

# How Does Precedent Constrain?

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# 1 Introduction: three problems

This paper describes three conceptual problems presented by a standard picture of precedential constraint, suggests that two of them have now been solved, and begins to explore a solution to the third.

We start with the familiar—and very natural, though not uncontroversial—position that constraint in the common law depends on rules. A precedent case normally contains, not only a factual description of some situation together with a decision on the basis of those facts, but some particular rule through which that decision is justified, the *ratio decidendi* of the case. And according to the position under consideration, it is this rule that carries precedential constraint. Just as statutory and regulatory law is based on statutes and regulations, the common law is likewise thought to be based on rules, except that common law rules are formulated by courts, rather than legislators or administrative agencies.

This general position—that precedential constraint depends on rules—can be developed in at least two ways, depending on the conventions governing the use of these rules. On one view, defended with great force by Larry Alexander and Emily Sherwin, a common law rule introduced in an earlier case must govern any later case in which it is applicable, unless the court in the later case wishes to overrule the earlier decision and has the authority to do so.<sup>1</sup> According to a second view, however, although only certain courts, depending on their place in the judicial hierarchy, have the authority to overrule earlier decisions, all courts have the power of *distinguishing* a new case from previous cases in

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<sup>1</sup>See Alexander (1989) and then, especially, Alexander and Sherwin (2008).

which a rule was formulated or applied—the power, that is, of identifying important, or material, differences between the facts of the two cases, and so modifying the earlier rule to avoid an inappropriate application in the present situation. The idea that common law rules can be adapted to fit new situations is, arguably, the most prevalent position among legal theorists, and provides what I will call the *standard model* of precedential constraint.<sup>2</sup>

The process of rule modification underlying this standard model could be illustrated by tracing the development of an actual legal doctrine, but it will be simpler to concentrate on a more ordinary example. Suppose, then, that Jack and Jo are the parents of two children—Emma, who has just turned nine, and Max, age twelve—and that they have agreed to respect each other’s decisions concerning the children, treating these decisions, in effect, as precedents. And imagine that, one night, Emma, who has completed both her chores and her homework, but did not finish dinner, asks Jo if she can stay up and watch TV. This is like a legal case: a situation is presented to an authority, Jo, who must make a decision and, ideally, provide a rationale for her decision. Suppose that Jo resolves the case by granting the request, stating that Emma can stay up to watch TV since she is now nine years old. This decision can be seen as introducing a household version of a common law rule—perhaps, “Children age nine or greater can stay up and watch TV”—fashioned in response to a particular set of circumstances, but applicable to future situations as well.

Now imagine that, the next day, Max, who has likewise completed chores and failed to finish dinner, but who has, in addition, failed to complete homework, asks Jack whether he can stay up and watch TV. And suppose that, in this case, Jack refuses, on the grounds

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<sup>2</sup>Versions of this position have been developed, by Levi (1949), Simpson (1961), Raz (1979), Eisenberg (1988), and Schauer (1989, 1991), along with many others.

that Max has not completed his homework. Max might reasonably appeal Jack's decision with the complaint, "Ah, but given the precedent established last night, in the case of Emma, our household is now governed by a rule according to which children age nine or greater can stay up and watch TV." The standard model of constraint, however, allows Jack to defend his decision by distinguishing the two cases, arguing that the previous rule should not apply to the new case of Max, since this new case, unlike the previous case of Emma, presents the additional feature that the child in question has not completed his homework. An effect of Jack's decision would be that the rule set out by Jo in the case of Emma is modified to avoid application in the case of Max—perhaps now understood to mean "Children age nine or greater can stay up and watch TV, unless they have failed to complete their homework."

Various proposals have been offered about how, exactly, Jack's modification of Jo's previous rule might be justified. Regardless of justification, however, the fact that the standard model of constraint allows Jack to modify Jo's rule at all leads to the first of our conceptual problems concerning constraint. If Jack is indeed able to reformulate Jo's earlier rule to avoid unwanted application in a later case, it is hard to see how he can be thought of as constrained by that rule. More generally: if later courts are free to modify the rules set out in the decisions of earlier courts, then how can those rules carry any constraints at all—how can courts be constrained by rules that they are free to modify at will?

In fact, the literature already contains a response to this initial conceptual problem—first set out explicitly by Joseph Raz, although, as Raz notes, it owes much to the previous

work of A. W. B. Simpson.<sup>3</sup> The central idea is that, although later courts are indeed free to modify the rules introduced by earlier courts, they are not free to modify these rules entirely at will. Any later modification of an earlier rule must satisfy the two *Raz/Simpson conditions* on rule modification: First, the modification can consist only in the addition of further restrictions, narrowing the original rule. And second, the modified rule must continue to support the original outcome in the case in which it was introduced, as well as in any further cases in which this rule was appealed to as a justification.

If we understand the standard model as including the Raz/Simpson conditions on rule modification, then a response to the first conceptual problem presented by the notion of constraint is at hand: Even though later courts are free to modify the rules set out by earlier courts, they are still constrained by these rules, since they can modify them only in certain ways, those satisfying the Raz/Simpson conditions. This response to the first conceptual problem, however, leads at once to a second. Presumably, even if some modification of an earlier rule satisfies the Raz/Simpson conditions, a later court would, all the same, choose not to modify the rule in that way unless the court believed that it could actually improve the rule by doing so. But if a later court believes that it can improve an earlier rule through modification, why should it limit itself to modifications that satisfy the Raz/Simpson conditions? Why should the court not be free to modify the rule in any way at all that leads to an improvement, or if rule modification must be subject to conditions, then why these conditions and not others—in short: what is the justification for this particular set of conditions, the Raz/Simpson conditions, on rule modification?

