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FACING UP: A REPLY†

JOSEPH RAZ*

We are all familiar with the peculiar feeling of coming across one’s past objectified, as when one overhears others telling how they perceived a certain event in which one played the hero’s role. Reading the contributions to this issue was a bit like that. In particular, it made me realise how I have abused the tolerant paper by writing all too much, while leaving so many hostages to fortune, so many loose ends, and expressing so many half-baked ideas. It is also embarrassing because it is like a summons to the confessional, to repent my sins of omission and commission, and to recant. I’ll do a certain amount of that, while declining the invitation to undertake a thorough character reform.

I should probably be more repentant than I am. Given more time to cogitate, I would probably come to realise a greater need to modify my views than will be evident from this reply, for it is only a preliminary reaction to the many careful and thoughtful points made by the contributors to this symposium. At times my comments are tentative. At times I will overlook points which require careful considerations. In all cases I strove to see for this I take to be my responsibility whether the essential position I advanced in the past could be defended. But its defence requires recognition that some views I have put forward were more peripheral than others, and some were less well considered than others.

Happily, the criticism addressed at me tends to be concentrated around a number of central issues. I will try to focus my reply on the essential points raised by these criticisms. My reply is just that. I make no attempt to comment on the many rich ideas presented and suggestions made in the various articles, but merely respond to the criticism of my work within them.

† I am grateful to David Dolinko, John Fisher, Steve Munzer, and Carl Craner for comments on a draft of part of this Article.

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I. REASONS—ORDINARY AND EXCLUSIONARY

Our understanding of law is greatly defective unless it includes and is based on a sound view of the role of law in practical reasoning. The first precept of legal theory is that law is practical, that its essential function is to play a role in its subjects' reasoning about what to do.\(^1\) I will return to this proposition below. I mention it here because it means that a theory of law assumes an understanding of practical rationality. I wish I had a more complete account of this subject to offer, or that I knew of one I could endorse. Unfortunately, my account of it leaves much to be desired. Some mistakes are pointed out in this symposium. Stephen Perry is clearly right in saying that I have failed to provide an adequate explanation of the role of uncertainty or risk in practical reasoning.\(^2\) On this occasion, however, I will largely confine myself to a consideration of the case against exclusionary reasons.

A. ON THE REALITY OF CONFLICTS OF REASONS

A few words about the reality of conflicts of reasons are called for as a preliminary to a discussion of the special type of conflict to which exclusionary reasons give rise. According to Moore, what appear as conflicts of reasons may in fact be cases in which reasons are subject to exceptions. Once the exceptions are taken into account the appearance of conflict dissolves. This seems to me to be mistaken. Exceptions are at home when we consider rules, especially authoritative, institutionalised rules. There are no exceptions to a reason. There are merely cases to

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1. This point is the cornerstone of Burton's contribution to this symposium, in which some of its implications are most usefully illustrated. See Burton, Law as Practical Reason, 62 S. CAL. L. REV. 747 (1989).

2. See Perry, Second Order Reasons, Uncertainty and Legal Theory, 62 S. CAL. L. REV. 913, 924-25 (1989). Perry is inclined to think that uncertainty can be accounted for only by regarding people's beliefs (that a certain event may happen, etc.) as reasons. I still tend to resist this view. I think myself that in these cases, as in reasoning which is free of uncertainty, reasons for actions are (in general) belief-independent facts, though they may be facts about the evidence available to particular reasoners. This is necessary to account for the difference between our assessment of Robert and of Roberta, who both think, let us say, that it is likely that commodity prices will decline in the near future, and who both reach this conclusion by reasoning in the same way from the same beliefs. Assume further, however, that Robert has available to him information not available to Roberta, the existence or relevance of which he failed to appreciate, and which should have alerted him to the fact that commodity prices will rise in price. We wish to criticize him, but not her, for failure in reasoning. The difference is not in the beliefs which were their reasons. It is in the evidence available to them, that is in the existence of facts that Robert could have found out about, or could have known to be reasons bearing on the issue.

Throughout, my discussion is confined to guiding reasons. Beliefs in (guiding) reasons are explanatory reasons. For an example of the distinction between the two see J. RAZ, PRACTICAL REASONS AND NORMS (1975).
which it does not apply. But where it does apply, it may still be overrid-
den or defeated. A promise which was voluntarily given ought to be
kept. If it is overridden by the need to attend to an emergency, it is not
overridden because there is no reason to keep the promise in such cir-
cumstances, but because there is a greater reason which conflicts with it.3

Contrary to Moore’s observations, the reason for accepting the real-
ity of conflict is not that “our subjective emotional experiences are evi-
dence of . . . objective moral features.”4 There is no special emotional
experience characteristic of belief in the existence of conflicts, nor would
it be of great relevance if there was (at least not in the way indicated by
Moore). We are not concerned with the discovery of some mysterious
moral facts which are indirectly observed by the traces they leave in our
emotional life. The question whether reasons conflict is not a substantiv-
eproperly, but about a formal property of the concept of reason.

The reasons for an action are considerations that count in favour of
that action. We can think of them as the facts, statements of which form
the premises of a sound inference to the conclusion that the action ought
to be done. That considerations which establish the disadvantages of the
action obtain as well, does not in the least show that the reasons do not
exist, nor does it show that the reasons are subject to an “exception.”
The original reason is still there. The inference drawn from it (that the
act ought to be done) is still valid. The conflicting considerations merely
show that there are conflicting reasons, that is, that there is also a sound
inference to the conclusion that the act ought not to be done.5

Rules are different. They belong to the lower level of any two-level
way of understanding practical reasoning. That is, they are based on
reasons. Usually, each rule is based upon a number of reasons, and they
reflect a judgment that within the scope of the rule those reasons defeat

3. My own account of this kind of conflict, which includes the presence of exclusionary rea-
sions, is more complex, but we can overlook the complexity here.
5. Such a conflict does not amount to a contradiction. For an explanation of the sense of
“ought”-sentences, which explains how it can be that we ought to perform an action while also being
the case that we ought not to do so see Practical Reasoning, 11-15 (J. Raz ed. 1978). This
account presupposes that practical inferences are defeasible in the sense explained by philosophers
such as A.J.P. Kenny and R. Chisholm. See Kenny, Practical Reasoning and Rational Appetite, in
Practical Reasoning, supra, at 63; Chisholm, Practical Reason and the Logic of Requirement, in
Practical Reasoning, supra, at 118.
various, though not necessarily all, conflicting reasons. Rules are, metaphorically speaking, expressions of compromises, of judgments about the outcome of conflicts. Here, talk of exceptions comes into its own. Characteristically, cases are "simply" outside the scope of the rule if the main reasons that support the rule do not apply to such cases. A case falls under an exception to the rule when some of the main reasons for the rule apply to the case, but the "compromise reflected in the rule" deems other, conflicting reasons to prevail in such a case. It is in this sense that "You may deceive to save life," if true, is an exception to the rule, "Never deceive," if there is such a rule. Since exceptions belong to the logic of rules and do not apply to reasons, they cannot be used to show that reasons do not conflict. In fact, exceptions to rules exist precisely when reasons do conflict.\footnote{There are also exceptions to what we say, and the remarks about exceptions to rules apply to them as well. If I assert that one should never deceive, I may nevertheless admit to an exception when deceit is necessary to save life. What we say expresses our judgment on all the relevant considerations we are aware of, and is subject to exceptions when the main reasons which apply to the case are overridden in particular circumstances.}

**B. SOME NON-EXISTING AMBIGUITIES**

Moore thinks that I have been using the term "exclusionary reasons" in three different senses; Perry thinks that I have been using it in two. I think they are both wrong. Exclusionary reasons are reasons against acting for certain reasons. This is, as I understand him, the second of Moore's senses. As he notes, I explicitly mention and reject the other two senses in which he thinks that I am using the term. The first sense identifies exclusionary reasons with (first-order) reasons not to engage in certain thoughts, or not to reflect on certain issues. This is, Moore alleges, the sense of the term in the following passage:

Jill has made a rule to spend her holidays in France. . . . Jill . . . faces many conflicting considerations, but she has no intention to act on the balance of reasons. She has adopted a rule to spend her holidays in France and she did so precisely in order to spare herself the necessity of deciding every year what to do during the holidays. She adopted the rule in order not to have to act on the balance of reasons on each occasion. Having the rule is like having decided in advance what to do. When the holidays come she is not going to reconsider the matter. Her mind is already made up. Her rule is for her an exclusionary reason . . . .\footnote{See Raz, Reasons for Action, Decisions and Norms, in PRACTICAL REASONING, supra note 5, at 140-41; cf. Moore, supra note 4, at 855.}
It seems to me that “exclusionary reason” is used here in its proper sense, as explained above. For Jill, her rule is an exclusionary reason. Her reason for adopting such a rule is, it is true, to avoid having to decide every year where to go on her holidays. This may be because she does not like to reflect on the relative merits of various holiday resorts, but it need not be. Her reason may be a desire to avoid the uncertainty as to where she will be, the anxiety of having to decide, or a number of other factors. Be they what they may, they are her reasons for the rule. They are not to be confused with the rule itself. The rule is a reason to go to France, as well as a reason for not acting on certain considerations (for example, that hotels in Ibiza offer particularly attractive deals this year). If the reason for the rule is a desire to avoid the need to reflect on certain matters, the rule can help with this goal, since if one’s mind is already made up, one reason for the unwanted reflection disappears. Notice that even after Jill has adopted the rule she has no reason not to reflect on the merits of various resorts. If she wants to contemplate such matters she is free to do so. She merely no longer has any need to do so, because she has a reason for not acting on the outcome of such reflections. She should follow her rule instead. This was the purpose of the rule as stated in the original passage. It relieves her of the need to reflect on the merit, without implying that there is anything wrong in doing so if she wishes to.\(^8\)

Moore detects another sense in which I use “exclusionary reasons.” In this sense exclusionary reasons “actually change what counts as a right-making characteristic of an action,”\(^9\) they “exclude ... other reasons ... from counting at all.”\(^10\) Moore advises the reader not to allow “Raz’s explicit definition of ‘exclusionary reasons’, his special ... examples of them, and the alignment of both within the Kantian tradition in ethics, [to] blind us to [this] third interpretation of exclusionary reasons.”\(^11\) The only reason I can detect for ascribing the ambiguity is that “some of [Raz’s] best examples of exclusionary reasons are most fruitfully unpacked with this justificatory interpretation.”\(^12\) I think that Moore is simply trying to be charitable here. He must know that his claim, if correct, may show that my analysis of the examples he has in

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8. As usual, different cases will differ in their rationale. There may be cases where, given that one’s judgment is unreliable, there is reason for one not to contemplate the pros and cons if doing so may lead one to act on one’s judgment. But given that one’s decision or rule puts an end to this danger, once it is adopted there is no longer a reason not to reflect, idly, on the merits.
9. Moore, supra note 4, at 857.
10. Id. at 854.
11. Id. at 857.
12. Id. at 858.
mind, in terms of exclusionary reasons, is mistaken, and that those examples are to be understood in some other way. He must know that there is nothing here to point to an ambiguity, but he gently prefers to ascribe to me an ambiguity rather than a mistake.

"Exclusionary reasons" is a technical term adopted to explain features of our reasoning which are frequently ignored. The analysis of the role of these reasons in practical thought is, therefore, anything but a straightforward observation of the obvious. My argument was that promising binds us to disregard certain reasons. Moore suggests that it would be better to interpret promising as turning reasons which count into ones which do not count. I have pointed out, and he acknowledges the fact, that the reasons which we are to disregard are not canceled. He says, in effect, that I must mean that they are not canceled on the first level but they are canceled on the second level, for they are preempted from affecting the rightness of the action. This is yet more technical terminology, and I find it difficult to understand what it means. We understand what an exclusionary reason means. It simply means a reason not to act for a certain reason. We are, for example, familiar with spouses promising their partners to decide how to spend the weekend in the light of their own desires, disregarding what they think their partners want. Their promises are exclusionary reasons, reasons to exclude a consideration from being the ground for any decision they may make. Hence, there is no mystery about the nature and existence of exclusionary reasons. But how reasons which are neither canceled, nor excluded or overridden, can fail to affect the rightness of the action is not obvious. I do not wish to deny that some further technical distinctions may be useful, nor that something like the idea intimated by Moore may figure among them, once it receives a proper explanation. But Moore provides none.

Still, it is possible that Moore is right in suggesting that my analysis of all or some cases fails on its own terms, that to meet the points I am making one needs not exclusionary reasons but some other notion. The most likely candidate is that of canceling reasons. Think of it this way: Think of John, who is subject to an (undefeated) exclusionary reason. Let us assume that it affects the outcome of his deliberations, that is, that the action indicated by the balance of all first-order reasons is different from the action required by the balance of the unexcluded reasons only. John, I have argued, is acting correctly only if he disregards the excluded

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13. See id. Perry seems to entertain a similar view of the only way in which to understand what he calls "objective" exclusionary reasons. See Perry, supra note 2, at 928 n.48.
reasons in his deliberations. I do not mean that he must not think of them, only that he must not base his action on them. He must not act for those reasons. Before he acts, the right action to take from his perspective is the one which is indicated by the unexcluded reasons. How is he to judge his own conduct after he acts? Assume that he acts correctly from the point of view of the ex ante considerations. His action may be out of step with the balance of first-order reasons, but on the other hand it is in accord with the exclusionary reasons, and this explains and justifies the deviation from first-order reasons. He could not conform both to them and to the exclusionary reason, and the exclusionary one prevails. Well, this is almost right. He could not conform to both the balance of first-order reasons and the exclusionary reasons if he reasons correctly.

Assume, however, that he makes a mistake. While completely disregarding the excluded reasons and letting them play no part in his motivation, John nevertheless performed the action which is in fact indicated by the balance of all the first-order reasons. He simply miscalculated. Paradoxically his mistake seems to be rather fortunate. Because of it he managed to conform both to the exclusionary reason (he did not act for any excluded reason) and to the balance of first-order reasons. Up to a point this is a familiar puzzle. It is a general feature of the difference between judging actions ex ante and judging them ex post. Sometimes when trying to act on the evidence before us we make a mistake which turns out to be a lucky one, and we perform an action which the partial evidence available at the time, correctly evaluated, did not justify, but which is in fact justified in the light of all the facts of the case.

But are exclusionary reasons to be understood in this way? As Moore recognises, some clearly are. Many exclusionary reasons are "evidential" in character. That is, their justification is that conformity to them will lead to improved conformity with the excluded reasons. This is the case, for example, when a person refrains from acting on new information because he is too tired, intoxicated, or otherwise unable to trust his judgment of its significance. Clearly, if by luck his action conforms to the reasons furnished by the information which he dismissed, no one can complain. The same is true if the exclusion is justified on rational grounds of saving labor, time, or anxiety, which while not improving conformity with the excluded reasons, specifically make the agent comply better with reasons generally. Certain reasons are justifiably excluded. One does not act for them. Supposing that the exclusion would have led to a suboptimal action, but that a miscalculation led the
agent to the optimal action, we simply count him lucky. There is no mystery or paradox in this.

At other times, the exclusion is justified directly by motivational considerations. If Colin promised to disregard his own interest in deciding on the education of his son, then he has discharged his duty if he did indeed disregard his interest. If his misunderstanding of the merits of various schools fortuitously led him to choose one which suits his interests as well, then all we can say is that he is lucky. Perhaps we should also say that his son is unlucky, because but for this mistake a school which is better for the son would have been chosen. But this is no ground for condemning the decision, for after all the parent's interests matter as well, and we are assuming that in this case and within these bounds they outweigh those of the son.

These are individual examples of the way (some) exclusionary reasons work. My aim in introducing the concept was of course more ambitious. I claimed that it helps explain certain concepts, especially those of decision, mandatory rule, authority, and promises, by ascribing to them a special role in practical reasoning. Does that part of my explanation survive the apparent paradox of luck through miscalculation? Again, it seems to me that it does. There is, however, a complicating factor in these cases, and it may explain Moore's suspicion that I need something stronger than a mere exclusion. The complicating factor is that the mentioned concepts are explained in terms of protected reasons. These are, as Moore mentioned, a combination of an exclusionary reason and a first-order reason. So these notions are indeed explained by reference to something stronger than mere exclusionary reasons. Rules, promises, decisions, and authoritative decrees affect the outcome not only by excluding certain considerations, but also by adding certain reasons to the balance of first-order reasons. How does that factor affect the case of luck through miscalculation?

We need to distinguish between the two ways in which the first-order reasons provided by promises, authoritative directives, rules, and decisions can be related to the reasons excluded by the exclusionary aspect of such protected reasons. The first-order reasons may be meant to reflect the excluded ones, or they may be meant to add to them. A decision is typically meant to reflect the reasons which led (or should have led) to it.\footnote{A decision is meant to reflect reasons which were within the ambit of the factors considered by the agent. A precise exploration of this condition is a matter of some complexity, and cannot be undertaken here.} An authoritative rule prohibiting the marketing of a
dangerous toy is similarly meant to reflect the reasons that make the toy
too dangerous for use by children. A court's decision that the plaintiff
defamed the defendant and is liable to pay damages is likewise meant to
reflect considerations that applied to the plaintiff prior to the decision.
But a law imposing a tax on capital gains, while reflecting reasons which
indicate that people who benefit from capital appreciation should con-
tribute to financing public projects, also adds to the excluded reasons. It
settles precisely how much one should pay, at what time and to what
address such contributions should be made, and so on. It thus creates
"new" first-order reasons, such as, to file reports within a certain period,
to pay within a certain period, or to pay a particular sum rather than a
little less or a little more, etc. When we talk of acting on the right bal-
ance of reasons, with the excluded reasons taken into account, we mean
all the first-order reasons, including the new first-order reasons created
by the promise, the law, etc., but excluding the "dependent" first-order
reasons created by the promise, the law etc., which are merely a reflec-
tion of other first-order reasons, and which should not be allowed to
count twice.15

In putting forward the normal justification thesis as part of a theory
of authority, I emphasized the fact that the rationale of authority is, in
the last resort, that it facilitates conformity with reason. Authority is
legitimate only where conformity with reason is better and more securely
assured by following authority than by acting on one's own. This is con-
sistent with the fact that conformity to the authority's demand may be,
on occasion though not in general, sub-optimum. For example, on occa-
sion it may fail to reflect correctly the underlying reasons which it is
meant to reflect. Therefore, here again conformity to the balance of first-
order reasons in an individual case which may result from misunder-
standing what one has to do to conform with an authoritative directive is
a lucky mistake, provided that the balance includes all the previously
existing reasons (including the excluded ones), plus the new first-order
reasons added by the authority, but excluding the dependent first-order
reasons added by the authority.

I believe that the same sort of analysis satisfactorily accounts for the
similar lucky mistakes in observing promises. Of course, the analysis lies
to be sensitive to the different reasons for the validity of promises. Some
are binding because of their contribution to cementing special relations,
others because of the basis they provide for relying on other people's

15. For a detailed explanation of the argument from double counting, see J. Raz, THE
MORALITY OF FREEDOM 59 (1986).
conduct. Depending on the reasons for the validity of the promise, the exclusionary element of it may primarily reflect motivational considerations, or insurance against change of conduct if underlying reasons change, or are thought to change, etc. The analysis will vary with the kind of case involved, but will always, I think, make use of the conceptual structures I analysed. I may be wrong in thinking that, but Moore has not provided an argument to show that I am. I provisionally conclude that Moore has detected neither an ambiguity in the notion of "exclusionary reason" nor a defect in its application (at least none that is indicated by his discussion of the ambiguities).

Perry alleges yet another ambiguity in "exclusionary reasons." Sometimes the term means a reason not to act for a certain reason (the objective interpretation), whereas at other times it means a reason not to rely on one's belief in a reason (the subjective interpretation).¹⁶ Like Moore, Perry is really criticizing my analysis (in this case of authority) rather than pointing to an ambiguity. I have, in the past, considered his suggestion, and for good or ill I have rejected it in the following terms:

Incapacity-based exclusionary reasons differ from all others . . . in that they depend on the circumstances of the agent at the time he decides what to do. This may incline people to think that such reasons are not exclusionary reasons at all . . . Some may claim that incapacity is a reason for not acting on one's judgment (because it is likely to go wrong). It is not a reason for not acting on valid reasons. It is obvious that the fact that one's judgment may be wrong is in such circumstances the ground for the reason. But is it also true that the reason is a reason for mistrusting one's judgment rather than for not acting on certain reasons? One cannot act for a reason unless one believes in its validity. The practical relevance of a reason not to act for a reason that p is, therefore, the same as the practical relevance of the reason not to act for p, if one believes that p is a valid reason. In an obvious sense the latter is a reason not to act on one's beliefs. But in this sense every second-order reason is also a reason to act on or to refrain from acting on one's beliefs in reasons. There is no independent argument which I can see which shows that only reasons grounded in temporary incapacity are reasons not to act on one's beliefs or that they are not reasons not to act on reasons.¹⁷

I take it that this passage shows that there was no ambiguity in my usage. I simply chose a different analysis than that preferred by Perry. Clearly, if the argument cited here is good at all, it applies not only to

¹⁶. See Perry, supra note 2, at 928-29.
¹⁷. J. Raz, Practical Reason and Norms, supra note 2, at 48 (footnote omitted).
temporary incapacity but also to cases of authority based on superior knowledge, upon which Perry focuses his attention.

