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## Second-Order Decisions

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*(Article begins on next page)*

1998

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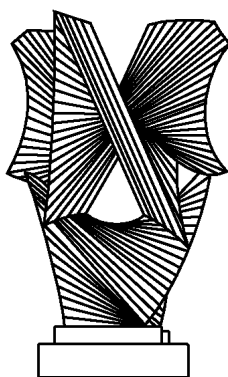
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# CHICAGO

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## Second-Order Decisions

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THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

## Second-Order Decisions

*Cass R. Sunstein\* and Edna Ullmann-Margalit\*\**

### I. Introduction

In making decisions, people sometimes calculate the costs and benefits of alternative courses of action, and choose the option that maximizes net benefits, however these may be described and understood. Certainly this is a conventional picture of practical reason in both private and public life.<sup>1</sup> When deciding what to buy, where to travel, whether to support legislation, or how to vote in a dispute over constitutional rights, people might seem to proceed in this way. A common idea about decision-making is that agents are typically in the business of maximizing or optimizing. At the time of choice, this is their basic method and their basic goal.

A moment's introspection shows that this picture is inaccurate or at least too simple. The cost of deliberation is often high. When and because the stakes are extremely low, people may use simplifying strategies; when and because the stakes are extremely high, people may seek approaches that relieve them of the burden of or the responsibility for choice. Sometimes calculation of costs and benefits of alternative courses of action is exceedingly difficult, or in any case tedious and not worthwhile. Every bureaucrat knows that cost-benefit analysis may fail cost-benefit analysis, and almost everyone, bureaucrat or not, is sometimes willing to do a great deal in order to reduce or to eliminate the burdens of decision. Often agents very much want *not* to make (particular) decisions. Often they know that they will want not to make decisions even before they undertake the particular calculations involved in those particular decisions. Part of what it means to optimize is to try to reduce the burdens of judgment, a fact that can lead people not to calculate at all, or to do so in a sharply truncated fashion. Noncalculative or truncated

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<sup>1</sup> See, e.g., Gary Becker, *Accounting for Tastes* (1996).

decisions can in turn have substantial individual and social consequences.

This is true for decisions both large and small, and for decisions both by individuals and by institutions, political and otherwise. When people are deciding what cereal to buy at the grocery store, whether to buckle their seatbelts or lock their car doors, what route to take to the movie theatre, or what to say in response to the question, “how are you,” they may want, almost more than anything else, a simple way of proceed. Reduction of the burdens of decision and choice is valued in less routine settings as well. Consider the decision whether to purchase a house, to get married, to move to another city, to have a child, or, in the political realm, to create a new right, to reduce spending on welfare programs, or to make war or peace; here people often find themselves in a poor position to calculate ultimate consequences, and they seek to produce simpler strategies for choice.

The point very much bears on ethics, politics, law, and institutional design. To be sure, people often believe that it is important to face the responsibility for decision, even though another strategy would produce a better outcome. Sometimes elected officials—simply because of the democratic legitimacy that comes from their election—refuse to relinquish responsibility to those with superior knowledge; democratic considerations may force them to make decisions on their own. But when officials decide whether to sign a civil rights law, or to support affirmative action, they may not be in a position to calculate net benefits, and hence they may choose some other decision-making strategy for political or strictly cognitive reasons. Public institutions generally operate on the basis of this understanding; some institutions, like the Environmental Protection Agency and the Food and Drug Administration, owe their existence partly to the legislature’s desire to reduce the burdens of judgment. Or consider adjudication. When deciding cases, judges are constantly in a position to decide how much (and to some extent whether) to decide, and different judges, with different assessment of how to weigh the cognitive burdens, often split on just this question.

Our particular interest here is in *second-order decisions*. The term requires some clarification. In the case of second-order desires, one deals with desires-about-desires; in the case of second-order beliefs,

one deals with beliefs-about-beliefs. In the case of second-order decisions, however, one does not exactly deal with decisions-about-decisions. Rather, one deals with the decision about appropriate strategies for avoiding decisions or for reducing their costs. More particularly, our concern is with *strategies that people use in order to avoid getting into an ordinary decision-making situation in the first instance*. Thus people (and institutions) might be said to make a second-order decision when they choose one from among several possible second-order strategies for minimizing the burdens of, and risk of error in, first-order decisions. Second-order decisions about second-order strategies are thus our basic topic.

The procedure of choice might, for example, be a delegation to some other person or institution (“I’ll ask what my wise friend John thinks; he’ll know how to handle that question” or “the Environmental Protection Agency will decide how to solve the problem of groundwater pollution”). Or the chosen procedure may involve a judgment, before ultimate decision-making situations arise, in favor of proceeding via some rule settled in advance (“I always buckle up my kids in the back seat, even on short rides,” or “whenever the bill to be paid is less than \$50, I shall pay cash,” or “if the opposing party proposes a tax increase, do not support it”). As we understand it here, the term “second-order decisions” refers to strategies chosen before situations of first-order decision in order to eliminate the need for ordinary choice or to reduce the calculative demands of choice.

Second-order decisions are a pervasive part of ordinary life and a major aspect of ethics, politics, and both private and public law. But they have not been studied systematically. In this essay, we attempt to make some progress on the topic. One of our strategies is to see what might be learned by exploring analogies and disanalogies between the cases of individuals and institutions. Each of us lives according to a wide range of second-order decisions, many of them so reflexive and so thoroughly internalized that they do not seem to be decisions at all. Political and legal institutions often confront or embody second-order decisions. Indeed, one of the most important tasks for a Constitution itself is to make a series of second-order decisions. Even after a Constitution is in place, political actors face a range of further second-order decisions, and well-organized private

groups tend to know this, at least where the stakes are especially high.

Part of our purpose is simply to organize this topic by providing a taxonomy of strategies—the first step toward understanding the adoption, at the individual and social levels, of one or another second-order decision. We also try to provide some guidance on positive and normative issues. Both individual people and collective bodies may face an interesting meta-decision: Which of the possibilities on the menu is the suitable one with regard to a given kind of cases? Should an agent or an institution adopt a rule or a presumption? When is it best to take small steps, or instead to delegate to another party?

Second-order strategies differ in the extent to which they produce mistakes and in the extent to which they impose informational and other burdens on the agent and on others either *before* the process of ultimate decision or *during* the process of ultimate decision. Thus a second-order decision might well be based on a judgment about how best to (1) reduce the overall costs of decision and (2) regulate the number, magnitude, and quality of mistakes. There are three interesting kinds of cases. *First*, some second-order strategies impose little in the way of decisional burdens either before or during the ultimate decision. This is a great advantage, and a major question is whether the strategy in question (consider a decision to flip a coin) produces too much unfairness or too many mistakes. *Second*, some second-order strategies greatly reduce decisional burdens at the time of ultimate choice, but they require considerable thinking in advance (consider, for example, the creation of rules to govern emissions from coal-fired power plants, or to govern misconduct by one's children). Decisions of this kind may be burdensome to make in advance; but the burdens may be worth incurring if they remain far less than the aggregate burdens of on-the-spot decisions. Here too there is a question of how to regulate the number, magnitude, and quality of mistakes. *Third*, some second-order strategies impose little in the way of decisional burden in advance, but may impose high burdens on others who must make the first-order decision; a delegation of power to some trusted associate, or to an authority, is the most obvious case.

We attempt to understand these different kinds of cases by drawing on actual practices, individual and institutional. The result is

to provide some guidelines for seeing when one or another strategy will be chosen, and also when one or another makes best sense. In the process we introduce some ethical, political, and legal issues that are raised by various second-order decisions.

## II. A Taxonomy

People determined to ease the burdens of decision have a number of available strategies. The following catalogue captures the major alternatives. The taxonomy is intended to be exhaustive of the possibilities, but the various items should not be seen as exclusive of one another; there is some overlap between them, a point to which we shall return.

### *1. Rules*

People anticipating hard or repetitive decisions may adopt a rule, in the form of an irrebuttable presumption. A key feature of a rule is that it amounts to a full, or nearly full, *ex ante* specification of results in individual cases. All, or nearly all, of the work of decision is done in advance.