What I want to suggest is that this second problem, too, has now been solved. In recent

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<sup>3</sup>See Raz (1979, pp. 180–209) and Simpson (1961).

work, motivated by ideas from the field of artificial intelligence and law, and by an earlier proposal due to Grant Lamond, I developed a model according to which precedential constraint is not a matter of rules at all, but of reasons.<sup>4</sup> On this view—which we can call the *reason model* of constraint—what matters about a precedent case is the earlier court’s assessment of the balance of reasons presented by that case; later courts are then constrained, not to follow some rule set out by the earlier court, or even to modify this rule only in certain ways, but simply to reach decisions that are consistent—in a sense to be explained shortly—with the earlier court’s assessment of the balance of reasons. Although the reason model was originally developed as an alternative to the standard model, it turns out that the two models are, in a precise sense, equivalent. The reason model can therefore be interpreted as providing a semantic justification for the standard model, with its Raz/Simpson conditions on rule modification.

This equivalence between the reason model and the standard model of constraint is not something I can review here, since the arguments are complex and somewhat technical, requiring a precise formulation of the standard model as well as the reason model.<sup>5</sup>

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<sup>4</sup>See Lamond (2005) for his initial presentation of this general idea, and Lamond (20xx) for more recent reflections. The first version of the account presented here is found in Horty (2011), later developed in Horty (2015, 2016); a more detailed exposition is contained in Horty (20yy). This account has been related to research in artificial intelligence and law in Horty and Bench-Capon (2012), compared to arguments from analogy and enriched in various ways in Rigoni (2014, 2015), and explored from a formal perspective in Prakken (20xx). More recently, a different interpretation of Lamond’s original proposal, and one that connects more closely with traditional ideas from legal theory, has been presented in Mullins (2020); interestingly, Mullins also shows that his alternative interpretation is, in a precise sense, equivalent to that presented here.

<sup>5</sup>See Horty (2015) for an initial presentation of the equivalence result, and then Horty (20yy) for a more

Instead, I want to focus in this paper on a third conceptual problem presented by the notion of constraint, reflecting what may be the deepest, or at least the most frequent, objection to the idea that common law rules are malleable. The objection is that, as long as the rules set out by courts can be modified—even if the modifications involved are required to satisfy the Raz/Simpson conditions—it may nevertheless seem that common law decisions cannot really constrain at all, since no two situations are ever entirely alike: there will always be features available for future courts to use in distinguishing the situations they face from those confronted earlier. What I hope to show is that, in addition to providing a semantic justification for the Raz/Simpson conditions, the reason model can help us formulate a response to this third problem as well.

The paper is organized as follows. After introducing basic concepts and notation in the following section, I define the reason model of constraint itself in Section 3—these two sections can be read as a self-contained introduction to the reason model. In Section 4, with the reason model before us, we then return to the third conceptual problem presented by the notion of constraint, that any fresh situation will always be distinguishable.

## **2 Basic concepts**

### **2.1 Factors and fact situations**

We will suppose that a situation presented to a court for decision can be represented as a set of *factors*, where a factor is a legally significant fact or pattern of facts bearing on that decision. In our domestic scenario, the legal, or quasi-legal, issue at hand is whether a

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careful analysis.

child can stay up and watch TV, and the factors involved might reasonably include those already considered—whether the child has reached the age of nine, completed chores, eaten dinner, finished homework—as well as countless others.

Many factors can naturally be taken to have polarities, favoring one side or another. In our domestic example, being older than nine or completing chores strengthens the child’s claim, as plaintiff, that he or she should be allowed to stay up and watch TV; failing to finish dinner or homework strengthens the parents’ claim, as defendants, that the child should go to bed immediately. As a simplification, we will assume here, not just that many, or even most, factors have polarities, but that all factors are like this, favoring one particular side. In addition, we rely on the further simplifying assumption that the reasoning under consideration involves only a single step, proceeding at once from the factors present in a situation to a decision—directly in favor of the plaintiff or the defendant—rather than moving through a series of intermediate legal concepts.

Formally, then, we start by postulating a set  $F$  of legal factors bearing on some particular issue. We will let  $F^\pi = \{f_1^\pi, \dots, f_n^\pi\}$  represent the set of factors favoring the plaintiff and  $F^\delta = \{f_1^\delta, \dots, f_m^\delta\}$  the set of factors favoring the defendant. Given our assumption that each factor favors one side or the other, the entire set of legal factors will be exhausted by those favoring the plaintiff together with those favoring the defendant:  $F = F^\pi \cup F^\delta$ . As this notation suggests, we take  $\pi$  and  $\delta$  to represent the two sides in a dispute, plaintiff and defendant, and where  $s$  is one of these sides, we let  $\bar{s}$  represent the other:  $\bar{\pi} = \delta$  and  $\bar{\delta} = \pi$ .

Given this collection  $F$  of factors, a *fact situation*  $X$ , of the sort presented to the court for judgment, can be defined simply as some particular subset of these factors:  $X \subseteq F$ . And



where  $X$  is a fact situation of this kind, we let  $X^s$  represent the factors from  $X$  that support the side  $s$ , so that:  $X^\pi = X \cap F^\pi$  and  $X^\delta = X \cap F^\delta$ . Of course, any interesting situation will contain factors favoring both sides of a given dispute. For example, the situation  $X_1 = \{f_1^\pi, f_2^\pi, f_1^\delta, f_2^\delta\}$  contains two factors each favoring the plaintiff and the defendant, with those factors favoring the plaintiff contained in  $X_1^\pi = \{f_1^\pi, f_2^\pi\}$  and those favoring the defendant contained in  $X_1^\delta = \{f_1^\delta, f_2^\delta\}$ .

