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Does Incommensurability Matter? Incommensurability and Public Policy

Richard Warner, *Chicago-Kent College of Law*

DOES INCOMMENSURABILITY MATTER? INCOMMENSURABILITY AND PUBLIC POLICY

RICHARD WARNER[†]

Reasons are incommensurable when, and only when, they cannot be compared as better, worse, or equally good.¹ Incommensurability so conceived is relevant to choosing public policy because it is a barrier to realizing the following ideal: In forming public policy, we should select the policy supported by the best reasons. As an ideal, this surely seems uncontroversial. Time constraints, lack of information, and the vagaries of group political processes are, of course, barriers to realizing this ideal, as is incommensurability. The latter, however, is a significantly different barrier. When we encounter incommensurable reasons in crucial areas of public policy, we cannot do what we should do: Choose the option supported by the best reasons. This problem is significantly different from the problems posed by lack of time, lack of information, and the caprices of politics. The latter problems prevent us from realizing the ideal in practice; incommensurability prevents us from realizing the ideal in practice or in principle because it is impossible in principle to compare the relevant reasons. Does this mean that it is not generally true that we should select the policy supported by the best reasons? Must we, in cases of incommensurability, decide in some other way? Or,

[†] Associate Professor of Law, Chicago-Kent College of Law. I am indebted to Stuart Deutsch, Sheldon Nahmod, Henry Perritt, Calvin Sharpe, and Richard Wright for helpful comments on earlier drafts. I owe a special debt to Richard Wright for years of discussion on this topic.

¹ Compare Joseph Raz: "A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value." JOSEPH RAZ, *THE MORALITY OF FREEDOM* 322 (1986). Note that Raz defines incommensurability in terms of values, not reasons. The two approaches are largely intertranslatable. See *infra* text accompanying notes 12-14. Indeed, Raz is quite willing to describe reasons as incommensurable. See RAZ, *supra*, at 338, 340 (explaining that the ability to choose one option over another does not establish that the reason for the first choice is commensurable with the reason for the alternative). Generally, discussions of incommensurability involve talk of reasons, values, options, lives, careers, choices, and various other items as being incommensurable. For an overview of incommensurability, see Ruth Chang, *Introduction*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 1, 3 (Ruth Chang ed., 1997) [hereinafter *INCOMMENSURABILITY*]. We focus on reasons since our concern is with reasons for choosing public policy.

should we find some way to eliminate or avoid the incommensurabilities we encounter? These questions matter.

Matter to whom? We will not reject, modify, or defend any existing law. Our concern in resolving the dilemma is simply to advance a certain description and understanding of our laws and of the processes that create them. Some may complain that if the investigation neither recommends change nor defends the status quo, it is of interest only to theoreticians and not to those whose primary concern is the practical one of deciding what laws should in fact regulate our actions. We might simply, and correctly, reply that theory matters. More pointedly, however, we can reply that ignoring incommensurability so profoundly misconceives the value and dignity of individuals that the resulting conception of persons and their motivations is better labeled a cartoon rather than a conception. To base our laws on such a distorted caricature is to misunderstand ourselves, our laws, and our relation to the state and to one another as citizens. If avoiding such a misunderstanding is not "practical," then such a myopically philistine "practicality" should not be our only concern in making public policy.

This Article is a plea for attention to our collective identity as a society in the making of public policy. For example, suppose that it would greatly promote economic development to allow industrial pollution that would deposit a small amount of lead in drinking water. Assume that one consequence would be that one in every thousand infants in a relatively small residential area would be mentally disabled. How should we decide? One natural reaction is to marshal and compare the reasons to benefit economically against the reasons to protect the health of infants. Attention to incommensurability leads us to ask a different question: Do we wish our collective identity as a society to be defined in part by our willingness to disable infants for economic gain? Some will object immediately that the comparative approach readily accommodates such a concern. Why is a concern about collective identity not simply one more reason, perhaps a very important reason, to be considered along with all the other relevant reasons? An adequate understanding of incommensurability reveals why it is not, and why the point is important.

The key to understanding incommensurability and its consequences lies in understanding certain features of individual rational action. This may seem odd. Our primary concern is public decisionmaking and public rationality, not individual rationality. To dispel the air of oddity, consider law and economics. The descriptive

claims and normative recommendations of law and economics depend on a theory of individual rationality, the rational choice theory of individuals as expected-utility maximizers. The same is true for the descriptive and normative perspective incommensurability provides, although the theory of individual action is decidedly different. Indeed, the existence of incommensurability is inconsistent with the claims of rational choice theory, and reflection on incommensurability reveals the serious limitations of rational choice theory as a perspective from which to frame public policy.²

I. POLITICAL LEGITIMACY AND THE COMPARISON OF REASONS

Before we turn to issues about individual action, we should consider briefly why it seems so clear that we should strive to select the policy supported by the best reasons. The short and obvious answer is that proceeding in any other way would be irrational. A longer answer—the answer we need—links rationality with political legitimacy. That answer begins with the observation that, in a democracy, a governmental decisionmaker “accepts the responsibility, among others, to explain, particularly to those adversely affected, why different treatment of others in other circumstances is not capricious or arbitrary or discriminatory.”³ In the making of public policy, there will almost always be “those adversely affected,” as public-policy decisions typically impose costs on some and benefits on others. How does a decisionmaker show that the treatment is not “capricious or arbitrary or discriminatory”? Surely by articulating the reasons for the policy, and—especially to address the concerns of the adversely affected—explaining why those reasons are better than the reasons for competing policies that would have allocated costs and benefits differently.

Articulating the reasons for policy decisions is a requirement of political legitimacy. As Steven Burton emphasizes, “[i]n a society that cares about justice . . . , decision making based on reason . . . , not preference or faith, is crucial for legitimacy.”⁴ The ideal of legitimacy

² I discuss rational choice theory and its incompatibility with incommensurability in Richard Warner, *Impossible Comparisons and Rational Choice Theory*, 68 S. CAL. L. REV. 1705 (1995).

³ Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in PRAGMATISM IN LAW AND SOCIETY 359, 373-74 (Michael Brint & William Weaver eds., 1991). Dworkin is talking about courts, but the remark applies equally to nonjudicial public decision-makers.

⁴ Steven J. Burton, *Reaffirming Legal Reasoning: The Challenge from the Left*, 36 J. LEGAL EDUC. 358, 368 (1986).

is the ideal of a government that commands compliance with its dictates, not through the threat of force, but because citizens, insofar as they are rational, see themselves as having adequate reasons to comply.⁵ Consequently, governmental decisionmakers undermine their legitimacy when they fail to base policy on a comparison of reasons. To undermine, however, is not necessarily to destroy. We may have reasons to obey particular commands that we regard as irrational, for we may in general regard the state as conducting itself in a way that enlists our rational assent to almost all of its commands. On the other hand, too many ill-reasoned decisions and policies will destroy legitimacy by ensuring that we will fail to have, and to see ourselves as having, adequate reason to comply.

An example illustrates the link between legitimacy and public decisionmaking based on comparing reasons:

Due to budgetary restrictions, a town must decide whether to cut funding for the schools, the fire department, or the police department, although needs for all three services are urgent and increasing. While in some circumstances the rankings might be fairly easy to make, it is equally easy to imagine circumstances in which individuals might find it difficult or impossible to make them, for instance when the town's desire to fund each service is supported by weighty, but very different reasons.⁶

Richard Pildes and Elizabeth Anderson offer this example in their critique of social-choice theory when they claim that the "very different" reasons are incommensurable ("the rankings [are] . . . impossible to make").⁷ Suppose, *arguendo*, that this is true, and to simplify, drop the fire department, and suppose that the choice is a binary one between cutting funding for the schools or cutting funding for the police. Imagine that the town council decides to fund the police. How will it justify its decision to the proponents of funding the schools? It can, of course, cite the reasons it has for funding the police, but what will it say when the proponents of the schools ask why

⁵ The reasons in question are reasons other than the merely prudential reason of avoiding punishment by the state.

⁶ Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2160 (1990).

⁷ Pildes and Anderson actually say that "individuals might find it difficult or impossible to make" the rankings. *Id.* This is a slip. Mere difficulty is insufficient to show impossibility—even if the difficulty is so great that we could characterize it as practically impossible to make the comparison. Impossibility of comparison is not a matter of comparison being difficult; it is a matter of it being impossible.

those reasons are better than the reasons for school funding? If the reasons cannot be compared, the council cannot answer this question. But surely the proponents of funding the schools are entitled to an answer. How else is the town council to meet the demand of democratic legitimacy that it explain why its decision is not "capricious or arbitrary or discriminatory"?

A qualification: The town council need not provide the explanation. It would be extremely unrealistic to insist that every public decisionmaker respond to demands for explanations from every person adversely affected by a decision. The requirement is that a rational, sufficiently informed, and intelligent citizen should, in principle, possess or be able to construct an adequate explanation. Political leaders, political parties, and general political discourse should, but lamentably do not, play leading roles in ensuring that citizens sufficiently closely approximate such an ideally rational, informed, and intelligent citizen. Having noted that the decisionmaker need not provide an explanation, we will, for expositional convenience, talk as if the decisionmaker does, and should, provide the explanation.

Assuming public decisionmakers ideally should select policy based on the best reasons, how should such decisionmakers respond to incommensurability? Of course, there is nothing to worry about if incommensurability does not exist. Does it?

II. DOES INCOMMENSURABILITY EXIST?

Different theorists mean different things by incommensurability. We will focus on—to use Joseph Raz's term—"constitutive incommensurability."⁸ Constitutive incommensurabilities arise when "[b]eing engaged in a pursuit or a relationship includes belief that certain options are not comparable in value."⁹ The point is that the "pursuit or relationship"¹⁰ is in part defined by the belief; without the belief, one does not count as involved in that pursuit or relationship. Raz offers friendship as an example: "Only those who hold the view that friendship is neither better nor worse than money, but is simply not comparable to money or other commodities are *capable* of having friends."¹¹ An initial difficulty here is that Raz explains constitutive

⁸ See RAZ, *supra* note 1, at 345-53.

⁹ *Id.* at 356.

¹⁰ *Id.* at 355.

¹¹ *Id.* at 352.

incommensurability in terms of the incomparability of values, not reasons.¹² In general, the incommensurability literature identifies a wide array of items as capable of incommensurability: options, goods, actions, and life plans, for example, as well as values and reasons.¹³ We have focused on reasons because our concern is with reasons for choosing public policy. One, however, easily may translate Raz's talk of values into talk of reasons.

