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LEGAL REASONS, NORMATIVE DETERMINACY, AND RULES OF CLOSURE

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In "Legal Reasons, Sources and Gaps", Joseph Raz points out that statements of reasons – mainly, conclusive legal reasons – are the most basic category of legal analysis. The conceptual importance of statements of legal reason implies that legal philosophers must use them to explain other legal concepts. In this sense, Raz claims that conclusive reason is a useful analytical tool for dealing with a classic problem of legal philosophy: gaps in the law. Raz defends a particular form of indeterminacy of law, which are ordinary gaps produced by the imprecision of the concepts used in the formulation of legal norms (when the law speaks with an uncertain voice) or by specific conflicting legal reasons (when the law speaks with many voices). In such cases, judges have discretion to resolve legal disputes. However, he denies that the law can have genuine gaps (when the law is silent) and, in those cases, judges lack discretion. In this paper, I criticise Raz's arguments for denying the existence of genuine gaps in the law and suggest an alternative which partially preserves Raz's intuitions but does not compromise with their implausible consequences.

I. Introduction

In "Legal Reasons, Sources and Gaps", Joseph Raz points out that statements of reasons — mainly, conclusive legal reasons — are the most basic category of legal analysis.[1] The conceptual primacy of statements of legal reasons implies that legal philosophers must use them to explain other legal concepts. To Raz, "all other and more complex kinds of deontic statements are explained by pointing out their logical relations with these elementary forms of statements", and immediately he adds that his analysis of statements of legal reasons "is a discussion of one particular kind of statement, the considerations invoked apply to all legal statements of all kinds".[2]

While Raz has extensively authored papers delving into rights, liability, and legal competence, he has not provided explicit formal reconstructions of the intricate logical connections between statements of reason and other legal propositions. Instead,

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1 Joseph Raz, "Legal Reasons, Sources and Gaps" in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford Academic, 1979) 53 at 63 [Raz, "Legal Reasons"].

2 *Ibid* at 65.

Raz's scant logical development only aims to dismiss Dworkin's critique of legal positivism.[3] Raz defends a particular form of indeterminacy of law, which are ordinary gaps produced by the imprecision of the concepts used in the formulation of legal norms ("when the law speaks with an uncertain voice") or by conflicting legal reasons ("when the law speaks with many voices"). In such cases, judges have discretion to resolve legal disputes[4]. However, he denies that the law can have genuine gaps ("when the law is silent") and, in those cases, judges lack discretion. Raz claims that the law solves cases even when conclusive reasons are unavailable. In such circumstances, judges must repudiate claims that lack justification, specifically those unsupported by conclusive reasons for a particular action.

In this paper, I do not intend to analyse Raz's response to Dworkin's challenge to legal positivism. Instead, I criticise Raz's arguments for denying the existence of genuine gaps in the law and suggest an alternative which partially preserves Raz's intuitions but does not compromise with their implausible consequences.

II. Consistency and Completeness of Conclusive Reasons

A legal proposition is a normative statement that asserts that an action p is obligatory, prohibited or permitted. Joseph Raz reconstructs Dworkin's attack by representing the connection between propositions of law and sources by the equivalence: "$p \leftrightarrow Sp$". This formula says that the legal proposition p is true if and only if there is a social source grounding the truth of p (*ie*, Sp).[5] According to Raz's reconstruction, from the material equivalence between propositions of law and statements about legal sources follows – by substitution and transitivity – $\sim Sp \leftrightarrow S\sim p$. In other words, the *Social Sources Thesis* entails that the law regulates any action since, if there is no source for p, we can logically derive that there is a source for ~p.

Raz dismisses the conclusion because he disagrees that a decision in a case p, where legal norms do not regulate, requires assuming the existence of a source guaranteeing ~p.[6] Raz rejects this conclusion[7] because he claims that the decision in an unregulated case p does not require assuming that there is a source that guarantees ~p.[8] In these cases, judges could follow a practice of deciding according to specific values or moral considerations. Thus, Raz points out that "when doing so they are

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3 Ronald Dworkin, "No Right Answers?", in Hacker, P M & Raz, Joseph eds. *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Oxford: Oxford University Press, 1977) 58–84.