## 2.2 Reasons, rules, cases, case bases

When presented with a fact situation, the court's primary task is to reach a decision, or determine an outcome. Given our assumption that reasoning proceeds in a single step, we can suppose that the *outcome* of a case is a decision either in favor of the plaintiff or in favor of the defendant, with these two outcomes represented as  $\pi$  or  $\delta$  respectively.

In addition to deciding for one side or the other, we generally expect the court to supply a rule, or principle, to serve as justification for its decision. Rules of this kind will be characterized in terms of reasons, where a *reason for a side* is some set of factors uniformly favoring that side; a *reason* can then be defined as a set of factors uniformly favoring one side or another. To illustrate,  $\{f_1^\pi, f_2^\pi\}$  is a reason favoring the plaintiff, and so a reason.

Since reasons, like fact situations, are sets of factors, we can stipulate that a reason  $U$  holds in a situation  $X$  just in case each factor from  $U$  belongs to  $X$ , so that  $U$  is a subset of  $X$ , or  $U \subseteq X$ . And we can also define a relation of strength among reasons for a side according to which, where  $U$  and  $V$  are reasons for the same side, then  $V$  is at least as strong a reason as  $U$  for that side just in case  $U$  is a subset of  $V$ , or  $U \subseteq V$ . To illustrate: We can

see, first, that the reason  $\{f_1^\pi\}$  holds in the previous fact situation  $X_1 = \{f_1^\pi, f_2^\pi, f_1^\delta, f_2^\delta\}$ , since  $\{f_1^\pi\} \subseteq X_1$ . And we can see that, of the two reasons  $\{f_1^\pi\}$  and  $\{f_1^\pi, f_2^\pi\}$ , the second favors the plaintiff at least as strongly as the first, since  $\{f_1^\pi\} \subseteq \{f_1^\pi, f_2^\pi\}$ .

Given this notion of a reason, a *rule* can now be defined as a statement of the form  $U \rightarrow s$ , where  $U$  is a reason supporting the side  $s$ . For convenience, we introduce two auxiliary functions—*Premise* and *Conclusion*—picking out the premise and conclusion of a rule, so that, if  $r$  stands for the rule just mentioned, we would have  $Premise(r) = U$  and  $Conclusion(r) = s$ . And we will say that a rule is *applicable* in a situation whenever the reason that forms its premise holds in that situation. To illustrate: The statement  $\{f_1^\pi\} \rightarrow \pi$  is a rule, since  $\{f_1^\pi\}$  is a reason supporting the plaintiff. If we take  $r_1$  to stand for this rule, we would have  $Premise(r_1) = \{f_1^\pi\}$  and  $Conclusion(r_1) = \pi$ . And  $r_1$  is applicable in the situation  $X_1$  above, since  $Premise(r_1)$  holds in this situation.

The rules defined here are to be interpreted as defeasible, telling us that their premises entail their conclusions, not as a matter of necessity, but only by default. Continuing with our illustration: What the rule  $r_1 = \{f_1^\pi\} \rightarrow \pi$  means, very roughly, is that, whenever the premise  $\{f_1^\pi\}$  of the rule holds in some situation, then, as a default, the court ought to decide that situation for the conclusion  $\pi$  of the rule—or perhaps more simply, that the premise of the rule provides the court with a pro tanto reason for deciding in favor of its conclusion.<sup>6</sup>

Given the concepts introduced so far—fact situations, rules, outcomes—a *case* can be defined as a situation together with an outcome and a rule through which that outcome is justified: such a case can be specified as a triple of the form  $c = \langle X, r, s \rangle$ , where  $X$  is a

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<sup>6</sup>On the relation between reasons and default rules, see Horty (2012).

situation containing the factors presented to the court,  $r$  is a rule, and  $s$  is an outcome.<sup>7</sup> For illustration, consider the case  $c_1 = \langle X_1, r_1, s_1 \rangle$ , where the fact situation of this case is the familiar  $X_1 = \{f_1^\pi, f_2^\pi, f_1^\delta, f_2^\delta\}$ , where the case rule is the familiar  $r_1 = \{f_1^\pi\} \rightarrow \pi$ , and where the outcome of the case is  $s_1 = \pi$ , a decision for the plaintiff. This particular case, then, represents a situation in which the court, when confronted with the fact situation  $X_1$ , decided for the plaintiff by applying or introducing the rule  $r_1$ , according to which the presence of the factor  $f_1^\pi$ —that is, the reason  $\{f_1^\pi\}$ —leads, by default, to a decision for the plaintiff.

Finally, with this notion of a case in hand, we can now define a *case base* as a set  $\Gamma$  of precedent cases. It is a case base of this sort—a set of precedent cases—that will be taken to represent the common law in some area, and to constrain the decisions of future courts.

### 3 Constraint by reasons

According to the reason model, what matters about a precedent case is the precedent court's assessment of the relative strength of the reasons presented by that case for each of the opposing sides. This assessment is represented as a priority ordering on reasons; later courts then required to reach decisions that are consistent with the priority ordering

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<sup>7</sup>Our representation of cases embodies the simplifying assumption that the particular rule underlying a court's decision is plain, ignoring the extensive literature on methods for determining the *ratio decidendi* of a case; and we suppose, as a further simplification, that a case always contains a single rule, ignoring situations in which a court might offer several rules for a decision, or in which a court reaches a decision by majority, with different members of the court offering different rules, or in which a court might simply render a decision in a case without setting out any general rule at all.

derived from the decisions of earlier courts.