In order to ease the burdens of decisions, people might say, for example, that they will never cheat on their taxes or fail to meet a deadline, or that they will never borrow money, or that in their capacity as friend, they will always keep secret anything told in confidence. While dieting, you might adopt a rule against eating desert; a former smoker might adopt a flat ban against having a cigarette, even a single one late at night. There are many institutional analogues. A legislature might provide that no one may smoke on airplanes; or that judges can never make exceptions to the speed-limit law or the law banning dogs from restaurants; or that everyone who has been convicted of three felonies must be sentenced to life imprisonment. Irrebuttable presumptions are widespread in law, partly because they greatly reduce the burdens of judgment in the course of individual cases.

Importantly, rules produce many mistakes (in the sense of bad results) simply because rebuttal is not allowed. Rules are typically overinclusive and underinclusive by reference to the reasons that justify them.<sup>2</sup> If taken very seriously, a rule-bound speed limit law

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<sup>2</sup> See Frederick Schauer, *Playing By The Rules* (1993).



will produce some extremely bad outcomes (imagine an unusually safe driver rushing his friend to the hospital); so too for mandatory imprisonment for three-time felons; so too with a ban on any dogs in restaurants (suppose a police officer needs help from his bomb-sniffing German Shepherd). Good friends and good doctors tend to have a flexible attitude toward rules.<sup>3</sup>

It is because of their generality that rules are often criticized as a pathology of unnecessarily rigid people and (still worse) of modern bureaucratic government<sup>4</sup>; but they might be defended as a way of minimizing the burdens of decision while producing good results overall. The rigidity of rules can also produce serious interpretive difficulties, as when a rule confronts an unanticipated case and produces, in that case, a transparently absurd outcome; here the question is whether the rule should operate as something like a presumption. A good deal of interpretive dispute in law is focussed on such problems, which is why rules often are nearly full, rather than full, *ex ante* specifications of outcomes.<sup>5</sup>

## *2. Presumptions*

Often ordinary people and public institutions rely not on a rule but instead on a presumption, which can be rebutted. A presumption is typically rebuttable only on the basis of a showing of a certain kind and weight.<sup>6</sup> People might say, for example, that they will presume against disclosing a confidence; or they might say that they will violate the speed-limit only in compelling, unusual circumstances (like saving a life); or that the government may discriminate on the basis of race only if there is an especially strong reason for doing so. In order to obtain greater accuracy, rules may be “softened” in the direction of presumptions. The result, it is hoped, is to make fewer mistakes while at the same time limiting decisional burdens.

It is important here to distinguish between a presumption and a rule-with-exceptions, though the distinction is subtle. A rule with

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<sup>3</sup> On doctors and rules, see Kathryn Hunter, *Doctor's Stories* (1993).

<sup>4</sup> See Eugene Bardach and Robert Kagan, *Going By the Book: The Problem of Regulatory Unreasonableness* (1982); see also the popular treatment in Philip Howard, *The Death of Common Sense* (1992).

<sup>5</sup> See HLA Hart, *The Concept of Law* 127-30 (2d ed. 1996).

<sup>6</sup> See Edna Ullmann-Margalit, *On Presumptions*, 80 *J. Phil.* 143 (1983).

exceptions tends to have the following structure: “Do X—except in circumstances A, in which case do non-X (or, in which case you may be exempt from doing X).” Thus, for example, “observe the speed limit—except when you’re driving a police car or an ambulance in an emergency, in which cases you may exceed it.” By contrast, a typical presumption says something like: “Act on the assumption that P—unless and until circumstances A (are shown to) obtain, in which case, stop (or reconsider or do something else).” The two amount to the same thing when the agent knows whether or not circumstances A obtain. The two are quite different when the agent lacks that information. With a presumption, you can proceed without the information; with a rule-with-exceptions, you cannot proceed, that is, you are justified neither in doing X nor in not doing X. Thus presumptions function as default rules; they free up the agent, who has a set course of action without knowing whether there are rebutting circumstances.

In law, the distinction between rules-with-exceptions and presumptions is sometimes conceived as a distinction between *ex ante* specification and *ex post* specification of rebutting circumstances. Thus a speed limit law may have specified exceptions (police officers and ambulance drivers may violate it); a prohibition on killing does not apply in cases of self-defense. With a presumption, the rebutting circumstances are not identified in advance; it is understood that life may turn up problems that could not have been anticipated. Here the idea of a presumption overlaps with the idea of a “standard,” to be taken up presently.

Many important presumptions result from the suggestion that in the case of uncertainty or lack of information, an individual, or a government, should “err” on one side rather than another. Consider, for example, the presumption of innocence and the notion of “prevention” as the strategy of choice in environmental law. Folk wisdom is captured in the notion, “better safe than sorry,” an idea that often has an ethical dimension and that has analogues in many areas of law and politics. There are also presumptions in favor of liberty and equality. Daily decisions are permeated and much simplified by presumptions—in favor of particular grocery stores, routes to the downtown area, lunch plans. Often there is also an implicit but widely shared understanding of the kinds of reasons that will rebut the relevant presumptions. Thus Ronald Dworkin’s

influential claim that rights are “trumps” can be understood as a description of rights as strong presumptions, rebutted only by a demonstration of a particular kind.<sup>7</sup>

Presumptions play an important role in the law of contract and statutory interpretation.<sup>8</sup> Described as “default rules,” much of contract law is founded on an understanding of what most parties would do most of the time; the parties can rebut the presumption by speaking clearly. These “market-mimicking” default rules produce continuing debates about the extent to which courts should attempt to ask, not what most parties would do, but what these particular parties would have done if they had made provision on the point; the more specific inquiry increases the burdens of decision but promises to increase accuracy. Sometimes contract rule presumptions are “information-eliciting,” that is, they attempt to impose on the party in the better position to clarify contractual terms the obligation to do precisely that, on pain of losing the case. In the law of statutory interpretation, there is a similar set of presumptions, designed to discern what Congress would have done or instead to impose the duty to obtain a clear statement from Congress on the party in the best position to do so. It is possible to see disputes over liberty and equality as rooted in presumptions, more or less crude, about appropriate social states, presumptions that can be rebutted by special circumstances.

### *3. Standards*

Rules are often contrasted with standards.<sup>9</sup> A ban on “excessive” speeds on the highway is a standard; so is a requirement that pilots of airplanes be “competent,” or that student behavior in the classroom be “reasonable.” These might be compared with rules specifying a 55 mph speed limit, or a ban on pilots who are over the age of 70, or a requirement that students sit in assigned seats. In daily life, you

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<sup>7</sup> See Ronald Dworkin, *Taking Rights Seriously* (1975); this is an effort to read Dworkin through the lens provided by the discussion of exclusionary reasons in Joseph Raz, *Practical Reason and Norms* 37-45 (2d ed. 1990).

<sup>8</sup> See Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts*, 99 *Yale LJ* 87 (1989).

<sup>9</sup> See, e.g., Kaplow, *Rules and Standards: An Economic Analysis*, 42 *Duke L.J.* 189 (1992); Sullivan, *Foreword: The Justices of Rules and Standards*, 105 *Harv L. Rev.* 22 (1993).

might adopt a standard in favor of driving slowly on a snowy day, or of being especially generous to friends in distress. The degree of vagueness is of course highly variable among standards.

The central difference between a rule and a standard is that a rule settles far more in advance and allows on-the-spot judgments to be quite mechanical. Standards can structure first-order decisions, more or less depending on their content, but without eliminating the need to continue to deliberate. In law, the contrast between rules and standards identifies the fact that with some legal provisions, interpreters have to do a great deal of work in order to give law real content. The meaning of a standard depends on what happens when it is applied. Of course the nature of the provision cannot be read off its text, and everything will depend on interpretive practices. Once we define the term “excessive,” we may well end up with a rule. Perhaps officials will decide that a speed is excessive whenever it is over 60 miles per hour.

An important illustration here comes from standards of proof and in particular from the notions of “clear and convincing evidence” and “beyond a reasonable doubt.” Judges have refused to assign numbers to these ideas. Thus the legal system has standards rather than rules. Why should the “reasonable doubt” standard not be said to call for, say, 97% certainty of guilt? Part of the answer lies in the fact that this standard must be applied to many different contexts—different crimes, different police behavior, different defendants, and so forth—and across those contexts, a uniform formula may well be senseless. The “reasonable doubt” standard allows a degree of adaptation to individual circumstances, and this is part of its advantage over any single number. This is also its disadvantage, for it imposes substantial burdens on those who must make the ultimate decision.