4 Unless otherwise indicated, I shall not analyse these uncertainties hereafter.

5 Raz, "Legal Reasons", *supra* note 1 at 55.

6 *Ibid*.

7 *Ibid*.

8 Legal philosophers have not paid too much attention to the formal aspects of the debate between Raz and Dworkin. Some remarkable exceptions could be mentioned: Navarro, Pablo & Rodríguez, Jorge Luis, *Deontic Logic and Legal Systems* (New York: Cambridge University Press, 2014) 150 at 158–166; Moreso, José Juan, Navarro, Pablo E & Redondo, M Cristina, "Legal Gaps and Conclusive Reasons" (2002) 68 Theoria: A Swedish Journal of Philosophy 52; Bulygin, Eugenio, "The Silence of Law" in Bulygin, Eugenio *et al.*, *Essays in Legal Philosophy* (Oxford: Oxford University Press, 2015) 293; Halpin, Andrew, "The Applications of Bivalent Logic, and the Misapplication of Multivalent Logic to Law" in Glenn, Patrick and Smith, Lionel D eds. *Law and the New Logics* (Cambridge University Press, 2017) 208.

not relying on legally binding considerations but exercising their own discretion. Professor Dworkin does not refute legal positivism. He prefers to ignore it."[9]

Raz's response to Dworkin stems from the following ideas:

A. *Social Sources as the Foundation of the Statements of Reason*

Although norms are usually considered the foundation of what we should or should not do, in his defence of the social source thesis, Raz omits the intermediary role of norm.[10] In his response to Dworkin, he prefers to deal only with the relationship between sources and legal statements. For simplicity's sake, henceforth, the source of a rule will only be the fact that an authority has formulated a particular prescription. In this sense, the *reason that* grounds the statement's truth according to which a certain action p is obligatory (prohibited, permitted *etc*) is the *social fact* that a certain authority has ordered p (to a specific normative subject x). In other words, x has a legal reason for performing p because the legal authority ordered that action. A statement about the conclusive reasons the law imposes on an individual x to perform a particular action is represented as "LRc, x, φ". Henceforth, I always refer to conclusive reasons of a given individual (*ie*, x) to perform a particular action p. Thus, instead of "LRc, x, φ", I use "LRp".

B. *The Consistency of Conclusive Legal Reasons*

Raz states that conflicts between conclusive reasons are impossible.[11] The principle of consistency of conclusive reasons is:

$$(1) \sim (LRp \wedge LR{\sim}p)$$

This formula is read as follows: it is false that there is a legal reason for p, and there is a reason for ~p. This principle of consistency of conclusive reasons is a specific thesis of practical reasoning. It is different, though compatible, with certain principles of propositional consistency, the validity of which derives from classical logic.

$$(2) \sim (LRp \wedge {\sim}LRp)$$

According to this principle, it cannot be true that there is a legally conclusive reason for p, and, at the same time, it is false that there is a conclusive legal reason for that action.

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9 Raz, "Legal Reasons", *supra* note 1 at 59.

10 *Ibid* at 62.

11 *Ibid* at 64.

C. *Conclusive Permissions*

Raz points out that an action ~p is conclusively permissible by law (*ie*, "LPerm~p") when there is no conclusive reason for p.[12] Therefore, Raz accepts that it is false that there is a conclusive legal reason for p if and only if it is conclusively permitted to omit the action p, producing the following equivalence (in symbols):

(3) (~LRp ↔ LPerm~p)

D. *Explicit Permissions*

It is worth mentioning that when an authority allows an action p, that action p is explicitly permitted. This permission occurs, for example, by formulating a permissive rule or repealing a previous prohibition of p.[13] In those cases, there is a source that cancels out a conclusive reason incompatible with the permitted action. Although both permissions are compatible (*ie*, an action may be explicitly and conclusively permitted), the most crucial difference would be that "express permissions are always source-based, but conclusive permissions are never source-based".[14] However, this last sentence seems to be an exaggeration since when the law conclusively requires an action p (*eg*, "LRp"), the principle of consistency of reasons implies that p is conclusively permitted. In that case, the basis of the conclusive permission is the source that establishes "LRp".[15]

III. Legal Gaps and Conclusive Reasons

For Raz, if there are complete legal answers about the determinacy of a particular action, the law determines the truth value of statements about conclusive reasons. In those cases, it is true:

(4) LRp ∨ L~Rp

A *genuine* legal gap arises when the law does not exhaustively determine the conclusive reasons for a particular action p. Thus, the denial of (4) would express a gap in the law, *ie* that the law is silent about the conclusive reasons for a specific action.