Was my judgment sound? It is based on holding that (1) all second-order reasons are also reasons to act or not to act on one's judgment; (2) there is no practical difference between a reason to act on one's judgment that \( p \) and a reason to act on \( p \); and (3) there is no special reason to prefer the subjective construction (favoured by Perry) in some cases and not in others. The first of these propositions still seems true to me. The second can be challenged in the following way. It is true, it can be said, from the point of view of the agent before the act, from the ex ante perspective. But evaluation of the action from an ex post point of view shows the difference. If one does not back one's judgment and happens to conform to reason, then one has done all one had reason to do if one acts on a reason not to trust one's judgment, but one acts wrongly if one had reason not to act for a reason. By now this argument sounds familiar. It is the mirror image of the argument we canvassed above in considering Moore's alleged third sense of "exclusionary reasons." That discussion also exposed the fallacy of this argument. If you do not trust your judgment and do not act for the excluded reason, you comply with the exclusionary reason. If, through luck or miscalculation, you nevertheless happen also to conform with the excluded reason, you made a lucky mistake. It therefore seems to me that the second of my original propositions is also true.

The trouble starts with the third proposition. Even if true, it falls short of the mark. It merely establishes that there is as much reason to support the objective interpretation as to support the subjective interpretation. It does not establish the superiority of one over the other. Furthermore, is not the fact that the ground for the reason is in one's subjective incapacity, or inferior competence, reason enough to distinguish these cases from the others and give them a subjective interpretation preserving the objective one to the others? I think that defective though my argument was, it can be supplemented by two further propositions, which make it good: (4) Ultimately, reasons are facts, and our beliefs matter only inasmuch and because they aim at the facts. (Perry agrees with this.) This seems to me to suggest that the objective interpretation is true of the ordinary case. Perry also seems implicitly to agree that the fourth proposition provides a general motive in favour of the objective interpretation which prevails in all cases in which there is no special reason to prefer the subjective one. (5) There are strong reasons to prefer a unitary interpretation. If this is so, then it should be the
objective one. This much follows from the fourth proposition. The reason for preserving a unitary interpretation (while not denying that the grounds for an exclusionary reason are sometimes in subjective incapacities, inferiority of judgment, etc.) is that the different cases shade into each other.

Perry's discussion very clearly shows the strains of nonuniformity. He regards authoritative directives as being subjective reasons, for he takes authorities to be based primarily on expertise and superior knowledge. He recognises that I argue that "sometimes" they are based on reasons of coordination, but he fails to integrate this point into his account. In fact, in my view, political authorities are justified primarily on grounds of coordination, though these are mixed with considerations of expertise. For example, expertise predominates in matters of consumer protection legislation, but there and in other cases such as taxation, where financial expertise plays a (usually modest) role in justifying governmental action, superior knowledge is mixed with considerations of the government's ability to achieve concerted action in society. Think also of the courts. On the one hand, they are appointed with a view to expert knowledge of the law to improve the quality of their findings. On the other hand, they are justified as institutionalised ways of containing and channeling disputes. Both justifications play their role in arguments for the authority of the courts. It would be extremely awkward to construct an account of authority which carefully distinguishes the role of objective reasons from that of subjective reasons. The different considerations are too closely intertwined. They are mutually supportive and are inseparable in their operation.

Given this strong case for a unitary account, and the possibility of providing it in terms of exclusionary reasons (i.e., Perry's objective interpretation of them), which allows that some of their grounds have to do with unreliability of the subjects' judgments or the expertise of the authority, I conclude that not only the case for an ambiguity but also the case for a fault in the analysis remain unproven.

C. THE PRESENCE OF EXCLUSIONARY REASONS

Moore argues that my reasons for believing that exclusionary reasons feature importantly in our practical reasoning are inconclusive. In Practical Reason and Norms I tried to give both functional and phenomenological reasons for accepting the prevalence of exclusionary reasons,

though their mere presence, and occasional validity, can be more directly established by appeal to examples. Moore concentrates on the phenomenological argument. He takes it to be an argument that the common experience of people is evidence of the structure of real moral reasons. It is not that. It is an argument about features of our concepts, based on the way they function in our discourse and thought. But that is not an adequate reply to Moore's observation that there are other ways of accounting for the phenomenological features I isolated. He seems to me to be partly right. My description of the phenomenological features which show the presence of exclusionary reasons was far too crude and indiscriminating.

Moore's criticism concentrates exclusively on my invocation of perceptions of conflicting assessments of what we ought to do. He rightly points out that there could be other explanations of such conflicting assessments. However, he largely disregards two other features of our self-understanding which I relied on. They are the fact that we sometimes think, for example, in the presence of superior orders, that it is not for us to act on the ordinary reasons which apply to the case. That task was assigned to our commanders, and that is precisely what it is to be under someone's command. He also disregards my invocation, again when confronted with orders, or promises, of the two ways of assessing the matter, which do not leave us undecided, since we know which assessments prevail, but which represent a two-level structure of reasoning rather than merely the presence of conflict within one evaluation. It expresses itself in saying that our hands are tied; or that we can see that reason points one way, but we are bound, by our allegiance to our superiors, or by our promises, to act another way. These features are not explicable as the expression of perceived conflicts of reasons. As I mentioned, they are characteristic of certain situations only and are entirely absent from ordinary conflicts of reasons. I agree that their existence may be susceptible of some other explanation, but my case rests in large measure on the other two arguments that Moore does not consider at any great length.

Let me briefly rehearse some of them. As I do so I will deal with another of Moore's criticisms, namely that there is an overwhelming

19. See Moore, supra note 4, at 861.
20. See id. He also refers to my saying that in such cases reasons, or their evaluations, are incommensurate, id. at 863, but I do not rely on incommensurability in my argument.
21. In J. RAZ, PRACTICAL REASON AND NORMS, supra note 2, at 41-43, I wrongly said that the presence of conflicting assessments alone can be decisive proof of the belief in reasons which should be understood as exclusionary ones.
moral objection to the validity of any exclusionary reasons. Exclusionary reasons are reasons for not acting for certain reasons. Occasionally people have such reasons. The easiest way to illustrate this is, as we saw before, to imagine that someone promises not to act for certain reasons. For example, Jane may promise to disregard her own interest when advising a friend whether to leave USC for a job at Yale. Whatever advice she would give will be based on all the considerations which bear on the matter, except that one. If that promise is binding, then it constitutes an exclusionary reason, a reason not to act for a certain other reason. I can see no ground on which to fault the promise. It is easy to imagine many circumstances in which it would be a very sensible promise. Even when it is rash or ill-advised, it does not seem to suffer from any of the defects which render a promise invalid.

My example appears innocent enough, but appearances can be deceptive. Could it be that the promise is invalid after all because it is a promise to do something which may be a moral error to do? This seems to be Moore’s belief. He says that morality never “exclude[s] morally compelling considerations from counting to determine the rightness of keeping some promise or following some order. Morality never does this because nothing can be excluded in the balance of objective reasons of morality without leading to moral error.”2 Moore, supra note 4, at 872-73.

I am assuming that in my example Jane’s interests will be significantly affected by her friend’s decision, and that they are therefore “compelling moral reasons.” What I cannot see is how their exclusion may lead to moral error. I suspect it is the other way round. Disregarding the promise will be a moral error, for it commits the error Moore is worried about. It excludes a binding promise from the moral balance.

We seem to be in a quandary. If no reason is to be excluded, then certain promises, and other considerations, which if valid constitute exclusionary reasons, must be denied any moral validity. On the other hand, if these considerations are to be admitted as morally valid, then other considerations will be excluded by them. This shows that Moore’s rejection of exclusionary reasons is an arbitrary choice of one side in a symmetrical quandary.

Not that the quandary is particularly puzzling. Its basic features are present in every conflict of reasons. After all, if one reason is more important than another, and therefore outweighs it, the weaker reason is

2 Moore, supra note 4, at 872-73.
not acted upon. We do not think that this is a moral error, for we understand that to say that moral considerations are reasons for action is to say that they should play their proper role in moral reasoning. They are all presumptively sufficient to determine what ought to be done, that is, other things being equal, they determine what ought to be done. But other things are not always equal. There is no moral error in recognising that a reason has been defeated, in some particular circumstances, because of the presence of other, weightier reasons. Similarly, there is no error in recognising that it has been excluded by an exclusionary reason. Both times it makes sense both to say that it is a reason and that it does not determine what is to be done.

This leaves the question, what is the difference between the two ways of defeating reasons? What is the difference between reasons being outweighed and being excluded? This is a crucial question. Without answering it, talk of exclusionary reasons is incomprehensible. But it is a different question from Moore's. His question accepts the intelligibility of exclusionary reasons and challenges their validity. I have indicated why I think the challenge fails.

It may, nevertheless, be useful to examine briefly the question of the difference between the two types of conflict of reasons, the familiar one and the one between an exclusionary reason and the reason it excludes. Here is a familiar conflict. I'm hungry, but I'm due for a medical examination which can only be carried out on an empty stomach. I have a reason to eat (now), and a reason not to eat (now). I cannot satisfy both. If one is more important I should satisfy it. Now consider a different case. Assume that it is wrong to eat in a hurry. One should always eat slowly, in a measured way. This reason, one may say, partially conflicts with any other reasons for eating. Certain ways of eating, certain ways of satisfying the reasons for eating, violate it. But other ways of eating are untouched. In such partial conflicts the question which is the more important reason does not arise. Since one can satisfy both, one should always do so.

In a similar way exclusionary reasons generate partial conflicts. The reason, if there is one, not to eat for pleasure partially conflicts with (first-order) reasons for eating. One can satisfy both, for one can eat without eating for pleasure. (Notice that one can have pleasure in eating even when one does not eat for pleasure.) That is why an exclusionary reason always triumphs in such conflicts. It always excludes the first-
order reasons it is aimed against. If $p$ is a reason to $A$ and $q$ is an exclusionary reason not to $A$ for $p$ the conflict between them is only a partial one. Both can be satisfied if one does $A$ for a reason other than $p$.

To be sure, conflicts involving exclusionary reasons are a special kind of partial conflicts. They differ in important respects from ordinary partial conflicts. For example, that eating is pleasurable is, let us agree, a reason for eating. It is satisfied if I eat, for whatever reason. Suppose I eat because I am hungry. My eating satisfies all the reasons for eating that there are. Since, whatever the pleasure I actually derive from eating, I do not eat for pleasure, I also comply with the reason I have not to eat for pleasure. Note that the fact that eating is pleasurable is a first-order reason. It is simply a reason to eat. It is to be distinguished from the second-order reason that I may have to eat for pleasure. As Moore notes, there can be conflict between two or more second-order reasons and these will turn on weight. So if my reason is not a reason to eat but a reason to eat for pleasure, it completely, and not merely partially, conflicts with the reason not to eat for pleasure, and the resolution of the conflict turns on the respective weights of these reasons.\(^2\)

These rather cryptic remarks point the way toward an explanation of how conflicts between exclusionary and first-order reasons differ from ordinary conflicts of first-order reasons, and why exclusionary reasons always "win" in such conflicts regardless of weight. One way to put it is to say that even if exclusionary reasons are admitted there is a sense in which nothing is excluded, every valid consideration plays its role (though of course not every reason "wins"). It is merely a matter of structuring the reasons, of elucidating their proper interrelations, and this involves the exclusion of some reasons by others.

D. The Moral Repugnance of Exclusionary Reasons

So far I have argued that exclusionary reasons occur from time to time, that they are marked by giving a special structure to certain aspects of our practical reasoning, and that they are not morally paradoxical. Much of my previous writing was concerned with to show that exclusionary reasons are crucial to our understanding of various familiar normative concepts, in particular promises, obligations, decisions, orders, authority, certain rules (which I call mandatory rules), and normative

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23. The same will be true if for some reason the conflict between the exclusionary reason and the first-order reason is not a partial one but a head-on collision.
powers. All these arguments are meant to show that promises, authoritative directives, and the others structure our reasoning in the way that exclusionary reasons do. This is their special function in our practical deliberations.\(^\text{24}\)

Moore does not address any of these arguments, but he has a detailed counter-argument to show that there cannot be any morally valid exclusionary reasons.\(^\text{25}\) His argument takes the form of examples which show that the law cannot be understood in that way, for if it is, then it cannot be morally binding. At the very least, he must be taken to argue that if I am right, then all legal systems are deeply morally flawed. Since examples similar to his can be constructed to reach the conclusion that, if I am right, then all authorities are illegitimate, all promises are invalid, and so on, this is a far-reaching argument against my analysis.

The law, being a structure of authority, is, in my view, to be explained in part by the prominence of exclusionary reasons in it. They have a dual role, reflecting the fact that in an important way the law is a double-tiered system of authority. First, it claims binding force to the exclusion of certain contrary considerations. That is, while all legal systems allow certain moral defences and exceptions, they claim the right to determine which moral defences and exceptions count, and necessarily exclude some, namely those on the basis of which the law itself was determined. Second, legal questions are subject to authoritative adjudication, since the law is a self-administering system. Once a case is authoritatively decided, once it becomes res judicata, one has to conform to that adjudication, even if it is mistaken in law. It is important to remember that this is the only case in which the law systematically excludes itself, that is, in which one legal decree excludes others.\(^\text{26}\) On the first level of exclusion what is excluded (special cases aside) is not the law but certain non-legal considerations. Some of Moore's examples, which turn on judicial discretion to weigh various legal considerations against each other, are irrelevant to this argument.\(^\text{27}\) This still leaves

\(^{24}\) See, e.g., J. RAZ, PRACTICAL REASON AND NORMS, supra note 2, at 49-84; J. RAZ, THE MORALITY OF FREEDOM, supra note 15, at 38-69.

\(^{25}\) Moore never objects to, and at times seems to accept the validity of, individual cases of exclusionary reasons, such as the examples of promises not to act on one's own interests. His general strategy of argument commits him to rejecting the validity of any exclusionary reasons, including these. The mere fact that he can find nothing against these examples is enough to invalidate his argument.

\(^{26}\) Once a judicial decision is res judicata it excludes other legal reasons under both the doctrines of res judicata and of collateral estoppel.

\(^{27}\) See Moore, supra note 4, at 869 n.129 (referring to United States v. Kirby, 74 U. S. (7 Wall.) 482 (1868)).
much to be considered, including much about which I am uneasy.

Moore's argument is of the following form: If I am right, he says, then the law cannot be morally binding. Since I regard the conclusion as an open question, I find this argument, even if successful, not altogether compelling.\textsuperscript{28} However, as I indicated above, if he is right, then it follows from my analysis that there are no binding promises, no legitimate authorities, etc. So I cannot escape his argument by denying the legitimacy of the law. I doubt, however, whether the argument is successful. I think that it fails regarding adjudication involving statutes, and since this seems to me the simpler case I will start with it.\textsuperscript{29}

These are matters on which Moore has written extensively and illuminatingly. Our disagreement on this occasion is rather narrow. We need not inquire into the sort of considerations relevant for adjudication involving statutes. We can assume agreement there. The question is of the role of these considerations. My aim is to illustrate the sort of account which is required to make sense of legislation so as to show that it involves recognition of the role of exclusionary reasons, a role innocent of moral objections. For example, certain decisions, while otherwise well supported by reason, will be rejected in deference to considerations of separation of powers.\textsuperscript{30} So far so good. The only question is what is the role of this consideration. Is separation of powers a first-order reason, or an exclusionary one? I think that typically, though perhaps not exclusively, the doctrine of separation of powers claims the existence of exclusionary reasons.

Imagine an income tax law which is sensitive both to levels of income and to its sources, so that unearned income is taxed at a higher

\textsuperscript{28} Moore suggests that my views entail that there is a difference between the political obligations of ordinary citizens and of the courts. I do not think that they do. It is true that necessarily "the courts are bound to apply [the law] regardless of their view of [its] merit," \textit{Moore, supra note 4,} at 835, but the same is true of ordinary citizens. Both courts and ordinary citizens are legally bound to so act. Neither are necessarily morally so bound. Moore is right to say that I subscribe to the common view that there are additional reasons for obeying the law which apply to judges, at least in reasonably just societies. But I am not convinced that those amount to a binding moral obligation in all cases. He suggests that the existence of an obligation to obey the law in a reasonably just society is self-evident, and any analysis which doubts this should be rejected out of hand on that count. \textit{Id.} at 869. The point would have been more convincing had he confronted the various arguments that I, and others, offered in support of our view. These arguments, by the way, do not rely on the exclusionary force of the law.

\textsuperscript{29} It may be worth observing that Moore objects to the view that the law makes exclusionary claims on the first tier. He says nothing about the claim that it is exclusionary on the second tier, that is, in its doctrine of res judicata.

\textsuperscript{30} Here and in the following paragraphs I use "separation of powers" in its general sense which is wider than its technical meaning in American constitutional law.
rate than earned income, for the same level of income. Imagine that someone claims that his tax is unjust, and that he is unfairly discriminated against, the fact that his income is unearned should be irrelevant to his liability. In Britain his claim will be rejected. It is possible that various legal systems have provisions for adjudicating such a claim on its merits. All I am saying is that wherever there is a legal system based on separation of powers it will exclude certain considerations from being considered by the courts. So let's take this one as an example of the effect of the principle of separation of powers.

Why does the separation of powers support differential taxation according to source? There is nothing in the doctrine to show that it is just to tax unearned income more heavily. The doctrine leads the court to say something like this:

Since the issue of the justice of such a differentiation was clearly decided upon by Parliament, we are precluded from examining the reasons for or against it on their merits. There may be an injustice here, but if so, it is not for us to put it right. We are excluded from subjecting the wisdom of Parliament's decision to our review.

So deferring to the authority of Parliament allows the admission of exceptions which the courts may build into the law, but it is inconsistent with their rejecting the basic rationale of the legislature's enactment.

Again, I am not claiming that this is the precise meaning of the doctrine in English law, though it seems to me a reasonable first approximation. I am certainly not saying that this is how the doctrine must be understood in every country. The name, "separation of powers," marks a whole family of related doctrines, which vary greatly in detail, especially in the range of the exceptions allowing limited judicial modification of statutory rules. But they all share the same structure. Whatever else they may do, they all set exclusionary reasons for the considerations for which courts may act.\textsuperscript{31}

It is less clear to me whether the same is true of the binding force of precedent. It seems clear to me that English law, at the very least until

\textsuperscript{31} At the risk of repeating an earlier point let me clarify my view once again. The surprising thing about my explanation of separation of powers is not so much that it makes it include an exclusionary reason as that it does not amount to much more. Why not say simply that the courts have an overriding reason for not regarding the differential taxation as unjust. The answer is that the separation of powers does not show that it is not unjust. Nor does it show that justice should not prevail in cases of taxation. It merely addresses the question: Who should see that justice be done when the allegation of injustice is based on this consideration? The reason why this consideration is excluded from adjudication under this statute, while it may be available to the court on other occasions, is that Parliament was here first, and has already adjudicated this particular question.
the 1966 Practice Statement, that is, while it forbade the House of Lords to overrule itself, included a strong exclusionary element. The reasoning leading to this conclusion mimics the previous argument on the separation of powers doctrine. Today, the rule that the Court of Appeal may not overrule itself, and generally the prohibition on lower courts overruling higher ones, indicates the existence of similar exclusionary elements in the English Common Law. Beyond that, even today the House of Lords is subject to an exclusionary reason to the effect that it should not pursue every improvement but only clear ones. Legal systems vary in this matter. If Moore is right in arguing that any exclusionary rules limiting the right of the courts to review precedents are morally indefensible, then this part of the law is morally indefensible.

The problem I feel lies elsewhere. Must the House of Lords' power to overrule precedents be subject to exclusionary reasons for the Common Law to be law? On the one hand, if they can change precedents whenever the balance of reasons suggests that this would be best, then they are not bound by them. All we can say is that they are bound by reason. On the other hand, in that sense no legislature bound by its legislation. Statutes are binding not because Parliament cannot change them, but because ordinary people cannot. Besides, they are binding on Parliament until changed in accordance with due process of law. But is this good enough when we turn from Parliament to the courts? We can, and should, say that the courts make law. To that extent they are not bound by precedent, since they can change it. But in what sense are they bound if they can change it whenever it is relied upon? And if the courts are never bound, in what sense are other people bound by the precedent if in every case to which it applies people can challenge it in the courts?