In order to develop this idea, we need to explain how a priority ordering on reasons can be derived from the decisions of earlier courts, and then what it means for the decision of a later court to be consistent with that ordering.

### 3.1 A priority ordering on reasons

To begin with, then, let us return to the case  $c_1 = \langle X_1, r_1, s_1 \rangle$ —where  $X_1 = \{f_1^\pi, f_2^\pi, f_1^\delta, f_2^\delta\}$ , where  $r_1 = \{f_1^\pi\} \rightarrow \pi$ , and where  $s_1 = \pi$ —and ask what information is carried by this case; what is the court telling us with its decision? Well, two things. First of all, with its decision for the plaintiff on the basis of the rule  $r_1$ , the court is registering its judgment that  $Premise(r_1)$ , the reason for its decision, is more important—or has higher *priority*—than any reason for the defendant that holds in  $X_1$ , the fact situation of the case.<sup>8</sup> How do we know this? Because if the court had viewed some reason for the defendant that held in the situation  $X_1$  as more important, or higher in priority, than  $Premise(r_1)$ , the court would have found for the defendant on the basis of that reason, rather than for the plaintiff on the basis of  $Premise(r_1)$ . And second, if the court is telling us explicitly that the reason  $Premise(r_1)$  itself has higher priority than any reason for the defendant that holds in  $X_1$ , then the court must also be telling us, at least implicitly, that any other reason for

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<sup>8</sup>When comparing the relative importance of reasons, it is more common to say that one carries greater weight than the other, or that one is weightier than the other. I prefer to speak in terms of priority, rather than weight, for two reasons: first, the priority ordering on reasons to be defined here is nonlinear, while the concept of weight tends to suggest linearity; second, the ordering to be defined here allows only ordinal comparisons among reasons, while the concept of weight suggests that cardinal comparisons must be available as well.

the plaintiff that is at least as strong as  $Premise(r_1)$  must likewise have a higher priority than any reason for the defendant that holds in this situation.

We can recall that a reason  $U$  for the defendant holds in the situation  $X_1$  just in case  $U \subseteq X_1$ . And a reason  $V$  for the plaintiff is at least as strong for the plaintiff as the reason  $Premise(r_1)$  just in case  $Premise(r_1) \subseteq V$ . If we let the relation  $<_{c_1}$  represent the priority ordering on reasons derived from the particular case  $c_1$ , then, the force of the court's decision in this case is simply that: where  $U$  is a reason favoring the defendant and  $V$  is a reason favoring the plaintiff, we have  $U <_{c_1} V$  just in case  $U \subseteq X_1$  and  $Premise(r_1) \subseteq V$ . To illustrate: Consider the reason  $\{f_1^\delta\}$  for the defendant and the reason  $\{f_1^\pi, f_2^\pi, f_3^\pi\}$  for the plaintiff. Here, we have  $\{f_1^\delta\} \subseteq X_1$  as well as  $Premise(r_1) \subseteq \{f_1^\pi, f_2^\pi, f_3^\pi\}$ . It therefore follows that  $\{f_1^\delta\} <_{c_1} \{f_1^\pi, f_2^\pi, f_3^\pi\}$ —the court's decision in the case  $c_1$  entails that the reason  $\{f_1^\pi, f_2^\pi, f_3^\pi\}$  favoring the plaintiff is to be assigned a higher priority than the reason  $\{f_1^\delta\}$  favoring the defendant.

Generalizing from this example, we reach the following definition of the priority ordering among reasons derived from a single case:

**Definition 1 (Priority ordering derived from a case)** Let  $c = \langle X, r, s \rangle$  be a case, and let  $U$  and  $V$  be reasons favoring the sides  $\bar{s}$  and  $s$  respectively. Then the relation  $<_c$  representing the priority ordering on reasons derived from the case  $c$  is defined by stipulating that  $U <_c V$  if and only if  $U \subseteq X$  and  $Premise(r) \subseteq V$ .

Once we have defined the priority ordering on reasons derived from a single case, we can introduce a priority ordering  $<_\Gamma$  derived from an entire case base  $\Gamma$  by stipulating that one reason has a higher priority than another according to the case base whenever that

priority is supported by some particular case from the case base:

**Definition 2 (Priority ordering derived from a case base)** Let  $\Gamma$  be a case base, and let  $U$  and  $V$  be reasons. Then the relation  $<_{\Gamma}$  representing the priority ordering on reasons derived from the case base  $\Gamma$  is defined by stipulating that  $U <_{\Gamma} V$  if and only if  $U <_c V$  for some case  $c$  from  $\Gamma$ .

And using this concept of the priority ordering derived from a case base, we can now define a case base itself as inconsistent if its derived ordering yields conflicting information about the priority among reasons—telling us, for some pair of reasons, that each has a higher priority than the other—and consistent otherwise:

**Definition 3 (Inconsistent and consistent case bases)** Let  $\Gamma$  be a case base with  $<_{\Gamma}$  its derived priority ordering. Then  $\Gamma$  is inconsistent if and only if there are reasons  $U$  and  $V$  such that  $U <_{\Gamma} V$  and  $V <_{\Gamma} U$ , and consistent otherwise.