#### *4. Routines*

Sometimes a reasonable way to deal with a large decisional burden is to adopt or to continue a routine. By this term we mean something similar to habits, but more voluntary, more self-conscious, and without the pejorative connotations of some habits (consider the habit of chewing one’s fingernails). Thus a forgetful person might adopt a routine of locking his door every time he leaves his office, even though sometimes he will return in a few minutes;

thus a commuter might adopt a particular route and follow it every day, even though on some days another route would be better. The advantage of a routine is that it reduces the burdens of decision even if it produces occasional error. The adoption of routines is of course a common phenomenon in daily life, as people act “without thinking.” These are the “standard operating procedures” by which people negotiate their daily affairs.

We have said that routines are related to habits; they are also related to rules. Often they are the concrete specifications of how precisely a rule is to be followed. If, say, the rule is that in a snowstorm, when driving conditions are hazardous, schools are to be called off, then the routines, taken as standard operating procedures, will specify exactly how the responsibilities for carrying this out are to be allocated: what key features in the weather report should trigger the cancellation, who should notify whom (local radio stations, local TV stations, possibly some particular parents), in what order the school buses are to go out, and so forth. Something similar happens when visiting dignitaries come to a nation; the rules of protocol say who will receive special treatment (the “red carpet”) and the routines specify what steps will be taken, who does what and when. In this way routines work like manuals; their point is to minimize the discretion allowed to the accidental people who happen to be there when the event occurs—all the thinking is done in advance.

Institutional practices entrench routines as well. Any parliament is run in large part by routines, many of them unwritten. To the extent that a legal system relies on precedent, it follows a practice of this general kind. In fact respect for precedent can be seen an especially important kind of routine. Judges follow precedents not because they believe that past decisions are correct—they usually do not even ask whether they are—but because doing so is a routine. If an account is to be offered, it is (roughly) that a legal system will be better if judges follow precedent, because adherence to precedent promotes planning, decreases the burdens of decisions, and accomplishes both of these goals without, on balance, creating more mistakes than would be created without reliance on precedent. Thus following precedent is a kind of “enabling constraint”—a constraint

on the power of choice that helps to simplify and to facilitate choice.<sup>10</sup>

### *5. Small steps*

A possible way of simplifying a difficult situation at the time of choice is to attempt to make a small, incremental decision, and to leave other, larger questions for another day. When a personal decision involves imponderable and apparently incommensurable elements, people often take small, reversible steps first.<sup>11</sup>

For example, Jane may decide to live with Robert before she decides whether she wants to marry him; Marilyn may go to night school to see if she is really interested in law; the government might experiment with certain subsidies to independent movie producers before committing itself to a full-scale program. A similar “small steps” approach is the hallmark of Anglo-American common law.<sup>12</sup> (If it appears at this point that the common law can run afoul of the rule of law ideal, the appearance captures reality, or at least so many people now urge.<sup>13</sup>) Judges typically make narrow decisions, resolving little beyond the individual case; at least this is their preferred method of operation when they are not quite confident about the larger issues. It is sometimes suggested that because of the likelihood of unintended bad consequences, government do best, in certain domains, if their steps are small and incremental.<sup>14</sup> The notion of “pilot programs” is based on this idea. In the psychological literature, the “small steps” approach has been identified with both steady, reliable success (“small wins”<sup>15</sup>) and recurrent error.<sup>16</sup>

<sup>10</sup> See Stephen Holmes, *Passions and Constraint* (1996).

<sup>11</sup> See Edna Ullmann-Margalit, *Opting: The Case of “Big” Decisions*, in *The 1985 Yearbook of the Wissenschaftskeleg Zu Berlin*.

<sup>12</sup> See Edward Levi, *An Introduction to Legal Reasoning* (1948).

<sup>13</sup> The tension between the rule of law and the common law method is the basic theme of Antonin Scalia, *A Matter of Interpretation* (1997).

<sup>14</sup> See James Scott, *Seeing Like A State* (1998).

<sup>15</sup> See Karl Weick, *Small Wins*, 39 *Am. Psych.* 40 (1984). Weick urges, “[I]t seems useful to consider the possibility that social problems seldom get solved, because people define these problems in ways that overwhelm their ability to do anything about them. . . . Calling a situation a mere problem that necessities a small win . . . improves diagnosis, preserves gains, and encourages innovation. Calling a situation a serious problem that necessities a larger win may be when the problem starts.” *Id.* at 48.

### *6. Picking*

Sometimes the difficulty of decision pushes people to decide on a random basis. They might, for example, flip a coin, or make some apparently irrelevant factor decisive (“it’s a sunny day, so I’ll take that job in Florida”). Or they might “pick” rather than “choose” (taking the latter term to mean basing a decision on reasons).<sup>17</sup> Sometimes this happens when the stakes are very low. In the supermarket, busy shoppers often pick; if they were to choose (among, say, toothpastes or pain relievers or cereals) they might find themselves shopping for an intolerably long time. There are many public analogues. A legal system might, for example, use a lottery, and indeed lotteries are used in many domains where the burdens of individualized choice are high, and when there is some particular problem with deliberation about the grounds of choice, usually because of underlying asymmetries among the alternatives.

While people sometimes pick because the stakes are low, they may pick in the extreme opposite case too: When the differences between the alternatives are enormous, too big and confusing to contemplate, or in some respect incommensurable. They may pick because they do not know where to begin (so to speak). Or the consequences for decision may be so large that people do not want to take responsibility for making the decision; hence they pick (consider Sophie’s Choice). Here delegation might be an alternative to picking as the second-order strategy.

### *7. Delegation*

A familiar way of handling decisional burdens is to delegate the decision to someone else. People might, for example, rely on a spouse or a friend, or choose an institutional arrangement by which certain decisions are made by other authorities established at the time or well in advance. In actual practice, such arrangements can be more or less formal; they involve diverse mechanisms of control, or entirely relinquished control, by the person or people for whose benefit they have been created.

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<sup>16</sup> See Daniel Kahneman and Don Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 *Mgmt. Sci.* 17 (1993).

<sup>17</sup> See Edna Ullmann-Margalit and Sidney Morgenbesser, *Picking and Choosing*, 44 *Social Research* 757 (1977).

Sometimes the principal grants full authority to the agent to whom power has been delegated; “trustees” often have authority of this sort. Sometimes the principal retains ultimate power of decision. Thus, for example, in a system of separated and divided powers, war-making decisions are typically delegated to specified officials, subject to various safeguards. In the private sphere, people may rely on the wisdom of those in whom they have great confidence, and here there is a continuum from mere consultation to a delegation of full authority over the outcome.

### *8. Heuristics*

People often use heuristic devices, or mental short-cuts, as a way of bypassing the need for individualized choice. For example, it can be overwhelming to figure out for whom to vote in local elections; people may therefore use the heuristic of party affiliation. When meeting someone new, your behavior may be a result of heuristic devices specifying how to behave with a person falling in the general category in which the new person seems to fall. The relevant category may be age, gender, education, race, religion, demeanor, or something else. What is important is that decisions are a product of heuristic devices that simplify a complex situation and that can also lead to error.

A great deal of attention has been given to heuristic devices said to produce departures from “rationality,” understood as a result of decisions based on full information.<sup>18</sup> And sometimes heuristic devices do lead to errors, even systematic ones. But often heuristic devices are fully rational, if understood as a way of produce pretty good outcomes while at the same time reducing cognitive overload or other decisional burdens.

## III. Decisions and Mistakes

### *A. Costs of Decisions and Costs of Errors*

Under what circumstances will, or should, an agent or institution choose one or another second-order strategy? Begin with a somewhat crude generalization: Rational people attempt to

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<sup>18</sup> See, e.g., John Conlisk, Why Bounded Rationality?, 34 J. Econ. Lit. 669 (1996).



minimize the sum of the costs of making decisions and the costs of error, where the costs of making decisions are the costs of coming to closure on some action or set of actions, and where the costs of error are assessed by examining the number, the magnitude, and the kinds of errors. We understand “errors” as suboptimal outcomes, whatever the criteria for deciding optimality; thus both rules and delegations can produce errors. If the costs of producing optimal decisions were zero, it would be best to make individual calculations in each case, for this approach would produce correct judgments without compromising accuracy or any other important value. This would be true for individual agents and also for institutions.

Two qualifications are necessary. The first is that people may want to relieve themselves of responsibility for certain decisions, even if those people would make those decisions correctly. This is an important reason for delegation (and hence for institutional arrangements of various kinds, including the separation of powers). A second qualification comes from the fact that special problems are created by multi-party situations: public institutions seek to promote planning by setting down rules and presumptions in advance, and the need for planning can argue strongly against on-the-spot decisions even if they would be both correct and costless to achieve. We will take up these qualifications below.

