing or exhausting it: the good of just harmony. This good is a moral good just insofar as it is itself promoted and respected as one aspect of the ideal of integral human fulfillment. As a moral good its implications are specified by *all* the moral principles that could bear upon it.

IV.

Thus there emerges the tension which Ronald Dworkin's work on legal reasoning has done so much to clarify—even though his own attempt to overcome the tension is, I believe, most instructive precisely by its own failure to grasp the real nature and implications of the tension.[14]

Dworkin tries to show that a *uniquely* correct ("the right") answer is available in "most" hard cases. But his efforts, I shall argue, provide an even better dialectical case for the contrary and classical view. In the classical view, while there are many ways of going and doing wrong, there are in most situations of personal and social life a variety of incompatible *right* (i.e. not wrong) options. And, while personal choice or authoritative social decision-making can greatly reduce this variety of options for the person who has made that commitment or the community which accepts that authority, still those choices and decisions were themselves not required by reason, i.e., were not preceded by any rational judgment that *this* option is the right answer or the best solution. On the view which I am calling "classical", and which I believe to be correct, we approach cases which have not been simply settled by prior choice or an applicable social rule—hard cases—with a view to finding good answers, and rejecting bad ones, but we should not dream of finding a *best* answer.

My denial that uniquely correct, or best, answers are available to most non-technical questions of praxis has nothing to do with any sort of skepticism. Nor is it related to a popular argument which Dworkin is rightly concerned to scorn and demolish—the argument that disagreement is endemic and inevitable, and therefore justified. For disagreement is a mere fact about people, and is logically irrelevant to the merits of any practical or other interpretative claim.

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[14] In what follows, I focus on R. DWORKIN, LAW'S EMPIRE (1986); *see also* Finnis, *On Reason and Authority in Law's Empire*, 6 LAW AND PHILOSOPHY 357-80 (1987).

Nor does my denial rest on the observation that none of us has the "superhuman" powers of Dworkin's imaginary ideal judge. An ideal human judge, no matter how "superhuman" his powers, could not sensibly search for a uniquely correct legal answer to a hard case (as lawyers in sophisticated legal systems use that term). For in such a case, the search for the one right answer is particularly incoherent and senseless, in much the same way as a search for the American novel which meets the two criteria "most romantic and shortest" (or "best and funniest"; or "most American and most profound").

In judicial reasoning as portrayed by Dworkin, two incommensurable criteria of judgment are in use—and these two criteria or dimensions of judgment correspond to the third (moral) and fourth (technical) orders of rationality. The first of these dimensions Dworkin calls "fit": coherence with the existing legal "materials"—note the appropriately "technological" term—created by past political decisions, i.e., with legislation and authoritative judicial decision (precedent). The second Dworkin calls "justifiability" (confusingly, since both dimensions are necessary to justifying a judicial decision; his previous name was better: inherent substantive moral "soundness").[15]

Given these two dimensions of assessment, we can say that a hard case is hard (not merely novel) when not only is there more than one answer which violates no applicable rule, but also the available answers can be ranked in different orders along each of the relevant criteria of evaluation: for novels, their brevity, their American character, humour, profundity, etc.; for judicial judgments, or theories of law, their fit, their *inherent* moral soundness, etc. Thus there emerges what theorists of rational choice call "intransitivity", a phenomenon which theories of rational choice (such as a game and decision theory) confessedly cannot handle: solution A is better than solution B on the scale of legal fit, and B than C, but C is better than A on the scale of moral soundness; so there is no sufficient reason to declare A overall "legally better" than C, or C than A, or B than either. If the rank order was the same on both scales, of course, the case was never a hard one, and the legal system already had what one always *desires* of it: a uniquely correct answer.