Therefore, Raz defines genuine gaps as:

(5) ~ (LRp ∨ L~Rp)

However, he also shows that (5) is incompatible with:

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[12] *Ibid*.

[13] *Ibid* at 65.

[14] *Ibid* at 67.

[15] The difference between explicit and conclusive permission resembles the classic distinction between strong and weak permissions (Georg Henrik von Wright, *Norm and Action: A Logical Enquiry* (New York: The Humanities Press, 1963) at 86; Alchourrón, Carlos E & Bulygin, Eugenio, *Normative Systems* (New York: Springer-Verlag, 1971) at 121–125 [Bulygin, *Normative Systems*]). Still, unless otherwise indicated, the expression "permitted" always indicates conclusive permissions without mentioning whether its foundation arises from a social source.

$$(6)\ \sim LRp \leftrightarrow L\sim Rp$$

If accepted (6), the thesis (4) LRp ∨ L~Rp – which purports to capture the complete answers the law provides about action p – is transformed by substituting equivalent propositions — into LRp ∨ ~LRp. Of course, that formula is valid, and its negation is a propositional inconsistency. Therefore, the validity of (6), which I will call "*Raz's Law*", together with the need to maintain propositional consistency, leads to the rejection of genuine gaps (Raz argues for the validity of (6)).[16]

It is worth mentioning that *Raz's Law* is logically equivalent to stating that permission is equal to the absence of prohibition. That is our thesis (3):

$$(3)\ \sim LRp \leftrightarrow LPerm\sim p$$

According to Raz, the thesis (3) (or its equivalent (6) ~LRp ↔ LPerm~p) would be a way of expressing "the familiar closure rule according to which everything that is not prohibited is allowed and vice versa"[17] and then adds that in cases where the law is silent, "closure rules, which are analytic truths rather than positive legal rules come into operation and prevent the occurrence of gaps".[18]

Three things about Raz's Law are worth mentioning.

(a) The formula (~LRp ↔ L~Rp) allows us to change from internal negation to external negation. In almost every modal logic, external negation has a classical behaviour and satisfies the standard propositional requirements of negation, *ie* completeness and exclusivity. Internal negation is heterodox since a proposition is incompatible with its internal negation, but the disjunction of both does not exhaust logical space. As Raz's Law equates both negations, we could "translate" all internal negations into external ones.

(b) Conclusive permissions resemble weak permissions, as classically reconstructed in deontic logic, and Raz builds his argument against the existence of genuine legal gaps according to this insight. The analytic truth of ~LRp ↔ L~Rp, concerning any legal system based on social sources, cannot be challenged by empirical arguments since its truth is the product of the meaning of the statements of reasons and the rules of logic. In this sense, Raz's definition of "conclusive permissibility of ~p" as the absence of a conclusive reason for p is just another way of expressing the following tautology: there is a conclusive reason for p, or there is no conclusive reason for p[19].

(c) The possibility of using only the external negation helps us to eliminate the operator "L" and transform it into a parameter without changing the meaning. In this sense, a formula like "LRp" can be transformed into "$R_L p$". Alternatively, simply into "Rp", assuming that our universe of discourse is limited to legal qualifications. If we admit this displacement, then it is easy

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16 Raz, "Legal Reasons", *supra* note 1 at 76.

17 *Ibid*.

18 *Ibid* at 77.

19 For a different understanding of the Raz's Law, see Horacio Spector, "La clausura interna de los sistemas normativos" (2013) 33 Análisis Filosófico 223; see also Horacio Spector, "Metanormas y metaclausura" en Moreso, J J *et al.* eds. *Eugenio Bulygin en la teoría del derecho contemporánea* vol I (Madrid: Marcial Pons, 2022) 35.

to notice that his concept of genuine gaps is a kind of "definitional stop" since Raz's original formula (~LRp ∧ ~L~Rp) would express a simple propositional contradiction: (~Rp ∧ Rp). Therefore, such indeterminacies are impossible since they point out a logically impossible situation.