The chief motivation for second-order decisions is that most people know two important facts: their own (first-order) decisions may be wrong, and arriving at the right decision can be very difficult, or have high costs. For any agent these costs are of qualitatively diverse kinds: time, money, unpopularity, anxiety, boredom, agitation, anticipated ex post regret or remorse, feelings of responsibility for harm done to self or others, injury to self-conception, guilt, or shame. Things become differently complicated for multimember institutions, where interest-group pressures may be important, and where there is the special problem of reaching a degree of consensus. A legislature, for example, might find it especially difficult to specify the appropriate approach to affirmative action, given the problems posed by disagreement, varying intensity of preference, and aggregation problems; for similar reasons a multimember court may have a hard time agreeing on how to handle an asserted right to physician-assisted suicide. The result may

be strategies for delegation or for deferring decision, often via small steps.

The costs of decision and the costs of error move people to make and to stick to second-order decisions. There are a number of general reasons why one or another second-order strategy might be best. Consider the pervasive tendency to delegate decisions to others. People tend to delegate the power of choice when the cognitive or emotional burdens of decision are especially high and when the costs of error are likely to be much reduced by giving the power of decision to some other person or institution. Thus those who feel unusual stress at certain decisions are likely to find someone who can make those decisions for them. More formally, certain actors are said to have “authority” if giving them the power of decision can promote accuracy while reducing decisional burdens.<sup>19</sup> In industrialized nations, the grant of power to administrative agencies stems largely from a judgment to just this effect; the political or informational costs of specific decisions about (for example) the regulation of coal-fired power plants or sex discrimination press legislators in the direction of broad and somewhat open-ended standards, to be given particular content by administrative delegates. Thus the Federal Communications Commission and the Environmental Protection Agency are effectively Congress’ delegates. We will return to this point below.

An institution facing political pressures may have a distinctive reason to adopt a particular kind of second-order decision, one that will *deflect responsibility for choice*. Jean Bodin defended the creation of an independent judiciary, and thus provided an initial insight into a system of separated and divided powers, on just this ground; a monarch is relieved of responsibility for unpopular but indispensable decisions if he can point to a separate institution that has been charged with the relevant duty. This is an important kind of enabling constraint.<sup>20</sup> In modern states, the existence of an independent central bank is often justified on this ground. Consider the Federal Reserve Board in the United States. The President has no authority over the money supply and indeed no authority over the Chairman of the Federal Reserve Board, partly on the theory that

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<sup>19</sup> Cf. Joseph Raz, *The Morality of Freedom* 23-31 (discussing authority).

<sup>20</sup> See Stephen Holmes, *supra* note.

this will prevent the President from being criticized for necessary but unpopular decisions (such as refusing to increase the supply of money when unemployment seems too high); the fact that the Federal Reserve Board is unelected is an advantage here. There are analogues in business, in workplaces, and even in families, where a mother or father may be given the responsibility for making certain choices, partly in order to relieve the other of responsibility. Of course this approach can cause predictable problems.

*B. Restricting Options and Reducing Knowledge*

These various points are closely related to two important phenomena: wanting not to have *options* and wanting not to have *knowledge*. Through restricting options and reducing knowledge, people can simplify decisions, and hence they often adopt a second-order strategy to accomplish these goals.

It is sometimes suggested that people would always prefer to have more choices rather than fewer, and on conventional assumptions about how people “maximize,” the suggestion makes a great deal of sense. There is a familiar exception: options consisting of threats disguised as offers. But the exception does not come close to exhausting the field. Even if we put threats to one side, we can readily see that often people would like fewer rather than more options, and they would much like to be in a position to take certain possibilities off the agenda.<sup>21</sup> Indeed, they may be willing to do or to pay a lot to reduce the option set. Sometimes this is because the addition of options increases the burdens of decision without increasing, much or at all, the likelihood of a good decision. Thus 1000 television channels, or 500 selections on the menu of your favorite restaurant, might well increase decision costs without improving outcomes, in such a way as to produce a net loss. As a second-order decision, people familiarly truncate the universe of options: I want shoes, I want to shop around for an optimal buy, but I decide in advance to limit my hunting to all the shoe stores in one particular mall. Or I want to go to graduate school, but I might be overloaded with too many choices, so I apply to only five schools

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<sup>21</sup> A good discussion, highly relevant to second-order decisions, is Gerald Dworkin, *Is More Choice Better Than Less*, in Gerald Dworkin, *Autonomy* (1991).

(knowing that some of those to which I have not applied may be better than the best of the five to which I am admitted). There are other examples of enabling constraints; consider legislative procedures, or rules of order and relevance, designed to reduce the number of issues that can be considered at any one time. When something is considered “out of order,” by informal or formal rule, it is because this limitation, embodying a second-order decision, simplifies judgment by reducing options.

Sometimes both people and institutions want not to have options for a quite different reason: they suffer from weakness of will and fear temptation. They know that if cigarettes or chocolates are available, they may “succumb,” and they therefore attempt to close off the universe of possibilities. Legal systems are frequently responsive to this problem. Consider mandatory “cooling off” periods for certain purchases, or mandatory payments to a social security system. In circumstances of temptation, second-order decisions usually take the form of rules embodying precommitment strategies.

It is reasonable to think that more knowledge is usually better than less, but both individuals and institutions often seek to be or remain ignorant.<sup>22</sup> Whether or not ignorance is bliss, no one searches for all available information. Sometimes this is because of the sheer difficulty of obtaining all relevant facts. But people take positive steps—are willing to incur substantial costs—to prevent themselves from finding things out. This may be because knowledge creates strategic problems or biases decisions in the wrong direction. The goddess Justice is blindfolded; the blindfold symbolizes a kind of impartiality. The law of evidence is based largely on a judgment that certain information will prejudice the jury and should not be heard, even if it is material to that decision.

Similarly, people may have a second-order reason for denying themselves knowledge that will make them choose wrongly, impose on them unwanted feelings of responsibility (as when an acquaintance confides a deep secret), or otherwise produce harm to self or others. The notion of “plausible deniability,” made famous in the Watergate era, can be taken as a metaphor for decisions not to

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<sup>22</sup> See Edna Ullmann-Margalit, *Not Wanting to Know*, in *Reasoning Practically* (Edna Ullmann-Margalit ed., forthcoming, Oxford University Press 1998).

obtain information that may compromise the person who has become informed. Presidents and Supreme Court justices prevent themselves from knowing many relevant facts. Thus many second-order decisions consist of a failure to secure more information, especially but not only if it is costless to do so. People fail to seek options or information, or take affirmative steps not to get either of these, in order to minimize the burdens of decision and the number and magnitude of errors, or to reduce actual or perceived responsibility.

*C. Burdens Ex Ante and Burdens Ex Post*

Thus far we have offered a taxonomy of second-order strategies and suggested some general grounds on which someone might pursue one or another approach. It will be useful to organize the discussion by observing that several of them require substantial thought before the fact of choice, but little thought during the process of ultimate choice, whereas others require little thought both before and during the process of choice. Thus there is a temporal difference in the imposition of decision costs, which we describe with the terms “High-Low” and “Low-Low.” To fill out the possibilities, we add “Low-High” and “High-High” as well. Note that by the terms decision costs we refer to the overall costs, which may be borne by different people or agencies: the work done before the fact of choice may not be carried out by the same actors who will have to do the thinking during the process of ultimate choice. Consider Table 1:

Table 1: Burdens Ex Ante and Burdens Ex Post

|                              | little ex ante thinking   | substantial ex ante thinking   |
|------------------------------|---|--|
| little ex post thinking      | Low-Low: picking; small steps; various heuristics; some standards (1) | High-Low: rules; presumptions; some standards; routines (2)                        |
| substantial ex post thinking | Low-High: delegation (3)  | High-High: Hamlet; characters in Henry James novels; dysfunctional governments (4) |

Cell 1 captures strategies that seem to minimize the overall burdens of decision (whether or not they promote good overall decisions). These are cases in which agents do not invest a great deal of thought either before or at the time of decision. Picking is the most obvious case; consider the analogous possibility of flipping a coin. Small steps are somewhat more demanding, since the agent does have to make some decisions, but because the steps are small, there need be comparatively little thought before or during the decision. As we have noted, cell 1 is the typical procedure of Anglo-American common law; we shall soon investigate this method in more detail. The most sharply contrasting set of cases is High-High, Cell (4). As this cell captures strategies that maximize overall decision costs, it ought for our purposes to remain empty. Fortunately it seems to be represented only by a small minority of people in actual life (consider Hamlet or certain characters in Henry James novels and their real-world analogues, and also incompetent bureaucracies).