In earlier works, Dworkin tried to deflect the problem of incommensurability of criteria by proposing a kind of lexical ordering: candidates for "best account" of the law of Ohio in 1988 must fit the existing Ohio legal materials *adequately*, and of those which satisfy this "threshold" criterion, that which ranks highest in intrinsic moral soundness is overall, absolutely, "the best" even though it fits less well than (an)other(s).[16] But

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[15] [Throughout this discussion of Dworkin's dimensions of assessment, I shall take for granted his assumption that "morality" and "moral soundness" refer to a "dimension of assessment" which can sometimes be rightly (in some sense of "right" relevant to judicial duty) subordinated to some other criterion or criteria (such as "fit"). But the truth here is different, though not simple: morality always trumps every other criterion of choice, though not in such a way as to make immoral choice irrational; but the truth conditions of any moral truth(s) relevant to a judge include facts about fit; if the facts about fit cannot (on moral standards of judgment) be reconciled with morality, one is in a *lex injusta* situation, as to which see NATURAL LAW, *supra* note 3, ch. 12.]

[16] *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 340-42 (1978).

this solution was empty, for he identified no criteria, however sketchy or "in principle," for specifying when fit is "adequate," i.e. for locating the threshold of fit beyond which the criterion of soundness would prevail. (It is like searching for the funniest novel among those that are short "enough.") Presumably, candidates for "the right answer" to the question "When is fit adequate?" would themselves be ranked in terms both of fit and of soundness. An infinite regress, of the vicious sort which nullify purported rational explanations, was well under way.

In his book, *Law's Empire*, Dworkin abandons the simple picture of a lexical ordering between the criteria of fit and soundness—between legal-technical and moral considerations. We are left with little more than a metaphor: "balance"—as in "the general balance of political virtues" embodied in competing interpretations or accounts of the law. But in the absence of any metric which could commensurate the different criteria, the instruction to balance (or, earlier, to weigh) can legitimately mean no more than: bear in mind, conscientiously, all the relevant factors, and *choose*; or, in the legal sphere, hear the arguments in the highest court, and then: *vote*.

In understanding practical rationality in all its forms, it is important to take account of a feature of the phenomenology of choice. *After* one has chosen, the factors favoring the chosen alternative will usually seem to outweigh, overbalance, those favoring the rejected alternatives. The chosen option—to do X, to adopt rule Y—will seem (to the person who chose, if not to onlookers) to have a supremacy, a unique rightness. But the truth is that the choice was not rationally determined, i.e., was not guided by "the right answer." (And this does not mean it was *irrational*: it was between rationally appealing options.) Rather, the choice established the "right" answer—i.e., established it in, and by reference ultimately to, the dispositions and sentiments of the chooser.[17] When the choice is that of the majority in the highest relevant appeal court (a mere brute fact), the unique rightness of the answer is established not only by and for the attitude of those who have chosen it, but also for the legal system or community for which it has thus been authoritatively decided upon, and laid down as or in a *rule*.

V.

I have been discussing, in a special context, something of much wider importance: the incommensurability of goods and reasons at stake in morally significant choice (such as the choice before the judge in a genuine hard case).[18] The phenomenon of incommensurability is central to an understanding of the moral and political rationality which underpins (though not exhausts) legal rationality.

The problem of incommensurability—the problem that there is no *rationally* calibrated scale for "weighing" the goods and bads at stake in

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[17] *See* G. Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21, 46-7 (1978).

[18] [This is inexact. The incommensurability of reasons is not an instantiation of the incommensurability of goods, and differs from the latter incommensurability, except where all the reasons (e.g. aesthetic considerations) at stake are non-moral.]

moral and political choice—is in reality much more intense than in the simple Dworkinian picture of legal reasoning along the two dimensions of legal fit and moral soundness. Everyone confronts that incommensurability when having to choose between coming to a lecture, reading a good book, going to the cinema, and talking to friends. At the other extreme, so to speak, is the incommensurability of the relevant goods and bads in relation to such a fundamental social choice as to have or to reject or renounce a nuclear deterrent. An exploration of such a choice amply illustrates and explains the impotence of all forms of aggregative reasoning towards morally significant choice—choice outside the purely technical or technological task of identifying the most efficient means to a single limited goal.[19]