### 3.2 Constraint

We now present the reason model of constraint itself, building on the concept of case base consistency. The guiding idea, once again, is that, in deciding a case, a constrained court is required simply to preserve the consistency of the background case base. Suppose, more exactly, that a court constrained by a consistent background case base is confronted with a new fact situation. Then what the reason model tells us is that the court is permitted to reach a particular decision only if that decision is consistent with the background case base:

**Definition 4 (Reason model)** Let  $\Gamma$  be a consistent case base and  $X$  a fact situation confronting the court. Then against the background of  $\Gamma$ , the reason model of constraint permits the court to base its decision in  $X$  on a rule  $r$ , applicable in  $X$  and supporting the side  $s$ , if and only if the augmented case base  $\Gamma \cup \{\langle X, r, s \rangle\}$  is consistent.

How do we get from this notion of what a court is permitted to do to a notion of *constraint*, or of what the court is required to do? Simple: we stipulate that a court is required, or constrained, simply to reach some permitted decision.

The reason model can be illustrated by assuming as background the case base  $\Gamma_1 = \{c_1\}$ , containing as its single member the familiar case  $c_1 = \langle X_1, r_1, s_1 \rangle$ —where, again,  $X_1 = \{f_1^\pi, f_2^\pi, f_1^\delta, f_2^\delta\}$ , where  $r_1 = \{f_1^\pi\} \rightarrow \pi$ , and where  $s_1 = \pi$ . Suppose that, against this background, the court confronts the fresh situation  $X_2 = \{f_1^\pi, f_2^\pi, f_1^\delta, f_2^\delta, f_3^\delta\}$  and considers finding for the defendant in this situation on the basis of the reason  $\{f_1^\delta, f_2^\delta\}$ , leading to the decision  $c_2 = \langle X_2, r_2, s_2 \rangle$ , where  $X_2$  is as above, where  $r_2 = \{f_1^\delta, f_2^\delta\} \rightarrow \delta$ , and where  $s_2 = \delta$ . Is this decision permitted, by the reason model?

Well, as we can see,  $Premise(r_1) = \{f_1^\pi\}$ , the reason for the decision in the initial case, holds in the new situation  $X_2$  as well, since  $\{f_1^\pi\} \subseteq X_2$ . And of course, the new reason  $Premise(r_2) = \{f_1^\delta, f_2^\delta\}$  favors the defendant at least as strongly as itself—that is,  $Premise(r_2) \subseteq Premise(r_2)$ , or  $Premise(r_2) \subseteq \{f_1^\delta, f_2^\delta\}$ . It therefore follows from Definition 1 that  $c_2$ , the court's envisaged decision, would assign the reason  $\{f_1^\delta, f_2^\delta\}$  for the defendant a higher priority than the reason  $\{f_1^\pi\}$  for the plaintiff—that is,  $\{f_1^\pi\} <_{c_2} \{f_1^\delta, f_2^\delta\}$ . But  $\Gamma_1$  already contains the case  $c_1$ , from which, in a similar fashion, we can derive the priority relation  $\{f_1^\delta, f_2^\delta\} <_{c_1} \{f_1^\pi\}$ , telling us exactly the opposite. Since the augmented

case base

$$\begin{aligned}\Gamma_2 &= \Gamma_1 \cup \{c_2\} \\ &= \{c_1, c_2\}\end{aligned}$$

resulting from the court's envisaged decision contains both these cases, we would then have both  $\{f_1^\delta, f_2^\delta\} <_{\Gamma_2} \{f_1^\pi\}$  and  $\{f_1^\pi\} <_{\Gamma_2} \{f_1^\delta, f_2^\delta\}$  by Definition 2, so that, by Definition 3, this augmented case base would be inconsistent. By Definition 4, then, we can conclude that the court is not permitted to carry through with its plan of deciding for the defendant in the situation  $X_2$  on the basis of the rule  $r_2$ , since  $c_2$ , the resulting decision, would introduce an inconsistency into the background case base.

Of course, it does not follow from the fact that the court cannot decide for the defendant in the situation  $X_2 = \{f_1^\pi, f_2^\pi, f_1^\delta, f_2^\delta, f_3^\delta\}$  on the basis of the particular rule  $r_2$  that it cannot decide for the defendant in this situation at all. Suppose, for example, that the court appeals to the reason  $\{f_1^\delta, f_3^\delta\}$  to justify its decision for the defendant, leading to the case  $c_3 = \langle X_3, r_3, s_3 \rangle$ , where  $X_3 = X_2$ , where  $r_3 = \{f_1^\delta, f_3^\delta\} \rightarrow \delta$ , and where  $s_3 = \delta$ . The augmented case base

$$\begin{aligned}\Gamma_3 &= \Gamma_1 \cup \{c_3\} \\ &= \{c_1, c_3\}\end{aligned}$$

resulting from this decision would then be consistent. As before, the previous case  $c_1$  supports the priority  $\{f_1^\delta, f_2^\delta\} <_{c_1} \{f_1^\pi\}$ , and the new decision  $c_3$  would now support the priority  $\{f_1^\pi\} <_{c_3} \{f_1^\delta, f_3^\delta\}$ , so that we would then have both the case base priorities  $\{f_1^\delta, f_2^\delta\} <_{\Gamma_3} \{f_1^\pi\}$  and  $\{f_1^\pi\} <_{\Gamma_3} \{f_1^\delta, f_3^\delta\}$ . But there is nothing inconsistent about this pair of priorities, as we can see, informally at least, with another homely example: one can easily imagine a teenager thinking, and thinking consistently, that going to the movies



is more fun than going to the beach with her parents, but that going to the beach with her friends is more fun than going to the movies.