My instinct is to say that the theoretical possibility is immaterial. The practical difficulties in securing a judicial hearing, especially at the highest level, are enough to give perfect sense to the notion of precedent being binding on all, but subject to overruling (or distinguishing) by an

32. See J. RAZ, THE AUTHORITY OF LAW 190 (1979), for the application of this point to the House of Lords, and J. RAZ, THE MORALITY OF FREEDOM, supra note 15, at 62, for its general relevance for the application of my explanation of authority. The point is further discussed below. Moore is wrong to think that my position is like early Dworkin, see Moore, supra note 4, at 866. Dworkin was advocating a moral view of what the law is and should be. I merely described certain practices of the English Common Law. Dworkin was writing of how judges may overrule to overcome legal mistakes and give effect to the correct legal position. I was describing what judges may do in changing an existing law and making a new one. Finally, my criticism of Dworkin's early writing, which applies to his later writing as well, was based on his endorsement of a coherence view of how judges should decide cases, to which I am not committed. See Raz, Prof. Dworkin's Theory of Rights, 26 POL. STUD. 123 (1978).
appropriate court. Many years ago I used this kind of argument to rebut a parallel argument of John Austin's that the Sovereign cannot be bound by law since it can always change it. If it is sound, and if a similar argument can apply to precedent and the courts, then one need not insist that precedent must set exclusionary barriers to overruling by at least some courts. It remains true that it typically does set exclusionary reasons limiting the grounds of review in some or even in all courts.

I am far from clear whether the reflections above refute Moore's arguments in Part III of his paper. His argument is said to be addressed against interpreting the law in terms of exclusionary reasons understood in the first sense which he attributed to this term. Since I do not use “exclusionary reasons” in that sense he may be criticizing views which I do not hold, and we may have been arguing at cross purposes. But I suspect that Moore is really arguing against my analysis in terms of exclusionary reasons as I use the term. If so, I think that his argument fails for a simple reason. He refuses to examine any of the points repeated by me in the previous section above, which show that exclusionary reasons may be sound. That is, that justice may require exclusion of some reasons, rather than inclusion of all reasons in the judicial process in order, for example, to give effect to participatory legislative democracy, and to prevent judges from overriding it, or in order to establish fairness and uniformity in the decisions of various courts by subjecting them to binding precedents by superior courts, and other similar considerations. The difference between us is not in our estimation of the relevance or validity of factors of this kind. We may well agree on their importance. But for Moore, if they are valid, it follows that they are first-order reasons. He refuses to confront any of my arguments which show that they are reasons of a special function and structure, that is, exclusionary reasons.


34. This is particularly clear in Moore's observations. Moore, supra note 4, at 873-74. I advanced numerous arguments which are meant to show that some reasons are exclusionary (that is, the arguments about the structure of practical reasoning, the role of rules, decisions, authorities, etc., in such reasoning, and the arguments relating to the interrelations between the reasons for having authorities, rules, promises, or decisions, and the reasons which these provide). Instead of confronting any of these arguments, he is content with posing rhetorical questions: "R counted as a good reason for action before the rule was passed, and it still counts as a good reason after the rule is in place; how then could morality forbid actors to be motivated by R as they did A?" Id. Of course, one should not equate what one has reason not to do with what one is forbidden to do, but even when properly formulated a rhetorical question does not refute arguments.

In part, Moore blinds himself to the possible significance of exclusionary reasons by referring to them continuously as reasons to be motivated in certain ways. This, while in a way true, can be misleading. Exclusionary reasons address people's reasons for actions. Discourse of motives is most
E. THE ALLEGED INABILITY TO COMPLY WITH EXCLUSIONARY REASONS

After these technicalities it is a relief to turn to the grand arena of the psychological presuppositions of practical reasoning. I think we can avoid considering two general doctrines Moore relies upon. There is no doubt that belief in reasons causes us to act. We often say, and we are often right, that he did it because he believed that it would please his mother, or that it would serve a good cause, or that he was under a duty to so act, etc. Unlike Moore I do not regard this as a very significant point. At least it is not a significant answer to any question. Rather, it poses the question how to understand these causal statements. In what ways do they resemble other causal statements, such as “the stone broke the window,” or “the heat caused the explosion?” I do not think, however, that anything we are concerned with depends on this.

As Moore half suspects, I am not a believer in “ought implies can,” and not only for the reasons he indicates.35 I entirely agree, however, that if it is impossible to comply with reasons to act for reasons, or with reasons not to act for reasons, then it is absurd to suppose that there are such reasons. Here we do touch on a central problem in philosophy. Kant’s moral philosophy, for example, is a much more important victim of Moore’s criticism. Kant thought that an action is of moral value only if it is undertaken for the right reason, that is, out of respect for the moral law. If Moore is right and second-order reasons cannot be complied with, then according to Kant no action is of moral merit. But it is surprising that anyone should doubt the possibility of complying with such reasons. All that compliance requires is action for the specified reasons, or (in the case of exclusionary reasons) not acting on specified reasons. Since we do act for reasons, and since it is true that for many intentional actions there are some specific reasons for which they were taken and other reasons for which they were not taken, it is entirely possible to comply with second-order reasons.36

36. It is important here that we regularly act for reasons. It is not simply something that happens as a fluke once in a while.
Moore understands his objection as requiring a higher standard. It requires not only the possibility of compliance, but the existence of control over whether one complies or not. Moore rests his case on two claims. Both are encompassed by the statement "we cannot choose the reasons on which we act." First, he says that "[r]easons are not among the possible objects of our willing." Second, "we cannot make something be our motive for the same reason that we cannot manufacture a causal relation between solar flares and cancer." Moore is talking here about what he calls "subjective reasons" these are our beliefs in the existence of reasons. So the first statement is not that we cannot make need, or justice, or the avoidance of danger, be or not be a reason for action. Of course we cannot. Either they are or they are not, but that is not Moore's point. He states that we cannot choose what reasons. The second statement adds to this that once we have a belief we cannot choose to make it the cause of our action.

In the main I tend to agree with both claims, but how do they bear on the case for or against exclusionary reasons? The statements are meant to show that second-order reasons cannot be complied with. The argument fails for it assumes that what you cannot choose you cannot do. But from the fact that one cannot choose one's beliefs it does not follow that one cannot believe. As we saw, however, this would not satisfy Moore. His objection is not that we cannot comply with second-order reasons but that we have no control over whether we comply or not. Sometimes we do, sometimes we do not, but it is not up to us whether or not we do. Since we cannot choose what to believe, nor can we choose what our beliefs will cause, it is not up to us whether we comply with second-order reasons or not, and there is something odd about that.

I fear that this objection fails. It misunderstands the nature of choice and therefore concludes that what we cannot choose we cannot control. Whatever else is true of choice it seems to me to include the following two ideas. First, to choose to do, etc., is to be set to do, etc. Second, choice is an expression of one's will. One's will is determined to do the chosen act. This is very vague, and there is little I can do to explain it here. If we use the metaphor of the contrast between the internal and the external, one can say that choosing indicates that by one's

37. See his rejection of the weak sense of “can.” Moore, supra note 4, at 875-76.
38. Id. at 879.
39. Id.
40. Id.
will all that is internally required for the action has happened. That is what I meant by saying that one is set to act. If one does not then act, the failure is not in the internal, not in the self. One's limbs may have failed one, or luck may have frustrated the attempt, or the like.\footnote{I am leaving aside choices which take place some time before the action.}

This explains why one cannot normally choose to believe in a proposition, nor choose to want to eat, nor choose to like eating, etc. I cannot choose to believe not because what I believe is beyond my control, but because it is not subject to my will but to my intellect.\footnote{This is far too sweeping since, within certain limits, what I believe is subject to my will. The cognitive reasons for belief or disbelief are often indeterminate. In these cases the reasons why I do not normally choose to believe are those which explain why I do not choose to want something.} My intellect controls what I believe in by its own methods. I check the evidence, evaluate it carefully, look for more, and so on. That my intellect is not subject to my will does not show that it is not under control. On the contrary, it shows that it is properly under my control. It is when the will interferes with my intellect that I lose control over myself. Notice that the expression "I (he) chose to believe him" implies some bad faith, self-deception, rationalization, or some other cognitive defect.

I cannot choose to want something, or to like something or somebody, even though choosing and liking are manifestations of the will. The reason is that choosing means that one is set to do it. It does not normally entail that one did it, for external factors may have foiled one. With wanting and liking there are no external factors. To say that one is set to like or to want is to say that one wants or likes. There is no gap between the being set and the wanting or liking. Hence, there is no room for the idea of choosing. Its function is to mark the internal determination of the will, but the internal determination of the will to want or to like is that wanting or liking. Again, the inability to choose to want or to like is not a contingent empirical inability. It is a logical or conceptual one. It does not mark a failure of self-control. It simply indicates a difference in the mode of its exercise.

I am not saying, of course, that we always like or want what we want to like or want. Our self-control is not complete. Sometimes when we are not internally set to want something (that is, when we do not want it), but we either want to want it or realise that we ought to want it, we can set about training ourselves to want it, or manipulating our desires to make us want it. But the fact that our control is incomplete does not mean that we have no control. The only issue we are concerned with is to rebut the objection that we have no control over whether we comply
with second-order reasons. Sometimes we do, sometimes we do not, but it is not up to us whether or not we do. Compliance, according to this objection, is not something we do. It merely happens to us. This I hope to have refuted at least in so far as the objection rests on Moore's first proposition, namely that we cannot choose our beliefs and desires. Can it rest on the second proposition? Given that we have control over what we believe and what we will, can we choose which of our beliefs will cause our actions, for nothing less than that is required if compliance with second-order reasons is not something that merely happens to us.

Again, we cannot choose but we can control. Our control of what causes our actions is our control over our beliefs. For while I cannot make my belief that all things considered, this is what I ought to do cause me to do this, it is the case that the belief will, barring irrational factors and external obstacles, so cause me to act.\(^4\) My control over what causes me to act is, therefore, my control over what I take to justify the conclusion that, all things considered, that is what I should do. It is the process of reasoning which leads me to appreciate the force of various considerations, and to conclude which of them should determine my action. By coming to believe that my duty to my brother justifies the conclusion that when all is said and done I should accede to his request, I "make" that belief the cause of my action. So the objection which is based on Moore's two statements fails.

In concluding, I have to admit that I feel uneasy every time I mention "control." I suppose what I am really after are the sources of the distinction between activity and passivity with regard to our own self. Our thoughts and desires belong to the active side, and are unlike obsessions, compulsions, various forms of irrationality, and those of our passions which possess us. I do not know how to explain this distinction, but I have no doubt of its importance. Second-order reasons are suspect if conformity with them is a matter in which we are passive and impacted upon, rather than active.

I have given my reasons for thinking that we are active in those matters, that they are generally under our (partial) control. The crucial point there was the recognition that control is manifested in different ways in different matters. In particular, when we reach for the core, for our control of the will and the intellect, the familiar Kantian insight

\(^4\) I am not suggesting that every practical question is resolved by reasons indicating which is the best or the right action. Many practical questions are not so determined. But those do not concern us here.
applies: Control is in submission to the laws of rationality rather than in the absence of any shackles.

F. GENERALISING EXCLUSIONARY REASONS

Perry suggests that exclusionary reasons can be seen as a special case of a wider range of second-order reasons, which he calls weighting reasons. They are reasons to give first-order reasons a weight which differs from the one the agent would otherwise judge them to possess.44 "Subjective" exclusionary reasons are reasons to assign zero weight to first-order reasons.45 As we saw earlier, I do not use the notion of a "subjective" exclusionary reason. This does not mean that Perry's notion of weighting reasons is not a useful one. Bringing Perry's notion into line with my earlier argument that reasons for action are facts rather than beliefs about them, I take his notion of a weighting reason to mean the following: Certain facts are reasons for assigning other facts, which are reasons for action, a greater or lesser weight than they would otherwise merit.

In Practical Reasons and Norms I considered the role of weight-affecting considerations.46 For example, the fact that a friend's husband and children are away gives extra weight to the reason I have to visit her in hospital. Perry's reweighting reasons are different. They do not affect the "true" weight of the first-order reasons. They merely require agents to act as if they had a particular weight, regardless of the weight they really have. As Perry notes, the notion may be useful in discussing presumptions.

Perry makes a further suggestion which concerns the grounds for, or the conditions of applicability of, exclusionary reasons and presumably of all reweighting reasons. He calls them epistemic limitations. Perry's point amounts to the following: Sometimes the grounds which justify not acting on certain reasons have to do with the agent's epistemic state. For example, he may have reason to exclude certain reasons from his considerations (and, let us say, defer to the opinion of another) only if he is uncertain about the import of those considerations. But he has no reason to exclude any reason if he is clear in his own mind what their

44. Perry, supra note 2, at 932.
45. Id.
impact is on the balance of reasons. Perry calls such reasons "epistemically bounded" reasons. As these remarks make clear, they are a species of exclusionary (and of all weighting) reasons. Perry mistakenly regards them as a distinct type of reason. But, as he half recognises, they are not, they are really very similar to various species of exclusionary reasons which I specifically discuss. Most importantly, they are rather like exclusionary reasons grounded in considerations which show that the agent's own judgment is less reliable than that of the alleged authority. I myself tend to regard Perry's epistemically-bounded reasons as just such reasons, with the agent's uncertainty about the impact of various considerations being merely the ground for thinking that the authority's judgment is more reliable.

Perry's reason for thinking that his epistemically-bounded reasons are not exclusionary ones is that they do not fulfill the function that I assigned to exclusionary reasons. This if true shows that I was wrong about the function of some exclusionary reasons. It does not lend any credence to the view that epistemically-bounded reasons are not exclusionary. My mistake was to have claimed that valid mandatory rules, including authoritative ones, can be applied independently of the reasons for them. But Perry's epistemically-bounded reasons can be applied independently of the background reasons for their validity. All he has shown is that their validity cannot be established independently of such background considerations. But this was never in doubt. Later on we shall see that Moore argues that none of what I take to be legally binding exclusionary reasons can be applied without regard to their background justification. Perry, however, does not claim that.

II. ON LEGITIMATE AUTHORITY

A. Its Normal Justification

I have claimed (under the title "The Normal Justification Thesis") that the normal and primary argument for the justification of authority must show that conforming to its directives is more likely to lead one to conform better with reason than acting independently of it would. Perry thinks that this leaves out of account considerations of the conditions for an efficient operation of authoritative institutions. But the

47. Perry, supra note 2, at 942.
48. See id. at 943.
50. Perry, supra note 2, at 897, 939-40.
normal justification thesis is abstract enough to include such factors. The reason is simple. An efficient institution may be able to perform in a way which makes compliance with its directives closer to reason than either compliance with a less efficient institution or acting independently.

Morigiwa also finds the normal justification thesis too narrow. But this is due, I think, at least in part, to three misunderstandings of my view. First, even more than Perry, he thinks that in my view superior knowledge is the only possible justification of authority. Second, he mistakenly identifies my discussion of authority and of law in terms of reasons for action with moral reasons, when this term is narrowly construed. Reasons range from the humblest to the sublime, from the need to have some fresh air to the desirability of having a rich and fulfilling life, from concern with one's hairdo to concern for the victims of mass starvation. Third, Morigiwa identifies acting for a reason with action following conscious rational deliberation. In my view, people can internalise reasons and act on them automatically and instinctively. Once understood in these ways, my analysis of authority and law is seen to be free from some of the defects to which he objects.

One point where my account of justification of authority was at fault is in not emphasizing enough the value, to some people on some occasions, of not having to decide for themselves. The costs of decision in time, labor, mental energy, and anxiety are often considerable. Being able to spare them is often worth paying for, even through reduced success in conforming with reason.

I did, of course, take account of the reverse of this factor. I made clear that compliance with the normal justification is not sufficient for the legitimacy of an authority. One needs also to show that there are no defeating contrary reasons. I mentioned in particular the need to satisfy what Green calls "The Condition of Autonomy," that is, that the matter (over which someone is said to have authority) is not one on which it is more important that people should decide for themselves than that they should decide correctly. This is meant to take account of "the intrinsic desirability of people conducting their own life by their own lights."

51. They are briefly discussed in J. Raz, The Morality of Freedom, supra note 15, at 51-52.
"The case for the validity of a claim to authority must include justificatory considerations sufficient to outweigh such counter-reasons." If both the normal justification thesis and the condition of autonomy are fulfilled then, in general, the alleged authority is legitimate. Green agrees that these form necessary conditions for the legitimacy of an authority. But he thinks that they are not sufficient and they become sufficient only if the subject of the authority consented to be subject to it. I will consider the role of consent below. Let me first defend my claim that the two conditions specified are, normally, sufficient. He argues against this conclusion through an analogy:

Suppose Carol is an excellent investment counselor and that conformity to her advice is certain to be optimal. Suppose further that there is no intrinsic value in David managing his own financial affairs. Does that show that Carol has legitimate authority to act for David? No. Although it does show if she were given such authority she would be justified in having it, it also shows that David would be justified in giving it to her. Why should we think that a government is in a different position?

Authority to act for someone is authority in a slightly different sense of the term. It means being permitted to act in a certain way by someone with normative power to grant such permissions or authorizations. I will disregard that aspect of Green's example and treat it as a discussion of authority over people, by assuming that Carol tells David what to do, rather than that she does it for him. Is he bound by her advice?

I agree with Green that the government is in the same position. We can further agree that under the conditions described Carol has no authority to manage David's financial affairs. But has the example established that the two conditions are met? It asserted that the first condition is satisfied. How about the second? All we are told is that "there is no intrinsic value in David managing his own financial affairs." But, as Green says, that fact "does not show that there is no intrinsic value in deciding for himself whether or not to do so." Presumably Green is alleging that my condition "that it is more important that David should

55. Id.
56. The reason for not saying that the normal justification thesis and the condition of autonomy together constitute a sufficient condition for the legitimacy of an authority is that there may be other reasons against holding it legitimate. In this respect the passage cited by Green, supra note 53, at 808-09, is imprecise.
57. Id. at 811.
59. See Green, supra note 53, at 811.
60. Id.
decide for himself than that he should decide correctly’s means only that it is more important that he should decide for himself whether to buy stocks or to sell them, but not that it is important that he should decide for himself how to handle his financial affairs, for example, by reading the financial papers, getting daily advice from Carol, or putting her in charge. This was not my meaning, and I agree with him that the condition of autonomy must bear the wider of the two interpretations. Here is the way I tried to ward off such misunderstandings in The Morality of Freedom:

Since this chapter is meant as a normative-explanatory account of the core notion of authority, it can be extended to explain reference to authority in various specific contexts. But such extensions are neither mechanical nor automatic. For example, how does it help to understand discourse of someone being an authority? Consider as an example cases where a person is said to be an authority on a certain matter, as in ‘John is an authority on Chinese cooking’ or ‘Ruth is an authority on the stock exchange.’ Neither John nor Ruth has authority over me, even though my Chinese cooking and my financial affairs will prosper if I follow their advice rather than trust my own judgment.

... They do not have authority over me because the right way to treat their advice depends on my goals. Here the normal justification thesis establishes the credentials of John and Ruth as authorities in their fields. But whether or not there is a complete justification for me to regard their advice or instructions as guides to my conduct in the way I regard a binding authoritative directive depends on my other goals. In such cases while talking of a person as being an authority, one refrains from talking of him as in authority over one.

As this passage makes clear, where the autonomy condition is not met we do not talk of people as being in authority over us. This remains the case even if we decide to be guided by authorities rather than to follow our own judgment on the merits of each case. It is true enough that bodies with general authority over us, such as governments may have, are the exception to this rule. Where our decision not to be guided by our own judgment on the merit of the case is a condition of governmental authority over us, in accord with the autonomy condition, then we speak of governmental authority when that condition (and all others) is met.

61. See id.
Sometimes the granting of consent may be a way for meeting the condition of autonomy. This point suggests that Green is right in alleging that I underplayed the importance of consent as a condition of authority. I have concentrated on consent as the positive ground for authority, and I was particularly concerned with arguments which may show that political authorities, at least sometimes, have the authority which they claim to possess. But consent can also play a modest role in removing an objection to a limited authority. There are matters over which it is more important to decide correctly than to decide for oneself. In other matters, the importance of deciding for oneself overrides all other considerations. But in between there are areas where it is an optional good for a person to decide for himself. In such matters consent serves to establish authority. But this type of argument will never be enough to establish the authority that the modern state claims to itself, nor, as Green admits, will it dispense with the role of the normal justification as the way of establishing the main reason for authority, without which consent would not be binding.

B. Indicator Rules and Authority

Professor Regan agrees with much that I say about authority but thinks that I aspire to a more substantial notion of authority than my account warrants. To show this he advances his own account, which he calls the indicator rule account of authority. Indicator rules are Regan's elucidation of what are colloquially known as rules of thumb.\textsuperscript{63} The view that Regan favours is that a person has authority if and only if there is (given the current state of knowledge) a justified rule of thumb to the effect that he should be obeyed. Such a rule can be justified on grounds that following it will save time or avoid the problems of incomplete information, or of bias.