In this context, "value" has the sense it does when, for example, I say, "I value my daughter's playfulness." To say this is to express a certain attitude toward her playfulness, an attitude that typically finds expression in thoughts, feelings, and actions. Valuing as an attitude is intimately related to having reasons for action. Suppose, for example, I value philosophical discussion. I value it in the sense that I offer participating in philosophical discussion as a reason to, for example, participate in this Symposium; moreover, I offer it as a reason that is final, as a reason that needs no further justificatory or explanatory backing by any other reason. Thus, suppose you were to ask, "Why participate in philosophical discussion?" I would answer, "For its own sake." I do not engage in the activity simply as a means to an end; rather, I regard it as an end in itself.¹⁴ Valuing—in one good sense of the term—is simply regarding some experience, activity, or item as a source of final reasons. One also, of course, can value something derivatively as a means to something one values for its own sake. In such a case, one sees oneself as having a reason to realize the derivatively valued item as a means to realizing what one values for its own sake.

Expressed in terms of reasons, Raz's claim about friendship becomes the claim that friendship is defined in part, for example, by the belief that, when presented with the opportunity to gain \$1,000,000 by betraying one's friend, one cannot, insofar as one is really a friend, decide whether to betray by comparing the reasons to take the money to the reasons to remain loyal. Friendship is constituted in part by not conditioning its continued existence on the outcome of such

¹² For Raz's general account of incommensurability in terms of value, see *supra* note 1.

¹³ See *supra* note 1 (identifying other items as capable of incommensurability).

¹⁴ A "means" need not be a causal means. Looking at the Cézanne landscapes results in—in the sense of "realizes," not in the sense of "causally produces"—looking at impressionist landscapes, since that is what the Cézannes are. I draw some relevant distinctions in RICHARD WARNER, FREEDOM, ENJOYMENT, AND HAPPINESS 143-45 (1987).

calculations. Such is the claim. Is it true? More generally, are there pursuits and relationships defined in this way? The key to seeing that the answer is "yes" is to distinguish two senses of "reason."

A. *Two Senses of "Reason"*

To illustrate the first sense of "reason," suppose I devote considerable time to chess. When asked why, I explain that a well-played game displays the beauty of forces in dynamic tension; the game reveals the creativity, courage, and practical judgment of the players in an exercise of intuition and calculation akin to both mathematics and art. These considerations are my reasons for playing chess. They are reasons in the sense that they play a certain justificatory-motivational role. So, for example, if asked why I devote time to chess, I would (other things being equal) cite the above considerations as my justification. The same considerations motivate me to play chess, study chess, go to the chess book sections of bookstores, and so on.¹⁵

¹⁵ There is an important relationship in the case of reasons between justification and motivation: When a consideration is a reason for action, then typically a person is, or should be, motivated to act because the person thinks that the consideration justifies the action. This "because" covers many significantly different cases, but the differences do not matter here. A full philosophical treatment of incommensurability would explore these issues in detail, as well as issues related to the "or should be" in "a person is (or should be) motivated to act because"

To see the point of the "or should be," consider Mason. Mason is a gourmet who works as a restaurant reviewer for newspapers and magazines. His doctor tells him he has gout and must, on pain of destroying his health, stop eating the rich French food in which he delights. But Mason persists in his gourmet pursuits; he thinks of himself as a badly injured warrior who, although doomed to defeat, defiantly refuses to cease fighting for his ideal—the ideal for the gourmet Mason being the refinement of appetite as a source of pleasure. He does not deny that the health considerations justify ceasing his gourmet activities; however, no matter how much he reflects on those justificatory considerations, they fail to motivate him to curtail his gourmet delights. Mason's dismayed friends try to argue him out of his destructive course. They think that the justificatory considerations should motivate Mason. In reflecting on such cases, it is helpful to note what Finnis calls "a fundamental ambiguity" in the concept of a reason:

"Reasons," "choices" and "action" are words afflicted with a fundamental ambiguity. Its principal source is that we are animals, but intelligent. All our actions have an emotional motivation, involve our feelings and imagination and other aspects of our bodiliness But rationally motivated actions also have an intelligent motivation, and seek to realize (protect, promote) an intelligible good. So our purposes, the states of affairs which we seek to bring about, have a double aspect: the goal which we imagine and which engages our feelings, and the intelligible benefit which appeals to our rationality by promising to instantiate . . . some basic human good. The word "reason" is of-

To illustrate the second sense of “reason,” compare me as a chess player to Jones, for whom the considerations noted above do not play a reason’s justificatory-motivational role. There are a variety of possible explanations for this. Devoting himself to chess might be a possibility that Jones closed off earlier in life. He might have decided explicitly one day to devote his time and energy to other pursuits, or commitments might have gradually grown and developed in ways that left no time or energy for chess, or Jones simply might never have had any interest in chess at all. Whatever the scenario, the result is that the considerations do not play the relevant justificatory-motivational role. The considerations are confined for him to the role of making the actions of others intelligible. Jones still can acknowledge that the considerations constitute a reason, in the sense that, for others, they play a reason’s justificatory-motivational role.

B. *An Example*

Now, how does this distinction between senses of “reason” help explain constitutive incommensurability? An example is helpful. Suppose Jones and I are revolutionaries. An official in the government we oppose offers me \$1,000,000 to reveal names, hiding places, and plans of my fellow revolutionaries. I refuse. The official then makes the same offer to Jones, who also refuses. His refusal is based on a comparison of reasons. Jones would use the money to buy a yacht that he would sail around the world, and, in light of this ambition, he regards the money as a potential reason to betray the revolution. However, he also regards his loyalty as providing a reason not to betray the revolution. On reflection, he finds the loyalty-provided reason not to betray to be better than the money-provided reason to betray. However, as Jones cheerfully acknowledges, had the price been higher—say \$10,000,000—the result would have been different, and he would have betrayed the revolution without hesitation.

I might be thought to be relevantly like Jones. Indeed, suppose I share Jones’s circumnavigational fantasy, and that I, too, would use

ten used loosely to refer to one’s purposes, without distinguishing between a purpose motivated ultimately by nothing more than feeling and a purpose motivated by one’s understanding of a basic human good. I shall be using the word “reason” . . . to refer only to reason in the latter sense.

John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 1 (1990). Mason’s friends think that the justificatory considerations about health should motivate Mason because such a motivation would lead Mason to instantiate the basic human good of health.

the money to buy a yacht and sail around the world. Do I not have a reason to betray the revolution in order to get the money? But since I refuse the bribe, doesn't this mean that I must take my loyalty-provided reason not to betray to be better than the money-provided reason to do so? No. I do not refuse as a result of comparing reasons. I refuse precisely because I do not compare. I regard myself as having a loyalty-provided reason not to betray the revolution, and no money-provided reason—at least, no such reason that I will consider—to betray the revolution. I treat the offer of the money as if it provided no reason whatsoever to betray the revolution; I exclude it entirely from my deliberations. I refuse the bribe because I have a reason to do so, and no competing reason—no competing reason that I will consider—weighing the other way. I adopt this stance because it is constitutive of, definitive of, what I mean by loyalty that the money-provided considerations do not play the justificatory-motivational role of a reason for me.

Let us call such commitments “reason-excluding.” How are such commitments possible? Here is one way: My commitment to the revolution guarantees that the financial considerations are motivationally completely inert—they cannot motivate me at all to betray. In short, if the considerations do not motivate, they necessarily cannot play the justificatory-motivational role of a reason. The closing off of this motivational possibility is no accident; rather, it is definitive of the way in which I value the revolution. If the financial considerations inclined me to betray it, I would not be loyal to the cause in the way I am. Of course, I might be motivated—if I were drugged, incapacitated, confused, or in some other way disordered. The point is that when my commitment is at full force and my capacity to understand it and conform my thought and action to it is undiminished, then I cannot be motivated to betray the revolution in order to gain money.

It is essential to note that commitments, however, do not have to render considerations motivationally inert to ensure that those considerations fail to play the justificatory-motivational role of a reason. Recall what it is to play that role. It is not enough that a person merely acknowledges the justificatory force of a consideration. Jones does that when he acknowledges the justificatory force of the considerations I advance to account for my chess playing. Considerations play the relevant role only when a person actually uses (or would in appropriate circumstances use) those considerations to justify his or her own actions. This is what Jones does not do in the chess-playing

example. To transfer the observations to the loyalty example, consider that my commitment to the revolution is, in part, defined by the fact that I refuse to use considerations of financial gain to justify betraying the revolution.¹⁶ In this way, my commitment, as long as it remains in force, ensures that the financial considerations fail to play the justificatory-motivational role of a reason for me.

In both of the foregoing scenarios—no motivation, or a refusal to use as a justification—my loyalty cannot be bought. When Jones is offered money to betray the revolution, his reaction is, “How much?”; my reaction to a similar question is, “Money is not relevant.” I am shocked at Jones. I do not think he means the same by loyalty as I do. I mean a reason-excluding commitment; Jones does not agree.

Now, what do such commitments have to do with incommensurability? The answer is that they create incommensurability. Thus, I cannot compare the money-provided reason to betray the revolution to the loyalty-provided reason not to do so. Such a comparison would be inconsistent with my commitment. Suppose I were to treat the comparison of reasons as relevant to my decision; suppose, that is, that I were to see the comparison of reasons as determining, at least in part, whether I would betray the revolution. *To so regard the comparison is to treat the financial considerations as a reason to betray the revolution, and that is precisely what my commitment does not allow.*¹⁷ To compare a reason is not to exclude it.¹⁸

¹⁶ As we remarked *supra* note 15, a further feature of the justificatory-motivational role of a reason is that the considerations motivate because the person regards them as justifying action. It may well be typical of reason-excluding commitments that this link between justification and motivation is broken.

¹⁷ Raz does not explain constitutive incommensurabilities in terms of reason-excluding commitments. He does, however, come very close to offering such an explanation. Consider his remarks on selling children:

For many, having children does not have a money price because exchanging them for money, whether buying or selling, is inconsistent with a proper appreciation of the value of parenthood. . . . [B]oth their rejection of the idea that having children has a price and their refusal even to contemplate such exchanges are part of their respect for parenthood, . . . [and] of the very high value they place on having children.

