
Law-making and Incommensurability

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The author explores the implications of incommensurability for lawmakers. In a pluralistic society, the task of preferring one objective over another in cases where the value of these objectives cannot be measured or compared is daunting. The author argues that far from preventing rational choice, thoughtful consideration of the concept of incommensurability permits many legislative choices and precludes only dogmatism and undue righteousness.

The author first defines the parameters of the notion of incommensurability, allowing for a deeper understanding of the concept and limiting the notion to one that is relevant in the realm of practical decision making. He discusses incommensurability in relation to abstract notions of human goods, concrete instances of these goods, and moral principles and virtues. He then examines the ways in which decisions preferring the realization of one incommensurable benefit over another can be made in a manner that is not irrational.

The author concludes by challenging various arguments that incommensurability either requires or precludes certain doctrinal values or outcomes. He proposes that consequentialism, liberalism, and absolute rights and duties may be consistent with incommensurability, although not required by it. While philosophical reflection on incommensurability will not lead directly to answers, it offers an important contribution to honest and reflective decision making.

L'auteur explore les implications que pose le problème de l'incommensurabilité pour les juristes. Dans une société pluraliste, choisir une approche au lieu d'une autre, particulièrement lorsque la valeur de cette approche ne peut être mesurée ou comparée, peut être un processus insatisfaisant. L'auteur propose une analyse du concept d'incommensurabilité qui, plutôt que d'empêcher de faire un choix rationnel, permet de faire des choix législatifs et prévient le dogmatisme et la rectitude excessive.

L'auteur définit d'abord les paramètres de la notion d'incommensurabilité, permettant une meilleure compréhension du concept et limitant la notion à la sphère pratique de prise de décision. Il traite le concept d'incommensurabilité d'abord par rapport à la notion abstraite d'humanité, en s'attardant sur quelques exemples concrets, ensuite par rapport à certains principes moraux et à la vertu. Il examine finalement comment des décisions préférant la réalisation d'un bénéfice incommensurable au lieu d'un autre peuvent être prises de manière rationnelle.

Pour conclure, l'auteur remet en question certains arguments qui indiquent que l'incommensurabilité requiert ou prévient certaines valeurs ou conséquences doctrinales. Il propose de réconcilier les concepts de conséquentialisme, de libéralisme et de droits et de devoirs absolus avec la notion d'incommensurabilité, bien qu'ils n'en soient pas une condition nécessaire. Alors qu'une réflexion philosophique sur le concept d'incommensurabilité n'apportent pas de réponses précises, elle permet de prendre des décisions honnêtes et réfléchies.

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Introduction

In recent years, moral, political, and legal philosophers have directed much of their attention to the problem of value incommensurability.¹ An acknowledgment of incommensurability usually comes on the heels of value pluralism, the theory that there are many morally relevant values, each of which is ultimate or basic in the sense that it cannot be reduced to some other value, and each of which is worthy of our pursuit or allegiance.² These values are diverse and often come into conflict with each other when we must choose between alternative courses of action.³ This diversity of values is also apt to result in frequent incommensurability, or the absence of a determinate comparative ranking. If two conflicting values are completely diverse, so that they have nothing in common and cannot both be reduced to the same more basic value, it will be difficult to find a way to compare them and conclude that one is superior to the other.⁴ When one chooses one of the values over the other,

[w]hat one loses is of a different kind from what one gains. ... [Q]uite commonly there is no meaning to the judgment that one gains more than one loses. ... When one was faced with valuable options ... one simply chose one way of life rather than another, both being good and not susceptible to comparison of degree.⁵

Although the plurality, irreducibility, and diversity of values does not necessarily entail incommensurability,⁶ it is easy to see why pluralists typically assert that conflicting values are often incommensurable.

¹ See e.g. R. Chang, ed., *Incommensurability, Incomparability, and Practical Reason* (Cambridge, Mass.: Harvard University Press, 1997); Symposium, "Law and Incommensurability" (1998) 146 U. Pa. L. Rev. 1169.

² See e.g. I. Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (London: John Murray, 1990) at 11, 79-80 [hereinafter Berlin, *Crooked Timber*]; J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994) at 179 [hereinafter Raz, *Ethics*]. See also S. Wolf, "Two Levels of Pluralism" (1992) 102 *Ethics* 785 at 785.

³ See e.g. I. Berlin, *Four Essays on Liberty* (London: Oxford University Press, 1969) at ii, 169 [hereinafter Berlin, *Four Essays*]; S. Hampshire, *Morality and Conflict* (Cambridge, Mass.: Harvard University Press, 1983) at 21, 155, 165.