For *morally significant choice* would be impossible if one of the options could be shown to be *the best* on a single scale which, as all aggregative reasoning does, ranked all options in a single transitive order.[20] If there were a reason (for doing X) which some rational method of comparison (e.g., aggregation of goods) identified as preferable, the alternative reason (against doing X) thus identified as rationally inferior would cease to be rationally appealing in respect to that situation of choice. The reason thus identified as preferable, and the option favored by that reason, would be rationally unopposed. There would remain *no choice*, in the morally significant sense of choice, between the alternative options.[21] For one has a morally significant choice just where one really does have reasons for alternative options; for then the choice can be *free*, no factor but the choosing itself *settling* which alternative is chosen. So the reason why there are morally significant choices is precisely that there is no rational method of identifying the reasons *for* alternative options, *prior to moral* judgment, as rationally simply superior and inferior. That is to say, the instantiations of basic human goods, instantiations considered precisely as reasons for moral judgment and for action, are incommensurable with one another. And this is not surprising, for these instantiations are nothing other than aspects of human persons, present and future, and human persons cannot be weighed and balanced.[22]

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[19] *See* Grisez, Boyle and Finnis, *supra* note 2, at 177-272. Joseph Raz has explored the problem, with some similar conclusions, in the important chapter on incommensurability in his THE MORALITY OF FREEDOM 321-66 (1986).

[20] [This is stated too strongly. It is sufficient if one option "dominates" all the others; there will then be no morally significant, rationally guided *choice*, even if the remaining, dominated alternatives cannot themselves be ranked in a single transitive order.]

[21] [This sentence, like each of the two sentences following it, is stated too strongly. There remains the possibility that in choosing, a person follows a non-rational motive (e.g. fear of pain) against reason(s). But this possibility is irrelevant to the present discussion, which is an examination of aggregative *reasoning* towards morally significant choice.]

[22] [Again, this is a little too blunt. The good or harm done to a human person by a choice cannot be weighed and balanced against e.g. the good or harm done to the chooser in and as a result of that choice. But there can be situations in which an option concerning persons is "dominant".]

But one *can* identify reasons *against* an option, wherever (for example) that option involves *choosing* (intending) to destroy, damage or impede a basic human good, or imposing on persons, even as a side-effect, harms or burdens which one would not impose on oneself or one's friends and which one imposes for no motive other than differential feelings. Such reasons against a certain option must be respected unless some reason *for* that action is rationally preferable.[23] But what the argument about incommensurability shows is that *no* reason can be identified as rationally preferable to the reason not to choose to destroy or damage a basic good in a human person, or to the reason not to act unfairly.

VI.

The results of this reflection on incommensurability are of great importance for legal reasoning.

The first result is that there are moral absolutes, excluding intentional killing, intentional injury to the person, deliberate deception for the sake of securing desired results, enslavement which treats a human person as an object or a lower rank of being than the autonomous human subject. These moral absolutes, which *are* rationally determined and essentially determinate, are the backbone of the important human rights, and of the criminal law and the law of intentional torts, not to mention all the rules and principles which penalize intentional deception, withdraw from it all direct legal support, and exclude it from the legal process.

A second result concerns the implications of fairness. The core of the moral norm of fairness is the Golden Rule: "Do to others as you would have them do to you; Do not impose on others what you would not want to be obliged by them to accept". Although this too is a requirement of practical rationality, a rational norm of impartiality, its concrete application in personal life presupposes a commensuration of benefits and burdens *which reason is impotent to commensurate.* For, to apply to Golden Rule, one must know what burdens one considers *too great* to accept. And this knowledge, constituting a pre-moral commensuration, can only be one's intuitive awareness of one's own differentiated *feelings* towards various goods and bads as concretely remembered, experienced or imagined. This, I repeat, is not a rational and objective commensuration of goods and bads; but once established in one's feelings and identified in one's self-awareness, it enables one to measure one's options by a rational and objective standard of inter-personal impartiality: fairness.