RAZ, *supra* note 1, at 348.

¹⁸ Some may object that the most this shows is that a comparison of reasons cannot play any role in my decision. But surely—the objection goes—showing that I exclude the reasons is not the same as showing that I cannot compare them. Why could I not see the reasons as comparable—although not in a way relevant to deciding whether to betray the revolution? There is no need to settle this issue. What we care about is the comparison relevant to deciding what to do. A comparison of reasons irrelevant to decisionmaking is hardly worth consideration.

Two further points of clarification are in order. First, there is no need to argue over words here, over whether “loyalty” really signifies a reason-excluding commitment. The essential point is that we care about whether people are the sort who will see financial gain as a reason to betray commitments to causes, institutions, and other persons, and we have the concept of loyalty to mark the distinction. It is the difference that matters, not the word that names it. If someone wants to insist that Jones, who would sell his loyalty for a sufficiently high price, can be described as loyal, we have nothing to argue about as long as we recognize the difference and its significance.

Second, I do not claim that there are no circumstances in which one might betray loyalty for money. Suppose, for example, that I have a daughter who will die if she does not receive medical treatment costing \$1,000,000. I might betray the revolution to get the money, but, in doing so, I still would not be like Jones. Jones recognizes the financial reasons to have the money as reasons to betray the revolution; I recognize saving the life of my daughter as a reason to betray. The financial considerations are considerations I reject as reasons to betray. In general, I do not mean to suggest that what loyalty allows and disallows as a reason is well-defined. That is certainly not true; rather, in general, one discovers case by case what one will and will not count as a reason.

This understanding of the incommensurability-creating commitments explains why such commitments do not prohibit those household economies in which one trades goods such as health and safety against a variety of other goals. One’s commitment can prohibit betraying the revolution for financial gain while allowing one to allocate one’s time between caring for one’s family and spying on the government, or buying a new assault rifle instead of the very safe, but prohibitively expensive, car in which to drive one’s daughter. This is just what we should expect. In excluding reasons, our commitments set boundaries to comparison; they block comparisons we otherwise could make. Such boundary-setting does not prohibit all comparisons; that would make life unlivable. Reason-exclusion defines a line that prohibits some comparisons. To return to the loyalty example, the essential point is that excluding reasons—possibly different reasons for different people—in part defines loyalty. The boundary the reason-exclusion defines may differ for different people. But, whatever line it defines, the point is that, given the reason-excluding commitment, one cannot—cannot consistently with the commit-

ment—compare the excluded reasons to reasons one recognizes as legitimate bases for action.

C. *Incommensurability and the Self*

Brief reflection should suffice to identify a variety of cases of incommensurability now that the loyalty example has revealed the structure of reason-excluding commitments. Commitments to children, to friends, and to ideals, for example, are often reason-excluding commitments. That such commitments are typically commitments through which we define who we are underscores their importance, and helps locate their position on the intellectual landscape, to note.¹⁹ William James captures the relevant concept of the self. "I am," James writes,

often confronted by the necessity of standing by one of my empirical selves and relinquishing the rest. Not that I would not, if I could, be both handsome and fat and well dressed, and a great athlete, and make a million a year, be a wit, a *bon-vivant*, and a lady-killer, as well as a philosopher; a philanthropist, statesman, warrior, and African explorer, as well as a 'tone-poet' and saint. But the thing is simply impossible. The millionaire's work would run counter to the saint's; the *bon-vivant* and the philanthropist would trip each other up; the philosopher and the lady-killer could not well keep house in the same tenement of clay. Such different characters may conceivably at the outset of life be alike *possible* to a man. But to make any one of them actual, the rest must more or less be suppressed. So the seeker of his truest, strongest, deepest self must review the list carefully, and pick out the one on which to stake his salvation. All other selves thereupon become unreal, but the fortunes of this self are real. Its failures are real failures, its triumphs real triumphs, carrying shame and gladness with them.²⁰

James describes a widely shared conception of the self. One makes oneself the person one is by one's commitments—what one "stands by." Commitment, as James emphasizes, both opens up some possibilities and closes off others. We are defined as much by what we cannot do as by what we can. For example, suppose someone suggests to you that, in a committee meeting, you vote as political expediency dictates, not as your conscience demands. You respond with shock and outrage, "I cannot do that. What would ever make you

¹⁹ I discuss self-defining commitments in detail in WARNER, *supra* note 14, at 53-118.

²⁰ 1 WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 309-10 (Dover Publications, Inc. 1950) (1890). The artless sexism of the times ("a man," "lady killer") perhaps should not go unnoticed.

think I could? What sort of person do you think I am?" It is commonplace for us to define ourselves by what we cannot do.

Similarly, reason-excluding commitments open up some possibilities and close off others. This is why they are particularly important in defining our identities. Of course, not every identity-defining commitment is a reason-excluding commitment. The reason-excluding commitments are simply one important kind of identity-defining commitment. This is not to say that every reason-excluding commitment lies at the center of our self-definition. For example, one might be—as indeed many are—committed to maintaining one's health in a way that excludes financial considerations as reasons to forgo needed treatment. But this commitment need not figure prominently in one's sense of one's identity. Commitments form a continuum, ranging from those at the center of our self-definition to those that lie at the periphery. We will return to the connection between identity and incommensurability when we consider incommensurability's impact on public policy. However, we first should turn to a crucial objection to our account of incommensurability in terms of reason-exclusion.

D. The "*Underlying Comparison*" Objection

Our claim is that in reason-excluding commitments reasons are excluded, not compared. Thus, in the loyalty example, we claimed that my commitment to the revolution was defined by my excluding financial gains as a reason to betray the revolution. The objection is that we simply have overlooked an obvious way in which an underlying comparison could explain the exclusion. The claim is that "reason-exclusion," properly understood, dissolves into reason comparison. Consider my commitment in the loyalty example. I do have reasons for that commitment, and, given that I persist in the commitment, I must judge those reasons to be better than the reasons against having the commitment. Why not take this as the comparative judgment that underlies my excluding the money as a reason to betray the revolution?

There are two questions to distinguish here. First, can we *sometimes* compare reasons for and against having a commitment? Second, can we *always* compare reasons for and against having a commitment? The answer to the first question is clearly yes. Suppose you are considering a choice between a career as a jazz pianist and a career as a lawyer. This is a choice between two commitments—a commitment to the jazz-pianist life plan, or a commitment to the

lawyer life plan. There might be compelling reasons that one commitment is better than the other. You might, for example, be unhappy as a jazz musician but not as a lawyer; or perhaps as a jazz pianist you would create brilliant musical scores in which many would take pleasure while as a lawyer you would actually do great harm by defending polluting corporations.²¹

Now let us turn to the second question: Can we *always* compare reasons for and against having a commitment? We can pose the question somewhat more precisely by first noting that reasons for or against having a commitment will always be reasons for or against that commitment as opposed to another. The choice-of-career example illustrates such a situation. But, one might object, what of the situation in which there is just one commitment at issue? Suppose, for example, that I am simply considering a commitment to a career as a jazz pianist without the competing possibility of a career as a lawyer. How is my choice between one commitment and another? The answer lies in the fact that to have an identity as a person involves having some set of commitments. Thus, in the scenario just envisioned, my choice is between adding a commitment to a career as a jazz pianist, or remaining with my current stock of commitments.

Let us ask then: Given any two possible commitments *C* and *C'*, can we rank the totality of reasons to adopt *C* versus the totality of reasons to adopt *C'* as better, worse, or equally good? Let us first consider answering this question from an objective point of view valid for all rational agents.²² Suppose we could rank the relevant reasons. Consider the commitments, as there would undoubtedly be ties, at the very top of the ranking. These would be the commitments that would be most rational to have. It is difficult to see how we could rank commitments in this way unless, to quote John Finnis, "(a) human beings had some single, well-defined goal or function (a 'dominant end'), or (b) the differing goals which men in fact pursue

²¹ See RAZ, *supra* note 1, at 341 (demonstrating why certain commitments are superior).

²² We will leave this talk of points of view at an intuitive level. Thomas Nagel's work is, of course, the current *locus classicus* here. See, e.g., THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986). A point of view valid for all rational agents would be one that a person would have to adopt to count as rational. Of course, some will still question whether such a point of view exists with respect to substantive moral issues. For a discussion of relevant issues, see STEPHEN L. DARWALL, *IMPARTIAL REASON* (1983), and Thomas E. Hill, Jr., *Darwall on Practical Reason*, 96 *ETHICS* 604 (1986) (reviewing DARWALL, *supra*).

had some common factor, such as 'satisfaction of desire.'"²³ But, as Finnis notes, "neither of these conditions obtains. Only an inhumane fanatic thinks that man is made to flourish in only one way or for only one purpose."²⁴

A brief comment is in order on the role of this argument in Finnis's work. It is Finnis's argument that "basic goods" are incommensurable. A basic good is an experience, activity, or item that one must value to qualify as rational (we may put aside disputes over whether basic goods in the relevant sense exist).²⁵ Finnis takes it to be clear that there is a plurality of basic goods, and he contends—certainly correctly—that it is very implausible to think that all the possible tradeoffs among basic goods can be ranked as better, worse, or equally good. Our argument that ranking is impossible for commitments rests on very similar grounds. There is obviously a plurality of possible commitments, and, for the reasons Finnis gives, it is manifestly implausible to think that all possible commitments could be ranked as better, worse, or equally good.

So much for a comparison based on an impersonal point of view. Now, let us turn to a comparison based on a personal—or at least less-than-universal—point of view. For convenience, I label any less-than-universal point of view "personal." Returning to the choice-of-career example, suppose you are considering a choice between a career as a jazz pianist and a career as a lawyer. A personal perspective might provide grounds for choice. For example, if it has been your life-long dream to be a creative artist, then other things being equal, this might be a sufficient ground to choose being a jazz musician over being a lawyer. However, it could be that no such ground distinguish the two careers. Imagine that, on the one hand, you have values that pull you toward the lawyer-life: You value stability in personal and financial matters, and you value the role lawyers play in the legal system. Consequently, you have reasons to choose the life as a lawyer. On the other hand, suppose that you also have reasons to choose the life of a jazz musician, for you have values that pull you toward that life: You adhere to an ideal of creative expression in music, an art for which you have a deep love. In this scenario, from the perspective of the lawyer-values, you have better reason to choose to be a lawyer. Yet from the perspective of the jazz musician-values, you have better

²³ JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 113 (5th prtg. 1988).