⁴ Even if the two conflicting values have something in common and are thus only partially diverse, any comparison in terms of whatever they have in common will still ignore the morally relevant features that are unique to either value and will thus provide an inadequate ground for preferring one value to the other.

⁵ Raz, *Ethics*, *supra* note 2 at 179.

⁶ The lack of a common standard or measure does not logically preclude the possibility that one value is superior to the other in some other way. See W. Sinnott-Armstrong, *Moral Dilemmas* (Oxford: Basil Blackwell, 1988) at 59-60 (arguing that irreducibility does not entail incomparability: whereas two moral requirements, such as, for example, (i) to not break a trivial promise, and (ii) to

This article will focus on incommensurability as a problem in law-making, a particular form of practical choice involving the activity of adopting legal rules. In Part I, we will analyze the concept of incommensurability. Incommensurability will be defined as the absence of rational commensurability, either metrical or ordinal. We will conclude that this incommensurability is often present in the domain of basic human goods and in the domain of instantiations of basic human goods. Part II will demonstrate that there are a number of resources that enable lawmakers to resolve conflicts between incommensurable goods or instantiations without being irrational or even arational. Each such resolution, however, is neither required by reason nor prohibited by reason. In Part III, this indeterminacy will lead us to reject a number of arguments claiming that incommensurability implies a particular jurisprudential position on a given substantive moral issue.

I. Analysis of the Concept of Incommensurability

When lawmakers choose among alternative legal rules, they are guided by certain values relevant to moral choice. These values include the human goods that serve as ends or goals of law-making (goods such as health, liberty, and employment in meaningful work), and may also include moral principles or moral virtues. Typically, these values come into conflict when lawmakers assess their rulemaking options. If the conflicting values are incommensurable, the law-making options are apt to be incommensurable. In section A, below, a definition of incommensurability that can be applied to alternative options or to conflicting values of any type will be developed. We will use the generic word “items” to refer to any two or more things that lawmakers may be trying to compare in order to make a choice.

A. Defining “Incommensurability”

Joseph Raz has suggested that items A and B are incommensurable (or “incommensurate” or “incomparable”) if it is not true that A is better than B, not true that B is better than A, and not true that A and B are of equal value.⁷ Ruth Chang, however, claims that there is a fourth possible relation between A and B that can prevent incommensurability, namely, that A and B are “on a par” (meaning not precisely equal,

not kill, may not be reducible to a common standard, nevertheless they may be compared—(ii) is clearly stronger than (i)).

⁷ See J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 322-24 [hereinafter Raz, *Morality*] (discussing the incommensurability of options). See also R. Warner, “Does Incommensurability Matter? Incommensurability and Public Policy” (1998) 146 U. Pa. L. Rev. 1287 at 1287 (discussing the incommensurability of reasons for choice).

but very nearly equal or roughly equal).⁸ Law-making is not a precise science, and thus for law-making purposes, ascertaining that A and B are roughly equal usually has the same significance as ascertaining that A and B are precisely equal, namely, that a choice of either alternative is acceptable. We can thus approve the notion that items are not incommensurable if they are roughly equal.

When is A not better than B, not worse than B, not precisely equal to B, and not roughly equal to B? For the sake of convenience, we shall ask what it would take for A to be better than B or worse than B or in a relationship of precise or rough equality with B. If none of these comparative relationships obtain, we can say that the items A and B are incommensurable. In other words, we shall inquire as to what makes items commensurable and then say that incommensurability is the absence of any such commensurability.

1. Metrical Commensurability

If both items A and B can be measured and assessed on a quantitative metric or scale divided into units and using cardinal numbers, A and B are commensurable if certain conditions are met.⁹ If a tape measure reveals that John is six feet one inch in height and that Jim is five feet nine inches in height, John is superior to Jim with respect to height. John's height and Jim's height have what we will call "metrical commensurability".

One condition for metrical commensurability is that the metric being used is an appropriate metric that does not ignore any difference between the two items that is relevant to the purpose of the comparison.¹⁰ The tape measure meets this condition because it measures height, and John and Jim are being compared only with respect to height. The tape measure does not measure weight or intelligence, but differences in weight or intelligence are not relevant here.

A second condition for metrical commensurability is that the metric being used be capable of measuring all the items to be compared. When we compare John and Jim in terms of height, the tape measure satisfies this condition because it can measure

⁸ See R. Chang, "Introduction" in Chang, *supra* note 1, at 4-5, 24-27 (suggesting that items are "comparable" and not "incomparable" with respect to some covering value if they are on a par). See also J. Griffin, "Incommensurability: What's the Problem?" in *ibid.* 35 at 35, 38-39 (suggesting that roughly equal forms of life are comparable).