Cell (2) captures a common aspiration for national legislatures and for ordinary agents who prefer their lives to be rule-bound. Some institutions and agents spend a great deal of time deciding on the appropriate rules; but once the rules are in place, decisions become extremely simple, rigid, even mechanical. Everyone knows people of this sort; they can seem both noble and frustrating precisely because they follow rules to the letter. Legal formalism—the commitment to setting out clear rules in advance and mechanical decision afterwards—is associated with cell (2); indeed, the ideal of the rule of law itself seems to entail an aspiration to cell (2).<sup>23</sup>

When a large number of decisions must be made, cell (2) is often the best approach, as the twentieth-century movement toward bureaucracy and simple rules helps to confirm. Individual cases of unfairness may be tolerable if the overall result is to prevent the system from being overwhelmed by decisional demands. Cell (2) is also likely to be the best approach when a large number of people is involved and it is known in advance that the people who will have to carry out on-the-spot decisions constantly change. Consider institutions with many employees and a large turnover of employees

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<sup>23</sup> See Antonin Scalia, *A Matter of Interpretation* (1996).

(the army, entry levels of large corporations, and so forth). The head of an organization may not want newly recruited, less-than-well-trained people to make decisions for the firm: rules should be in place so as to insure continuity and uniform level of performance. On the other hand, the fact that life will confound the rules often produces arguments for institutional reform in the form of granting power to administrators or employees to exercise “common sense” in the face of rules.<sup>24</sup>

An intermediate case can be found with most standards. The creation of the standard may itself require substantial thinking, but even when the standard is in place, agents may have to do some deliberating in order to reach closure. Decisions are not mechanical. Of course there are many different kinds of standards, and it is possible to imagine standards that require a great deal of thought *ex ante* and standards that require very little, just as it is possible to imagine standards that greatly simplify or standards that give relatively little guidance.

Cell (3) suggests that institutions and individuals sometimes do little thinking in advance but may or may not minimize the aggregate costs of decision. As we have seen, delegations may require little thinking in advance, at least on the substance of the issues to be decided, and the burdens of decision will be felt by the object of the delegation. Of course some people think long and hard about whether and to whom to delegate, and of course some people who have been delegated power will proceed by rules, presumptions, standards, small steps, picking, or even subdelegations. Note that small steps might be seen as an effort to “export” the costs of decision to one’s future self.

It is an important social fact that many people are relieved of the burdens of decision through something other than their own explicit wishes. Consider prisoners, the mentally handicapped, young children, or (at some times and places) women; there is a range of intriguing cases in which society or law makes a second-order decision on someone else’s behalf, often without any indication of that person’s own desires. The usurpation of another’s decisions, or second-order decisions, is often based on a belief that the relevant other will systematically err. This of course relates to the notion of

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<sup>24</sup> See Phillip Howard, *The Death of Common Sense* (1996).

paternalism, which can be seen as arising whenever there is delegation without consent.

In some cases, second-order decisions produce something best described as Medium-Medium, with imaginable extensions toward Moderately High-Moderately Low, and Moderately Low-Moderately High. As examples consider some standards, which, it will be recalled, structure first-order decisions but require a degree of work on the spot, with the degree depending on the nature of the particular standard. But after understanding the polar cases, analysis of these intermediate cases is straightforward, and hence we will not undertake that analysis here.

We now turn to the contexts in which agents and institutions follow one or another of the basic second-order strategies.

#### IV. Low-High (with Special Reference to Delegation)

##### *A. Informal and Formal Delegations*

As a first approximation, a delegation is a second-order strategy that reduces the delegator's costs both before and at the time of making the ultimate decision, through exporting those costs to the delegate. Informal delegations occur all the time. Thus, for example, one spouse may delegate to another the decision about what the family will eat for dinner, what investments to choose, or what car to buy; a dieting teenager may delegate to his older sibling or best friend the decision whether and when desert may be eaten; an author may delegate to his coauthor the decision how to handle issues within the latter's expertise. These delegations often occur because the burdens of decision are high for the delegator but low for the delegate, who may have specialized information, who may lack relevant biases or motivational problems, or who may not mind (and who may even enjoy) taking responsibility for the decision in question. (These cases may then be more accurately captured as special cases of Low-Low.) The intrinsic costs of having to make the decision are often counterbalanced by the benefits of having been asked to assume responsibility for it (though these may be costs rather than benefits in some cases). Thus some delegates are glad to assume their role; this is important to, though it is not decisive for,



the ethical issue whether to delegate (consider the question of justice within the family). And there is an uneasy line, raising knotty conceptual and empirical questions, between a delegation (with a delegator and a delegate) and division of labor (consider the allocation of household duties).

Public institutions, most prominently legislatures, often delegate authority to some other entity. There are many possible factors here. A legislature may believe that it lacks information about, for example, environmental problems or changes in the telecommunications market; the result is an Environmental Protection Agency or a Federal Communications Commission. Alternatively, the legislature may have the information but find itself unable to forge a consensus on underlying values about, for example, the right approach to affirmative action or to age discrimination. The legislature may be aware that its vulnerability to interest-group pressures will lead it in bad directions, and it may hope and believe that the object of the delegation will be relatively immune. Interest-group pressures may themselves produce a delegation, as where powerful groups are unable to achieve a clear victory in a legislature but are able to obtain a grant of authority to an administrative agency over which they will have power. Or the legislature may not want to assume responsibility for some hard choice, fearing that decisions will produce electoral reprisal. Self-interested representatives may well find it in their electoral self-interest to enact a vague or vacant standard (“the public interest,” “reasonable accommodation” of the disabled, “reasonable regulation” of pesticides), and to delegate the task of specification to someone else, secure in the knowledge that the delegate will be blamed for problems in implementation.

### *B. When to Delegate*

Obviously a delegation is sometimes a mistake—an abdication of responsibility, an act of unfairness, a recipe for more rather than fewer errors. But when is delegation the right option? Delegation deserves to be considered whenever an appropriate delegate is available and there is a sense in which it is inappropriate for the agent to be making the decision by himself. Before delegating, comparison with other possible approaches may well be in order. As compared with making all first-order decisions on an all-things-

considered basis, a delegation promises to lower decision costs, certainly for the delegator and on certain assumptions on balance; this depends on the capacities of the delegate (can he or she make decent decisions quickly?). If the delegate is trustworthy, the delegation may well produce fewer mistakes.

Compared to a High-Low approach, a delegation will be desirable if the legislature, or the delegator, is unable to generate a workable rule or presumption (and if anything it could come up with would be costly to produce) and if a delegate would therefore do better on the merits. This may be the case on a multimember body that is unable to reach agreement, or when an agent or institution faces a cognitive or motivational problem, such as weakness of will or susceptibility to outside influences. A delegation will also be favored over High-Low if the delegator seeks to avoid responsibility for the decision for political, social, or other reasons, though the effort to avoid responsibility may also create problems of legitimacy, as when a legislator relies on “experts” to make value judgments about environmental protection or disability discrimination.

As compared with small steps or picking, a delegation may or may not produce higher total decision costs (perhaps the delegate is slow or a procrastinator). Even if the delegation does produce higher total decision costs, it may also lead to a higher level of confidence in the eventual decisions, which, if the delegate is good, will be sound. It follows, unsurprisingly, that the case for delegation will turn in large part on the availability of reliable delegates. In the United States, the Federal Reserve Board has a high degree of public respect and hence there is little pressure to eliminate or reduce the delegation. But a delegate—a friend, a spouse, an Environmental Protection Agency—may prove likely to err, and a rule, a presumption, or small steps may emerge instead.

There is also the independent concern for fairness. In some circumstances, it is unfair to delegate to, for example, a friend or a spouse the power of decision, especially but not only because the delegate is not a specialist. Issues of gender equality arise when a husband delegates to his wife all decisions involving the household and the children, even if both husband and wife agree on the delegation. Entirely apart from this issue, a delegation by one spouse to another may well seem unfair if (say) it involves a child's problems with alcohol, because it is an abdication of responsibility, a way of

transferring the burdens of decision to someone else who should not be forced to bear them alone.