²⁴ *Id.*

²⁵ For Finnis, such goods include: life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion. *See id.* at 85-90.

reason to be a musician. To choose either career is to consign the values realized in the other career to a minor—and perhaps eventually vanishing—role. You are pulled both ways, and your problem is that your current point of view includes both sets of values, but does not provide any neutral perspective from which to adjudicate between the competing reasons. There is no neutral perspective from which you can assess the choices as better, worse, or equally good. Consequently, you must arrive at, or construct, such a perspective. Until this is done, you oscillate uncomfortably between the alternatives—unable to decide, but pulled toward this one, then that one. Moreover, you would be unlikely to adopt an arbitrary decision procedure, such as flipping a coin; or, if you did, it would not be a sign of indifference, but of desperation, of an inability to decide in any other way. The clarification and resolution of the values you seek cannot be achieved by such arbitrary mechanisms.

We find ourselves not infrequently in such situations. Our personal perspectives hardly provide complete maps to guide us through the decisions we must make; rather, they offer sketches that leave large areas barely filled in, if filled in at all. Moreover, our perspectives not atypically incorporate competing, or outright inconsistent, claims and views. David Wiggins has aptly captured these aspects of practical reasoning:

No theory, if it is to recapitulate or reconstruct practical reasoning even as well as mathematical logic recapitulates or reconstructs the actual experience of conducting or exploring deductive argument, can treat the concerns which an agent brings to any situation as forming a closed, complete, consistent system. For it is of the essence of these concerns to make competing and inconsistent claims. (This is a mark not of irrationality but of *rationality* in the face of the plurality of ends and the plurality of human goods.) The weight of . . . these concerns is not necessarily fixed in advance. Nor need the concerns be hierarchically ordered. Indeed, a man's reflection on a new situation that confronts him may disrupt such order and fixity as had previously existed, and bring a change in his evolving conception of the point . . . or the several or many points, of living or acting.²⁶

This completes our argument that constitutive incommensurability exists. However, before turning to its role in public policy, it is worth distinguishing constitutive incommensurability from another kind of incommensurability, a kind that, for want of a better term, I

²⁶ David Wiggins, *Deliberation and Practical Reason*, in *ESSAYS ON ARISTOTLE'S ETHICS* 221, 233 (Amélie Oksenberg Rorty ed., 1980) (endnote omitted).

call "plain incommensurability." These were not distinguished earlier because it is only in the context of the foregoing discussion that we can make the distinction clearly.

E. *Plain Versus Constitutive Incommensurability*

Plain incommensurability arises when we lack a perspective from which to rank reasons as better, worse, or equally good. To contrast plain and constitutive incommensurability, consider the following example. Katrina is a Russian engineer in the 1930s who favors the development of the untouched Russian Steppe. She believes that "[o]ur steppe will truly become ours only when we come with columns of tractors and . . . break the thousand-year-old virgin soil. On a far-flung front we must wage war. We must burrow into the earth, break rocks, dig mines, construct houses. We must take from the earth."²⁷ Katrina's vision is of humans as masters of the earth, transforming it in their image, and she emphasizes the enormous benefits to the Russian people of an industrialized steppe. But she has never seen the steppe, and when she finally travels through it, she is overcome with awe at the untamed and untouched vastness of it all. Now, imagine that Katrina faces a dilemma similar to the choice-of-career example discussed earlier. On the one hand, from her "columns of tractors" perspective, she has compelling reasons to exploit the steppe; on the other hand, from the perspective of her sense of awe, she has compelling reasons to leave it untouched. As with the choice-of-career example, she lacks any neutral perspective from which to evaluate these reasons as better, worse, or equally good.

The point to emphasize is that Katrina's incommensurability need not involve any reason-excluding commitments, although it could. In other words, it could be definitive of the particular form her awe takes that she excludes benefiting the Russian people as a reason to exploit the steppe. But this need not be true. Awe can exist without such a reason-exclusion. We can conceive of Katrina's incommensurability as arising simply because she has competing concerns and no per-

²⁷ Albert E. Burke, *Influence of Man upon Nature—The Russian View: A Case Study*, in *MAN'S ROLE IN CHANGING THE FACE OF THE EARTH* 1035, 1048 (William L. Thomas, Jr. ed., 1956) (quoting a passage from a 1929 textbook used in the former Soviet Union for the education of 12- to 14-year-olds); see also CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS* 112 (1987) (arguing that "[a] true earth ethic would answer 'yes' to the question 'whether there is any cause to condemn an action that radically disturbs the environment but represents a net welfare gain for humans, even when the reduced value of the environment is accounted for'").

spective from which to rank the relevant reasons as better, worse, or equally good.

Plain incommensurability certainly is relevant to public policy and deserves careful study. With regard to public policy, John Finnis has done the ground-breaking work in this area.²⁸ Our concern, however, is with constitutive incommensurability, because it has been less studied and raises special problems for public policy. Thus, for the remainder of this Article, by "incommensurability," I mean constitutive incommensurability.

III. DOES INCOMMENSURABILITY MATTER?—FIRST PASS

We have made a case that incommensurability exists, but have we not—in explaining incommensurability as a matter of personal commitment—also shown that it is irrelevant to public policy? Consider the town budget example again.²⁹ Suppose I am a member of the town council who must vote on the budget, and that the council must cut funding to either the schools or the police. Assume further that the alternative is raising taxes, an option that the council already has rejected as economically unwise and politically inexpedient. Imagine that I have a commitment to public safety, defined in part by excluding the raising of taxes as a reason not to fund the police. Accordingly, I make an impassioned plea for my position, but the majority votes to fund the schools and not the police. I demand an explanation, and, indeed, I am entitled to an answer.

Legitimacy demands that the council be able to explain why its decision is not "capricious or arbitrary or discriminatory."³⁰ But why is the following not an adequate answer? The majority of the council acknowledges that I have made a case for a certain outcome—funding the schools instead of the police—but the problem is that others have made out conflicting cases. The council's task is to evaluate these competing contentions and arrive at a budget. How is the council to do so unless they compare reasons and rank options? Furthermore, the council notes that it arrived at its ranking by a legitimate, democratic decisionmaking process, one that took my considerations into

²⁸ See FINNIS, *supra* note 23, at 134-60, 134 (undertaking a "fuller analysis of the proper relationship between one's own well-being and the well-being of others"); John Finnis, *Commensuration and Public Reason*, in INCOMMENSURABILITY, *supra* note 1, at 215.

²⁹ See *supra* text accompanying notes 6-7.

³⁰ See Dworkin, *supra* note 3, at 374.

account as reasons to fund the police, but that, in the end, it found the reasons to fund the schools to be more compelling.

In short, the council compared reasons.³¹ But why should it not? The council had to rank the budgetary options, and what is wrong with a public decisionmaker doing so by comparing reasons for and against the various options? Indeed, democratic legitimacy would seem to require public decisionmakers to proceed in this way. In doing so, the council has not ignored my personal, incommensurability-creating commitment. It has taken my commitment into account as a reason to decide in my favor, but has decided against my interest. What is wrong with such a procedure? Why should a public decisionmaker be barred from comparing reasons by my personal com-

³¹ Some will object that selecting policy is not a matter of comparing reasons, but of aggregating preferences. Preference-summing, however, is an acceptable collective-decision procedure only within appropriate moral constraints. No one, for example, considers the preferences of child molesters as on par with preferences for literature over television. We only consider certain preferences. More generally, as Pildes and Anderson argue:

Rational choice should not be understood as a matter of satisfying undefended preferences, but of articulating good and convincing reasons for choices. Especially in democratic political contexts, choices must be justified through publicly articulable and acceptable reasons. Institutions for making collective choices should be designed to promote deliberative rationality understood in this way; a central criterion for judging political institutions ought to be whether they promote the activity of reason-giving and create contexts in which reason-giving can have a decisive influence over the actual choices made.

Pildes & Anderson, *supra* note 6, at 2193. Pildes and Anderson regard these remarks as an elaboration of an ideal of "deliberative politics," *id.* at 2193 n.185, that they find in the following articles: Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 372-78 (1986); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1341-49 (1988); and Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 76 (1986). A similar ideal seems to inspire "conversational" conceptions of political legitimacy. See Margaret Jane Radin, *The Pragmatist and the Feminist*, in PRAGMATISM IN LAW & SOCIETY 127 (Michael Brint & William Weaver eds., 1991). Michelman discusses Radin's views in Frank Michelman, *Private Personal but Not Split: Radin Versus Rorty*, 63 S. CAL. L. REV. 1783 (1990).

Joseph Singer is also a notable advocate of a "conversational" conception of legitimacy. See Joseph William Singer, *Should Lawyers Care About Philosophy?*, 1989 DUKE L.J. 1752 (book review). For a discussion of this aspect of Singer's views, see Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. ILL. L. REV. 535, 555-63. Additionally, CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993), provides a major book-length exposition of a conception of deliberative democracy. For a discussion of Sunstein's views, and of deliberative democracy in general, see James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 241-79 (1993). Sunstein replies to Fleming in Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 TEX. L. REV. 305 (1993).

mitment that prevents me from making the comparison with other reasons?

I will answer this question in the context provided by an examination of rational choice theory. I will argue that rational choice theory rests on an assumption that is inconsistent with incommensurability. Incommensurability's implications for public policy are particularly clear against this rational choice theory background. Furthermore, the inconsistency we will identify reveals a fundamental flaw in rational choice theory. Rational choice theory is the theoretical foundation of law and economics. Law and economics is a dominant force in legal scholarship and, to some extent, in the formation of public policy. It is well worth seeing that it rests on a deeply flawed theory.

A. *Rational Choice Theory*

What is rational choice theory?³² The heart of the theory is the expected-utility rule.³³ Stating the rule against the background of certain facts about action throws the rule into sharp relief and reveals the assumption. The facts are basic and uncontroversial. I will describe them using the notion of a reason, or more precisely, a consideration playing the justificatory-motivational role of a reason. Some will object that the notion of a reason is irrelevant to rational choice theory. Rational choice theory concerns preferences, not reasons. It is a theory about what action a rational person will perform, given certain preferences. Our exposition of rational choice theory in terms of reasons is, however, not inconsistent with this fact; quite to the contrary, it reveals why we can—apparently—drop talk of reasons

³² I take rational choice theory to lie at the heart of "positive political theory." There is considerable disagreement over just what constitutes positive political theory. See Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 457-63 (1992) (exploring "the conflicting views of the symposium participants about PPT [positive political theory] and its relationship to public choice").