### 3.3 The domestic scenario

All of this has been very abstract. For a more concrete illustration, we return to the domestic example set out in the Introduction. The example centered around a situation in which Jack and Jo have two children: Emma, who has just turned nine, completed her chores, failed to finish dinner, but completed her homework, and Max, age twelve, who also completed his chores, but neither finished dinner nor completed homework. Both children wanted to stay up and watch TV. We imagined that Emma first asked Jo, who granted the request to watch TV, justifying her decision with the rule, “Children age nine or greater can stay up and watch TV.” Next, we imagined, Max asked Jack, who denied the request to watch TV, distinguishing this case from that of Emma by appeal to the fact that Max failed to complete his homework, and introducing the new rule “Children who have not completed their homework cannot stay up and watch TV.”

With Max and Emma as plaintiffs, and with Jack and Jo functioning—as parents do—both as defendants and as adjudicators, this scenario can be cast in our framework by letting the factor  $f_1^\pi$  represent the fact that the child in question is at least nine years old, by letting  $f_2^\pi$  represent the fact that the child in question completed chores, and then letting  $f_1^\delta$  and  $f_2^\delta$  represent, respectively, the facts that the child failed to finish dinner and failed to complete homework. The initial situation presented by Emma to Jo can then be represented as  $X_4 = \{f_1^\pi, f_2^\pi, f_1^\delta\}$ , which Jo then decided for Emma on the basis of the rule  $r_4 = \{f_1^\pi\} \rightarrow \pi$ , leading to the decision  $c_4 = \langle X_4, r_4, s_4 \rangle$ , where  $X_4$  and  $r_4$  are as

above, and where  $s_4 = \pi$ . As a result of this initial decision, the case base representing the common law of the household, at least as it pertains to staying up and watching TV, is  $\Gamma_4 = \{c_4\}$ , with  $<_{\Gamma_4}$  as its associated ordering on reasons.

Next, the situation presented by Max to Jack can be represented as  $X_5 = \{f_1^\pi, f_2^\pi, f_1^\delta, f_2^\delta\}$ . In keeping with our story, we can suppose that Jack would like to decide against Max on the basis of the rule  $r_5 = \{f_2^\delta\} \rightarrow \delta$ , leading to the decision  $c_5 = \langle X_5, r_5, s_5 \rangle$ , where  $X_5$  and  $r_5$  are as above, and where  $s_5 = \delta$ . Is he permitted to do so, according to the reason model, against the background of the case base  $\Gamma_4$ ? The answer is Yes. From Jo's earlier decision, we can conclude that the reason  $\{f_1^\pi\}$  is to be assigned a higher priority than the reason  $\{f_1^\delta\}$ —that  $\{f_1^\delta\} <_{c_4} \{f_1^\pi\}$ , so that  $\{f_1^\delta\} <_{\Gamma_4} \{f_1^\pi\}$  as well. And Jack's decision would force us to conclude also that the reason  $\{f_2^\delta\}$  must be assigned a higher priority than the reason  $\{f_1^\pi\}$ —that  $\{f_1^\pi\} <_{c_5} \{f_2^\delta\}$ . But there is no conflict between this priority statement and the previous priority statement, derived from Jo's decision—a reasonable individual might, for example, prefer chocolate ice cream to vanilla and vanilla to strawberry. And because the background case base  $\Gamma_4$  currently contains only Jo's decision, it follows that Jack's decision in the case of Max is consistent with this case base as well. The reason model thus permits Jack to carry through with his decision, resulting in

$$\begin{aligned}\Gamma_5 &= \Gamma_4 \cup \{c_5\} \\ &= \{c_4, c_5\}\end{aligned}$$

as the updated case base now representing the household common law, with  $<_{\Gamma_5}$  as its strengthened ordering on reasons.

## 4 The real mechanism of constraint

### 4.1 The alligator and the ocelot

We now return to the third conceptual problem presented by the standard model of constraint—that, if distinguishing is allowed, then real constraint is impossible, since there will always be features available for future courts to use in distinguishing the situations they face from those confronted earlier, and in which earlier rules were formulated.

This problem is set out forcefully by Alexander and Sherwin, who illustrate the point with their story, slightly adapted here, of the alligator and the ocelot.<sup>9</sup> Imagine, first, that Albert, as defendant, wishes to keep a pet alligator on his property, but that the local neighborhood association, as plaintiff, brings suit against Albert asking him to remove the alligator on the grounds that it is a dangerous wild animal. Albert argues that he should be allowed to keep his alligator, since it resides on private property, but the court is not convinced, and justifies its decision for the plaintiff with the rule “Residents are not allowed to keep dangerous wild animals.” Next, suppose that another resident, Olive, acquires a pet ocelot, and the neighborhood association again brings suit for removal. This time, however, imagine that the case comes before a court that is sympathetic to the ocelot, wishes to arrive at a decision for the defendant in the case at hand, but is aware that it must distinguish the current situation from the previous case of the alligator in order to do so. The court therefore notes that ocelots, but not alligators, are furry, and proceeds to distinguish on that basis, modifying the previous rule to read, “Residents are not allowed to keep dangerous wild animals, unless they are furry,” and, we might as

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<sup>9</sup>See Alexander and Sherwin (2008, pp. 84–86).

well suppose, justifying its own decision for the plaintiff with the new rule, “Residents are allowed to keep furry wild animals.”