In institutional settings, there is an analogous problem if the delegate (usually an administrative agency) lacks political accountability even if it has relevant expertise. The result is the continuing debate over the legitimacy of delegations to administrative agencies.<sup>25</sup> Such delegations can be troublesome if they shift the burden of judgment from a democratically elected body to one that is insulated from political control. So too, there is a possibly illegitimate abdication of authority when a judge delegates certain powers to law clerks (as is occasionally alleged about Supreme Court justices) or to special masters who are expert in complex questions of fact and law (as is alleged in connection with a proposed delegation in the Microsoft litigation). Avoidance of responsibility may be a serious problem here.

### *C. Complications*

Three important complications deserve comment. First, any delegate may itself resort to making second-order decisions, and it is familiar to find delegates undertaking each of the strategies that we have described. Sometimes delegates prefer High-Low and hence generate rules; almost everyone knows that this is the typical strategy of the Internal Revenue Service, a delegate of Congress that likes to proceed via rule. Many spouses, delegated the power of decision by their husbands or wives, operate in similar fashion. Presumptions may be favored over rules for the now-familiar reason that they can reduce ex ante costs and promote greater “flow.” Alternatively, delegates may use standards or proceed by small steps. This is the general approach of the National Labor Relations Board, which (strikingly) avoids rules whenever it can, and much prefers to proceed case-by-case. Or a delegate may undertake a subdelegation. Confronted with a delegation from her husband, a wife may consult a sibling or a parent. Asked by Congress to make hard choices, the President may and frequently does subdelegate to some kind of commission, for some of the same reasons that spurred Congress to delegate in the first instance. Of course a delegate may just pick. She

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<sup>25</sup> Compare David Schoenbrod, *Power Without Responsibility* (1995) with Jerry Mashaw, *Chaos, Greed, and Governance* (1997).

may, for example, choose to flip a coin, or she may decide without doing much thinking about what decision is best.

The second complication is that the control of a delegate presents a potentially serious principal-agent problem. How can the person who has made the delegation ensure that the delegate will not make serious and numerous mistakes, or instead fritter away its time trying to decide how to decide? There are multiple possible mechanisms of control. Instead of giving final and irreversible powers of choice to the delegate, a person or institution might turn the delegate into a mere consultant or advice-giver. A wide range of intermediate relationships is possible. In the governmental setting, a legislature can influence the ultimate decision by voicing its concerns publicly if an administrative agency is heading in the wrong direction, and the legislature usually has the power to overturn an administrative agency if it can muster the will to do so. Ultimately the delegator may retain the power to eliminate the delegation, and to ensure against (what the delegator would consider to be) mistakes, it may be sufficient for the delegate to know this fact. In informal relations, involving friends, colleagues, and family members, there are various mechanisms for controlling any delegate. Some "delegates" know that they are only consultants; others know that they have the effective power of decision. All this happens through a range of cues, which may be subtle.

The third complication stems from the fact that at the outset, the costs of a second-order decision of this kind may not be so low after all, since the person or institution must take the time to decide whether to delegate at all and if so, to whom to delegate. Complex issues may arise about the composition of any institution receiving the delegation; these burdens may be quite high and perhaps decisive against delegation altogether. A multimember institution often divides sharply on whether to delegate and even after that decision is made, it may have trouble deciding on the recipient of the delegated authority.

#### *D. Intrapersonal Delegations and Delegation to Chance*

Thus far we have been discussing cases in which the delegator exports costs to some other party. What about the intrapersonal case? On the one hand, there is no precise analogy between that problem and the cases under discussion. On the other hand, people

confronted with hard choices can often be understood to have chosen to delegate the power of choice to their future selves. Consider, for example, such decisions as whether to buy a house, to have another child, to get married or divorced, to move to a new city; in such cases agents who procrastinate may understand themselves to have delegated the decision to their future selves.

There are two possible reasons for this kind of intrapersonal delegation, involving timing and content respectively. You may believe you know what the right decision is, but also believe it is not the right time to be making that decision, or at least not the right time to announce it publicly. Alternatively, you may not know what the right decision is and believe that your future self will be in a better position to decide. You may think that your future self will have more information, suffer less or not at all from cognitive difficulties, bias, or motivational problems, or be in a better position to assume the relevant responsibility. Perhaps you are feeling under pressure, suffering from illness, or not sure of your judgment just yet. In such cases, the question of intrapersonal, intertemporal choice is not so far from the problem of delegation to others. It is even possible to see some overlapping principal-agent problems with similar mechanisms of control, as people impose certain constraints on their future selves.

From the standpoint of the agent, then, the strategy of small steps, like delay, can be seen as a form of delegation. Also, the strategy of delegation itself may turn into that of picking when the delegate is a chance device. When I make my future decision depend on which card I draw from my deck of cards, I've delegated my decision to the random card-drawing mechanism, thereby effectively turning my decision from choosing to picking.

## V. High-Low

(with Special Reference to Rules and Presumptions)

We have seen that people often make second-order decisions that are themselves costly, simply in order to reduce the burdens of later decisions in particular cases. When this process is working well, there is much to do before the fact of decision, but once the decision is in place, things are greatly simplified.

*A. Diverse Rules, Diverse Presumptions*

We have suggested that rules and presumptions belong in this category, and frequently this is true. But the point must be qualified; some rules and presumptions do not involve high burdens of decision before the fact. For example, a rule might be picked rather than chosen—drive on the right-hand side of the road, or spoons to the right, forks to the left. Especially when what it is important is to allow all actors to coordinate on a single course of conduct, there need be little investment in decisions about the content of the relevant rule. A rule might even be framed narrowly, so as to work as a kind of small step. A court might decide, for example, that a law excluding homosexuals from the armed services is unconstitutional, and this decision might be framed as a rule; but the court's opinion could be issued in such a way as to leave undecided most other issues involving the constitutional status of homosexuals. Rules often embody small steps. Of course the same points can be made about presumptions, which are sometimes picked rather than chosen and which might be quite narrow.

For present purposes we focus on situations in which an institution or an agent is willing to deliberate a good deal to generate a rule or a presumption that, once in place, turns out greatly to simplify (without impairing and perhaps even improving) future decisions. This is a familiar aspiration in law and politics. A legislature might, for example, decide in favor of a speed limit law, partly in order to ensure coordination among drivers, and partly as a result of a process of balancing various considerations about risks and benefits. People are especially willing to expend a great deal of effort to generate rules in two circumstances: (1) when planning and fair notice are important and (2) when a large number of decisions will be made.<sup>26</sup>

In most well-functioning legal systems, for example, it is clear what is and what is not a crime. People need to know when they may be subject to criminal punishment for what they do. The American Constitution is taken to require a degree of clarity in the criminal law, and every would-be tyrant knows that rules may be irritating constraints on his authority. So too, the law of contract

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<sup>26</sup> See Louis Kaplow, *Rules and Standards: An Economic Analysis*, 42 *Duke LJ* 557 (1992).

and property is mostly defined by clear rules, simply because people could not otherwise plan, and in order for economic development to be possible they need to be in a position to do so.

When large numbers of decisions have to be made, there is a similar tendency to spend a great deal of time to clarify outcomes in advance. In the United States, the need to make a large number of decisions has pushed the legal system into the development of rules governing social security disability, workers' compensation, and criminal sentencing. The fact that these rules produce a significant degree of error is not decisive; the sheer cost of administering the relevant systems, with so massive a number of decisions, makes a certain number of errors tolerable.

Compared to rules, standards and "soft" presumptions serve to reduce the burdens of decision *ex ante* while increasing those burdens at the time of decision. This is both their virtue and their vice. Consider, for example, the familiar strategy of enacting rigid, rule-like environmental regulations while at the same time allowing a "waiver" for special circumstances. The virtue of this approach is that the rigid rules will likely produce serious mistakes—high costs, low environmental benefits—in some cases; the waiver provision allows correction in the form of an individualized assessment of whether the statutory presumption should be rebutted. The potential vice of this approach is that it requires a fair degree of complexity in a number of individual cases. Whether the complexity is worthwhile turns on a comparative inquiry with genuine rules. How much error would be produced by the likely candidates? How expensive is it to correct those errors by turning the rules into presumptions?