³³ More precisely, the heart of rational choice theory is *some version* of the expected-utility rule. Disconfirming evidence has proven fertile ground for the proliferation of suggested revisions. Tversky and Kahneman provide a list of proposed revisions. See Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S271 (Supp. 1986). For a detailed review of proposed revisions, see Colin Camerer, *Individual Decision Making*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 587 (John H. Kagel & Alvin E. Roth eds., 1995). We can, however, put these revisions to one side. Our concern is with a fundamental assumption that remains in all revisions, and, in articulating and evaluating this assumption, we can take the simple and convenient course of focusing on the classical form of the expected-utility rule.

in favor of talk of preferences. The “apparently” qualification is crucial, for it is precisely here that we encounter the mistaken assumption.

Let us turn then to the relevant facts about action. Suppose you are trying to choose between going to law school to become a lawyer and retiring to the woods to write your first novel. You choose to go to law school. You do so even though you think the balance of reasons weighs much more heavily in favor of life as a successful novelist, rather than life as a successful lawyer. The explanation for your choice is that this assessment of reasons is not the sole determinant of your choice. You also consider the probability of succeeding at realizing each option.³⁴ More fully, you combine an assessment of reasons and probability considerations to obtain a ranking of the actions of going to law school and of retiring to the woods. You think that you are unlikely to succeed in writing even one novel and highly likely to succeed in graduating from law school with a law degree. These probability considerations lead you to rank going to law school ahead of retiring to the woods, and you act accordingly. In contrast, the following is an example in which the strength of reason compensates for low probability: As you stand in front of the ice-cream store, the probability that buying an ice-cream cone will lead to the pleasure of eating it is high, but you pass up the virtually certain pleasure for the far less certain benefit of entering the bookstore next door. The explanation lies in the strength of the relevant reasons. The thought of reading an interesting book plays the justificatory-motivational role of a reason for you, as does the contemplation of the ice-cream eating pleasure. You find the former reason so much more compelling that you rank entering the bookstore higher than buying an ice-cream cone, despite the low probability of finding an interesting book.

There is a crucial distinction to draw here. The distinction is between *payoffs* of actions, for example, being a lawyer or being a successful novelist, and the *actions* aimed at realizing the payoffs, such as going to law school or retiring to the woods. Very roughly, a payoff is what one gets out of performing an action; it is a result the action yields.³⁵ The crucial point is that one ranks payoffs in light of reasons;

³⁴ It does not matter for our purpose whether the probabilities are objective or subjective.

³⁵ It need not be a causal result. See *supra* note 14. Also, to avoid misunderstanding, we should note that a payoff (that for the sake of which the action is performed) might itself be an action. What I get out of the action of entering the bookstore is reading or buying a book, which certainly qualifies as an action. In general, the

for example, you may rank being a successful novelist over being a successful lawyer because certain considerations make a much more compelling case for the former than the latter. Talk of "ranking" is talk of choice. To say that you rank being a novelist over being a lawyer is to say that, in appropriate circumstances,³⁶ the reasons that favor being a novelist—the complex of considerations playing the justificatory-motivational role of a reason—would lead you to choose the former over the latter. (These are not choices under uncertainty, but choices with certainty; the choice is between the certain payoff of being a lawyer, and the certain payoff of being a novelist.) In general, given a range of payoffs, we can rank them in terms of which payoff you would choose over which others.³⁷ Let us call this the "payoff-ranking."

Now let us turn from payoffs to actions. The payoff-ranking is not a ranking of *actions*. One ranks actions—such as going to law school and entering the bookstore—by combining probability considerations with the payoff-ranking. So, for example, you rank going to law school over retiring to the woods because of probability considerations. Let us call the result of such combination the "action-ranking" (and thus, unlike the payoff-ranking, the action-ranking essentially involves probabilities). Again, talk of "ranking" is talk of choice. Combining the reasons that rank payoffs with probability considerations provides reasons for action. These considerations guide choices by playing the justificatory-motivational role of a reason, and to say that going to law school ranks higher than retiring to the woods to

payoff/action distinction is relative to the context in which an agent acts; given the context, and a range of actions open to the agent in that context, we readily can distinguish between action (entering the bookstore) and payoff (reading or buying a book). Given our purposes, there is no need to be more precise.

³⁶ The "appropriate circumstances" qualification is essential. Suppose you were offered a choice between being a successful novelist and being a successful lawyer in circumstances in which you would be killed if you opted for either. You undoubtedly would choose neither. In applying rational choice theory to such examples, a great deal depends on how one describes the choice. Rational choice theory tends to be rather unsophisticated in its approach to identifying and describing choices. Theorists tend to ignore the problems of intentionality that have preoccupied philosophers. See Jean Hampton, *The Failure of Expected-Utility Theory as a Theory of Reason*, 10 *ECON. & PHIL.* 195 (1994).

³⁷ Such unique ranking may not exist, for we cannot uniquely determine the truth or falsity of the counterfactual statement, "You would choose payoff *O* over payoff *O'*." Its truth or falsity will vary as we vary the detail and breadth of the background assumptions against which we assess its truth. We will put these issues to one side. Basically, these considerations mean that rational choice theorists have to predict action against some fixed set of background assumptions.

write a novel is to say that the relevant considerations would, in appropriate circumstances, lead you to choose to go to law school over retiring to the woods.³⁸ Insofar as one is rational, one performs the action that ranks highest in one's action-ranking.

The action-ranking, as we have just seen, is a construct of two more basic elements: the payoff-ranking and probability considerations. If we could predict what action-ranking a person would construct out of a given payoff-ranking and set of probability considerations, we could predict choices from the knowledge of these two basic elements alone. To do so, of course, we need to know the rule or procedure by which one combines probabilities and payoff-rankings to obtain action-rankings. What rule do we use? Reflection suggests a plausible hypothesis. When we combine value and probability, we give weight to value and weight to probability: The greater the value or probability, the greater the effect we give it in determining the action-ranking. There is a simple mathematical way to represent such a procedure—multiplication: The bigger (smaller) the multiplicand, the bigger (smaller) it makes the product.

This is just how expected-utility theory represents the rule. The rule represents probabilities by numbers, of course, and it represents a person's payoff-ranking by a utility function. The utility of a payoff is a number that indicates the place of that payoff in the person's payoff-ranking. This is all we need to note; the exact mathematical structure of the utility function will not concern us.³⁹ Rather, we want to focus on the rule for combining utility and probability. To see how the expected utility rule does this, suppose *A* is an action with only two possible payoffs, *O* and not-*O*. Using *u* for the relevant utility function, their respective utilities are *u*(*O*) and *u*(not-*O*). Using *P* for the probability that *A* will yield the payoff *O*, the expected utility of the action *A* is:

$$(P \times (u(O)) + ((1 - P) \times u(not-O)).^{40}$$

We can construct an action-ranking by calculating the expected utility of each relevant action. Rational choice theory asserts that rational agents perform the action at the top of the ranking so con-

³⁸ Again, the "appropriate circumstances" qualification is essential (and perhaps more difficult to spell out in this context), and again, in general, there may be no unique ranking generated by counterfactual claims about what one would choose. See *supra* notes 36-37.

³⁹ For some discussion, see George A. Quattrone & Amos Tversky, *Contrasting and Psychological Analyses of Political Choice*, 82 AM. POL. SCI. REV. 719 (1988).

⁴⁰ Probabilities must sum to 1; this is why the probability of realizing not-*O* is *1 - P*.

structed, the action with the greatest expected utility. This is the rational choice theory version of the common-sense fact that a person performs the action highest in the person's action-ranking.

We began this exposition of rational choice theory to reveal a fundamental assumption behind the theory, and the assumption is now clear. The assumption is that only two things matter to constructing the action-ranking: utility—the relative ranking of payoffs—and the relevant probabilities of realizing those payoffs. The crucial point is that reasons are assumed to be relevant only to determining the payoff-ranking. Once that is established, a person's reasons play no further role in predicting behavior.⁴¹ This assumption lies behind the use of the notion of preference in rational choice theory, and we can further illustrate the assumption's role by seeing why we can—if the assumption is correct—drop talk of reasons in favor of talk of preference. To see why, consider that we need to know the payoff-ranking to construct the action-ranking, but all that matters about the payoff-ranking is the order of the payoffs. All we need to know is whether the person would, in appropriate circumstances, choose one payoff over another. The person's reasons may explain the choice, but we do not care *why* the person would choose the payoff; we only care *that* the person would choose it. So why be concerned with reasons at all? All it seems we really care about is preference, where one prefers *a* to *b* when, and only when, one would choose *a* over *b* in relevant circumstances.⁴²

So it *seems*, but this appearance is an illusion. We cannot always confine reasons to the construction of the payoff-ranking. Incommensurability shows that reasons sometimes play a role in the proce-

⁴¹ This remains true in all proposed revisions of rational choice theory—with the possible exception of prospect theory. In prospect theory, the role of frame selection and the use of a decision weight instead of probabilities may allow values to play some role in directly determining an action's place in the action-ranking. At this stage in the development of prospect theory, it is difficult to say how this issue will turn out. For an interesting application of prospect theory to the law, see Richard L. Hasen, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391 (1990).

⁴² Of course, there is a point to replacing value with preference only if we have some way to determine a person's preferences independent of information about a person's values, but there is an obvious technique here: Ask the person. This is the tactic contingent valuation takes. We ask how much one would be willing to pay to have one payoff or another. If one is willing to pay more to have *a* than *b*, one would choose *a* over *b*, and thus *a* ranks higher than *b* in the payoff-ranking. This does not mean that value is irrelevant. A person's values do determine a person's preferences, but, as far as rational choice theory is concerned, it seems we safely can relegate value to the undiscussed background.

dures by which a rational person constructs the action-ranking out of the payoff-ranking and the probabilities. In such cases, rational choice theory makes the wrong predictions, for it constructs the wrong action-ranking.