I agree that rules of thumb can provide justification for some people or organizations having limited authority over some people. As Regan points out, the rule of thumb justification, where it is available, meets the three theses about the nature of authority that form my account of the concept of legitimate authority. The analysis provided there shows clearly that rules of thumb can provide justification for authority. Also,

\textsuperscript{63} I think that all the features mentioned by Regan as distinguishing his "indicator rules" from rules of thumb do in fact apply to rules of thumb, except that some rules of thumb are infallible (e.g., the rule that a number is divisible by 9 if the sum of its digits is divisible by 9. See Regan, Authority in Value: Reflections on Raz's Morality of Freedom, 62 S. Cal. L. Rev. 995, 1004 (1989). Notice, however, that even infallible rules of thumb are revisable in the sense that it may turn out that there are better alternative rules to follow as guides to such solutions. See infra note 70.
as Regan notes, the argument of Chapter 4 of *The Morality of Freedom* concerning the authority of the state conforms in many respects to his view as explained in the present article and in his *Law's Halo*. The main theoretical difference between us concerns the best way to understand the role of authority in initiating and maintaining coordinative practices. I will consider this issue, in which Regan seems to join forces with Green, later. First we need to clarify some minor conceptual misunderstandings which create the impression that Regan and I disagree when, once the confusions are out of the way, we do not.

My discussion of authority in *The Morality of Freedom* falls into two parts. Chapter Three provides an account of the concept of practical authority. It applies to parental authority, divine authority, the authority of football coaches, teachers, and all other cases of authority, or claimed authority, in our societies as well as in others. Chapter Four utilizes that account to offer some arguments concerning the authority of the modern state. Some of Regan's gentle dissatisfaction with my treatment of the subject results from his failure to take notice of this fact. It is essential for an explanation of the concept of authority to recognise that people who do not accept the agent-neutral consequentialist view which Regan favours do share the same concept, and use it cogently, even if they may hold mistaken views as to who has legitimate authority and who does not. The account of the concept may not be committed to, though it should be compatible with, agent-neutral consequentialism. The wavering that he chides me for in this regard, as well as that concerning the question whether a clear mistake puts a directive outside the jurisdiction of the authority, is no wavering at all. I was putting forward an account which explains a concept used by people holding different views on these issues. To make it a good account I had to recognise that, and avoid any explanation that takes sides on these issues.

In other words, to succeed, such an account must provide the framework for arguments about the justification of authority, its duties, and the duties of the subject towards it. But it should leave the actual filling-in of the arguments to further, more substantial stages in the argument. In my case, since the book is concerned with the authority of states only,

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65. Three, if the critical and preliminary analysis of Chapter Two is included.
66. As to the question whether my view is a consequentialist one or not the position I took in the book was that successive refinements of the notion of consequentialism have left almost bereft of all content and made it an unrewarding tool of analysis or clarification. The fact that Regan congratulates me for being a consequentialist even though I rightly reject most theses supported by consequentialists only strengthens this belief.
the filling-in comes with the argument of Chapter Four. Regan's complaint that I do not really argue for the normal justification thesis shows a similar misunderstanding. No full-fledged moral argument is called for at this stage. What is required, and what I attempted to provide, is an account which shows how various features of authority hang together (the service conception), how they are free from objections, and how they capture the most important features of the concept as we know it (this last task necessarily relies largely on pointing to what every reader knows).67

For myself, I find Regan's neglect of the distinction between an explanation of the notion of authority and a complete moral argument about the conditions under which anyone has legitimate authority puzzling. Is his account meant to be an account of the concept? I think it hardly qualifies as such because it takes a partisan consequentialist view, which disqualifies it as an account of the concept of authority used by Kantians and others, as well as by consequentialists. As I already acknowledged, Regan's account when duly fleshed out provides a (presumptively68) sufficient condition for the legitimacy of practical authority. Regan argues that there cannot be a justification of authority on any other grounds because (1) whatever role authorities may play in the generation of solutions to coordination problems (or prisoners' dilemmas, etc.) they do not, in doing so, function as authorities (though their success may depend on the fact that they are on other occasions or for other purposes authorities); (2) my non-instrumental arguments for the justification of authority are flawed.

Before I consider these arguments, let me note that in one respect Regan is unjust to his own account. He says that it does not justify talking of obedience to authority, nor of the legitimacy of authority since we do not obey rules of thumb, nor do we talk of them as legitimate. But these observations, though true, do not support his conclusion. It is not the rule of thumb which is to be obeyed or to be held legitimate. It is the authority. The rule of thumb is the rule that X is a legitimate authority in matters such as . . ., or that there is a duty to obey X . . ., or that X's directives are binding . . . . If we follow the rule, we obey the authority, and hold it to be legitimate. If the rule of thumb is to be followed, we ought to obey the authority, and it is legitimate.

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67. On the strategy of the explanation I used see J. RAZ, THE MORALITY OF FREEDOM, supra note 15, at 63, 165.
68. That is, it is sufficient, other things being equal.
It is just as well that Regan has, I believe, slipped on this point. If his account fails here, if it cannot explain why we regard justified authority as binding, or as imposing obligations, or as legitimate, then it would not be an account of authority. Regan's cavalier comment that we need not regard authorities as legitimate or as imposing obligations misses the point. We have no choice in the matter. It is of the essence of justified authorities that they are legitimate, and that they impose obligations. To fail to see that is to fail to understand the concept of authority. 69

Regan believes that I reject the rule of thumb account of authority. 70 As I have just explained, I do, and I do not. I do reject it as an account of the concept of authority, and I see no reason to regard it as a necessary condition for the legitimacy of authority. But it has the kernel of an account of a presumptively sufficient condition for the legitimacy of some authorities. Regan's reasons for attributing to me a negative attitude to his account are, however, mistaken. He identifies his own account with the recognition conception of authority which I criticized. 71 Here again I think that Regan is making a mistake which does an injustice to his own view. 72 It accounts for his, to my mind mistaken, belief that the rule of thumb account cannot explain the role of authorities in coordinating behaviour. Rules of thumb, which are, let me repeat, among other things, exclusionary reasons, can justify authorities on the ground that they are useful in coordinating behaviour. In other words, in appropriate circumstances my best rule of thumb is to do what X tells me to do, because following his directives seems most likely to secure desirable coordination. Of course, such a rule is, according to Regan, a rule of thumb only if its adoption is justified by reference to the incompleteness

69. The point is argued in Chapter Two of THE MORALITY OF FREEDOM. 70. This statement is not entirely accurate. Strictly speaking Regan thinks that I reject the indicator rule account of authority. I believe that rules of thumb are not indicator rules. I believe that rules of thumb are exclusionary reasons. Indicator rules are not. They are rules for not considering certain reasons. As explained in Section I.B. above such reasons are not exclusionary reasons, and they are not part of an explanation of authority. See also J. RAZ, THE MORALITY OF FREEDOM, supra note 15, at 23-35, where I considered and criticized Hart's explanation of authority in terms of reasons for not considering certain reasons; J. RAZ, PRACTICAL NORMS AND REASON supra note 2, at 59-62, I argued that rules of thumb provide exclusionary reasons for action. For this reason I discuss rules of thumb directly, rather than Regan's "indicator rules." I think that all the views concerning rules of thumb which I attribute to him are views which he holds. 71. This criticism is found in Chapter Two of THE MORALITY OF FREEDOM. Regan is unsure of this identification. See Regan, supra note 63, at 1019 n.57. 72. Incidentally, it reinforces my view that rules of thumb are not to be by analysed as indicator rules.
of one's information or to the need to avoid bias or to save time. Sometimes such factors will figure in the justification. The following is (a sketch of) an example:

When I have to decide what to do on matters I do not have the time or the information to decide what course of action has salience and would form the solution to the coordination problem. If I always follow X's directives I am much more likely to do what everybody else will do than if I trust my judgement in those circumstances, especially if, as is likely, other people will do the same.

Sometimes rules justifying authority, that is, rules that one person should obey another, are justified not by such factors but by the desire to avoid the psychological anxiety of deciding for oneself on each occasion, or to save the mental energy involved. But such and similar factors should be added to Regan's over restrictive list of the grounds the presence of which qualifies a rule as a rule of thumb. My point is simply that all these reasons may combine with reasons for achieving coordination, just as they can combine with reasons for avoiding toxic toys and the like, to justify authority. I am not suggesting, of course, that all authority-legimating rules which are based on reasons of coordination are rules of thumb. Only that some are. So these observations do not solve the main difficulty that Regan is dealing with. The question is what more need be said about the role of authority in securing coordination.

C. COORDINATION AND AUTHORITY

We are now ready to consider Regan's main argument. Regan's point is simple and powerful. He agrees that authoritative directives can play a crucial role in securing coordination. By, let us say, passing a law requiring a certain course of action, which is one of several possible solutions to a many-person coordination problem, the legislature makes that solution the salient one, and secures its adoption by the population, which is only too eager to adopt any solution likely to be adopted by everyone. But, insists Regan, it is the salience of the solution, rather than the fact that it was made legally obligatory, which is people's reason for following it. The law serves its role in creating salience. But it does not function as an authoritative directive which has to be recognised itself as a reason for action. The need to secure coordination can never justify regarding the law itself as a reason for action. All it can ever be, where coordination is concerned, is the cause of salience.73

73. Some elements of the argument were in a much cruder form anticipated and endorsed by me in Chapter 12 of THE AUTHORITY OF LAW. The following discussion indicates also where I
I think that Regan's argument will strike most people as counter-intuitive for one simple reason. They will rightly observe that the law endows the course of action it requires with salience precisely because it is recognised as authoritative by the population. Regan is aware that something like this response is likely and tries to get around it. I think that he fails. One cannot argue that it is legislature's authority on other matters enables this statute to make the action it (illegitimately) requires salient. If people believed that the authority is exceeding its legitimate powers in passing this statute, they would be likely to resent it, and would prefer not to follow it. It would acquire, if you like, negative salience. This is at least a likely outcome, and this would be enough to discourage the authority from trying to solve coordination problems in this way. The fact is, of course, that the prescribed conduct becomes the salient solution because people assume that the authority was within its rights in passing the statute, and that is why each one expects the others to obey it. Still, it is not clear whether there is here an answer to Regan's argument.74

Consider, for example, my position. I am faced with a coordination problem. I discover that because of other people's belief in the legitimacy of the legislature, a particular course of action, which is in fact a solution to the coordination problem, will be followed. So I follow it just because of that. I do not accept the legitimacy of the authority, nor need I do so. I simply rely on a prediction as to how other people will behave. The fact that the prediction is based on my knowledge of their belief in the legitimacy of the authority of the legislature is neither here nor there. It does not show that the legislature has authority over me, that is, that I ought to do as the statute prescribes because it was duly enacted, rather than because it is likely to be followed by others.

This line of argument may suggest that I am free-riding, in a rather special way. I am a cognitive free-rider. In fact, everyone is in my position and can reason similarly. But if all, or many, did, and if this became generally known, then the authority will lose its ability to secure coordination. If my views were generally shared, and were known to be shared, no one would be able to reason as I now do, for the premise of my argument would then be false. In other words, my beliefs are collectively self-

74. My following observations may capture the way that Regan intended his own rebuttal of this counter-argument to be understood, but I am not sure of that.
This may count against my belief. It is arguable that to show that a normative or evaluative belief is collectively self-defeating is to provide a sort of reductio ad absurdum argument against it. I do not wish to pursue this line of argument any further, for whatever its merits it falls short of what is required to show that authority can rest on the need to secure coordination. Two reasons show the inadequacy of the argument. First, at best the argument shows the legitimacy of the authority to set up new schemes of coordination. At the beginning the statute, one may say, is binding because it gives hope that coordination will emerge. But after a while the statute ceases to matter. If a coordinative practice emerged, then one ought to conform for that reason, regardless of whether the statute is still in force. If a coordinative practice failed for some reason to emerge, then one has no reason to follow the statute, for it will now be likely that it simply failed, and that it lost its chance to motivate the emergence of a coordinative practice. The second way the previous argument fails to establish the legitimacy of the authority is that it merely establishes that its directive is an ordinary reason for action. It fails to establish that it is a pre-emptive reason. But authoritative directives are pre-emptive reasons. This point is the backbone of Green's argument alluded to above. Regan, who agrees that authoritative directives are pre-emptive, would agree with the point.

I have written briefly in the past that arguments such as Green's and Regan's apply only to coordination problems as defined in game theory, but that is an artificially narrow sense of the term. My claim that authorities can be justified by their help in securing coordination is not meant to refer to this technical sense of the term. Securing coordination means just that. It means getting people to act in ways which are sensitive to the way others are guided, or are likely, to act so that benefits can then be expected which are less likely if people act without coordinating their efforts, that is, without basing their own actions on a view as to how others should or are likely to act. Coordination presupposes that people are not trying to fail one another. Rather, they are trying to secure goals which are shared by all, or perhaps just goals that all should have. But coordination does not presuppose that every participant will improve his position by coordinating. People can coordinate in attempting to rescue

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75. See D. Parfit, Persons and Reasons (1984), on the notion of beliefs which are collectively self-defeating.

76. This, broadly speaking, was the view I adopted in Chapter 12 of The Authority of Law. The argument needs refining to account for different probable development in varying circumstances.

77. Though I admit that at times I wrote in ways which encourage that mistake.
the victims of a natural disaster, though they do so at a great cost to themselves. The prospect that coordinative practices will emerge Automatically, which is held out by game theory, is less than compelling given that the need to secure coordination is not the same as the need to solve game-theoretical recurring multi-person coordination problems.

Let me comment briefly on the reasons which can establish the desirability of social coordination in this wider sense. They arise from two sources. First, without a coordinated effort, some good, which can in principle be secured at an acceptable cost, will be lost. Second, sometimes the good need not be lost. It can be secured through the contribution of a smaller number of people, but it would be unjust to impose the full burden of securing the good on those people rather than on a larger group. This last point may suggest to some that I am confusing coordination problems with the free rider problem in the provision of public goods. But remember that I do not have in mind only what game theory dubs coordination problems. Nor do I have in mind only the provision of public goods. Coordination may be necessary to secure the protection of an endangered species, or of a natural wilderness. Their protection need not be thought of as a good to anyone. It may be a good in itself. But the coordinated effort, or the contribution required for it, arises out of the two reasons I mentioned. Without the coordination, either the goal will not be achieved, or if achieved it will be secured through some individuals carrying more than their fair share of the burden, while others contribute nothing or less than they should, or even stand in the way of the goal by their behaviour, which may positively increase the danger to the endangered species or to the environment.

The common ways of defining coordination problems in game theory can be adapted to include cases in which people have non-self-interested reasons for securing goals requiring coordination with others. But they cannot be extended to encompass another way in which our ordinary notion of a coordination problem differs from the game-theoretical one. The game-theoretical notion is essentially subjective. That is, for a coordination problem to exists it is not enough that people's reasons indicate that there are several courses of action each of which will be the best if adopted by all others. A coordination problem exists only if people generally are (1) aware of the structure of their reasons; (2) aware of the courses of action which, if generally followed, will lead to the desired result; (3) aware that the same is true of other people's reasons; and (4)
aware that it is generally known that all four conditions (that is, the previous three and this one) are met. According to the sense of "coordination" in common discourse, coordination problems exist whenever the reasons which apply to people are such that they would do best if they act in a coordinated way. The subjective conditions (1) to (4) are not part of the problem, but commonly, part of its solution. That is, the problem is to get people to realise that they are confronting a coordination problem and, once this is achieved, to get them to realise that it is common knowledge that there is a coordination problem, and that it is common knowledge that it is common knowledge.

Needless to say, the fact that coordination problems arise not only when people can best satisfy their own preferences by coordinating with others, but also when they can only secure the morally best outcome by coordinating with others, increases considerably the possibility that they will fail to realise that they face a coordination problem, and even if they do, they will doubt whether this understanding is common. But quite apart from this consideration there is a big gap between the existence of a coordination problem in the common (objective) sense and the existence of a coordination problem in the game-theoretical (subjective) sense. Once the subjective conditions are met the most difficult part of solving the problem is over. Indeed, on many occasions once the subjective conditions are met no problem remains. On many occasions there is only one course of action which will secure, if generally followed, the desired result. Barring irrationality, forgetfulness, etc., it will be followed if the subjective conditions are met. To salvage a problem out of its definition, game theory includes a further condition in the definition of a coordination problem. There is such a problem only if there are several possible equilibrium points, that is, several different courses of action, each of which will be best if generally followed. The only problem that game theory identified as a coordination problem is choosing which course of conduct one should follow under those conditions.

Our common understanding of coordination and its attendant problems, while recognising that this problem can be real enough, does not regard it as a necessary condition of a coordination problem. The most difficult problems are different. They have to do with finding a way of satisfying the four subjective conditions, which are necessary to secure coordination. I hope that it is now plain how authorities can play a crucial role in securing coordination, and how this role is crucial in establishing the legitimacy of political authorities.
Knowing the limits of my knowledge and understanding, and being aware of the danger that my judgment will be affected by bias, and my performance by the weakness of my resolve, I am aware of the possibility that another person, or organization, might be better able to judge when there are sufficient reasons for social coordination to which I should contribute. This may be the case if the person or organization is less likely to be biased than I am and if they have greater expertise than I concerning the goods and social needs for which coordination may be needed, and the ways of achieving them. In such a case I should adopt a rule to follow the instructions of such a person or body, to regard them as authorities, within certain specified bounds. The rule will be justified by the fact that following it will lead me to participate in justified coordinated social behaviour more reliably than if I should try to decide for myself when the conditions of a coordination problem exist, and when I should follow a certain course of conduct as a way of participating in a justified coordinative practice.

So far I have been assuming that all the conditions for a coordinating practice, barring (when it is a condition for the existence of the practice) my participation, exist. The authority I recognise is an authority on (some) existing coordinative practices. It can instruct me better than I can myself when such practices are justified and how I should contribute to them. But often I should take a further step. I should recognise that other people are in my position and that if we all adopt a coordinative practice to follow the directives of a certain body within certain limits then we will all be able to establish and preserve justified coordinative practices which would otherwise evade our grasp. The reason is that by sharing the knowledge that we all assigned to this body the power to decide for us when coordination problems (in the objective sense) exist, and to make generally known its proposed solutions, we make sure that the subjective conditions are met. We know that they are met whenever the body whose authority we recognise issues one of its directives.

78. It is sufficient if that person or body is advised by people with such expertise, and tends to follow such advice.

79. The full story requires much refinement. I may regard the authority's directives as sufficient to indicate that the reasons for coordination, within the specified limits, require certain conduct of me, without regarding its directive as a necessary condition for such a conclusion. This seems to be the common attitude, though there are cases in which the authority's directives are regarded, perhaps justifiably, as necessary conditions.

80. There is a further advantage to having such an authority. By making the matter public, and involving other people in it, it can strengthen me against weakness of the will.

81. This is again too simple. I am assuming that the authority is limited to solving coordination problems only. In the normal case in which it has other powers as well, all we know is that if its directive is meant to solve a coordination problem, then (1) there is likely to be such a problem, (2)
In other words, there can be justified (second-order) coordinative practices setting a person or body as a coordinative authority, that is, as capable of authoritatively determining when there is a coordination problem and what to do about it, and such practices may be justified. Such practices are neither rules of thumb, which can achieve their aims regardless of their adoption by others, nor indicator rules. But they are rules which justify the legitimacy of an authority (within proper bounds) in accordance with the normal justification thesis. They enable all of us to solve coordination problems better than we might when we try to judge for ourselves whether there is a coordination problem and whether the subjective conditions for its solution are met.

Now we see how the two objections mentioned earlier are met. The argument shows that the coordinative role of the authority functions as a preemptive reason (thus solving Green’s objection), because the whole purpose of following the authorities, directives will be defeated if I try to follow my own judgment in the matters entrusted to the authority judgment. The whole point of recognising the authority was that its judgment should be trusted rather than mine. All the standard arguments I advanced for regarding authoritative directives as preemptive reasons apply here.\footnote{82}

Furthermore, the authoritative directives are reasons for action not only when a new coordinative practice is to be set, but also when it is already in existence, or at least might be in existence. First,\footnote{83} the population subject to the directive is constantly changing, people die and others come of age, some emigrate and some immigrate. With practices participation in which depends on other conditions there are other reasons for the fluctuations. People become parents of minors, and stop being so, they become income earners, and they stop being so. Such fluctuations may well threaten the stability of coordinative practices, for they put in question the satisfaction of the subjective conditions. If the second-order practice of recognising the authority of the government remains intact, it prevents such destabilization. It is easier to secure the satisfaction of the subjective conditions regarding the one practice of authority, as all countries do by directing much publicity and educational efforts to this end,

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83. The following argument is based on a suggestion of Richard Warner.
than to secure their satisfaction regarding many diverse individual coordinative practices. Hence, authorities are useful as a means of securing the continuity of coordinative practices in the face of changing populations. Second, by relying on the authoritative directives I am spared the need to judge for myself if the coordinative practice exists (a task at which I am no expert). Furthermore, knowing that others are likely to reason like me makes it more likely that the practice exists. And this is doubly so since it is common knowledge that I and others reason in this way.

Two crucial points must be mentioned here. This argument is meant to reinforce my observation in *The Morality of Freedom* that only a de facto authority can be a legitimate coordinative authority. Naturally, the loss of the obedience of the population undermines the whole argument and denies the authority its legitimacy. Second, it may well be that in cases where it is clear that the hoped for coordinative practice failed to materialize after a time the directive intended to secure and maintain the practice should not be regarded as binding. It is arguable that though authorities should repeal such directives, they cannot be trusted to do so. Therefore, if it is clear to all that the hoped for practice failed to come into existence, the continued existence of the directive cannot reliably be used in the argument made in the preceding paragraph.