### *B. Of Planning and Trust*

Often institutions are faced with the decision whether to adopt a High-Low strategy or whether instead to delegate. We have seen contexts in which a delegation is better. But in three kinds of circumstances the High-Low approach is to be preferred. First, when planning is important, it is important to set out rules (or presumptions) in advance. The law of property is an example. Second, there is little reason to delegate when the agent or institution has a high degree of confidence that a rule (or presumption) can be generated at reasonable cost, that the rule (or

presumption) will be accurate, and that it will actually be followed. Third, and most obviously, High-Low is better when no trustworthy delegate is available, or when it seems unfair to ask another person or institution to make the relevant decision. Hence legislatures tend in the direction of rule-like judgment when they have little confidence in the executive; in America, parts of the Clean Air Act are a prime example of a self-conscious choice of High-Low over delegation. Liberal democracies take these considerations as special reasons to justify rules in the context of criminal law: The law defining crimes is reasonably rule-like, partly because of the importance of citizen knowledge about what counts as a crime, partly because of a judgment that police officers and courts cannot be trusted to define the content of the law.

When would High-Low be favored over Low-Low (picking, small steps)? The interest in planning is highly relevant here and often pushes in the direction of substantial thinking in advance. If the agent or institution has faith in its ability to generate a good rule or presumption, it does not make much sense to proceed by random choice or incrementally. Hence legislatures have often displaced the common law approach of case-by-case judgment with clear rules set out in advance; in England and America, this has been a great movement of the twentieth century, largely because of the interest in planning and decreased faith in the courts' ability to generate good outcomes through small steps.

Of course mixed strategies are possible. An institution may produce a rule to cover certain cases but delegate decision in other cases; or a delegate may be disciplined by presumptions and standards; or an area of law, or practical reason, may be covered by some combination of rule-bound judgment and small steps.

*C. Private Decisions: Ordinary People, Intrapersonal Collective Action Problems, and Recovering Addicts*

Thus far we have been stressing public decisions. In their individual capacity, people frequently adopt rules, presumptions, or self-conscious routines in order to guide decisions that they know might, in individual cases, be too costly to make or be made incorrectly because of their own motivational problems. Sarah might decide, for example, that she will turn down all invitations for out-of-town travel in the month of September, or John might adopt a



presumption against going to any weddings or funerals unless they involve close family members, or Fred might make up his mind that at dinner parties, he will drink whatever the host is drinking. Rules, presumptions, and routines of this kind are an omnipresent feature of practical reason; sometimes they are chosen self-consciously and as an exercise of will, but often they are, or become, so familiar and simple that they appear to the agent not to be choices at all. Problems may arise when a person finds that he cannot stick to his resolution, and thus High-Low may turn into High-High, and things may be as if the second-order decision had not been made at all.

Some especially important cases involve efforts to solve the kinds of intertemporal, intrapersonal problems that arise when isolated, small-step first-order decisions are individually rational but produce harm to the individual when taken in the aggregate. These cases might be described as involving “intrapersonal collective action problems.”<sup>27</sup> Consider, for example, the decision to smoke a cigarette (right now), or to have chocolate cake for desert, or to have an alcoholic drink after dinner, or to gamble on weekends. Small steps, which are rational choices when taken individually and which produce net benefits when taken on their own, can lead to harm or even disaster when they accumulate. There is much room here for second-order decisions. As a self-control strategy, a person might adopt a rule: cigarettes only after dinner; no gambling, ever; chocolate cake only on holidays; alcohol only at parties when everyone else is drinking. A presumption might sometimes work better: a presumption against chocolate cake, with the possibility of rebuttal on special occasions, when celebration is in the air and the cake looks particularly good.

Well-known private agencies designed to help people with self-control problems (Alcoholics' Anonymous, Gamblers' Anonymous) have as their business the development of second-order strategies of this general kind. The most striking cases involve recovering addicts, but people who are not addicts, and who are not recovering from anything, often make similar second-order decisions. When self-control is particularly difficult to achieve, an agent may seek to

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<sup>27</sup> Cf. Thomas Schelling, *Self-Command in Practice, in Policy, and in a Theory of Rational Choice*, 74 *Am. Econ. Rev.* 1 (1984).

delegate instead. Whether a delegation (Low-High) is preferable to a rule or presumption (High-Low) will depend in turn on the various considerations discussed above.

## VI. Low-Low

(with Special Reference to Picking and Small Steps)

### *A. Equipose, Responsibility, and Commitment*

Why might an institution or agent pick rather than choose? When would small steps be best? At the individual level, it can be obvious that when you are in equipose, you might as well pick; it simply is not worthwhile to go through the process of choosing with its high cognitive or emotional costs. As we have seen, the result can be picking in both low-stakes (cereal choices) and high-stakes (employment opportunities) settings. Picking can even be said to operate as a kind of delegation, where the object of the delegation is “fate,” and the agent loses the sense of responsibility that might accompany an all-things-considered judgment. Thus some people sort out hard questions by resorting to a chance device (like flipping a coin).

Small steps, unlike a random process, are a form of choosing. High school students tend to date in this spirit, at least most of the time; often adults do too. Newspapers and magazines offer trial subscriptions; the same is true for book clubs. Often advertisers (or for that matter prospective romantic partners) know that people prefer small steps and they take advantage of that preference (“no commitments”). In the first years of university, students need not commit themselves to any particular course of study; they can take small steps in various directions, sampling as they choose.

On the institutional side, consider lotteries for both jury and military service. The appeal of a lottery for jury service stems from the relatively low costs of operating the system and the belief that any alternative device for allocation would produce more mistakes, because it would depend on a socially contentious judgment about who should be serving on juries, with possibly destructive results for the jury system itself. The key point is that the jury is supposed to be a cross-section of the community, and a random process seems to be the best way of serving that goal (as well as the fairest way of

apportioning what many people regard as a social burden). In light of the purposes of the jury system, alternative allocation methods would be worse; consider stated willingness to serve, an individualized inquiry into grounds for excuse, or financial payments (either to serve or not to serve). For military service, related judgments are involved, in the form of a belief that any stated criteria for service might be morally suspect, and hence a belief that random outcomes produce less in the way of error.<sup>28</sup>

*B. Change, Unintended Consequences, and Reversibility*

Lotteries involve random processes; small steps do not. We have said that Anglo-American judges often proceed case-by-case, as a way of minimizing the burdens of decision and the consequences of error. In fact many legal cultures embed a kind of norm in favor of incremental movement. They do this partly because of the distinctive structure of adjudication and the limited information available to the judge: in any particular case, a judge will hear from the parties immediately affected, but little from others whose interests might be at stake. Hence there is a second-order decision in favor of small steps.

If, for example, a court in a case involving a particular patient seeking a “right to die” is likely to have far too little information, and if it attempted to generate a rule that would cover all imaginable situations in which that right might be exercised, the case would take a very long time to decide. Perhaps the burdens of decision would be prohibitive. This might be so because of a sheer lack of information, or it might be because of the pressures imposed on a multimember court consisting of people who are unsure or in disagreement about a range of subjects. Such a court may have a great deal of difficulty in reaching closure on broad rules. Small steps are a natural result.

Judges also proceed by small steps precisely because they know that their rulings create precedents; they want to narrow the scope of future applications of their rulings given the various problems described above, most importantly the lack of sufficient information about future problems. A distinctive problem involves the possibility

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<sup>28</sup> On ethical and political issues associated with lotteries in general, see Jon Elster, *Solomonic Judgments* 36-122 (1993).

of too *much* information. A particular case may have a surplus of apparently relevant details, and perhaps future cases will lack one or more of the relevant features, and this will be the source of the concern with creating wide precedents. The existence of (inter alia) features X or Y in case A, missing in case B, makes it hazardous to generate a rule in case A that would govern case B. The narrow writing and reception of the Supreme Court's decision in the celebrated Amish case, allowing an exemption of Amish children from mandatory public schooling, is an example.

Quite apart from the pressures of inadequate information, too much information, and disagreement, small steps might make special sense in view of the pervasive possibility of changed circumstances. Perhaps things will be quite different in the near future; perhaps relevant facts and values will change, and thus a rule that is well suited to present conditions may become anachronistic. Thus it is possible that any decision involving the application of the first amendment to new communications technologies, including the internet, should be narrow, because a broad decision, rendered at this time, would be so likely to go wrong. On this view, a small step is best because of the likelihood that a broad rule would be mistaken when applied to cases not before the court.