Similarly, in the life of a community, the preliminary commensuration of rationally incommensurable factors is accomplished not by rationally determined judgments, but by *decisions.* Is it fair to impose on others the

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[23] [This sentence, taken in isolation from the following sentences, is misleading. In a situation in which the reasons *against* an option are of the sort referred to in the previous sentence, there cannot be a rationally preferable reason *for* the action; the class of exceptions referred to by the "unless . . ." clause is a null class.]

risks inherent in driving at more than 10 miles per hour? Yes, in our community, since our community has by custom and law *decided* to treat those risks and harms as *not too great.* Have we a rational critique of a community which decided to limit road traffic to 10 m.p.h. and to accept all the economic and other costs of that decision? No, we have no rational critique of such a community. But we do have a rational critique of someone who drives at 60 m.p.h. but who, when struck by another, complains and alleges that the mere fact that the other's speed exceeded 10 m.p.h. proved that other's negligence. And we have a rational critique of one who accepts the benefits of the road traffic law and of other communal decisions but who rejects the burdens as they bear on him and those in whom he feels interested; and so forth. In short, the decision to permit road traffic to proceed faster than 10 m.p.h. was *rationally under-determined.*[24] But *once the decision has been made,* it provides an often *fully determinate* rational standard for treating those accused of wrongful conduct or wrongfully inflicting injury.

In the working of the legal process, much turns on the principle—a principle of fairness—that litigants (and others involved in the process) should be treated by judges (and others with power to decide) *impartially,* in the sense that they are as nearly as possible to be treated by each judge as they would be treated by every other judge. It is this above all, I believe, that drives the law towards the artificial, the *techne* rationality of laying down and following a set of positive norms identifiable as far as possible simply by their "sources" (i.e., by the fact of their enactment or other constitutive event) and applied so far as possible according to their publicly stipulated meaning, itself elucidated with as little as possible appeal to considerations which, because not controlled by facts about sources (constitutive events), are inherently likely to be appealed to differently by different judges. This drive to insulate legal reasoning from moral reasoning can never, however, be complete, as Dworkin's work reminds us.

The two principal results of the phenomenon of incommensurability are implications which rule out the technique of legal reasoning known as Economic Analysis of Law. For it is central to that technique that every serious question of social order can be resolved by aggregating the overall net good promised by alternative options, in terms of a simple commensurating factor (or maximand), viz. wealth measured in terms of the money which relevant social actors would be willing and able to pay to secure their preferred option. Equally central to Economic Analysis is the assumption, or thesis, that there is no difference of principle between buying the right to inflict injury intentionally and buying the right not to take precautions which would eliminate an equivalent number and type of injuries caused accidentally. A root and branch critique of Eco-

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[24] Of course, this does not mean that it was "indeterminate" in the strong sense of the word which the Critical Legal Studies Movement uses so vaguely and uncritically, i.e., indeterminate in the sense of being wholly unguided by reason.

nomic Analysis of Law will focus on these two features of it. Less fundamental critiques, such as Ronald Dworkin's (helpful and worthwhile though it is), leave those features untouched. Indeed, Dworkin's own distinction between rights and collective goals, the latter being proposed by Dworkin as the legitimate province of legislatures, is a distinction which uncritically assumes that collective goals can rationally be identified and preferred to alternatives by aggregation of value without regard to principles of distributive fairness and other aspects of justice—principles which themselves constitute rights, and which cannot be rationally traded off against measurable quantities of value.[25]

VII.

In sum: Much academic theory about legal reasoning greatly exaggerates the extent to which reason can settle what is greater good or lesser evil, and minimizes the need for authoritative sources which, so far as they are clear and respect the few absolute moral rights and duties, are to be respected as the only rational basis for judicial reasoning and decision, in relation to the countless issues which do not directly involve those absolute rights and duties. A natural law theory in the classical tradition makes no pretence that natural reason can determine the one right answer to those countless questions which arise for the judge who finds the sources unclear.

(*See Critical Legal Studies*, *supra* note 5, at 147, 157-61.) For the good of human bodily life and integrity is a genuine reason always practically relevant; and some further rational criteria for decision are provided by facts about human reaction times and susceptibility to impact, and by the rational demand for consistency with our individual and communal tolerance or intolerance of other—non-traffic—threats to that good.

[25] *See* Finnis, *A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence*, 71 PROC. BRIT. ACAD. 303, 318-22 (1985).