D. **THE PREEMPTIVE FORCE OF AUTHORITATIVE INSTRUCTIONS**

My preemption thesis states that directives which fall within the bounds of an authority's jurisdiction should replace rather than be added to the balance of reasons on which the authority had power to pronounce. The previous discussion indirectly illustrates and adds support to the thesis. I argued for it explicitly in Chapter 3 of *The Morality of Freedom*. In the appendix to his article, Regan presents an interesting argument which, if successful, undermines the thesis. It is addressed at one simple argument I made. I suggested that if one knows that another person performs better than oneself (in the sense of making the correct decision more often), and if one has not further information which would suggest in which subclass of cases the other person's judgment is better than one's own, then one will do better by following the other person's advice than by any strategy which will assign some weight to both one's own independent judgment and to that person's advice.

My suggestion was that this informal argument can be formalized and can be generalised so that it will apply to all cases which display these features, however unlike they are in other respects to the example I
used to illustrate my point. In reply, Regan attempts a more rigorous statement of the assumptions and the steps in the argument and finds that his attempt at generalising the argument failed. His version of the argument holds only under certain conditions. This seems to me plausible, but I see no reason to believe that my informal argument cannot be generalised.

The one substantive difference of opinion between us revealed by this discussion lies in Regan’s suggestion that it would be reasonable for people in the situation envisaged in my example, who lack any further information, to adopt a policy of following their own judgment when they feel that the case is clear and following the authority when they are less clear, or when they feel that the case is close. Regan thinks it is a priori true that, for the most part, people make more mistakes in the latter type of case than in the former. I doubt this assumption in this general form. I tend to think that it holds good only where people have a good enough grasp of what determines the correctness of decisions, or where they are lucky enough to have discovered a good correlate of correct decisions even though they have but a poor understanding of what accounts for the correctness of their decisions. In other cases, especially in cases in which they hold mistaken beliefs about the matter they decide on (as when they have a wrong belief about the relations between inflation and the value of shares, or where they hold some astrological theory about the success of wars), there is no reason to believe that there is a positive correlation between seeing the matter as clear and a likelihood of being right.

When one does have an account of what makes a decision right then one may well have the additional information required to indicate in what subclass of cases the other person is worse than oneself. In such cases one should not follow the person’s advice regarding that subclass of cases at all. As Regan realises, this conforms to the aim of my argument which was meant to show that considerations of reliability may lead to letting others’ views preempt one’s judgment or to their dismissal as irrelevant.

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84. As Regan does not provide a complete account of his argument one has to reserve final judgment.

85. It is possible that something like Regan’s thesis is true in a special range of cases, or in much qualified form. Evolutionary theory may lead one in some such direction. Whether there is any a priori thesis to that effect is moot.

86. Others’ views, however, may serve as warnings that one may wrong. As such they may make one double check or hedge one’s bets.
I think that Regan has not produced a counter-example to my argument. But I am not confident that no counter-example can be found. Regan’s own attempt at a counter-example amounts to treating an expert’s advice as a weighting consideration, to use Perry’s terminology. The argument can be made that at least under some conditions when one has reason to give extra weight to another’s judgment that person has authority over one. It is not easy to make this idea more precise. It calls for an evaluation in two rounds. First, the subject forms a judgment on the issue at hand, taking into account the advice received by others but excluding (all or some of the) considerations which bear on the reliability of that judgment. In the second round, one brings in those considerations (for example, I am somewhat intoxicated, or I am rather ignorant about such issues). In light of these considerations one may come to the view that the judgment of the other person should be given a greater weight than one was originally inclined to give it. When these and other as yet unspecified conditions are met then the other person has authority over one. Neither Perry nor Regan is strictly committed to such a view, though some of their points suggest it. The matter seems to me fraught with difficulties and requires much more careful consideration than I can give it here.

E. Respect for Law

Both Regan and Green object to my claim that an attitude of respect for law, which expresses itself in a belief that one has a duty to obey the law because it is our law, the law of our country, expresses identification with one’s society and is, when such identification is valuable, self-vindicating, that is, that the people who have such an attitude have the duty they believe in. Regan believes that respect for law provides reason for obeying the law. But he denies that it amounts to an obligation to obey. He professes some bewilderment about the difference between having an obligation and having a reason. I am sorry that he does not advert to my attempt to elucidate duties in terms of categorical protected reasons, that is, ones which do not depend on the desires of their subject (though they may be sensitive to them) and which have preemptive force. How does that apply to respect and the obligation of obedience? To recap briefly, my argument is as follows: Respect for law can be a reason for obeying the law because it can manifest an attitude of identification with

87. See Perry, supra note 2, at 913.
88. See Regan, supra note 63, at 1035-36.
one's society, or such an attitude may be valuable. I shall say nothing about why and when it is valuable to identify with one's society, and to express this through one's attitude to its law. But how can respect for the law express such identification? It does so in expressing trust in the government of the society which passed the law and is in charge of its enforcement. The trust shows one's confidence that one's society and its institutions work together, and that by and large they do so in the right way. The trust is expressed in holding oneself bound to obey the law because it is made by the government, without submitting every law and regulation to careful scrutiny to see whether they are the best, or whether they are just, or whether one has reasons to obey or to disobey them. Instead of such case by case scrutiny one accepts the law on trust as binding. This is a very crude outline of one crucial step in the argument. But it makes clear that if at all valid, it establishes a preemptive reason to obey, and therefore that it qualifies as a duty. Regan in expressing his doubts about respect (and consent) amounting to a duty to obey does not address this argument.

This is not an oversight on his part. He finds the argument unpersuasive. It has, he says, the form of inferring from "It would be a good thing if X" that "X", where "X" is a moral proposition. Regan is surprised that anyone should find this a valid form of argument. Perhaps in the very general form it is not valid. But a suitably restricted form of it is a standard presumptive justification of normative conclusions on instrumental grounds. One may argue, for example: if such and such a duty exists (e.g., a duty to give to charity), then people will give to charity. Since it is good that people should give to charity it is right to conclude, other things being equal, that they owe such a duty. The only unusual feature of my argument is that it was not instrumental, but tries to justify an intrinsic good. Therefore, it involves self-reference (an attitude being justified by the goodness of itself). Regan does not find these novel features problematical. I assume that he objects to the justification of any duties on instrumentalist grounds. But I am not clear what his objection is.91

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90. Regan, supra note 63, at 1037.
91. My guess is that this point is related to what is to me the most obscure aspect of Regan's comments. He seems to raise true moral reasons (unlike mere rules or thumb and other instrumental or contingent considerations) to an elevated level. That is why he suspects that I wish to regard authority and legitimacy as thicker than my arguments justify, and why he insists that authorities are based merely on indicator rules which establish neither legitimacy nor duties, and which cannot be obeyed. I find all this mystifying. To my mind the sort of considerations that Regan and I have
Green does not share Regan’s misgivings about my handling of consent (Regan regards consent and respect as in the same boat, as in most respects I do too). But he objects to the argument for a semi-voluntary obligation to obey the law deriving from respect for the law. It is not clear to me which part of my argument he rejects. He does not seem to reject the factual aspect of the argument, that some people have the beliefs and the attitudes I described. His objection is to the claim that their beliefs are self-vindicating. He makes one point: To express identification, an action must be appropriate to this role. Obedience is not appropriate.\(^2\) I have to admit that I am baffled by this claim. It is not backed by any argument.\(^3\) All I can do is repeat briefly my position: The normal justification thesis shows that an obligation to obey exists when the government can be trusted to guide one correctly, that is, when following its guidance conforms to independent reasons. Belief in an obligation to obey is, therefore, an expression of trust in the government.\(^4\) Trust is a fitting expression of loyalty and identification. It is a conventional expression of loyalty to one’s spouse or friends. And it fulfills a similar role in our attitudes to institutions such as universities or trade unions or other associations of which one may be a member. In the life of some people, that is those who regard their government and their law as an aspect of their society and its life, trust in the government expresses an identification with the society and is expressed in a belief in an obligation to obey.

As I have already mentioned, such identification is valuable only under certain conditions, among them that people’s trust in the law is not completely misplaced. It is misplaced, for example, in an unjust legal system. Such a system does not deserve to be trusted, and no valid obligation can be derived from someone’s belief that it does. This means that respect for law is not the normal justification for the authority of the law. It is dependent on and derived from the normal justification being met to a high degree. But when this is the case it is an important secondary justification, and it helps establish the authority of the law beyond the been examining are precisely the considerations which validate claims of legitimacy, duty, and obedience, and if this makes such terms thinner than someone thinks they are (whatever that may mean), so be it.

\(^2\) See Green, supra note 53, at 812-18.

\(^3\) Green has a brief and inconclusive discussion of the appropriateness of obedience as an expression of gratitude, but none of the suitability of a duty of obedience as an expression of identification.

\(^4\) The “therefore” is a bit too quick. It assumes that the basic stand of the normal justification thesis reflects the common view of authority in our culture. I believe the assumption to be well-founded.
limits set by the normal justification thesis alone. The value of identification may compensate for a lack in some other aspect in the law which would otherwise mean that its authority is not complete. 95

F. Questions About Citizenship and Authority

Green disagrees with the modest role I assigned to consent as a source of governmental authority. As we saw above, he has a good case. But he has a different explanation of the role of consent. He regards governmental authority as resting on consent to the role of citizenship, which includes acceptance of the authority of the government and of an obligation to obey the law. 96 This view seems to me to lack, as yet, sufficient articulation to evaluate its merits. Green indicates, for example, that he understands consent to apply in "a somewhat extended" sense, 97 but he gives no analysis of what counts as consent. We are not told, for instance, whether such undertakings bind for life, or whether they are revocable. My conviction that whatever factors justify regarding consent to the authority of the law as binding exist in other cases which fall short of consent as well led me to develop the idea of respect for law as an additional source of obligation. Green does not react to that aspect of the argument. Nor does Green tell us much about the role of citizenship, or its value to the individuals who assume it. The little he says is insufficient to allow one to judge whether that value does not reside precisely in enabling citizens to identify with their society, which is the value I claimed as validating, under appropriate conditions, both respect and consent. Green says that "[i]t is not so much that consenting to obey expresses a valuable feeling of belonging to one's society, but that it concretely instantiates a form of association which may be regarded as a shared good." 98 However, when he describes the value of that form of association, he explains it in terms of civic ties and social solidarity of all

95. Notice that in my view identification is a possible, but not a compulsory (secondary), source of the authority of law. Moreover, people may express such identification by accepting a qualified obligation to obey. They may, for example, extend it to all but the duty to serve in the armed forces. See J. RAZ, THE AUTHORITY OF LAW, supra note 32, at 259. I should add that the secondary nature of the justification is appreciated by Green, who seems for some reason to regard it as an objection to my view. See L. GREEN, THE AUTHORITY OF THE STATE 182-84 (1988); Green, supra note 53. This is all the more surprising since in Green's own view consent, which is the only way to establish an obligation to obey, is itself dependent for its validity on the normal justification thesis and satisfaction of the condition of autonomy. This makes it dependent to a greater extent than it is in my view, since I allow for trade-offs between the degree to which the normal justification thesis is satisfied and the value of identification.

96. See L. GREEN, supra note 95, at ch. 7; Green, supra note 53, at 818 passim.

97. L. GREEN, supra note 95, at 205.

98. Id. at 208.
those who share the role of citizens.\textsuperscript{99} This may or may not mean more than a sense of belonging to, of identifying with, the citizenry, and what is implied by such attitudes. We are not told enough to know.

I am not suggesting, of course, that there are no visible differences between Green's view and mine. Here are two ways in which my notion is wider than his. First, the commonality Green is talking about is the commonality of the citizens. I was talking of a vaguer notion of belonging to a society. Clearly, people who did not consent to the authority of the law, nor share respect for it, can still be members of the society with which I identify. I identify with my society by respecting the law which governs and rules it. I thus identify with a society in which many views obtain, including those of people who are suspicious of the law. My justification does not require reciprocity. Green's does. By becoming a citizen I share civic ties only with people who are, in this respect, like-minded.\textsuperscript{100} For Green, accepting the authority of the law which governs the whole society is part of the role of the citizen shared by only some of its members. This seems to me to tell quite decisively against Green's view. Second, Green's consent can have effect only in societies which conventionally have a role of citizen.\textsuperscript{101} Mine contains no such limitation. It requires a society in which respect for law is a recognised way of expressing trust and loyalty, but it does not require the socially defined complex of rights and duties defining citizenship that marks Green's view.

Finally, let me mention one consideration which, pending a further elaboration of Green's view, seems to me to militate against it. I do not believe that our notion of citizenship is tied to the law in the way supposed by Green. I doubt whether there is a social role of citizenship which in our society makes a difference to the obligation under private law to perform one's contractual undertakings or to a surgeon's duty to exercise due care in surgical operations, etc. Citizenship seems to be a political and public notion. It may well affect people's attitude toward political and public law, that is, to those which define the system of government and the public character of life in the society concerned. It is doubtful whether it has much to do with relations between individuals in what is, generally speaking, the private domain.

\textsuperscript{99} Id.

\textsuperscript{100} It excludes not only "foreigners," but also those who are legally citizens but since they never consented to this status, are not citizens in Green's sense. See Green, \textit{supra} note 53, at 817-18 (warning us of this fact).

\textsuperscript{101} Id.
III. LAW AND LEGAL PRECEDENTS

A. THE FUNCTIONS OF LAW

In his article, Burton considers some of the fundamental questions of legal philosophy, such as the relations between law, reason, and morality. He raises issues which require much further thought. The limitations of the occasion prevent me from engaging in that debate here. However, I will briefly address a few of Burton's views.

Burton favours a generalised definition of law which is sufficiently imprecise to be consistent with all main line approaches to law. Such a definition may indeed have some use in popularising philosophical ideas. Its use is, however, more limited than meets the eye. It is only to be expected that divergent legal theories will converge when they come to identify the phenomena discussed. This does not guarantee convergence of the underlying structure of the theories or of their motivations and insights, nor does Burton suppose otherwise. But the divergence of underlying justifications may make it difficult to defend the generalised, imprecise definition without taking sides in the philosophical controversies that Burton wishes to avoid.

More interesting is another limitation of his approach. It is tempting to think, as Burton does, that a generalised and imprecise definition of law, like his, is less likely to be wrong than any of the more sharply defined theories in legal philosophy. But this is a mistake. There is no reason to think e.g. that the next theory to appear will fall within the sphere demarcated by the generalised definition. Since new theories almost invariably involve conceptual revision, they may well cut across the conceptual distinctions relied upon in the definition. The survival of the definition as a representation of the broad consensus depends on one's luck and intuition in deciding which way to generalise from existing theories. It is arguable, for example, that Perry's conception of the law is inconsistent with Burton's generalised definition.\(^\text{102}\) Perry considers my general analysis of the function of law,\(^\text{103}\) according to which

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102. See Perry, supra note 2, at 958-59.
103. Perry regards my general discussion of the nature of law as a Dworkinian interpretation. *Id.* at 948-49. This it is not. This is not the place to analyze the differences, but I'll mention two: In Dworkin's terms you may say that my aim is to analyse the concept of law, whereas Dworkin concentrates on proposing a particular conception of law. More accurately, I am not committed to the concept/conception distinction which is crucial to Dworkinian interpretation. Second, Dworkin thinks that any interpretation is successful in proportion to its ability to present whatever it interprets as being as good as is possible. I do not think that this is an aim or a criterion of the success of interpretation in general, nor do I try to present an explanation of the law which makes it as good of its kind, whatever that may mean, as possible.
institutionalised guidance of conduct is the most abstract statement of the function of law, and contrasts it with his own: “[T]he basic function of law is not the guidance of the citizens’ conduct as such but rather the institutionalized adjudication and social resolution of disputes in accordance with appropriate principles of personal and political morality.”

Perry fully anticipates my, and other people’s, response to his claim. The two functions under discussion are not in the least incompatible. Indeed, I, for example, have long maintained that all legal systems provided for the resolution or processing of unregulated disputes, that is, disputes regarding which pre-existing laws do not uniquely determine one correct answer, but whose resolution requires the use of judicial discretion. It is true that I do not believe that all legal systems provide for the resolution of all disputes. If that is part of Perry’s claim, then I believe him to be factually mistaken. But he would probably disavow any such interpretation of his thesis. Where then is the difference?

One problem is that Perry’s statement of the law’s function cannot be the whole story. It leaves out the importance of legislation in the law. Perry replies that morality dictates that disputes should be resolved on the basis of statutes, where such statutes are available. In this way legislation is covered by his general statement of the function of the law, which refers to morality. This, however, is an inadequate response. Racialist legislation is part of South African law even though morality does not require the judiciary in South Africa to enforce it. This statement is controversial, but the abstract point need not be. There are “evil” statutes in various legal systems which morality does not require the judges to enforce, but which are part of the law. That judicial disobedience of the law is morally justified is a logical possibility which Perry’s conception of the law does not admit. Guidance through law-making is an essential feature of all law not because morality requires it, but simply because the law is this kind of a social institution.

A second problem is that Perry’s own assumptions make clear that he is not presenting a general account of the function of law since he concedes that his account does not apply to the criminal law. Perry may argue that my statement of the law’s general function is similarly

104. Id. at 958.
105. The inevitability of the task follows from the impossibility in principle of drawing a sharp divide between regulated and unregulated disputes.
106. Since the criminal law in England is largely a common-law-based branch of the law, at least in its origins and general principles, this fact is crucial to evaluating some of Perry’s further claims. He may, for example, be forced to entertain the possibility that English law has two doctrines of precedent, one for private law and one for public law (including the criminal law).
incomplete in not mentioning the resolution of conflicts. Judicial proceedings do, however, lead to determination of how the parties ought to conduct themselves. This is why I assumed that resolution of disputes is but one aspect of the institutionalised guidance of behaviour by law. The centrality of this aspect of the law has always been a key feature of my writing. If it clarifies matters, I have of course no objection to singling out Perry's function for special mention, once it is amended to recognise the special importance of law-making as a source of standards for dispute resolution.

B. COMMON LAW ADJUDICATION: SOME PRELIMINARIES

The truth is that the preceding discussion misses what is interesting about Perry's views. His statement of the function of law is far too general, as well as incomplete, to carry the burden of his distinctive views. In the sequel I will examine the substance of his objections to my position, independently of his general characterisation of himself, based on his endorsement of the description of the function of law that we have examined, as adjudicativist. He is making two separate claims: (1) My account of common law adjudication is inadequate; and (implicitly) (2) my account of the limits of law, of the boundary between law and non-legal standards, is inadequate. No explicit argument for (2) is offered. It is implicitly supported by his argument for (1). Undermining my account of common law adjudication is meant to undermine my claims about the limit of law. I will concentrate only on the issue of common law adjudication. Moore also challenges my understanding of adjudication, both regarding precedent and concerning statutory interpretation. It may be useful to start with a response to Moore's objections, since my response to them consists mainly in clarifying obscurities in my previous writings.

I am unable to reply directly to Moore's objection in his Part V.107 My vision is obscured by the fact that Moore seems to have misunderstood my views on a number of counts and at other points simply states as given propositions to which I see no reason to agree. Let me try to clarify some of these points.

(1) I do not have "a theory of precedent," nor do I believe that such a theory exists, if by that one means a theory about how judges ought to decide cases or treat precedent. These are largely matters of law differently regulated by the law of different countries. I do not mean that they

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107. See Moore, supra note 4, at 883-85.
are subject to explicit legislation or precedent. Even where they are, these give but an imperfect picture of the law, which is in the main constituted by the practices of the courts and of the legal profession. There are, it is true, a few general jurisprudential statements one can make on these issues, but they do not amount to a theory. In Chapter Ten of The Authority of Law, I outlined some features of the English practice in order to illustrate how some of the general jurisprudential points fit in with the practice of one country. Naturally, different accounts are needed to show how the same jurisprudential points fit with the practices of different countries.

(2) I do believe that courts have discretion in every case, in so-called easy cases no less than in so-called hard ones. In every case, e.g., the court has discretion to distinguish a binding precedent, and in many it has the discretion to overrule it.

(3) I am not sure what Moore has in mind when he refers to the "three levels of influence" that a precedent may have. I do not think that is a view which I hold. Perhaps I believe in two levels of influence. A binding precedent is binding, and has (in England) to be followed unless it is distinguished or overruled. Besides, it, like any other part of the law, affects moral considerations in the way that any fact does. Like the existence of a wall, it may indicate the moral desirability of an indirect approach, or the unattainability of certain goals. In my view, this is the best way to understand analogical arguments. They show how a new decision fits with the existing facts. They are not reasons for or against it, but they provide information which is relevant to such reasons.

(4) Moore says that I "cannot mean that judges should... regard the ratio [as a protected reason] when they are distinguishing or extending it... for to carry out their obligations here judges must not exclude any moral considerations." I am afraid that I disagree. There is at least one legal system, namely, the English one (the only one I was discussing in the text considered by Moore), where they must so regard the ratio. Naturally, the fact that the ratio is a protected reason does not impede the courts when they decide to lay down a similar rule for cases to which the ratio does not apply (that is, when they extend it); in such cases they do not interfere with the existing law where it does apply. Since it remains the same, its protected status is not called into question.