In an argument very much in this spirit, Joseph Raz has connected a kind of small step—the form usually produced by analogical reasoning—to the special problems created by one-shot interventions into complex systems.<sup>29</sup> In Raz' view, courts reason by analogy in order to prevent unintended side-effects from large disruptions. Similarly supportive of the small-step strategy, the German psychologist Dietrich Dorner has done some illuminating computer experiments designed to see whether people can engage in successful social engineering.<sup>30</sup> Participants are asked to solve problems faced by the inhabitants of some region of the world. Through the magic of the computer, many policy initiatives are available to solve the relevant problems (improved care of cattle, childhood immunization, drilling more wells). But most of the participants produce eventual calamities, because they do not see the complex, system-wide effects of particular interventions. Only the

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<sup>29</sup> Joseph Raz, *The Authority of Law* (1985).

<sup>30</sup> See Dietrich Dorner, *The Logic of Failure* (1994).

rare participant is able to see a number of steps down the road—to understand the multiple effects of one-shot interventions on the system. The successful participants are alert to this risk and take small, reversible steps, allowing planning to occur over time. Hence Dorner, along with others focussing on the problems created by interventions into systems,<sup>31</sup> argues in favor of small steps. Judges face similar problems, and incremental decisions are a good way of responding to the particular problem of bounded rationality created by ignorance of possible adverse effects.

From these points we can see that small steps may be better than rules or than delegation. Often an institution lacks the information to generate a clear path for the future; often no appropriate delegate has that information. If circumstances are changing rapidly, any rule or presumption might be confounded by subsequent developments. What is especially important is that movement in any particular direction should be reversible if problems arise.

The analysis is similar outside of the governmental setting. Agents might take small steps because they lack the information that would enable them to generate a rule or presumption, or because the decision they face is unique and not likely to be repeated, so that there is no reason for a rule or a presumption. Or small steps may follow from the likelihood of change over time, from the fact that a large decision might have unintended consequences, or from the wish to avoid or at least to defer the responsibility for large-scale change.

## VII. Summary and Conclusions

### *A. Second-Order Strategies*

The discussion is summarized in Table 2. Recall that the terms “low” and “high” refer to the overall costs of the decision, which are not necessarily borne by the same agent: with Low-High the costs are split between delegator and delegate; with High-Low they may split between an institution (which makes the rules, say) and an agent (who follows the rules).

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<sup>31</sup> See James Scott, *Seeing Like A State* (1998).

Table 2: Second-Order Strategies

| Strategies   | Examples  | Potential Advantages   | Potential Disadvantages   | Appropriate Context   |
|--|---|--|---|---|
| 1. low-high: delegation                              | spouses, friends; administrative agencies   | relief from direct responsibility for ultimate decisions; increased chance for good outcomes | problems relating to trust, fairness, and responsibility; possible high costs in deciding whether and to whom to delegate | availability of appropriate and trustworthy delegate; high burdens of, or perceived likelihood of error in, decision by delegator                                   |
| 2. low-low: picking, small steps, various heuristics | Anglo-American common law; lotteries; big personal decisions                      | low overall costs; reversibility; coping with change and with unintended consequences        | difficulty of planning; high aggregate decision costs; multiple mistakes  | equipoise/symmetry of preferences or values; aversion of drastic changes; fear of unanticipated consequences  |
| 3. high-low: rules, presumptions, routines           | speed limit laws; legal formalism; criminal law; recovering addicts; rigid people | low costs of numerous decisions once in place; uniformity; facilitates planning              | difficulty of generating good rules or presumptions; mistakes once in place   | sheer number of anticipated decisions/decisionmakers; repetitive nature of future decisions; need for planning, confidence in ability to generate ex ante decisions |
| 4. high-high   | Hamlet; Henry James characters; dysfunctional governments                         | none (unless decision costs are actually pleasant to incur and decisions end up being good)  | paralysis; unpopularity; individual or institutional collapse   | agency or institution cannot do otherwise   |

*B. Do People Make Second-Order Decisions?*

We have not yet discussed an important underlying issue: do people, or institutions, actually make a self-conscious decision about which second-order strategy to favor, given the menu of possibilities? Sometimes this is indeed the case. A legislature may, for example, deliberate and decide to delegate rather than to attempt to generate rules; a court may choose, self-consciously, to proceed incrementally; having rejected the alternatives, a President may recommend a lottery system rather than other alternatives for admitting certain aliens to the country. Thus it is possible to think of cases in which an institution or a person expressly makes an all-things-considered decision in favor of one or another second-order strategy.

Sometimes, however, a rapid assessment of the situation takes place, rather than a full or deliberative weighing of alternative courses of action. This is often the case in private decisions, where judgments often seem immediate. Indeed, second-order decisions might be too costly if they were a product of an on-the-spot optimizing strategy; so taken, they would present many of the problems of first-order decisions.

As in the case of first-order decisions, it often makes sense to proceed with what seems best, rather than to maximize in any systematic fashion, simply because the former way of proceeding is easier (and thus may maximize once we consider decision costs of various kinds). For individuals, the salient features of the context usually suggest a particular kind of second-order strategy. Often the same is true for institutions as well.

These are intended as descriptive points about the operation of practical reason. But at the political level, and occasionally at the individual level too, it would be better to be more explicit and self-conscious about the diverse possibilities, so as to ensure that societies and institutions do not find themselves making bad second-order decisions. It is possible, for example, to find pathologically rigid rules; the Sentencing Guidelines are often criticized on this ground, and whether or not the criticism is just, pathological rigidity is a problem for societies as well as individuals. Legal formalists, like Justice Antonin Scalia, repeatedly argue for a High-Low strategy, but they do so without engaging the pragmatic issues at stake, and without

showing that this strategy is preferable to the realistic alternatives.<sup>32</sup> Often a court or even a state would do best to proceed via small steps, in such a way as to ensure reversibility; this is an important means of avoiding the problems associated with social planning, even for those who do not believe that a general antipathy to state planning is warranted. But it is possible to find circumstances in which small steps lead to disaster, by preventing those who must deal with the law from predicting its content. People do not generally make self-conscious second-order decisions, and often this is fortunate; but the discussion here has been intended as an initial step toward making it possible to be more systematic and conscious about the relevant options.

### *C. Conclusion*

In the course of making decisions, people are often reluctant to calculate the costs and benefits of the alternatives. Instead they resort to second-order strategies designed to reduce the burdens of first-order decisions while producing a tolerably low number of suboptimal outcomes. This is a pervasive aspect of the exercise of practical reason, and second-order decisions have large consequences for individuals, for institutions, and for societies.

Some such strategies involve high initial costs but generate a relatively simple, low-burden mechanism for deciding subsequent cases. These strategies, often taking the form of rules or presumptions, seem best when the anticipated decisions are numerous and repetitive and when advance planning is important. Other strategies involve both low initial costs and low costs at the time of making the ultimate decision. These approaches work when a degree of randomization is appealing on normative grounds (perhaps because choices are otherwise in equipoise, or because no one should or will take responsibility for deliberate decision), or when the decision is too difficult to make (because of the cognitive or emotional burdens involved in the choice) or includes too many imponderables and a risk of large unintended consequences.

Still other strategies involve low initial costs but high, exported costs at the time of decision, as when a delegation is made to another person or institution, or (in a metaphor) to one's future self.

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<sup>32</sup> See Antonin Scalia, *A Matter of Interpretation* (1997).



Delegations can take many different forms, with more or less control retained by the person or institution making the delegation. Strategies of delegation make sense when a delegate is available who has relevant expertise (perhaps because he is a specialist) or is otherwise trustworthy (perhaps because he does not suffer from bias or some other motivational problem), or when there are special political, strategic, or other advantages to placing the responsibility for decision on some other person or institution. Delegations can create problems of unfairness, as when delegates are burdened with tasks that they do not voluntarily assume, or would not assume under just conditions, and when the delegation is inconsistent with the social role of the delegator, such as a legislature or a court. Hence delegations can be troubling from the point of view of democracy or the separation of powers.

The final set of cases involve high costs both *ex ante* and at the time of decision, as in certain hopelessly indecisive fictional characters, and in highly dysfunctional governments. We have merely gestured in the direction of this strategy, which can be considered best only on the assumption that bearing high overall costs of decision is an affirmative good or even something to relish. This assumption might appear peculiar, but it undoubtedly helps explain some otherwise puzzling human behavior—behavior that often provides the motivation to consider the other, more promising second-order decisions discussed here.

This Working Paper is a preliminary draft dated 5/24/98. All rights reserved. Readers with comments should address them to:

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