By modifying the earlier rule in this way, the later court renders it inapplicable to the case of the ocelot, providing itself the freedom to decide the new case as it wishes, without constraint from the rule. And as Alexander and Sherwin emphasize, this instance of rule modification satisfies the Raz/Simpson conditions, merely narrowing the previous rule, and narrowing it in such a way that the modified rule continues to support the decision arrived at in the previous case. The example thus highlights the fact that distinct cases can be differentiated in any number of ways, even if many of these differences are either entirely incidental or of only marginal importance—that one dangerous wild animal but not the other is furry, or that the defendant in one case but not the other has freckles, or plays the harmonica, or has an aunt living in Idaho. And if all a court needs to do in order to shield the decision it wishes to reach from some previous rule is to narrow that rule by appeal to one of these incidental or marginal differences, it really does begin to seem, from the perspective of the standard model, that the decisions reached in earlier cases cannot constrain later courts at all.

But let us look at the example more closely. Suppose the court considering Olive’s ocelot actually does believe that the ocelot’s furry nature provides a reason for allowing Olive to keep it on her property, and indeed a stronger reason than that provided for the opposite conclusion by the fact that it is a dangerous wild animal. In that case, it would be right, at least from an internal perspective, for the court to reach exactly the decision described in the example—that the new situation should be distinguished, and the ocelot allowed because it is furry. The court, after all, has an obligation to reach the decision it

sincerely thinks is best.

What is so odd about this result, and what gives the example its force, is not some problem with the idea of distinguishing, but simply the assumption that the court might actually conclude, in all sincerity, that this particular decision is best—that the court could somehow conclude that the ocelot’s furry nature, even if it is a reason at all, is a strong enough reason that it should outweigh important reasons favoring the other side. How could this conclusion be justified? Surely a court that reasoned its way to a conclusion like this would be subject to criticism, just as those who engage in poor reasoning in any other domain are criticized.<sup>10</sup>

And it is by focusing on this idea—that common law decisions require justification, or otherwise, are subject to criticism—that we can locate a response to the objection that, if distinguishing is allowed, then any situation can be distinguished from any other, so that constraint is illusory. In fact, this line of response has already been explored by Simpson, who notes that, when we ask whether or not a court can distinguish a case, we are not asking about the “can” of human ability.<sup>11</sup> Instead, he writes, we are asking about the “can” of permissibility. What we want to know is not just whether it is possible for a court to find some factual difference between two cases—of course it is—but whether, in distinguishing on the basis of this difference, the court’s action will be seen as permissible, in the sense that the factual distinction highlighted by the court will be accepted as a

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<sup>10</sup>There is also the suggestion in Alexander and Sherwin’s own presentation of the example that the court, by introducing the ocelot’s furry nature as a consideration at all, is being disingenuous. But then, this move would be criticizable as well—not in the way that poor natural reasoning is criticized, but in the way that the misrepresentation of important information can be criticized.

<sup>11</sup>See Simpson (1961).

justification for failing to follow a binding rule, or whether, instead, the court will be subject to criticism, by the standards at work in the legal system or in society at large:

From this [factual difference] it does not follow that it is always permissible for a judge to distinguish a case; that he can do so whilst conforming to the rules of the legal system, or that he can do so without becoming liable to be criticized for having acted improperly. Distinguishing does not simply involve pointing out a factual distinction between two cases; it involves further the use of this factual distinction as a justification for refusal to follow the earlier case . . . .<sup>12</sup>

It is important to emphasize, and to tease apart, two distinct notions of permissibility at work in this passage, and in Simpson's paper more generally. There is, first, a notion according to which a decision is permissible if it satisfies the relevant legal norms—it is this notion that is explicated by the reason model, which classifies a decision as permissible if it is consistent with the existing case base. But, second, there is also a notion according to which a decision is permissible if it can be justified by the standards of society at large. In the remainder of this paper, I refer to the first of these notions of permissibility as "formal permissibility" and to the second as "social permissibility," and try to show how the real mechanism of constraint arises from an interplay between these two notions.<sup>13</sup>

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<sup>12</sup>Simpson (1961, p. 175).

<sup>13</sup>The contrast between formal and social permissibility, and its use here, is related to the distinction between doctrinal and social propositions, and to the use of this distinction, in Eisenberg (1988).

## 4.2 Two notions of permissibility

We begin by coding the alligator/ocelot example in our representational framework, taking  $f_1^\pi$  as the factor, favoring the neighborhood association as plaintiff, that a wild animal is dangerous, and taking  $f_1^\delta$  as the factor, favoring the resident as defendant, that the wild animal is kept on private property. The initial situation presented by Albert's alligator, a dangerous wild animal kept on private property, is therefore represented as  $X_6 = \{f_1^\pi, f_1^\delta\}$ . And let us assume that the background case base concerning animals in the neighborhood is initially empty, so that the alligator poses a case of first impression.

Now suppose that, of the two conflicting reasons that hold in this situation, danger and private property—that is,  $\{f_1^\pi\}$  and  $\{f_1^\delta\}$ —neither is generally recognized as more important than the other: the priority relation between these reasons is a matter about which reasonable people can disagree. Imagine, however, that the case of Albert's alligator comes before a court that, while recognizing the matter as one of legitimate disagreement, itself happens to assign greater priority to the danger posed by the alligator—imagine, that is, that this court prioritizes  $\{f_1^\pi\}$  over  $\{f_1^\delta\}$ . Given its own priorities, we can suppose, therefore, that the court finds in favor of the plaintiff in the case of the alligator on the basis of its danger, leading to the decision  $c_6 = \langle X_6, r_6, s_6 \rangle$ —where  $X_6$  is as above, where  $r_6 = \{f_1^\pi\} \rightarrow \pi$ , and where  $s_6 = \pi$ —and resulting in  $\Gamma_6 = \{c_6\}$  as the augmented case base on the issue.