109. Moore, supra note 4, at 886.
110. Id. at 887.
and does not come into play. When rules are distinguished they are modified and they can be modified only on the basis of non-excluded reasons. The fact that the whole rule which is being distinguished is unjust, for example, is excluded, and is not a ground for distinguishing it. In short, it is the fact that the rule is a protected reason which forces the courts to distinguish rather than overrule. In defending his claim, Moore simply resorts to his allegation considered above that a limited power to distinguish is undesirable. This, even if true, does not refute the existence of such a limitation in English law. Furthermore, as shown in the previous discussion, Moore is mistaken in the reasons he advances for the undesirability of all restriction of judicial powers.

(5) Moore has caught me in another careless statement. I said that the reason the actual formulation of the ratio does not carry the weight of statutory language is that courts are often a little careless in their formulations. This makes it sound as if the difference between the legal effect of statutes and precedent noted there is a matter of universal moral necessity. All I meant is that that distinction exists in English law, and that it is sensible because of that reason. Of course, had a different practice prevailed, judges would have become much more like legislative draftsmen in their habits.

(6) I did not, however, say that the ratio is the justification for the stated holding. The ratio is what is stated, but when we understand what is stated we are not entitled to attribute the same importance to the choice of words, and to the text in isolation, as we do with statutes. The interpretation of what is stated is much more context-dependent. Both in statutory interpretation and in the interpretation of precedents the first question (though not the last, since there is much more to interpretation than explaining the law as it is) is what was said. Both are concerned with understanding acts of communication, but these acts take place within two different practices of communication, leading to different styles of expression and different conventions of interpretation.

111. This seems to be recognised by Moore in the paragraph starting "This thought by Raz is not inconsistent with ...", id., which seems to me to contradict the claim I cited from his preceding paragraph.

112. The reason for the emergence of the doctrine which states when cases can be distinguished is the fact that many courts may not overrule. This led by extension to the practice of separating overruling from distinguishing even in the practice of courts which can do both.

113. See supra text accompanying notes 19-23.

114. Moore, supra note 4, at 888.

115. I should, perhaps, repeat my suspicion that Moore's mistake is not in ignoring relevant moral considerations, but in mischaracterising their logical features.

I hope that these clarifications remove both the charge of inconsistency and the problem of the level of abstraction at which to understand the ratio. Both objections depend on the same misunderstanding of my observation that the language of cases is not canonical in the way the language of statutes is.

(7) There remains one last objection (not counting as an objection Moore's observation that a case which may be within the core of one rule may be within the penumbra of another, nor his remark that one needs a linguistic theory which accounts for the difference between core and penumbra). Moore says that according to what I called the pre-emption thesis one should not count the reasons for the rule when applying a rule, but the reasons for the rule count when interpreting its application to cases on which its impact is vague. I do not see any problem here. All I have argued for are two points. First, the identification of a legal rule should be independent of the reasons for the rule. Second, in applying a rule in cases of conflict, its weight and that of the reasons it is based upon should not both count. Neither of these is affected by considering the reasons for a particular rule in deciding whether it should apply to cases to which it does not clearly apply. Such applications are law-creative rather than law-applying, whereas my observations elucidate the nature of the application of rules.

The last point is relevant to an assessment of Perry's criticism as well. He mentions as an advantage of his view that "the courts constantly stay in touch, so to speak, with the ultimate first-order reasoning which is the subject of the presumptive weighting process." This is true and is an inescapable consequence of my analysis as well. Since courts have discretion, at least (in England) discretion to distinguish, in every case, they have to consider the reasoning underlying the legal rule which applies in the case (at least where the use of that discretion is seriously in question). As I explained above, this is consistent both with the sources thesis and with the exclusionary character of judge-made law.

Before we proceed with Perry's main arguments, different strands in his criticism should be separated. Though he treats all the issues as if they were one, Perry criticises my views on three distinct, and logically independent issues. First, he argues that the binding precedents set by common law courts should not be interpreted as protected reasons. Second, he claims that the rulings of such courts cannot be identified independently of the reasons which led to their adoption. Third, he holds

117. Perry, supra note 2, at 972.
some version of what I call the "no difference" thesis, according to which judicial decisions are taken on the basis of what he calls "morally relevant" reasons, and not on the basis of forward-looking rules laid down in binding precedents.\textsuperscript{118} It is only on the second issue, my tentative espousal of the sources thesis, that his criticism addresses itself to my theory of law. The other two points of contention concern my attempt to explain the practice of precedent in the English common law only.\textsuperscript{119}

\section*{C. On Sources and Exclusions}

Let me start with Perry's radical challenge to my theory—his challenge to the sources thesis. He advances only one argument, which I will quote:

The non-exclusionary conception of precedent attributes a certain presumptive weight to the reasoning of previous decisions, but it does not presuppose that the identification of that reasoning will itself be value free. Often it will be necessary to reconstruct the arguments of a previous decision, relying unavoidably on one's own moral sensibilities in the process, in order just to arrive at a clear understanding of them.\textsuperscript{120}

As it stands the argument fails. To identify the court's reasoning I need to reason in a way I know or believe that the court was likely to have reasoned. If the court was of my moral sensibilities, then I may indeed rely on my moral sensibilities in doing so. But this would not be because my moral views are (believed by me to be) correct, but because they are shared by the court. That this does not violate the sources thesis is clear from the fact that if I know that the court's moral sensibilities differ from mine, I will not rely on my sensibilities in reconstructing its reasoning. Rather, I will rely on whatever I know about the court's

\begin{itemize}
\item[118.] \textit{See}, e.g., Perry, \textit{supra} note 2, at 981. While Perry identifies my position as positivist on account of my views on all three issues, he knows that I myself regard legal positivism as committed only to something like the sources thesis, that is, to a view like the one I discussed on the second of the three issues.
\item[119.] Perry claims that his explanation of the Common Law vindicates Dworkin's theory of law. But there is only a tenuous connection between his views and Dworkin's. Perry agrees with Dworkin, and with many others, that what is law and what is not is, in part, a moral question. I will argue that this point is not supported by the rest of Perry's views. More pertinently, Perry's view of civil law adjudication is identical with one interpretation of Dworkin's Rights Thesis, that is, with its interpretation as the view that in deciding a case the courts should have regard to the relative merits of the case of the litigants only. It is quite likely, though I will not argue the point here, that this is not the way Dworkin himself understands his thesis. \textit{See}, Raz, \textit{The Authority of Law}, \textit{supra} note 32, at 123. Many of Dworkin's more distinctive views are neither supported nor contradicted by Perry's account. Being an account of private law adjudication in the common law it is, not surprisingly, consistent with a variety of legal theories, including, as I will argue, mine.
\item[120.] Perry, \textit{supra} note 2, at 973.
\end{itemize}
views to reconstruct its arguments on the occasion which is of concern to me. Since the structure of my reasoning in the two cases is the same, and since I do not use moral reasoning in a sense inconsistent with the sources thesis when I reconstruct the reasoning of a non-like-minded court, it follows that I do not violate the sources thesis in reconstructing the reasoning of a like-minded court.¹²¹

Are common law decisions protected reasons? Above I explained that there is no logical necessity for the decisions of the highest court of appeals of a country to hold that it must view its own decisions as protected reasons. My general way of understanding the law entails that those who do not have power to change the law are legally required to view it as a protected reason. This entails that if legal decisions create law, then courts of first instance can only have a limited power to change the law, that is that they are legally required to regard it as a protected reason. But, I suggested above, the same need not apply to the highest court(s). It may be able to change the law whenever it sees fit in light of the balance of all reasons.

As I understand him, Perry does not deny that common law precedents are in general protected reasons. He does not deny that my analysis applies to the criminal law, or, presumably, to other areas of public law. His concern is exclusively with private law adjudication. Nor does he deny that prior to the 1966 Practice Statement the English House of Lords regarded its own decisions as protected reasons binding not only lower courts but itself as well. This means that he does not deny that lower courts, in England, are legally required to regard binding decisions of higher courts as protected reasons, and that even today the Court of Appeal is similarly required to regard its own decisions as protected reasons.¹²²

This leaves two possible areas of disagreement. First, what is the degree of deference to its prior decisions which the House of Lords is bound to display today? Here Perry convincingly argues that the court's duty is not to overrule itself unless the earlier decision is clearly mistaken and its reversal would constitute a significant improvement. I agree that this accounts better for the practice of the court than my suggestion that the court regards only certain grounds as suitable for overruling.¹²³ I

¹²¹ For an assertion of the same point, see J. RAZ, THE AUTHORITY OF LAW, supra note 32, at 40.
¹²² For agreement on all these points, see Perry, Judicial Obligation, Precedent and the Common Law, 7 OXFORD J. LEGAL STUD. 244 (1987).
¹²³ J. RAZ, THE AUTHORITY OF LAW, supra note 32, at 114.
was nearer the truth when I said "that a court should not overrule unless it is certain that the new rule is an improvement compared with the old one." I went on to emphasise "the disadvantages under which the courts labour in trying to assess the different social and economic consequences of different legal arrangement. Hence the need to avoid acting unless one is certain that the change is an improvement, however small it may be." 124 This is somewhat closer to Perry's view. As Perry is aware, this explanation is compatible with regarding the court subject to an exclusionary reason. 125 The second area of disagreement concerns the analysis of the power of the English courts to distinguish earlier cases. On this point, I am not sure of the superiority of Perry's analysis to mine. 126 I will not, however, consider the issue here beyond noticing that our disagreement is limited. Perry thinks that binding precedents are in part epistemically-bounded exclusionary reasons. He also thinks that they are often weighted reasons. They may be. If he is right, his views on this matter form a further development and refinement of the general position which I have outlined.

D. FORWARD-LOOKING PRECEDENTS

The most distinctive of Perry's claims is that in all private law cases the courts decide only on the basis of considerations of justice between the litigants before them. This I take to be the point of his statement that "the system continues to settle disputes on the basis of exactly the same sorts of moral considerations as before . . . ." 127 Courts should disregard any considerations of social justice, the general welfare, or any others which manifest concern for people other than the litigants. They should, therefore, not take account of the fact that their decision is a binding precedent and will, both in my view and in Perry's, constrain the way courts will decide in the future. Perry thinks that I am committed to denying this proposition because I say that in unregulated disputes courts "act and should act just as legislators do, namely, they should adopt those rules which they judge best." 128 But this is a mistake. The quotation commits me to advocating decisions based on forward-looking, socially-oriented considerations only if they are the best. Perry thinks

124. J. RAZ, THE AUTHORITY OF LAW, supra note 32, at 190-91; see also supra text accompanying notes 32-34.
125. See Perry, supra note 2, at 934-35; J. RAZ, THE MORALITY OF FREEDOM, supra note 15, at 62.
126. See Perry, supra note 122, for Perry's analysis.
127. Perry, supra note 2, at 972.
128. Id. at 984 (citing J. RAZ, THE AUTHORITY OF LAW, supra note 32, at 197).
that such decisions are unjust. If he is right, then they are not the best and should not be adopted by the courts. According to Perry, the injustice of the forward-looking considerations has much to do with the fact that, in a view like mine, they amount to retrospective legislation. But as my advice to Parliament to enact the best rules does not commit me to recommend retroactive Parliamentary legislation, so the same advice to the courts does not commit me to recommend unjust judicial decisions.

The first question in trying to understand how common law adjudication works in practice is, how do courts decide cases? Do they take account of forward-looking considerations? Perry is clear in his own mind that they should not. But can he also argue with the same confidence that they do not? There seems to be too much evidence to the contrary.

It is, of course, possible that the practice of the common law courts is unfair and unjust. Perry appears to belong with the many theorists who find it difficult, and in the case of some, impossible, to entertain the idea that the practices of the common law courts might be unjust. It is an advantage of views like mine that they leave the question open. But I think Perry exaggerates the injustice that may be involved. To see this, imagine that the court’s decision is no precedent at all. Should it take into account general considerations of social welfare and distributive justice in deciding between the parties? Take Perry’s example and assume with him that “the Hand test would, if complied with by the bulk of the population, lead to the socially optimal level of accident occurrence.”

Assume that this means it is justified for the legislature to adopt it. Given that it did not, should the court take it into account? I think that, other things being equal, it should. If the Hand test sets the just standard for responsibility in negligence, then people should observe it, whether it is legally binding or not. Even where it is impractical to be guided by it before the accident, people should accept it as a basis for settlement of damages claims after the harm occurred. At the very least people should agree to conform to it in order to help in establishing or maintaining a social practice which will be, by hypothesis, just if generally complied with it. Given that it is the relevant test which applies to individuals, it should, by Perry’s own standard, be the basis of the courts’ decisions.

If I am right so far, then, other things being equal, the distinction between the forward-looking considerations, which Perry condemns, and the so-called “morally relevant” ones, which he approves of, is illusory.

129. Perry, supra note 2, at 983.
Of course, other things are not equal. If the Hand test is not already widely observed, for example, then my adhering to it is merely Quixotic. It will do no good, and I have no reason to adhere to it. Given that I do not have reason to adhere to it the courts may not enforce it against me.

So far so good. Now remove the fiction that the courts do not set precedents which constrain their future decisions, and return to the reality that they do set binding standards. This, it seems to me, affects what I ought to do. I now know, or can know, that the court should, if it could do so without injustice, adopt the Hand test, because if it does it will set the just standard for society and the court is bound to be aware of the impact of its decisions and to use its power to best effect. I know that the court knows that I know that. Given my knowledge I am forewarned that the Hand formula would be applied. And that means that it is not unjust to apply it against me. Formally speaking, once the complex reflexivity of the situation is carefully spelt out, the result is a tie. It is just to apply the test if I am forewarned that it will be applied, and I am forewarned of that, i.e. that it will be applied if I am forewarned. To be forewarned that it will apply if I am forewarned is not the same as to be forewarned that it will apply. But once we add the extra element, that is, that the courts’ practice is to apply such standards, then I have the relevant warning. So in countries in which such a practice exists it is, other things being equal, just.

It should be emphasised again that other things are not always equal. For example, if a less than completely just solution is established precedent, then it may be reasonable for individuals, in contemporary common law countries, to assume that the precedent is likely to be followed, because it reflects judicial attitudes, or because it will be thought to have been the basis of many settled expectations, and so on. This is why courts sometimes may not overrule, for doing so may be unjust to the litigants. Generally, however, the fact that a court’s decision constrains future decisions is relevant information, available both to the parties and to the court, and affecting what is just between the parties in a way that brings it into line with what is morally best for society at large.

Where did Perry go wrong? Consider the passage in which he asserts that “[a] forward-looking exclusionary rule is a standard which is intended to provide exclusionary guidance for citizens but which at the same time does not bear in any direct way on the moral resolution of existing disputes.”\textsuperscript{130} This passage incorporates two mistakes. First, it

\textsuperscript{130} \textit{Id.} at 982-83.
assumes that whereas it is possible to set rules which are epistemically-bound exclusionary reasons on the basis of considerations affecting justice between the parties only, it is impossible to set rules which are exclusionary reasons of other kinds on the basis of such considerations. In other words, Perry confuses (in the case of ordinary exclusionary reasons) the distinction between the effects of a ruling and the reasons for it. He wrongly assumes that the effects of a ruling of an ordinary exclusionary kind make it logically impossible to argue for it on grounds of justice between the parties. Contrariwise, he equally wrongly assumes that a rule which is epistemically-bound must be accepted on grounds of justice between the parties and nothing more. Second, he is wrong in thinking that the binding force of precedent has no moral implication to the relations between the litigants. He fails to see how it can affect what is just between the parties, just as any other fact can.  

IV. QUESTIONS OF VALUE AND AUTONOMY

A. Well-Being

In Regan's sketchy discussion of my remarks on well-being and on the role of social forms he manages to raise some penetrating and far-reaching questions. The importance of the problems he touches on, and the admitted incompleteness of his arguments, indicate that it is best to leave these matters for further contemplation. It may be best to await the full articulation and defence of Regan's views in his forthcoming book. Given, however, that he claims to have produced some conclusive ad hominem arguments against some of my views, I will venture a few, rather disjointed and incomplete, observations.

Regan thinks that ultimately people's well-being is not what counts. People pursue (or strive to pursue) valuable goals, not people's well-being.  

One last remark on a related issue. Perry is right to point out that much of private law is dispositive, and that some of it, like the rules of strict liability, cannot directly guide behaviour. \textit{Id.} at 986. He fails to realise, however, that dispositive rules guide behaviour barring agreement between the parties, and that rules which do not directly guide behaviour may guide it indirectly, for example, by determining the cost of certain activities thus affecting one's decision whether to engage in them, under what conditions for further contemplation. It may be best to await the full articulation and defence of Regan's views in his forthcoming book. Given, however, that he claims to have produced some conclusive ad hominem arguments against some of my views, I will venture a few, rather disjointed and incomplete, observations.

Regan thinks that ultimately people's well-being is not what counts. People pursue (or strive to pursue) valuable goals, not people's well-being.  

Regan may even go further and claim that any time one advances a worthwhile goal one serves the well-being of some people, i.e. those who pursue it. I rather doubt this, but two facts suggest that Regan may hold this view. First, whereas I expected him, having rejected the independent value of
desire satisfaction also shows that I am wrong to hold that individual well-being matters. I believe this is mistaken for a variety of reasons. My argument rests on the point, with which Regan agrees, that people do not desire the satisfaction of their false desires, i.e. those based on false beliefs, where the falsity of the beliefs undermines their reason for the desire. It follows that one cannot support the value of desire satisfaction on the ground that by satisfying people’s desires one gives people what they want. The seemingly tautological “people desire the satisfaction of their desires” is in fact deeply misleading, and, when understood in some natural ways, is false. I made this point to undermine a certain intuition which may move people to support the independent value of desire-satisfaction. A sensible outlook based on the view that we should give people what they desire should take account of the fact that their desires are premised on certain assumptions, and recognize that when

individual well-being, to base his own views on the value of certain (possible) goals, he does in fact refer continuously not to worthwhile goals but to worthwhile goals which are in fact pursued by people. This may be explained by a belief that only pursued values are worth pursuing, i.e., that only they are values. Second, in criticizing my view that not the realisation of one’s valuable goals but only one’s contribution to their realisation matters, Regan seems committed to identifying the success of people’s worthwhile goals with their well-being. These two points taken together suggest that while people’s well-being may not matter in itself, whatever one has reason to do will serve the well-being of people. Regan is right to point out that while this is so, the action of those who are guided by his principles will differ from the action of those who are moved by people’s well-being. The latter will be guided by certain views about the strength of the competing reasons to serve the well-being of various people, which are absent from his principles.

In two respects I have failed to be as clear as I should have been. Regan’s resulting misunderstanding of my views on these matters may have exaggerated the appearance of our disagreement. When I said that not all aspects of the success or failure of people’s goals, or projects, reflect on their well-being I was thinking of goals such as finding a cure for AIDS, or solving the problem of the homeless. Regan may have in minds goals in a slightly different sense, according to which an individual’s goals are rarely more than making a contribution to achieving the goals which I had in mind. In that sense the success and failure of his goals affect his well-being. In my rather expansive sense they do not always do so. For in the narrow sense of “goals,” their success or failure is the success or failure of the person who has them. In the wider sense of the term this is not necessarily so. I did not mean, as Regan suspects that I did, that people’s well-being is merely a function of success or failure which is due entirely to their mental diligence, intentions, negligence, etc. So-called “objective” factors, which are beyond the control of people, may well affect their well-being.

Second, while in my view people’s well being is independently valuable, it may be misleading to say that people have reason to maximize my (as well as anyone else’s) well-being. Quite apart from the fact that considerations of the incommensurability of options make reference to maximization inappropriate, this goal is in one sense an impossible one to all but the agent concerned. Given that well-being largely consists in the successful pursuit of worthwhile goals, it is up to the person concerned. Others can help, mainly by helping to ensure the conditions necessary for a life spent in that way. They ought to do that because well-being counts, but it is impossible for anyone to actually secure the well-being of another. This point, while not eliminating the difference between Regan’s views and mine, does, I think, indicate that the difference between our views may be thinner than it might appear to those who overlook it.
those assumptions fail there is, normally, no reason to respect the desires premised on them.

Regan, using another view which we share, namely that "it is false that we pursue our goals because their pursuit serves our well-being" claims that since people do not aim at their own well-being there is not reason, which I can rely on, to regard it as a value.133 This is a non-sequitur. At most Regan can conclude that insofar as we value giving people what they want, or rather what their actions are aimed at, we have no reason to promote their well-being.134 This conclusion does not in the least undermine my belief in the independent value of well-being. One purpose of my discussion of the issue was to deny that there is any reason why we should give people what they desire, when this is understood in a straightforward and ordinary way. Naturally, I would not wish to argue for the value of people's well-being on the ground that that is what they want or that it is what they aim at in their actions.