B. *The Inconsistency*

A variant of the loyalty example makes the point. Suppose a stranger offers me a lottery. If I enter the lottery, I have a 50% chance of getting \$1,000,000 without betrayal, and a 50% chance of getting \$1,000,000 in exchange for betraying the revolution. I refuse. When I refuse, the stranger changes the probabilities. He offers me a 70% chance of getting \$1,000,000 without betrayal, and a 30% chance of getting \$1,000,000 in exchange for betrayal. When I refuse again, the stranger offers me We can continue the scenario by imagining that I persist in refusing and that the stranger continues to improve the odds.

From the expected-utility point of view, the stranger is increasing the expected value of entering the lottery by offering ever more favorable probabilities. When we construct the action-ranking by the expected-utility rule, these increases move the choice of entering the lottery higher and higher in my action-ranking; at some point, the stranger will succeed in offering a lottery that has a greater expected utility.⁴³ The expected-utility rule predicts that I will accept the offer at that point.

This prediction, however, is wrong. I will never accept the stranger's offer since I treat the monetary considerations as simply irrelevant to my decision. Whatever reason these considerations provide to betray the revolution is a reason I exclude; instead, I proceed exactly as if the money provided no reason at all to betray. So, insofar as I am rational, I will not sell my loyalty because I have a reason not to sell (my commitment to the revolution), and no reason—no reason that I will consider—to do otherwise. This means that not betraying the revolution always will rank higher than any action that involves betraying it no matter what the relevant probabilities. Let me express this by saying that the action of remaining loyal occupies a rigid place in my action-ranking. Its position vis-à-vis relevant alternatives cannot be changed by altering the relevant probabilities. My commitment to the revolution explains this action-

⁴³ This assumes that remaining loyal has some finite utility. See *infra* note 44.

ranking rigidity. My commitment guarantees that I will never take the money. That is, the action of remaining loyal will always rank higher than the action of betrayal in my action-ranking. In such cases, reasons play a role in determining directly (not merely via the payoff-ranking) the action-ranking; reasons directly create a rigidity in that ranking. Reasons cannot be confined to a role in constructing the payoff-ranking.⁴⁴

There are two further points to note. First, although I have just emphasized that incommensurability concerns the place of an action in the action-ranking, it is, however, also true that incommensurability concerns the place of payoffs in the payoff-ranking. The loyalty example makes this clear. Consider Jones. The place of the payoff for betraying the revolution in Jones's payoff-ranking is a function of the strength of the reasons he has for betrayal: The greater the dollar amount, the stronger the reason to betray. When the dollar amount is sufficient, betrayal moves above remaining loyal in Jones's payoff-ranking. In my case, increasing the dollar amount cannot move betrayal above remaining loyal in my payoff-ranking; my reason-excluding commitment makes the offer of the money irrelevant to my decision to remain loyal. If we just focused on the payoff-ranking rigidity, we could not fully explain the difference between Jones and me in the loyalty example. To see why, let $u(\text{betray})$ and $u(\text{loyal})$ represent my respective utilities for betraying the revolution and remaining loyal; and let $u'(\text{betray})$ and $u'(\text{loyal})$ represent the same for Jones. Now, $u(\text{loyal}) > u(\text{betray})$, and $u'(\text{loyal}) > u'(\text{betray})$. In my case, $u(\text{loyal}) > u(\text{betray})$ because of my reason-excluding commitment to the revolution; for Jones, $u'(\text{loyal}) > u'(\text{betray})$ because Jones compares reasons and finds his reasons to remain loyal to be better than his money-based reasons to betray. The point is that—unless more is said—this difference in the reasons behind our respective payoff-rankings does not explain the rigidity in my action-ranking and the lack of such rigidity in Jones's action-ranking.

The second point is that it is the action-ranking rigidity that is most relevant to public policy. To see why, return to the town budget example. Recall that the majority of the town council explained that

⁴⁴ The obvious objection is that we indeed can confine value to this role if we are willing to assign an infinite utility to the payoff of keeping my daughter. If we assign infinite utility, then no matter what changes one makes in relevant probabilities, not selling always will rank higher than any competing action. In this way, the expected-utility rule can yield rigid action-rankings. I answer this objection in Warner, *supra* note 2.

it considered my incommensurability-based claim that the town should fund the schools, but they noted that others made conflicting claims, and they adjudicated among these claims by comparing reasons and ranking options. The problem is that the council's decisionmaking process did not address my position; it ignored it. The council treated my incommensurability claim as if it were only relevant to ranking payoffs—the payoff of funded schools versus the payoff of funded police. But my point is precisely that the incommensurability imposes a constraint directly on the action-ranking, the ranking of budgetary options. My claim is that funding the schools occupies a rigid position in that action-ranking, a position that ensures that the council will opt to fund the schools. My contention is that the reason-excluding commitment to education—my commitment, and the one I urge the council to adopt—establishes this position, and that it is inconsistent with this commitment to rank funding the schools by comparing reasons.

There is then a genuine conflict between incommensurability and the requirement that public decisionmakers decide by comparing relevant reasons. In framing public policy, decisionmakers cannot simply treat incommensurability-based claims as one more reason for or against a particular policy option. Such a claim concerns the ranking of actions, and the claim is precisely that certain actions occupy a rigid point in the ranking—a point not determined by comparing reasons, but by a reason-excluding commitment inconsistent with such a comparison.

How, then, should public decisionmakers handle incommensurability claims? The seriousness of this question depends on the extent to which we encounter incommensurable reasons in crucial areas of public policy. If we do not encounter them often, then the conflict is not a serious practical threat. How often do we encounter such reasons? I will answer by describing a single case. This instance will serve as a template. Once one knows what to look for, incommensurability is easy to spot.

IV. DOES INCOMMENSURABILITY MATTER?—SECOND PASS

*Moore v. Regents of the University of California*⁴⁵ provides the template. A doctor at the UCLA Medical Center treated John Moore for hairy-cell leukemia. To slow down the progress of the disease, the

⁴⁵ 793 P.2d 479 (Cal. 1990).

doctor removed Moore's spleen. The splenectomy was an appropriate treatment for Moore's condition. The doctor, however, realized that the removed spleen had great commercial value.⁴⁶ Without obtaining Moore's consent, he developed a cell line from the genetic material obtained from the spleen and applied for a patent.⁴⁷ Obtaining the material took considerable effort and expertise. Moore himself could not have obtained this material; only a trained researcher could. In exchange for this material, Moore's doctor was given 75,000 shares of stock in the private company that bought the material, and the doctor and UCLA together were given nearly \$450,000 over a three-year period.⁴⁸ When Moore discovered that the doctor was selling the genetic material from Moore's spleen, Moore sued, claiming, among other things, that he had a property right in the genetic material.⁴⁹ The California Supreme Court rejected Moore's claim.⁵⁰

The majority decided the case by comparing reasons. The majority acknowledged that there were reasons, advanced by Moore, to recognize a property right in the genetic material. Moore's basic claim was that the property right existed as a corollary of his right to control what happened in and to his body;⁵¹ he argued that the right extended to the genetic material extracted from his spleen.⁵² The majority, however, found reasons not to agree.⁵³ In particular, they emphasized that researchers used human cell lines stored in vast numbers in tissue repositories. Recognizing Moore's claim would, the majority contended, "threaten with disabling civil liability innocent parties who are engaged in socially useful activity, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes."⁵⁴ In addition, recognizing the claim would hinder "[r]esearch on human cells

⁴⁶ See *id.* at 481.

⁴⁷ See *id.* at 481-82.

⁴⁸ See *id.*

⁴⁹ See *id.* at 482 & n.4.

⁵⁰ See *id.* at 480.

⁵¹ This reason is most clearly discussed by Justice Broussard. See *id.* at 500-03 (Broussard, J., concurring and dissenting).

⁵² See *id.* at 487.

⁵³ In addition to the hindering-research-and-protecting-researchers reason, see *id.* at 494, the majority advanced statutory arguments for denying the property right, see *id.* at 489-91, contended that there was no good common-law precedent for doing so, see *id.* at 487, and suggested that common-law actions besides conversion adequately protected the interests of patients in situations like Moore's, see *id.* at 493-94.

⁵⁴ *Id.* at 493.

[that] plays a critical role in medical research.”⁵⁵ The majority concluded that there was a good reason to deny the property right. Let me refer to these reasons as the “research” reasons. The majority compared reasons, and, unfortunately for Moore, they found the research reasons to be the better ones.

The majority’s comparative approach provoked a strong dissent from Justice Mosk. He contended that:

[O]ur society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona. One manifestation of that respect is our prohibition against direct abuse of the body by torture Another is our prohibition against indirect abuse of the body by its economic exploitation for the sole benefit of another person. The most abhorrent form of such exploitation, of course, was the institution of slavery. Lesser forms, such as indentured servitude or even debtor’s prison, have also disappeared. Yet their specter haunts the laboratories and boardrooms of today’s biotechnological research-industrial complex. It arises whenever scientists or industrialists claim, as defendants claim here, the right to appropriate and exploit a patient’s tissue for their sole economic benefit—the right, in other words, to freely mine or harvest valuable physical properties of the patient’s body: “. . . . Such research tends to treat the human body as a commodity—a means to a profitable end. The dignity and sanctity with which we regard the human whole, body as well as mind and soul, are absent when we allow researchers to further their own interests without the patient’s participation by using a patient’s cells as the basis for a marketable product.”⁵⁶

Justice Mosk clearly thought that the majority undervalued, or even ignored, the value we place on persons.

Justice Mosk’s position admits of two interpretations. The first sees him as contending that the majority’s mistake consists in comparing wrongly. On this interpretation, Justice Mosk’s point would be that the “dignity” reasons to recognize the property right are better than the research reasons not to recognize such a right. The alternative interpretation sees Justice Mosk as asserting an incommensurability: The “dignity and sanctity with which we regard the human whole”⁵⁷ mean that we should exclude the research reasons from consideration. On this interpretation, the majority’s mistake does not consist in comparing reasons wrongly—it consists in comparing rea-

⁵⁵ *Id.* at 494.

⁵⁶ *Id.* at 515-16 (Mosk, J., dissenting) (quoting Mary Taylor Danforth, *Cells, Sales, and Royalties: The Patient’s Right to a Portion of the Profits*, 6 YALE L. & POL’Y REV. 179, 190 (1990) (footnote omitted)).

⁵⁷ *Id.* at 516 (Mosk, J., dissenting) (quoting Danforth, *supra* note 56, at 190).

sons at all. To assert an incommensurability claim is to hold that the relevant comparison is impossible, not that it is made wrongly.