In rendering this decision, the court introduces a legal proposition. This proposition, according to the reason model, is not a rule, like “Residents are not allowed to keep dangerous wild animals,” but instead a statement about the relative priority of vari-

ous reasons—the proposition that, as a matter of law, danger as a reason for the plaintiff carries a higher priority than private property as a reason for the defendant, or that  $\{f_1^\delta\} <_{\Gamma_6} \{f_1^\pi\}$ . Since, in introducing this proposition into the law, the alligator court simply elevates its own particular opinion concerning the relative priority of reasons to the status of legal doctrine, it is necessary to ask whether this decision is permissible, in each of our two senses: Is it socially permissible? Is it formally permissible?

The answer is that, at least given a certain sensible assumption, the decision is indeed socially permissible. We have already stipulated that the priority relation between danger and private property is a matter about which reasonable people can disagree. So all we need to assume—sensibly, it seems—is that it is socially permissible for a court to take some particular side on a contentious issue about which reasonable people can disagree. And of course, the alligator court’s decision is formally permissible as well, since the initial case base is empty and any decision at all is consistent with an empty case base.

Next, we turn to Olive’s ocelot—like Albert’s alligator, a dangerous wild animal kept on private property, but one that is, in addition, furry. In representing this example, we will assume that the ocelot’s furry nature, here taken as  $f_2^\delta$ , is a factor that favors the defendant, though very weakly. (Furry wild animals, especially large furry felines, tend to be beautiful in a way that, for most people, alligators are not; and we can assume that preservation of beauty in the neighborhood is at least a weak reason for allowing the ocelot.) The situation presented by the ocelot is therefore  $X_7 = \{f_1^\pi, f_1^\delta, f_2^\delta\}$ .

Since we have assumed that the priority between considerations of danger and private property is a matter about which reasonable people can disagree, let us now imagine that the ocelot case comes before a court that happens to prioritize property rights over



danger—we imagine, that is, that this court, unlike the previous alligator court, prioritizes  $\{f_1^\delta\}$  over  $\{f_1^\pi\}$ . Given its own priority ordering, the current ocelot court would prefer to find for the defendant on the basis of private property, leading to the decision  $c_7 = \langle X_7, r_7, s_7 \rangle$ , where  $X_7$  is as above, where  $r_7 = \{f_1^\delta\} \rightarrow \delta$ , and where  $s_7 = \delta$ . And of course, by an argument exactly parallel to that just offered for the alligator court, this decision, taken on its own, would have been socially permissible. Unfortunately for the ocelot court, however, it is not considering the new situation against the background of an empty case base, but against the background of the case base  $\Gamma_6 = \{c_6\}$  containing the previous alligator decision. In this context, the ocelot court's preferred decision is not formally permissible, since it would introduce an inconsistency into the background case base—the new priority  $\{f_1^\pi\} <_{c_7} \{f_1^\delta\}$  resulting from the ocelot court's preferred decision would conflict with derived priority  $\{f_1^\delta\} <_{\Gamma_6} \{f_1^\pi\}$  already established in the case of the alligator.

The effect of the alligator decision, then, is to prevent, on formal grounds, the ocelot court from reaching a decision for the defendant in what would have been, from the social standpoint, the most straightforward and easily justifiable way, on the basis of private property. But does the court have another option? Yes, at least from a purely formal perspective. As Alexander and Sherwin suggest, the ocelot court might decide for the defendant on the grounds of the ocelot's furry nature, leading to the decision  $c_8 = \langle X_8, r_8, s_8 \rangle$ —where  $X_8 = X_7$ , where  $r_8 = \{f_2^\delta\} \rightarrow \delta$ , and where  $s_8 = \delta$ —resulting in  $\Gamma_7 = \{c_6, c_8\}$  as an augmented case base. This new case base is consistent, so that the court's decision would be permissible by the formal standards of the reason model. But it is hard to imagine how such a decision by the ocelot court could ever be classified as socially permissible:

the proposition that the court would then introduce into the law—that a furry nature as a reason for the defendant has higher priority than danger as a reason for the plaintiff, or  $\{f_1^\pi\} <_{\Gamma_7} \{f_2^\delta\}$ —is so peculiar that it would surely be subject to intense criticism on substantive grounds.

This particular example illustrates the general mechanism of common law constraint, which relies on two notions of permissibility that work together. Decisions must be both formally permissible and socially permissible—neither is sufficient alone. Without the requirement of social permissibility, nothing prevents the ocelot court from reaching the decision  $c_8$ , allowing Olive to keep her ocelot on the grounds that it is furry. But without the requirement of formal permissibility, nothing prevents the decision  $c_7$ , allowing Olive to keep her ocelot on the grounds that it is kept on private property—even though the ocelot is also dangerous, and it was already decided by the alligator court in  $c_6$  that danger is prioritized over private property.

According to the reason model, then, earlier courts constrain later courts, not by preventing these later courts from reaching decisions for a particular side entirely through the application of formal standards, but by restricting the formally permissible decisions for that side to those that are more difficult to justify in a satisfactory way. Each decision settles the priority relations among certain reasons, and so, on formal grounds, restricts later courts from making decisions that would introduce conflicting priorities. After a sufficient number of decisions have been reached, the formal priority relations among the important reasons in some domain are settled to the extent that—as in our example—it becomes difficult to distinguish later cases without introducing further claims of priority among reasons that are harder to justify on social grounds, and so more likely to be

classified as socially impermissible.

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