My argument was different.135 It was that to the extent that we care about people136 we care about their well-being, for that is what caring about people means. I buttressed these points by pointing to the contrast between well-being and desire satisfaction, and, a point crucial for our present discussion, by pointing to the coincidence between the agent's and the outsider's view on this. When I consider my own life, and evaluate its course, what matters to me is my well-being, i.e. the extent my life was spent in the pursuit of worthwhile goals. The same is true generally of people's evaluations of their own life.137 When outsiders consider what they may do for me, and are, as I claim they should be, concerned with my well-being rather than with satisfying my desires, they are acting in tune with the way I think of myself, and with the way I would, were I clearheaded, wish them to think of me.

Can I consistently claim that in their actions people do not normally aim at their own well-being and maintain that when they think of their own lives what matters to people is their own well-being? I think so.

133. Raz, The Morality of Freedom, supra note 15, at 317. Regan's main concern is to argue that politics should not be motivated by the goal of advancing the well-being of people. See Regan, supra note 63, at 1042-43. But it seems that he denies well-being independent value altogether. See id.
134. Even this is an exaggeration for all I was disputing in the quoted sentence is that people always, or generally, aim at their well-being in their actions.
135. Though obviously I was not explicit enough in spelling it out.
136. I.e., about people generally, rather than about those who are our friends, relations, etc.
137. This point should be read in light of the qualification about the scope of moral judgment remarked on below.
The point is too complex to be adequately analysed here, but a partial analysis will suffice. It is not merely that people need not always aim at their well-being in their actions. It is not merely that those who do so are unappealing individuals with narrow sympathies. Nor is it merely that a whole range of relationships and projects cannot be pursued for this reason, for by their nature they can be pursued only for their own sake, or for the sake of other people, so that they remain beyond the reach of people who always aim at their own well being. The point to emphasize here is a more radical one. Those who aim only at their own well-being cannot prosper.

The reason is conceptual. For the main part, barring the necessities for comfortable survival as a person and some other elements, one's well-being is determined by one's pursuits. It depends on the value of one's pursuits and one's success in them. But what counts is one's success in the pursuit one chose for oneself. There is no independent identity to one's well-being that could guide one's choice of pursuits and activities. Can I choose to write a novel in order to advance my well-being? I can do so to advance my well-being instrumentally. I can do so to earn money, or to gain admission to literary circles. But all this will advance my well-being only if I could use the money, or my new social standing, in ways which advance my well-being. Assuming that my health and other needs for survival as a person are met, or will be met even if I choose an alternative pursuit, my decision to become a novelist can advance my well-being only because by choosing to become one I redefine the conditions of my well-being. From now on if I am a good novelist I will have a better life than if I become a lousy one, or fail to write any novels at all. As it happens I never set myself to become a novelist, and therefore my failure to write novels does not reflect on my life one way or another. The same goes for my pursuit of a friendship with a particular person. Having set out to become that person's friend, failure to keep his friendship is my failure in a way it would not be if I never set myself to cultivate his friendship.

So my choice of goals defines what conditions have to be met for me to prosper, for my life to go well. I cannot choose the pursuits in order to prosper. Of course all this has to be heavily qualified, and clarified. First, there are the needs of survival as a person. But they cannot be my only aims if I am to prosper. For a life of mere survival is not a flourishing life. To have a good life I must do something other than merely survive. Second, I may choose other pursuits with a view to my chances of succeeding in them. Since I am aware that my well-being will be
advanced by successful pursuit of worthwhile goals, I can look among worthwhile goals for those I am likely to succeed in, in order to make sure that I prosper. This indeed is true. It is irrational not to take account of one's chances of success and to choose one's goals irrespective of one's talents and limitations, or of the objective conditions. Can one choose one's goals with only one view, saying to oneself "I'll choose anything provided I am more likely to succeed in it than in any alternative, for that is the best way I can advance my well-being?" That seems to be the only way in which one can make one's own life be dominated by concern for one's well-being, and flourish. But I tend to think that this avenue is closed.

For it to be open one should be able to believe that success, for that is one's overall goal according to our supposition, is the best goal available to one. That is, regarding any project one is about to embark on in this spirit one has to believe that the greater success one is likely to achieve in it makes it the best of all the alternative projects available to one (i.e. that none of the available alternatives is better). If one does not believe that, then one can only choose that project erratically and irrationally, and that will not advance one's well-being. It is unlikely that the condition will be continuously met in any person's life. Suppose, however, that some people are so obsessed with their own well-being that they delude themselves believing that the condition is met. Can they prosper by sheer pursuit of their own well-being? No, for they are caught by the argument with which this subsection started. Their desires are premised on the assumption that they are not false desires. Only if they are not false desires can their pursuit be conducive, without qualification, to their well-being. By hypothesis their desires are false, being based on self-deluding beliefs. If this line of reasoning is correct, then it is impossible (barring miraculous conditions in which the belief that success is one's best goal is true for all one's options) to advance one's well-being by aiming only at it.

Could not one do whatever seems best, without giving improper weight to one's chances of success, because one is concerned only with one's well-being and was convinced by the argument in the previous paragraph that the best way to pursue it is to disregard that consideration and simply do what is best? At this point the difference between the people who always reason correctly (and do not give weight to their own well-being, except regarding their needs for survival as persons), and do it all in order to promote their well-being, and those who act in exactly the same way and know that by doing this they do the best they can to
promote their well-being, though that is not their aim, seems to me to have disappeared. This is not because it is difficult in general to distinguish between aiming at a goal and knowing for certain that it will be realised by one’s action. But it may be impossible to distinguish between the two when the fact that the goal will be realised is an immediate logical consequence of one’s action.\textsuperscript{138}

This lengthy detour brings out some features which are crucial to various aspects of my views. It explains, for example, that there is a conceptual reason for holding that there is no essential conflict between individuals’ concern for their own well-being and their moral obligations, or more generally, there is no conflict between one’s reasons arising out of considerations of one’s well-being and reasons constituted by other values. In the context of Regan’s observations, my argument shows that the fact that people do not aim in their actions at promoting their well-being (when this is the case) does not mean that people do not value their well-being. On the contrary, the notion of personal well-being captures what people value about their own lives. Furthermore, all one’s actions, if justified and successful, necessarily serve one’s well being. Finally, the argument explains the difference between the first person and the third person perspective.

As agents our choices determine the conditions which define our own well-being. Here well-being is not necessarily our goal. As outsiders, however, our actions affect the well-being of others in the way it was determined by their choices. Here we find it natural to talk of aiming at the well-being of others. This is the way that concern for people generally must express itself.\textsuperscript{139}

\textsuperscript{138} This is related to the old question of whether the cannibal who cuts open the chest of his unconscious victim and extracts his heart for ceremonial eating can plead not guilty to intentional homicide on the ground that while he knew for certain that his victim will die he did only intend to extract his heart, and in no way did he intend his death.

If there is anything in this contention it depends on the meaningfulness of the counterfactual (if you excuse the macabre joke): The cannibal would not have been less successful in his action had the heartless victim survived. When the consequence is an immediate logical one the counterfactual cannot be true and the distinction between foresight and intention may well disappear.

\textsuperscript{139} I should repeat once more that my argument here is rather rough. It also relies on views not shared by Regan, some of which will be considered in the next section.
B. CONVENTIONALISM AND INCOMMENSURABILITY

Like Regan, I think that social forms, social practices, are essential to the availability of many valuable options. Like him I am not a conventionalist, since I believe neither that all existing social practices establish or support valuable forms of activity or relationships, nor that the value put on a pursuit or activity by a social practice is its value. Yet, as Regan recognizes, I believe that the connection between values and social forms is closer than it is according to him. I am unable to explain the reasons for this view here, but let me briefly indicate some of its essential features.

I think that our historical knowledge sets the limits to the imaginable, and that our own practices set the limits to what is feasible for us. By that I do not mean that we can only imagine what has already happened nor that we can only act as others around us do. I do mean, however, that we can only imagine by relating to practices we know of, and constructing variations on them. The scope for invention is quite wide, but the further away we stray from forms of pursuits that we know a good deal about historically the less concrete, the less rich detail, our imaginings become, and therefore, the less relevant they become to what we can do.

This is consistent with holding that there are universal moral principles, so long as we recognize that these universal principles do not enable us to find out about radically new and unfamiliar values or ways of pursuing them. Humor furnishes a familiar example. We may have a good principle identifying good humor. It is still the case that we cannot invent radically unfamiliar forms of humor. When we discover a new culture, and its special forms of humor, we may quickly learn to see that theirs include many good examples of humor, i.e., examples which are good by our previously available principle. Yet, there was no way in which we could have discovered their type of humor, except by discovering the culture that developed it.

I believe that the same goes for forms of art, friendship, family relationships, hobbies, professions, and other valuable relationships and pursuits. This coexistence of universal principles with dependence on contingent historical traditions seems to me to indicate that social forms do more than determine the availability of valuable opinions. They constitute them. Regan, who generally rejects this view, betrays its force by saying that "perhaps no really complex comprehensive goal could be
invented by one or two individuals,“140 where one would have expected
him to say “could be discovered.” It just does not make sense to think of
discovering completely new forms of valuable activities or relationships,
though new ones can be developed with the emergence of new social
practices.

I do not, of course, believe that new valuable relationships or activi-
ties can be “invented” either, and here I move from emphasising primar-
ily the limits of the imaginable to considering the boundaries of the
feasible.141 They have to emerge with emerging practices.142 Regan pro-
tests that at least simple comprehensive goals can be invented by one or
two individuals. But in saying this he misses two fundamental points.
The first is that the density of texture that I relied on in the arguments he
objects to is not to be understood in terms of complex rules for multiple
eventualities only. It relates to the difference between a blue print (say
the text of a play) and its concrete enactment (in the performance of the
play). The play may be very simple, consisting of only two characters
each delivering a few lines. It still calls for more concreteness than is laid
out in the blue print. Should the line be delivered swiftly or in measured
tones, should the characters wear shoes or trainers, should they be of the
same age or different ages, should they be of the same educational back-
ground or not? Some answers may be provided in the blue print, but not
all can be. Nor can one rely on a closure clause saying that whatever is
not mentioned in the blue print is irrelevant. One would always be able
to imagine changes which were not dreamt of and which are, clearly or
possibly, relevant, such as staging the play in Hell, or during a space-
walk outside Mars, or as taking place between two gods bearing the
names of the characters. We always, of necessity, rely on shared prac-
tices and understanding which extend far beyond the blue print to deter-
mine what is relevant and what is not, what is permissible and what is
not.

Regan might retort that this shows that individuals cannot invent a
new social form as a blue print, but they can invent it as they go along,
over time. But that already changes the nature of what they are doing.

140. See Regan, supra note 63, at 1052.
141. Though variations on existing ones can be developed by individuals.
142. This does not necessarily indicate a lengthy process. The main point is the absence of
design. What emerges does so as a function of the activities of the many rather than created by
design. This does not mean that people cannot try to design new forms. This happens all the time.
It merely means that what emerges is unlikely closely to resemble the intention, and that in any case
it becomes a new valuable form of relationship available to people only after a practice is crystal-
lized. Until that time all one can do is experiment, which is a distinct social form supported by
appropriate practices and shared understandings in our culture.
They are experimenting. They may do that, subject to the first point, i.e., that their imagination is limited by their historical knowledge, which forms the basis for all their variations. But they cannot follow a fixed form, they certainly cannot follow an existing one. This is a crucial limitation, for value must be recognized as independent of our invention, except where the value is that of being inventive or experimental. These are important values, but they are inevitably parasitic on relatively stable and independent forms, which form the background for the experimentation, the standard of deviation, so to speak.

There is an additional consideration of great importance here. Valuable options, to be capable of being that, must be capable of providing reasons for action. This means that they must distinguish between correct action (i.e., those acts for which they are a reason) and incorrect actions. This demarcation must be independent of our will, or else it will not guide us. If we can invent valuable pursuits at will, we are the guides, not the guided. Experimentation is still possible so long as it is based on existing forms and amounts to finding variations on them. As I remarked above, we probably also have practices of experimentation which designate the boundaries, however imprecisely, of what is acceptable in such activities. The shackling of experimentation, by convention and by limits on the imaginable, to variations on existing forms, or to revivals of old ones, can only be engaged in as a special form of activity, which is clearly parasitic on established norms.

If social forms not only determine the availability of valuable (and other) options, but also constitute them, then the connection I argued for between the dependence of value on social forms and incommensurability is assured. This dependence indicates, though it does not conclusively prove, the possibility that our ability to compare options depends on the nature of our social practices, which may "run out" leaving us with no grounds for comparison.

Like Regan, I too feel that our disagreement on the issue of value incommensurability touches on the most fundamental issues on which we disagree. Unfortunately, considering them adequately will take us far beyond the proper bounds of the present discussion. Like Regan, I too will merely contribute a few inconclusive observations on the matter, mine concentrating on some of the points raised by him. The argument concerning the importance of social forms indicates why I am not

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143. The two main issues I will omit from my discussion are Regan's interesting observations on constitutive incommensurabilities, and on loyalty and commitments. My main problem with Regan's comments is that he does not appreciate that an important consequence of belief based on
convinced that even if Regan is right in saying that "the large variety of activities and relationships we think are valuable can be seen to share certain common features, which explain and help to commensurate their value," this offers only limited support for the prospect of commensurability. Since the concrete forms in which these values are manifested depend on contingent historical conditions, and cannot be derived from the abstract statement of the value, each form of the general value depends for its meaning on the social practices prevalent, in a way which defies any attempt to commensurate valuations on the basis of the abstract features only.

Similarly while Regan is happy to say that even if all our important decisions concerning major life choices are taken in light of evidence which is not sufficient to justify a belief that the chosen option is either better or as good as the rejected ones, nevertheless in principle this is the case. If social practices constitute valuable options this does not seem such an inviting possibility. It seems more likely that there is a general tie between the general features of our beliefs and what is actually the case. It is not very tight tie. It leaves room for ignorance and mistake on the part of both individuals and groups. But it is enough to indicate that the general features of epistemic conditions are correlated with general ontological conclusions. General epistemic indeterminacy reflects the incommensurability of values.

The main difficulty Regan has with the idea of incommensurability is that it fails to explain the difficulty people have in making choices among allegedly incommensurate options, and their tendency to believe that continued deliberation may help with the choice. If the options

the incommensurability of many particular options is that what would appear to those who believe in total fungibility as just two ways of doing the same thing (e.g., an exchange in kind, or in money, or foregoing the presence of your friend to make money doing a job out of town or obtaining a house in exchange for a promise not to communicate with the friend for a month) will be regarded as moving from the commensurate to the incommensurate. Furthermore, my view on constitutive incommensurabilities is based on the premise that these incommensurabilities depend on existing practices and attitudes. They can be shattered by changing practices and attitudes (it may come to be acceptable to regard friendship as a commodity and sell it for cash or other benefits the way we sell our old cars). This, I argued, will be a change in the nature and meaning of friendship, as we know it. That is why it is a constitutive incommensurability. But to make good these claims I have to make good my previous claims about the importance of social forms, and much else besides.

144. See Regan, supra note 63, at 1060.

145. Regan's argument that if two options are incommensurate then knowledge that one is more likely to succeed in pursuing one than in trying the other cannot resolve the incommensurability seems to me to be based on a mistake. Incommensurability, as discussed by me, holds primarily between concrete options, and only secondarily between option-types. A concrete option includes the degree of success to be obtained. More of one thing may be better than a certain amount of
are recognized to be incommensurate, would not that put an end to all deliberation and lead to an easy decision? This is a matter of considerable importance to any view of human life which includes a belief in the important incommensurabilities, such as mine. Indeed it is a large part of the purpose of such a view radically to reform some aspects of a common philosophical way to understanding deliberation. Many philosophical discussions take an excessively intellectualised view of deliberation. It is regarded exclusively as a matter of puzzling out the correct answer to questions entirely soluble through fact-finding and reasoning. Once the correct answer is believed to have been teased out the agent simply endorses it. The will, if I may put it like this, is the rubber stamp of reason. Admittedly, sometimes the will rebels, but then the agent is irrational, erratic.

All this seems to me profoundly misguided. The process of deliberation leading to decisions is primarily a matter of resolving to undertake (or to refrain from) some action, or course of action. The primary object is the determination of the will. Reasons play an important part in the process. They indicate the superiority of some options over others. This is the part which is commonly emphasised to the exclusion of all else. But that is only part of the story. Beyond this there still is the business of coming to want to pursue one course rather than another, where reasons do not indicate the superiority of either. This process, not being purely a matter of reaching beliefs on the basis of evidence, cannot be described using the common descriptions of reasoning processes. We need a new phenomenological account to do it justice. All I can say here is that reason plays a part in it as well. We choose on the basis of gaining perceived goods and avoiding perceived ills. The process of deliberation aimed at resolving the will is in large measure a matter of contemplating the various goods and ills of the alternatives and trying, in one’s imagination, to relate to the options in light of them. Hence, deliberation and reasoning about the reasons for and against various options may continue long after one comes to the conclusion (not that it need be consciously reached) that the options are incommensurate.

another, even if less of the first is incommensurate with that amount of the other. Admittedly not all degrees of success or failure are matters of more or less, but many are.

146. My view is closer to the cognitivist analysis than to non-cognitivist ones. But it can be seen as an attempt to give due place to what is true in both approaches.
C. RIGHTS TO COLLECTIVE GOODS

There is one main issue on which Waldron and I disagree, viz, the legitimacy of governments taking action to promote valuable opportunities and to discourage worthless or bad ones. But before I come to discuss that issue let me comment on some other matters of contention.147

My claim that we do not generally have individual rights148 to collective goods was first of all an observation of a feature common to many political theories, all those I was familiar with, and to common opinion.149 My argument that normally there are no such rights is meant to explain as well as justify this feature of our thought.150 If my explanation is successful, then there is no right to autonomy, for autonomy requires the existence of many collective goods. As Waldron correctly observes in what he regards as his first criticism of my views on the matter, it does not follow that there are no partial rights based on people's interest in autonomy. In the book I put the point in the following way:

It is wrong to identify autonomy with a right against coercion, for example, and to hold that right (i.e., the right against coercion) as defeating, because of the importance of personal autonomy, all, or almost all, other considerations. Many rights contribute to making autonomy possible, but no short list of concrete rights is sufficient for this purpose. The provision of many collective goods is constitutive of the very possibility of autonomy and it cannot be relegated to a subordinate role, compared with some alleged right against coercion, in the name of autonomy.151

147. Some issues I will let pass. In particular, Waldron is right that much more needs to be said on manipulation before it can be fully integrated with the other views I was supporting in my book. He is also right to say that I do not have an adequate definition of the state, though he is mistaken in thinking that I claimed to have one. I made claims concerning some essential properties of states, and even more so of legal systems, of which (in spite of Waldron's suggestion to the contrary) the Canon Law is one. But I never felt that I had a complete characterisation. It is true that I do not think that use of coercion is logically necessary for the existence of states or of municipal legal systems. But since I do believe that it is necessary given social conditions as we have them, and will remain so for the foreseeable future, the issue does not affect the argument of the Morality of Freedom. These issues are discussed at some length in other writings (especially in The Authority of Law, and in Practical Reason and Norms), texts which Waldron does not examine.

148. For independent reasons, I think that only some of these collective goods are the subject of group rights. But this is a separate story. Cf. J. Raz, The Morality of Freedom, supra note 15, at 207-09 (concerning the notion of group rights).

149. Similarly, legal systems do not recognise individual rights to collective goods, but there may be special reasons why no legal recognition and no legal enforcement should be provided to such rights if they exist at all.

150. Following a similar train of thought, Denise Reaume has since identified a narrower category regarding which it is even more counter-intuitive to assume the existence of individual rights. See Reaume, Individuals, Groups and Rights to Public Goods, 38 U. Toronto L.J. 1 (1988).

Waldron’s observation that the interest in autonomy is the foundation of some autonomy-based rights is fully recognised in the book. My concern there was to avoid two false suggestions. One is that those rights are, as Waldron puts it, “a right to autonomy,” since that would convey the false idea that there is nothing more to autonomy than what is covered by the right. The second false suggestion is that those autonomy-based rights are more important than one’s interest in any collective goods. Since many collective goods are vital for the possibility of autonomy, providing them may be as important as providing rights.

My explanation of the non-existence of rights to collective goods had to do with the fact that the provision of collective goods normally involves every member of the society, and imposes significant burdens on them. Waldron points to the fact that those people who are subject to the burdens are also the beneficiaries of them. But that is beside the point. The fact that I benefit from performing some tortuous exercises does not make their performance any less burdensome. He has a better point when he alludes to the fact that the people whose actions contribute to the collective goods are often contributing happily to it. They do not regard their contributions as burdensome, and therefore the contributions are not burdensome to them.

This subjective, attitudinal, element in the notion of a burden suggests to me that I could have chosen my words more carefully. I did try to ward off the danger of misinterpretation by referring to “potentially burdensome duties.” But I was clearly more successful when I referred to the lack of justification to impose duties on the bulk of the population in matters which deeply affect their lives, or which affect important aspects of their lives. The fact that the duties affect the bulk of the population matters here, as does the fact that the behaviour called for affects one’s life in important aspects.