Which interpretation better represents Justice Mosk's views?⁵⁸ We can begin by noting that there is a serious problem with the "compared wrongly" interpretation. The problem is that Justice Mosk made absolutely no attempt to show that the dignity reasons actually were better than the research reasons. This aspect of Justice Mosk's dissent baffled Justice Arabian, who wrote:

I share Justice Mosk's sense of outrage, but I cannot follow its path. His eloquent paean to the human spirit illuminates the problem, but not the solution. Does it uplift or degrade the "unique human persona" to treat human tissue as a fungible article of commerce? Would it advance or impede the human condition, spiritually or scientifically, by delivering the majestic force of the law behind the plaintiff's claim? I do not know the answers to these troubling questions, nor am I willing—like Justice Mosk—to treat them . . . as issues . . . susceptible of *judicial* resolution.⁵⁹

Justice Arabian's questions have considerable force, if we think Justice Mosk was comparing reasons. If he was, Justice Mosk's confidence was entirely misplaced when he claimed that "the dignity and sanctity with which we regard the human whole, body as well as mind and soul, are absent when we allow researchers to further their own interests without the patient's participation by using a patient's cells as the basis for a marketable product."⁶⁰ How did Justice Mosk know that this was how the complex and controversial comparison of reasons finally would come out? Perhaps allowing researchers to further their own interests actually would promote personal dignity as medical research saved lives, as well as prevented the degeneration and loss of dignity involved in the debilitating diseases that would take their toll in old age.

The incommensurability interpretation makes this worry irrelevant. On this interpretation, Justice Mosk had no need to explain why the comparison of reasons would come out a certain way, because no comparison was involved. To assert an incommensurability is to claim that the relevant comparison is impossible. The question is,

⁵⁸ Justice Mosk himself described his approach as a straightforward balancing of reasons: "[I]n my view whatever merit the majority's single policy consideration may have is *outweighed* by two contrary considerations . . ." *Id.* at 515 (Mosk, J., dissenting) (emphasis added). For reasons that follow, I think Justice Mosk misinterpreted his own position.

⁵⁹ *Id.* at 497-98 (Arabian, J., concurring).

⁶⁰ *Id.* at 516 (Mosk, J., dissenting) (quoting Danforth, *supra* note 56, at 190).

what kind of commitment would entail a reason-exclusion here? A closer reading of Justice Mosk's dissent reveals the answer. In Justice Mosk's eyes, the researchers treated Moore's body as an inanimate object to be exploited—a mine from which to extract ore, or a field from which to harvest a crop: The researchers claimed “the right . . . to freely mine or harvest valuable physical properties of the patient's body.”⁶¹ Justice Mosk also compared the researcher's treatment of Moore to the violations of the body involved in torture, slavery, indentured servitude, and debtor's prison.⁶²

Let us focus on the analogy to torture. Imagine we capture a terrorist who has planted a bomb in an elementary school. Our problem is that we do not know which school contains the bomb. If we can only find this crucial information out by torturing the terrorist, we have a reason to torture; torturing the terrorist is the only means of finding out where the bomb is. Of course, we also have reasons not to torture, such as the horrible pain and the grotesque violation of the value and dignity of persons. But, for many people,⁶³ we do not decide whether to torture by comparing the reasons for and against doing so—a comparison that would come out against torture only in some circumstances, while favoring it in others. The value we place on people prohibits deciding in this way; it creates an absolute and total ban on torture (or at least a nearly absolute and total ban).⁶⁴

⁶¹ *Id.* (Mosk, J., dissenting).

⁶² *See id.* at 515 (Mosk, J., dissenting).

⁶³ *See, e.g.,* THOMAS NAGEL, *War and Massacre*, in MORTAL QUESTIONS 53, 73 (1979) (“Even if certain types of dirty tactics become acceptable when the stakes are high enough, the most serious of the prohibited acts, like murder and torture, are not just supposed to require unusually strong justification. They are supposed *never* to be done, because no quantity of resulting benefit is thought capable of *justifying* such treatment of a person.”). For an extended discussion and criticism of consequentialist ethics, see SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM 1-13 (1982).

⁶⁴ Thomas Nagel, for example, holds such a position:

[T]he constraints on action represented by rights cannot be equivalent to an assignment of large disvalue to their violation, for that would make it permissible to violate such a right if by doing so one could prevent more numerous or more serious violations of the same right by others. This is not in general true. It is not permissible . . . to kill an innocent person even to prevent the deliberate killing of three other innocent persons. A general feature of anything worthy of being called a right is that it is not translatable into a mere assignment of disvalue to its violation.

Thomas Nagel, *Libertarianism Without Foundations*, 85 YALE L.J. 136, 144 (1975) (book review). Finnis makes a similar point. *See* JOHN FINNIS, MORAL ABSOLUTES 47-51, 51 (1991) (concluding that “[t]he way one's options relate to the human goods at stake in them is simply not captured by the model of a comparison of the human goods embodied in alternative states of affairs”). The puzzle, of course, is that many think we

Instead, we proceed just as I did in the loyalty example—we exclude the reason to torture.

We should interpret Justice Mosk as asserting a similar reason-exclusion. Justice Mosk, as we have seen, likened the use made of Moore and his spleen to the violations of the body involved in torture, slavery, indentured servitude, and debtor's prison. He saw the doctor as violating Moore's bodily integrity by using him as a mine from which they extracted "genetic ore." Given the weight Justice Mosk placed on these analogies, we should interpret him as holding that our commitment to the dignity and value of human beings excludes the research reasons as reasons to deny the property right. Many do value human beings and their bodies in such a way. Such an attitude informs much of Margaret Radin's work, for example.⁶⁵

This completes our discussion of *Moore*. With this case as a template, it should be possible to see incommensurability in a variety of public-policy issues. Incommensurability arguably plays a role in, for example, bankruptcy,⁶⁶ contracts,⁶⁷ environmental law,⁶⁸ free speech,⁶⁹

can "violate . . . a right if by doing so one could prevent more numerous or more serious violations of the same right by others," provided the violations are very numerous and very serious. How is this consistent with not regarding rights as "equivalent to an assignment of a large disvalue to their violation" in the less serious cases? Nagel, *supra*, at 144. We can put this puzzle to one side here.

⁶⁵ Radin insists that:

We feel discomfort or even insult, and we fear degradation or even loss of the value involved, when bodily integrity is conceived of as a fungible object.

Systematically conceiving of personal attributes as fungible objects is threatening to personhood, because it detaches from the person that which is integral to the person.

Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1881 (1987).

⁶⁶ See Donald R. Korobkin, *Value and Rationality in Bankruptcy Decisionmaking*, 33 WM. & MARY L. REV. 333, 341-42 (1992) (arguing that "[i]n answering bankruptcy questions . . . the court must resolve conflicts among . . . diverse values" that may not be comparable on a "single scale").

⁶⁷ See Richard Warner, *Excluding Reasons: Impossible Comparisons and the Law*, 15 OXFORD J. LEGAL STUD. 431, 451-53, 451 (1995) (arguing that a "workable comparison of reasons" is not always possible in contract law).

⁶⁸ See Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 629-33, 630 (1992) (claiming that "[c]omparative risk analysis [in environmental law] gives no guidance on how to make moral judgments when confronted with . . . conflicting types of risk").

⁶⁹ See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 829-34, 830 (1994) (arguing that incommensurability issues arise in deciding both "whether free speech values are unitary or instead plural and diverse" and "whether to treat speech as an ordinary commodity").

racial discrimination,⁷⁰ sexual equality,⁷¹ and torts.⁷²

V. DOES INCOMMENSURABILITY MATTER?—THIRD PASS

Even so, it does not yet follow that incommensurability is any serious barrier to deciding by comparing reasons. Suppose that as a society we, by and large, shared the same reason-excluding commitments. Then we would agree, for the most part, on what reasons to exclude and what reasons to compare, and public decisionmakers simply could decide by comparing nonexcluded reasons. With little disagreement over what to exclude, incommensurability would occasion little controversy. The problem, of course, is that we do not agree. John Rawls makes the point eloquently:

[L]ong historical experience suggests, and many plausible reflections confirm, that . . . reasoned and uncoerced agreement is not to be expected Our individual and associative points of view, intellectual affinities and affective attachments, are too diverse, especially in a free democratic society, to allow of lasting and reasoned agreement. Many conceptions of the world can plausibly be constructed from different standpoints. Diversity naturally arises from our limited powers and distinct perspectives; it is unrealistic to suppose that all our differences are rooted solely in ignorance and perversity, or else in the rivalries that result from scarcity. [The appropriate view of social organization] takes deep and unresolvable differences on matters of fundamental significance as a permanent condition of human life.⁷³

Rawls is, of course, talking about disagreement generally, not specifically about disagreement over reason-excluding commitments, but the point certainly applies to the latter sort of disagreement.

This is the sort of disagreement we saw in *Moore* and that we imagined in the town budget example. In *Moore*, some will not—as presumably the majority did not—find Justice Mosk’s analogies with torture, indentured servitude, and so on, compelling. After all, just how is the voluntary removal of a spleen like torture or indentured servitude? And even those who find the analogies apt still may not

⁷⁰ See *id.* at 828-29, 850-51 (suggesting that rights against racial discrimination are not economically valuable).

⁷¹ See *id.* at 847-49, 848 (arguing that sexual equality will be achieved only when women receive “the appropriate kind and not the appropriate level of valuation”).

⁷² See Radin, *supra* note 65, at 1876-77, 1877 (evaluating the argument that tort recovery ought not to be available for certain injuries because “human life activity, or at least certain aspects of it, ought not to be traded, nor to be conceived of in market rhetoric or evaluated in market methodology”).

⁷³ John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 542 (1980).

agree that “our society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona,” where this “ethical imperative” is interpreted as a reason-excluding commitment to human dignity.⁷⁴ Further, even those who do agree with this still may be convinced that we must abandon this commitment in *Moore*, for they may be convinced—as the majority was—that recognizing a property right for Moore simply is unworkable, given the current state of medical research. Such disagreement is inevitable. This is the town budget dilemma with which we began. We imagined my making an impassioned incommensurability-based plea for school funding. The difficulty is that others have made conflicting cases, either incommensurability-based or not. How is the council to decide in a legitimate fashion unless it compares reasons? This is the argument we put in the mouth of the town council majority earlier on. What is the answer?