IV. An Alternative to the Reconstruction of Genuine Gaps

Conclusive permissions resemble weak permissions, as classically reconstructed in deontic logic, and Raz builds his "logical argument" against the existence of genuine legal gaps according to this insight. However, as von Wright remarks:

> Some legal philosophers have been of the opinion that, of "norm logical necessity" normative orders are gapless and free from contradictions… This opinion is difficult to uphold in view of the empirical fact that existing legal orders sometimes contain mutually contradicting norms as well as legal gaps … The question therefore arises: Can one, one way or another, try to secure that a given legal order is free from these 'defects'? Certainly not by means of logic.[20]

To the extent that Raz's definition of genuine gaps seems more like a "definitional stop" than an analysis of legal indeterminacy,[21] it may be appropriate to explore an alternative that tries to preserve Raz's insights but avoids ruling out, by definition, the existence of genuine legal gaps.

Raz's central intuition is that gaps exist when a problem lacks complete legal answers. For this reason, a solid starting point is to analyse what happens when the law provides a complete solution, for example, when there is a conclusive legal reason for a particular action p (*ie*, LRp). If LRp is true, the law regulates p, and, at the same time, it guarantees that its negation ~p is not conclusively required. Therefore, gaps occur when it is false that the law regulates a particular action (*eg*, p).

LR, as well as LR~p, are complete determinations of the action and ~p. For simplicity's sake, I define the maximal determination of p and ~p as follows:

$$\text{DTXp: } (\text{LRp} \wedge \sim\text{LR}\sim\text{p})$$

$$\text{DTX}\sim\text{p: } (\text{LR}\sim\text{p} \wedge \sim\text{LRp})^{22}$$

Each definition of maximal determination entails the thesis of the complete legal answers (*ie*, (4) LRp ∨ L~Rp); therefore, they are incompatible with genuine gaps. In my opinion, this is the main argument analysed by Raz.

However, Raz points out that "it is not to be assumed that in every case to which reason applies there is a conclusive reason either for the action or against it. That is

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[20] Von Wright, Georg Henrik, "Deontic Logic: A Personal View" (1999) 12 Ratio Juris 26 at 33.

[21] Bulygin, *Normative Systems*, *supra* note 15 at 126.

[22] The maximal determination is relative to a universe of actions α where p and ~p are the only relevant contents. If we were interested in analysing a more extensive set of actions β (*eg*, {p; q}), 'LRp' is no longer a maximal determination (Bulygin, *Normative Systems, supra* note 15 at 39–41). Henceforth, I will only consider a universe of actions formed by a single action p.

(Rc,x, φ ∨ Rc x, ~φ) is false".[23] Adapting this idea to legal context and our formalism is equivalent to the formula (LRp ∨ LR~p). For reasons of simplicity, (LRp ∨ LR~p) – the disjunction rejected by Raz – will be called the "*thesis of exhaustivity*".

Raz cannot maintain that the thesis of exhaustivity is *always* false since it is true when there is a legally conclusive reason for p. This is an obvious consequence of applying the logical law of introducing disjunction (*ie*, LRp → (LRp ∨ LR~p)). Therefore, the falsity of the thesis of exhaustivity (LRp ∨ LR~p) is *contingent*, and this only means that in certain circumstances, the legal system is maximally indeterminate regarding p and ~p.

Maximal indeterminacy (MIT) can be defined as follows:

MIT: (~LRp ∧ ~LR~p)

In the next section, I deal with maximal indeterminacy and its consequences for defining legal gaps. However, it is essential to underline that such an indeterminacy must be clearly distinguished from a weaker concept of indeterminacy that Raz does not mention. Following Alchourrón and Bulygin, this weaker concept can be called *partial indeterminacy* (PITp).[24] The partial indeterminacy of p can be defined as follows:

PITp: ~LRp ↔ ((~LRp ∧ LR~p) ∨ (~LRp ∧ ~L~Rp)

This formula says that when there are no conclusive reasons for p, the law is *partially* indeterminate because ~LRp might be given together either with LR~p or ~L~Rp. In other words, the negation of LRp (*ie*, ~LRp) says nothing about the normative status of ~p since ~LRp is compatible with LR~p and ~LR~p, and this possibility is not ruled out by applying Raz's Law, *ie* (~LRp ↔ L~Rp).