153. Regan objects that given my understanding of rights I am not entitled to rely on considerations deriving from the weight of reasons for the right. He points out that on my view rights give rise to duties, and duties are not necessarily weighty reasons. That is indeed my view, but I believe that the weight of the reasons underpinning a duty is related to the nature of the countervailing reasons likely to be encountered on the occasions on which the duty is to be performed. If the reasons for the act are likely to be overridden on all, or most, occasions for its performance then we will not call it a duty. This observation is only a very rough approximation of the truth on this matter. I agree with Regan, and with Green, that what I had to say on the nature of duties generally is far from satisfactory.


155. Id. at 203, 247.
But if I myself benefit from behaving in the required way, does it not make it easier to require it of me? To be sure it does, and as Waldron observes I have no difficulty in saying that people have duties to behave in that way. The only question is whether they have rights that others so behave. A right has to be based on the interest of the right-holder. The duty may be based on the interest of the person subject to it, or on the interest of the world at large. This brings us to the third of Waldron's points. He says that when an interest is common to all individuals then it justifies not only recognising a duty to respect it, it also justifies talking of rights, even if the interest of no single individual would be a sufficient foundation for a right. My own view is that rights are based on the interest of the right-holder.

There is an important twist in the argument which must be carefully attended to. The importance of the right-holder's interest may depend on the way it serves the interest of others. That is why important state officials may be entitled to special protection. Protecting them serves their interest, but in doing so the interest of the population at large is also served, in a way in which it is not served by protecting me. I have tried to show that basic constitutional rights are indeed respected not merely because they serve the right-holders' interests severally, but because the protection of one individual's interests serves to protect the interests of others as well. This solves the problem Waldron raises in his third criticism without giving up the crucial connection between the right and the individual interest of the right-holder. As I have also argued, however, the interests of individuals in collective goods are commonly not of this kind. Your interest in an artistic, cultured, enlightened, beautiful, and otherwise desirable environment is served alongside serving my similar interest, but it is not served because it serves my interest. That my interest is being served is not causally instrumental in serving yours. But protecting my interest in free expression is causally instrumental in protecting yours.

D. MORAL INDIVIDUALISM

Waldron does not exactly disagree with what I have to say about individualism, but he thinks that I usurped the term to designate a non-existent target. I will be brief in saying a little to suggest that the target is

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156. Hence, Waldron's allegation that I cannot consistently claim that there are autonomy-based duties but no right to autonomy is misconceived. Besides, as I pointed out above, there are also autonomy-based rights. There just is not a right to autonomy.
158. See id. at 230.
real enough. I defined “moral individualism” (conceding that this is partly a stipulative definition) as the view “that only states of individual human beings or aspects of their lives, can be intrinsically valuable.”

Something is intrinsically valuable if and only if its value does not derive entirely from its (actual or likely) consequences, nor from consequences it can be used to bring about. Among people, philosophers, and others whom I know moral individualism in this sense is either the accepted view or a constant temptation. This is not surprising. If people are what matters, does it not follow that only states of those people can be non-instrumentally good?

Moreover, many people believe in a mental state version of moral individualism. They believe that only people’s mental states can be non-instrumentally valuable since they regard the well-being of people to consisting in their states of mind and attitudes, be they equated with happiness or not. The crucial point is that it seems paradoxical to many that people may be well-off but unaware of this. If it is impossible for people to be unaware that they are well-off, or that their lives are, intrinsically, bad for them (for of course people may be unaware that their lives are bad for their country, their relations or for human culture, etc.), then only conscious mental states or attitudes can have non-instrumental value.

My counter-argument consisted in showing that autonomy is intrinsically valuable, and that collective goods are essentially constituent parts of autonomy. It follows that collective goods (that is, states of society) are intrinsically good. We should think of the good life as having an essential, non-instrumental, social component, as being life in a certain environment, and, of course, as something the goodness of which the agent himself may be unaware of. These seem to me to be important and controversial points. Waldron thinks that this is an empty proof because, first, I have only shown that collective goods are non-instrumentally good, not that they are good in themselves, and, second, I do not deny that collective goods are good only because they contribute to the well-being of people.

I suspect that there are very few things which are good in themselves. Something is good in itself if it is good whatever else is the case. It must be good even in a world of post-nuclear devastation, in which people are subject to horrendous diseases, fears and traumas, or it must

159. Id. at 18.
be good even in a world in which the very existence of some people contributes to the perpetuation of great afflictions on the rest of humanity, and so on. I suspect that few things survive such tests. Certainly, most of the joys of our normal life, be they success in one’s career, leisure pursuits, the very joy of existence, and the like, fail such tests. Most of the intrinsic goods are good in certain contexts. There is no surprise that the same is true of the collective goods which contribute to autonomy. In fact, the same is true of autonomy itself.

Finally, I do not, of course, deny that what ultimately matters is the well-being of people. The whole point of my argument was to show that there is this viable position which denies that only states of people are intrinsically good, and yet maintains the moral significance of people, and is not led to the aggrandisement of, for example, nations or states. I am glad that Waldron finds this view unproblematic, but I am afraid that many others will not.

E. THE VALUE OF AUTONOMY

Waldron regrets the fact that I do not regard autonomy as a universal value. But he gives no reason to think that it is a universal value. To be a universal value it must be the case that people who lack personal autonomy cannot be completely well-off, or have a completely good life. I offered my version of an essentially Aristotelian account of well-being according to which it consists in successful pursuit of worthwhile activities in a life free from repression of important aspects of one’s personality.

I think that there were, and there can be, non-repressive societies, and ones which enable people to spend their lives in worthwhile pursuits, even though their pursuits and the options open to them are not subject to individual choice. Careers may be determined by custom, marriages arranged by parents, child-bearing and child-rearing controlled only by sexual passion and traditions, past-time activities few and traditional, and engagement in them required rather than optional. In such societies, with little mobility, even friends are not chosen. There are few people one ever comes in contact with, they remain there from birth to death, and one just has to get on with them. I do not see that the absence of choice diminishes the value of human relations or the display of excellence in technical skills, physical ability, spirit and enterprise, leadership, scholarship, creativity, or imaginativeness, which can all be encompassed in such lives.
Of course, to succeed in such lives one's socialisation has to succeed, and one must engage in the various pursuits wholeheartedly. But it is a mistake to think that what is chosen is more likely to attract our dedication or involvement than what is not. Of course, Waldron may feel that good as such non-autonomous lives can be they could always be improved if they were also autonomous. As I have argued, however, you cannot just add autonomy, that is, free choice, to the same life. Autonomy is not something we have on top of everything else. It is an aspect of the other values in our lives. The careers, relationships, and other pursuits in our societies are partly constituted by the fact that they have to be chosen to be engaged in as they ought to be engaged. The fact that they were freely chosen is part of what makes them into what they are. It makes no sense to say that a life with autonomy is better than the same life without autonomy. Can one say then that any life with autonomy is better than any life without it? This seems to me patently implausible. My reply is in the extensive argument (The Morality of Freedom ch. 13) about the incommensurability of such alternatives.

Waldron suspects that this modesty about the value of personal autonomy undermines the injunction to protect and provide the conditions of autonomy for all members of our societies. This is true only if one contemplates a global change of conditions, as do those advocates of a return to a pre-industrial community, or to a post-modernist perpetual revolution. They cannot be rebutted by saying that in their societies people will not have personal autonomy. They have to be resisted with the simpler argument that large scale social design is a leap into the dark where the only certainty is that the results will be totally unlike what was hoped for. Normal politics, to our relief, is not concerned with large scale social design. Its business is to conduct our affairs within the existing, though ever-changing (in part because of political interventions) social structures. That means that in normal politics providing and protecting the conditions of personal autonomy is essential to the promotion of individual well-being.160

160. Let me mention here one other argument of Waldron's that I cannot stop to consider at length. He agrees that autonomy is valuable only if used in valuable pursuits, but objects to my explicit argument to that effect. See Waldron, supra note 152, at 1127. I pointed out that an autonomous, demeaning, bad, or worthless life is worse than a non-autonomous life which is bad, demeaning, or worthless in similar ways. Waldron's objection is based on an analogy with virtue. But autonomy is not a virtue but a property of a life. The question is, does that property contribute to the value of the life. The answer, to which we both agree, is that it does so only if the life is spent in valuable pursuits. This is what I sought to show. The examples which I used, and that he criticises, show not that certain activities are bad even if autonomously undertaken. They show that undertaking them autonomously makes them worse. Neglecting one's child freely and autonomously is worse
Oddly enough a related point is made by Regan. He is sympathetic to the view that personal autonomy is valuable in societies which conform to certain conditions, but he thinks that that makes nonsense of the claim that the state should provide individuals with an adequate range of options. His point is valid only if all or at least enough of the options available in a society are always available to all its members. This is far from being the case. Much, if not most, of the movement for social reform in the last two centuries was motivated by a desire to make opportunities, which are available to some, open to all. Such aspirations are not justified if they are aspirations for all options to be available to everyone. All that is required is that enough options be available to each person. In complex modern societies this inevitably means that many more options than can be realistically available to each person must form the pool of options in the society. What Regan overlooks is that in modern pluralistic societies socialization introduces people, as it must to prepare them for life in those societies, to the value of choice, and of self-determination. That is the only way they can make sense of the social structures surrounding them. If it turns out that the range of options actually open to them, unlike those available to others in their society, is disablingly restrictive, they have a legitimate grievance.

than neglecting one's child out of necessity and without real choice. Waldron does not seem to address that aspect of the argument.

161. Regan, supra note 63, at 1081.

162. As my discussion in the book makes clear this argument is not meant to apply to isolated cultural enclaves which maintain worthwhile, viable traditions which are not autonomy-based.

Let me add here a comment on two other points raised by Regan. Contrary to his assertion, id. at 1084, there is no contradiction in claiming both that autonomy is intrinsically valuable and that the fact that people's lives are autonomous contributes to their well-being only to the extent that they engage in worthwhile pursuits. What is intrinsically valuable can be, and in the case of autonomy is, valuable as a constituent of a good in itself. Remove other elements of the good in itself and it may turn worthless, or even bad. Finally, Regan is right to point out that the "Clumsy tool" argument, id. at 1083, in support of the Harm Principle does not extend against the use of various forms of manipulation. My advocacy of the principle was meant to downgrade it to a sound practical principle to guide governmental action. I do not regard it as a fundamental principle of morality. As a practical, or pragmatic principle there is a lot to recommend it. Regan is right to point to the considerable support it receives from pragmatic concerns with governmental mistakes, incompetencies, and insensitivities. I think that the clumsy tool argument, understood as expressing a practical concern about the operation of coercion in our societies, and not as an argument of principle about its operation in some sanitized social conditions, lends further important support to the principle.
V. POLITICAL LIBERTY

A. THE NATURALNESS OF PERFECTIONISM

Waldron challenges my contention that perfectionism is the “natural” stance of governments. Let me therefore attempt to clarify the main propositions leading to that view. The view is, let us remind ourselves, that in principle all moral reasons are fair game for governmental action. “Perfectionism” is merely a term used to indicate that there is no fundamental principled inhibition on governments acting for any valid moral reason, though there are many strategic inhibitions on doing so in certain classes of cases. My view rests on three propositions.

The first is a logical point. That an act is good is a reason to do it, that a state of affairs is good is a reason to bring it about. Alternatively, that an act or a state of affairs is good entails that there are reasons to do it, or bring it about. Evaluations are connected with reasons. Of course, the fact that something is good does not show that one ought to bring it about. There may be other goods one could bring about, and some may be no less important, so that one has a choice, barring the ability to bring about all of them, as to which goods one should pursue. The good act or state of affairs may also have bad aspects or consequences, or the good act may be impossible to perform, or the good result impossible to bring about. But it does not make sense to say of a state of affairs that it is good but that fact is no reason whatsoever to do anything about it. If the value of our actions or of their consequences is no reason for action, then what can be such a reason? If there is a gap here, there is nothing to fill it.

Some may say that what is needed is the further claim that what is good is good for the agent. If something is just good, it certainly does not follow that it is good for me. Saving a crowd of civilians by throwing oneself on a bomb which is about to go off and kill them is not good for the person who so sacrifices his life. Could he then say: It is good to save those people but I have no reason to do so? On this view there are no moral reasons except self-interested ones. Worse still, on this view the only reasons people ever have are self-interested reasons. One can never work to save an endangered species because of the value of their preservation, never give a donation to a charity because it will help the needy, never contribute to the preservation of Venice because of its cultural value. All one’s reasons are self-serving and one’s only concern is with one’s own well-being. The untenability of that position has been argued
far too often for me to repeat it. Hence the first proposition: If something is valuable, then there is a (not necessarily conclusive) reason to bring it about or preserve it.

The second proposition is that the reasons which should guide governments are the reasons which should guide their subjects, and which governments are particularly suited to conform to, or realise. This proposition is the main subject of Part One of *The Morality of Freedom*, and I will not expand on it here. Briefly, I have argued that governments ought to act for dependent reasons, that is, those which apply to their subjects anyway, and that their authority is limited by two main considerations. First, they should act only where their intervention is likely to lead to greater conformity with those reasons than is likely if they do not intervene. Second, they should not intervene where it is more important that their subjects should decide for themselves than that they should get the right results.

It follows from these two propositions that governments should act on perfectionist reasons unless there are special reasons to think that they are incompetent in such matters, or unless there are issues where it is more important to leave the decision with ordinary people even if they will decide mistakenly. The third proposition I am relying on is that while the two qualifications just mentioned act in many cases to restrict governmental action, they do not rule out perfectionist considerations altogether. Perfectionism is not to be equated with the view that governments should always pursue all moral considerations at all costs. It is the view that whether or not a particular moral objective should be pursued by legal means is a question to be judged on the merit of each case, or class of cases, and not by a general exclusionary rule, as the so-called “neutralists” would have it.

There is reason to think that proper legal arrangements can, for example, curtail the invasion of commercialism into personal matters, like parenthood, by providing for legal adoptions based on non-commercial considerations, and making commercial transactions in babies unenforceable. Other moral goals, like the cultivation of brotherly love, are beyond legal intervention, which would only be self-defeating. Often it is not a question of whether or not to intervene, but what measures to take. Sometimes marginal legal measures can do some good, whereas a headlong legal attack on the problem will be counter-productive. In all this the question of what trust one can put in the political machine to reach sensible results looms large, and leads to a good deal of restraint. The same cautious approach, I claimed, is suited to issues that “neutralists”
regard as fair game for governmental action. Non-discrimination and desegregation are examples of problems where some legal intervention can do some good, whereas other measures can do a good deal of harm.

In *The Morality of Freedom* I pointed out that the issues favoured by "neutralists" and the issues that they rule out involve judgment on similar questions of value, that the two stem from a common moral root. Waldron is right to say that this does not refute all views which deny that governments are roughly equally liable to make mistakes on both fronts. But I do think that it creates a presumption that that is so. Waldron does nothing to refute it. Perfectionism is the natural position. But that does not show that it is right. "Neutralists" may have cogent counter-arguments. I tried to show that some arguments put forward in recent years are not cogent. But I know of no general argument that "neutralism" must be wrong.

B. REASONS FOR THE EXCLUSION OF IDEALS

Before we turn, finally, to Waldron's arguments in support of the exclusion of ideals from politics, I would like to clarify my view on a few relevant points, for in the pages leading up to his final argument Waldron somewhat misrepresents my position on a few issues.

First, as I mentioned above, I do not deny that most government actions rely on coercion as a means of ultimate enforcement. I think, however, that the role of coercion in politics is often exaggerated. It is important to remember the symbolic effect of governments' pronouncements and their ability to set the tone of the national debate and affect the national mood. It is also important to remember that an ever-growing proportion of government business is done not through using its authority or its coercive powers, but through its intervention in the economy under the same rules which apply to other actors, while flexing its enormous economic muscle to political ends.

Second, the measures I supported avoid direct coercion for perfectionist causes. The coercion that they involve can be fully justified on the grounds of protecting and promoting individual autonomy. The simplest example is that of taxation. Taxation is coercive. It is justified in my view only inasmuch as it is useful for the promotion and protection of autonomy for all. But in deciding how to use tax revenue, the government, having already performed the main coercive act on other grounds, should prefer to use it to encourage valuable pursuits, say schools, public

parks, sports facilities, preservation of historic buildings, provision of medical services, rather than on others, say free supply of pornography. I am not sure whether Waldron disagrees with this position. If I understand him correctly, he agrees subject to the distortion argument to which we will come below.

Third, Waldron is right that a much more detailed analysis of the different ways in which coercion enters into governmental action and colors its effects is needed. He makes some useful suggestions in this direction, for which I am grateful. He is, however, considering threats, whereas I was concerned with coercion, and coercive threats only. Clearly, not all threats are coercive ones, as his examples demonstrate. This discrepancy helps explain, to a limited degree, why he finds more coercion in the law than I do. There are many legal examples of non-coercive threats. To my mind it is important to remember, however, that only coercive threats invade autonomy, and are subject to the particular objections with which I was concerned.

One side issue arising here is Waldron's denial of my suggestion that coerced acts are always either justified or excused. His one reason is that "there may be some acts which are never justified or excused by coercion." This seems to me true. But it is also true that in those cases I cannot claim that I was coerced to do what I did. Let us assume that one should not under any circumstances kill one's mother, and that such action is never excused. A person who is threatened with death unless he kills his mother and kills her cannot say that he was coerced to do so. This is precisely because he should have refused to kill her even at the cost of his own life.

Finally, in examining the possibility of resort to taxation and subsidies in support of sound moral ideals, Waldron, wishing to isolate the issue, assumes that the tax or subsidy is not justified for redistributive reasons. But this misrepresents the whole thrust of my analysis. In my view, consideration of the protection and promotion of autonomy provides the basic grounds which determine issues of justice and distribution. They cannot be separated from them.

Waldron's core argument for the exclusion of ideals is that governmental intervention usurps a decision which should be left to individuals. There is, of course, something left to individuals, namely, deciding which

164. See id. at 417-18. This, I would say, applies also to the tax on fox hunting example that Waldron mentions. See Waldron, supra note 152, at 1141-47.
165. See Waldron, supra note 152, at 1138-41.
166. Id. at 1144.
options to pursue after the government interfered in the matter and affected the odds in favour of some options and against others, but that is the wrong decision for them. They are entitled to choose on the merits of the case, as it is free from government intervention.

As it stands, the argument has a breath-taking generality. If valid it amounts to the rejection of all authority. All authority, if it is legitimate, decides on the merits, relying on dependent reasons, that is, ones which apply to its subjects, and takes action which changes the initial balance of reasons in order to secure better conformity with that initial balance than was likely but for the authority's intervention. If that is treating people like babies, or manipulating them, then all authority is illegitimate. There is no comfort to the "neutralist" in this argument. What Waldron needs is a different argument which shows that certain issues are better left to individuals. He cannot rely on a blanket claim that all issues should be left to individuals. It is, of course, part of my own argument that certain issues are better left to individuals. But there is no argument I know of, and none that Waldron provides, to explain why the pursuit by political means of all ideals should be banned on this ground.

The implausibility of the argument in its sweeping generality is made plain by its underlying presupposition that all options have an intrinsic balance of merits and drawbacks which should guide agents who choose them. That assumption seems necessary if we are to say, with Waldron, that any authoritative intervention distorts the "true" balance which should guide choice. But if authoritative interventions can effect such distortions, so, presumably, can other interventions. If a multimillionaire buys all tickets to all London concerts and then offers them for sale at a twenty-five percent discount, his action does not differ much from governments offering a subsidy to music promoters in exchange for reducing the price of concert tickets. So presumably this multimillionaire is doing us a disservice and should desist. Now imagine that as a result of political persecution a large number of Hungarian musicians flee to London where they are willing to appear for lower wages, resulting in a 25% drop in the price of concert tickets. Is this also a distortion of the true price of music? Waldron's argument relies on a notion of intrinsic merit and demerit which is independent of social conditions, and which in most cases is hard to sustain. Alternatively, he must point to some


168. The choice of their friends was the hopefully uncontroversial example I gave in the book. See id at 57.
reason why governmental interventions are always wrong, while other social changes are not. This also seems implausible.

For myself, I believe that very often there is no way of saying what is the authentic, natural, or uninterfered-with balance of costs and advantages. But even then it is sometimes possible to say that one balance of costs and advantages is better than others for the people who might be in one or the other of the contemplated situations. A situation where parenthood is financially crippling is worse, other things being equal, than one in which it is not. When this is the case governments should, if they can do so effectively and without other, serious adverse consequences, act to facilitate the better situation.

This has been a long, and at times tedious article. I saw no way of acknowledging the force of the many penetrating arguments addressed against me in the articles assembled here other than to try and deal with as many of them as I could. Before I started, I hoped to take advantage of this opportunity and discuss some critical arguments against some of my views which appeared elsewhere. In the end, the task was so great that I did not even manage to consider some other arguments advanced elsewhere by contributors to this Issue, despite their affinity to the arguments they pursued here. It may look disingenuous to conclude by saying that in reading some of the articles my main worry is that they are far too generous. But in spite of many disagreements on some important issues, I do mean it. At the same time many comments pointed to shortcomings in my work, and for that I am grateful.