John Finnis offers a solution. In his discussion of incommensurability, Finnis asks, “How are conflicts of rights to be resolved? That is to say, how much interference with one person’s enjoyment of his ‘right’, by other persons, in the exercise of the same right, and of other rights, is to be permitted?”⁷⁵ He answers that there is

no alternative but to hold in one’s mind’s eye some pattern, or range of patterns, of human character, conduct, and interaction in community, and then to choose such specification of rights as tends to favour that pattern, or range of patterns. In other words, one needs some conception of the human good, of individual flourishing in a form (or range of forms) of communal life that fosters rather than hinders such flourishing.⁷⁶

The first point to note is that this is to compare reasons for and against various options by considering how well those options realize “some pattern, or range of patterns, of human character, conduct, and interaction in community.”⁷⁷ But, how else are we to decide, if not in this way? Indeed, as we noted at the outset, this is a requirement of political legitimacy,⁷⁸ for, to repeat Steve Burton’s admoni-

⁷⁴ *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 497 (Cal. 1990) (Mosk, J., dissenting).

⁷⁵ FINNIS, *supra* note 23, at 219.

⁷⁶ *Id.* at 219-20.

⁷⁷ *Id.* at 219.

⁷⁸ See *supra* text accompanying notes 4-5.

tion, "[i]n a society that cares about justice . . . decision making based on reason . . . not on preference or faith, is crucial for legitimacy."⁷⁹

Of course, this comparison of reasons occurs after we have settled on "some pattern, or range of patterns, of human character, conduct, and interaction in community."⁸⁰ How does a public decisionmaker decide what pattern to endorse? Finnis notes that we "can *adopt* a set of commitments that will *bring* the basic values into a relation with each other sufficient to enable one to choose projects and, in some cases, to undertake a cost-benefit analysis (or preference-maximizing or other like analysis) with some prospect of a determinate 'best solution.'"⁸¹ However, he emphasizes that "the adoption of a set of commitments, by an individual or society, is *nothing like* carrying out a calculus of commensurable goods."⁸²

So, what is it like? Consider the town budget example. When I make my incommensurability-based plea to fund the schools, I am urging the council to adopt a commitment that would resolve the issue of whether to fund the schools. If the council adopts my reason-excluding commitment, it would vote to fund the schools and cut funding to the police. Of course, political legitimacy would demand that the council produce adequate reasons to explain to those adversely affected why it has adopted this commitment. And, when the council does not adopt my commitment, it owes me an analogous explanation. Consider the initial version of the town budget example, when the council responded to my incommensurability claim by insisting on comparing reasons. The flaw in the council's response is not in the insistence on comparison, but in the failure to explain adequately why it refused to adopt my commitment.

But how is the council to provide such explanations? It is unlikely that it can produce a relevant comparison of reasons to justify its choice. As noted in the choice-of-career example, universal and personal perspectives often provide an inefficient basis for ranking reasons for competing commitments as better, worse, or equally good.⁸³ Public decisionmakers are in no better position. It is essential to note, however, that this does not mean that rational discussion is impossible. Raz is quite clear about this point: "Rational action is action for (what the agent takes to be) an undefeated reason. It is

⁷⁹ Burton, *supra* note 4, at 368.

⁸⁰ FINNIS, *supra* note 23, at 219.

⁸¹ *Id.* at 115.

⁸² *Id.*

⁸³ See *supra* Part II.D.

not necessarily action for a reason which defeats all others.”⁸⁴ Accordingly, the town council can reveal its action as rational by advancing its reasons for adopting or rejecting the reason-excluding commitment I propose. In doing so, it would not advance reasons to compare them, but to explain, and perhaps to persuade, to change points of view.

Some will disagree on the ground that rational choice is impossible in cases of incommensurability. William Lucy, for example, takes it as obvious that “we cannot rationally choose between incommensurable values.”⁸⁵ David Luban attributes essentially the same view to Finnis:

Finnis appears to be arguing . . . that if rational choice among goods is possible, they must be commensurable. For though he does not state this . . . point in so many words, he does offer the logically equivalent claim that incommensurability of goods implies that rational choice among them is impossible. Indeed, this claim is the central point of his argument⁸⁶

Lucy and Luban overlook a crucial distinction. An example makes this plain. Suppose you are trying to choose between being a dentist and being a lawyer. You have reasons for each choice, and let us stipulate that the reasons are incommensurable: They cannot be compared as better, worse, or equally good reasons for being a lawyer or a dentist. Does this mean that you cannot “rationally choose” between being a lawyer and being a dentist? The answer is “yes” and “no.” You certainly cannot have better reasons for choosing to be a lawyer instead of a dentist. We have stipulated that the reasons are not comparable in this way. So, if by “rational choice” we mean “having better reasons for one choice over the other,” then “rational choice” is impossible. But there is another, equally good, sense of “rational choice” that clearly is possible. You can choose to be a lawyer for reasons; indeed, you can choose to be a lawyer for reasons

⁸⁴ RAZ, *supra* note 1, at 339. A choice among incommensurable alternatives, according to Raz, “may be based on a reason. Though the reason is incommensurate with the reason for the alternative it shows the value of that option and when that option is chosen it is chosen because of its value.” *Id.* at 338.

⁸⁵ William Lucy, *Natural Law Now*, 56 MOD. L. REV. 745, 757 (1993). Lucy mistakenly cites Raz as holding this view. *See id.* at 757 n.23. Raz does discuss “the inability of reason to guide our action” in cases of incommensurability, but he is alluding to an inability to compare adequately the reasons for choosing between alternatives, not the inability to find reasons supporting any particular choice. RAZ, *supra* note 1, at 334.

⁸⁶ David Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, 38 CLEV. ST. L. REV. 65, 67-68 (1990) (commenting on Finnis, *supra* note 15, at 9-11).

that are not defeated by, or inferior to, any other reasons you have. Your choice to be a lawyer is backed by reasons and is in that sense rational. It is in this sense that incommensurability is compatible with rational decisionmaking.⁸⁷

A vital and mature political discourse could promote rational decisionmaking in this sense, perhaps even in a society as large and as fragmented as the United States.⁸⁸ Ideally, the discourse would have the result that those adversely affected by public policy, in principle, could provide themselves with adequate reasons to accept the policies that so affect them. Whether this is possible depends, of course, on a variety of social and political factors.⁸⁹ The point to emphasize is that these reflections require a reconsideration of the ideal with which we began: Namely, that in forming public policy, we should select the policy supported by the best reasons. We cannot interpret this to require in all cases a comparison of reasons; where such comparison is impossible, action can be based on undefeated reasons.

⁸⁷ Finnis, pointing out that Luban misunderstands him, makes essentially the same argument against Luban. See John Finnis, *Concluding Reflections*, 38 CLEV. ST. L. REV. 231, 236 (1990). Finnis argues that the

[c]hoice between incommensurable options is often rational in two ways: (a) inasmuch as it opts for the chosen option for the reasons which make that option rationally appealing (even though those grounds do not make that option unqualifiedly more appealing than alternative options); and (b) inasmuch as it conforms to all the requirements of practical reasonableness which we call moral, e.g., fairness, consistency, exclusion of any choice to destroy, damage or impede any basic human good, etc. Both (a) and (b) provide rich grounds for rational criticism of choices.

Id. at 237-38.

Similarly, Sunstein overlooks this point in arguing that incommensurability makes rational choice impossible, assuming that qualitative comparison is essential to rational choice. See Sunstein, *supra* note 69, at 808. This simply is not true, however, if one distinguishes between having reasons for choosing an option and having reasons that show that option to be better than other alternatives.

⁸⁸ This fact makes the emptiness of much of present politics even more deplorable. Given the shallow state of modern discourse, claims of incommensurability may be too subtle to be heard; in this sense, perhaps incommensurability really is, sadly, of little practical import.

⁸⁹ For some relevant theoretical points related to incommensurability, see Joseph Raz, *Mixing Values*, 65 ARISTOTELIAN SOC'Y 83, 83 (Supp. 1991) (exploring "[u]nder what conditions . . . one [can] compare the strength or stringency of conflicting reasons for and against an action where they are a function of irreducibly different values"), and Joseph Raz, *Moral Change and Social Relativism*, SOC. PHIL. & POL'Y, Winter 1994, at 139, 140-41 (discussing the influences on morality and examining the possibility and feasibility of moral change).

Moore illustrates these themes.⁹⁰ In his dissent, Justice Mosk asserts that the court should acknowledge that society has a reason-excluding commitment to human dignity that requires recognizing a property right for Moore.⁹¹ When the council in the town council example rejects my position, and when the *Moore* majority rejects Justice Mosk's, these decisionmakers are obligated to explain their rationale for not adopting the relevant reason-excluding commitment. To see what is at issue here, consider that reason-excluding commitments can, and often do, play a role in defining who we are, in defining our individual identities. By analogy, the reason-excluding commitments a society endorses can be said to define, in part, its collective identity. To accept, *arguendo*, Justice Mosk's characterization, do we wish to be a society that allows doctors to mine a patient as if he or she were a mineral deposit? Even in *Moore*, the judges—decisionmakers accustomed to considering delicate moral and political questions—fail to understand and address the incommensurability claim. In rejecting the incommensurability claim, the majority effectively is claiming either that society does not really have the reason-excluding commitment that Justice Mosk claims it has, or that, although it does have such a commitment, it must, in the face of developments in medical research, abandon or reinterpret that commitment. Incommensurability inevitably casts public decisionmakers in the role of interpreters of society's commitments.

CONCLUSION

Political legitimacy demands a collective discussion of those conflicting reason-excluding commitments implicated in public-policy choices. Therefore, since legitimacy matters, so do the incommensurability-creating commitments. Racial and sexual equality provide a final example. In rectifying unjust discrimination based on race and gender, affirmative action regards race and gender as reasons to choose one person over another in employment. We also have a conception of social equality that considers differences, such as race and gender, irrelevant to access to employment; our conception of social justice excludes race and gender as reasons. There is currently considerable controversy over precisely this issue. Resolving this controversy means interpreting our commitment to equality: Is it or

⁹⁰ *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 493-94 (Cal. 1990); *see also supra* notes 45-62 and accompanying text.

⁹¹ *See id.* at 516 (Mosk, J., dissenting).

is it not a commitment that excludes considerations of race and gender in hiring decisions? This Article is a plea for self-conscious attention to such questions.

* * * * *