The essential difference between partial gaps and ordinary gaps that stem from the many voices is the following: when the law speaks with many voices, there are a plurality of reasons in a conflict, and Raz claims that neither LRp nor its negation are true or false, but a partial gap is produced because it is not determined if there is a conclusive reason or not, even if we accept that, for example, ~LRp is true.

V. Partial Gaps and the Rejection of Maximal Indeterminacy

The rejection of the thesis of exhaustivity seems to provide a good starting point for reconstructing legal gaps as something different than a mere "definitional stop". So, why does Raz deny the existence of genuine gaps despite believing that the thesis of exhaustivity is false? The answer seems to be that there is no conflict in admitting that the legal system can conclusively permit both p and ~p. The falsity of the thesis of exhaustivity is equivalent to (~LRp ∧ ~LR~p), and, using *Raz's Law*, we can substitute external negations for internal negations. In this way, (~LRp ∧ ~LR~p) is equivalent to (L~Rp ∧ L~R~p). However, Raz argues that those cases only indicate that both reasons are equally balanced. That is:

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[23] Raz, "Legal Reasons", *supra* note 1 at 64.

[24] Bulygin, *Normative Systems*, *supra* note 15 at 20, 156.

> They cancel each other and it is false that there is a conclusive reason for the act and false that there is a conclusive reason for its omission. (L~Rp ∧ L~R~p) is true and it follows that LP_{er}~p ∧ LP_{er}p). This kind of situation involves no unresolved conflict or any legal gap.[25]

Unfortunately, Raz offers no argument to justify that conclusion. Nor does he provide an example that serves as a paradigmatic case for its analysis. Therefore, it is not easy to understand why he rejects a situation in which there are no conclusive reasons for an action and its denial, as a case unregulated by law, that is, a genuine case of legal gaps.

Rejecting maximal indeterminacy as a genuine legal gap has a noteworthy consequence. Raz believes that, in such cases, the law protects the (apparently) unregulated legal position, requiring judges to reject unjustified claims. According to Raz:

> It was pointed out in Essay 4 ["Legal Reasons, Sources and Gaps"] above that a dispute may be a regulated one not in virtue of a law governing its solution but because in the absence of any law applying to it a closure rule comes into operation. For example, since one of the disputants claims a right to a service from the other and since no law gives him such a right, he does not have it and the dispute should be settled in favour of the other party.[26]

However, there are at least two reasons for rejecting this analysis.

First, a rule that says "p is not prohibited if and only if p is not prohibited" – which is one of the possible readings of the closure rule – cannot resolve any case, just as the disjunction between LR and its denial says nothing about the conclusive determination of action p. Similarly, the propositional principle "((p → ~ p) ↔ ~ p)", known as *consequentia mirabilis* or *Clavius' Law*, tells us that a proposition implies its negation if and only if it is equivalent with its negation. This statement is a tautology but tells us nothing about whether p is true or false. In other words, analytic truths cannot guarantee anything that will serve to determine the truth value of a proposition or action conclusively. Therefore, Raz's stipulation about "not prohibited" and "permitted" cannot transform an unregulated case into a controversy regulated by law. We should not let the word "permitted" deceive us anymore because it only means that the action has not been forbidden. Thus, there is no guarantee or protection added to indeterminacy. Instead, that actions p and ~p are both conclusively permissible in Raz's stipulated sense only means that they are not regulated.

Second, Raz's conclusion does not follow from the premises. Suppose judges had a duty to protect unregulated situations. In that case, that duty does not arise from the meaning of the words "permitted" and "not prohibited", which is the only closure rule that Raz analyses. Instead, that obligation would have to arise from a social source (and in a way that avoided Dworkin's argument about social sources). Although finding a source-based rule of closure (*eg*, *nullum crimen sine lege*) is

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[25] Raz, "Legal Reasons", *supra* note 1 at 75.

[26] Joseph Raz, "Law and Value in Adjudication" in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford Academic, 1979) 180 at 192.

usual in contemporary criminal law, similar constraints do not guide judicial decisions in other branches of law. For example, according to Soeteman:

> …in civil law, where two disputing parties apply to a judge and the right of the one always implies the wrong of the other, there is no reason for having to assume e.g. that a judge would have to refuse compensation for all offences, which would not be specifically forbidden in advance.[27]

Therefore, it appears that one must admit that judicial duties can be as indeterminate when the law "is silent" as when it speaks with "different voices" or with "imprecise voice".

VI. Conclusions

As is well known, in *The Concept of Law*, Hart points out that the "most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in *some* sense obligatory".[28] It is, therefore, tempting to assume that obligations, as reasons for action, occupy a privileged place in the class of basic normative positions. However, Raz's proposal suggests that the basic position is permission since obligations only cancel out permitted options. According to Raz, those unregulated options can have normative consequences if the social source system does not determine them.

In this paper, I attempted to show that Raz draws more substantial consequences from the definition of "conclusive permission" than can be justified by his premises. What is necessary to complete Raz's argument? The answer is simple and well-known: explicit permissions authorising the behaviour. The existence of a rule allowing an action is the simplest way to characterise permission. Thus, "Pp" can be defined as "an authority has promulgated the norm Pp". It is usual to point out that this information is equivalent to maintaining that p is permitted in the strong sense.[29] It is also sometimes added that when p is permitted in the strong sense, it is also permitted in a weak sense, equivalent to saying that "p is not forbidden".[30] If such a definition of strong permission were accepted, then the coherence of the normative system would be presupposed. Conversely, when weak permission implies strong permission, the completeness of the normative system is assumed. Finally, if the system is complete and coherent, an action is weakly permissible if and only if it is strongly permitted (as shown for the first time by Alchourrón).[31] Conclusive

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27 Arend Soeteman, *Logic in Law: Remarks on Logic and Rationality in Normative Reasoning, Especially in Law* (The Netherlands: Kluwer Academic Publishers, 1989) 132 at 141.

28 H L A Hart, Joseph Raz & P Bulloch eds. *The Concept of Law* (Oxford: Oxford University Press, 1994) at 6.

29 Carlos E Alchourrón, "Logic of Norms and Logic of Norm-Propositions" (1969) 12 Logique et Analyse 242 at 249 [Alchourrón, "Logic of Norms and Logic"].

30 Von Wright, Georg Henrik, "On the Logic of Norm and Action" in Von Wright, Georg Henrik, *Practical Reason, Philosophical Papers I* (New York: Cornell University Press, 1984) 100 at 121–122.

31 Alchourrón, "Logic of Norms and Logic", *supra* note 29 at 264–265.

permissions are an attempt at a hybrid of both types of permissions. That is how the illusion arises that they can ensure completeness and consistency.

In legal theory, the commonplace observation prevails that legal systems inherently harbour indeterminacy, as legal authorities cannot anticipate every conceivable situation. As an illustration, Honoré provocatively questions, "…how can legal systems be complete? Where is the inexhaustible code by which the state classifies a citizen's conduct, after the event, as rightful or wrong?".[32] In contrast, Raz's argument on gaps presents a distinct perspective within the familiar discourse on normative closure, emphasising the interdefinability between prohibited and permitted actions.

I claimed that analytical rules about the relationship between "forbidden" and "permitted" indicate very little about the complete regulation of actions. To believe that such analytical truths help rule out gaps in the law is as naïve (though true) as saying that systems are complete when they have no gaps. On the contrary, acknowledging that completeness cannot be assumed, normative authorities, on certain occasions, close a normative system through a rule explicitly permitting everything not expressly prohibited (*eg*, Article 19 of the Constitution of Argentina). However, these positive rules are contingent on social sources, and presuming their existence in any legal system seems untenable.

[32] Tony Honoré, *Making Law Bind* (Oxford: Oxford University Press, 1987) at 1.