⁹ See e.g. F. Schauer, "Commensurability and Its Constitutional Consequences" (1994) 45 *Hastings L.J.* 785 at 785 (indicating that values are commensurable if there is a way of reducing them to a single metric).

¹⁰ See e.g. J. Finnis, "Commensuration and Public Reason" in Chang, *supra* note 1, 215 at 218-19 [hereinafter Finnis, "Commensuration"] (suggesting that goods and bads are not commensurable if non-measurable differences are significant).

both John's height and Jim's height. If there is no single metric that can measure both items, the items are not metrically commensurable."¹¹

If we are trying to compare two items in terms of an overall characteristic that depends on multiple criteria, and each criterion requires a different metric, there may be no one metric that measures everything that must be measured. However, the presence of multiple criteria does not necessarily preclude satisfaction of the second condition for metrical commensurability. Suppose we are comparing items A and B with respect to overall competence and have correctly decided that overall competence depends on two contributory criteria, with criterion 1 having twice as much weight as criterion 2. Assume that each criterion has its own metric and there is no single metric that measures both criteria. Nevertheless, A is superior to B in overall competence if A has a higher rating than B on the metric that measures criterion 1 and also has a higher score than B on the metric that measures criterion 2. We have a complex metric that measures both A and B in terms of overall competence and satisfies the second condition. This complex metric consists of (1) a metric for measuring A and B in terms of criterion 1, (2) a different metric for measuring A and B in terms of criterion 2, and (3) an axiom that one item is overall better than the other if it is superior with respect to both criteria.

Even if A is not better than B on both criteria, A is still superior in overall competence if A has a score of 70 on criterion 1 and a score of 50 on criterion 2, while B has a score of 60 on criterion 1 and a score of 60 on criterion 2. Because we have a 2:1 ratio that determines the relative weight of criterion 1 and criterion 2, and each criterion has a metric that measures both A and B, we have a complex metric that measures both A and B with respect to overall competence. The second condition for metrical commensurability is satisfied.

A third necessary condition for metrical commensurability is the acceptance of some axiom that enables measurement along a metric to yield a comparative judgment without any intervening judgment other than a mechanical application of the axiom. Typically, the axiom will be the familiar one: more units is better than fewer units. This maximization notion is used in grading certain student exams (where A must have a higher numerical score—more correct answers—than B in order to receive a higher letter grade) and in certain sports (where the team with the most points is declared the winner). Other axioms are possible however. If what is most desired is not maximization, but a mean between deficiency and excess, the axiom will indicate that a measured score closer to that mean is better than a score further from that mean.

¹¹ See J. Finnis, *Fundamentals of Ethics* (Washington, D.C.: Georgetown University Press, 1983) at 87 [hereinafter Finnis, *Ethics*] (pointing out that the size of a page, the weight of a book, and the number six are not commensurable; even though each has a quantitative measure, they lack a common measure).

Thus, an item that is measured to be two units short of the mean is better than an item measured to be five units beyond the mean. To satisfy the third condition for metrical commensurability, all we need is some axiom that allows us to make a comparative judgment about items by measuring units and applying the axiom, without any other preliminary judgment.

A number of writers define incommensurability as the absence of what I am calling metrical commensurability.¹² If metrical commensurability is not the only possible form of commensurability, such writers must come up with some term other than “incommensurability” (“incomparability”, for example) to designate situations in which items are not metrically commensurable or commensurable in any other way. It seems preferable to use “incommensurability” to mean the absence of commensurability in any form, and use different terms (such as “metrical commensurability”) to designate different forms of commensurability.

2. Ordinal Commensurability

Even if the items to be compared cannot appropriately be quantitatively measured by a metric using cardinal numbers, and thus lack metrical commensurability, they might properly be ranked ordinally, in priority order, and thus have what we will call “ordinal commensurability”.

For example, we may be playing a game of cards in which spades always trump diamonds, so that a three of spades beats a nine of diamonds. Or we may have a system of constitutional law in which the right to free speech always takes priority over the goal of economic growth. These are examples of situations in which there is a fixed, absolute hierarchy between two or more classes of items, so that an item be-

¹² See e.g. R. Craswell, “Incommensurability, Welfare Economics, and the Law” (1998) 146 U. Pa. L. Rev. 1419 at 1421 (two options are incommensurable if there is no scale or metric that would rank the options and justify choosing the higher-ranking option); E.A. Posner, “The Strategic Basis of Principled Behavior: A Critique of the Incommensurability Thesis” (1998) 146 U. Pa. L. Rev. 1185 at 1185 (the incommensurability thesis holds that we cannot always value options along a common and normatively justified metric); F. Schauer, “Instrumental Commensurability” (1998) 146 U. Pa. L. Rev. 1215 at 1215-16 (those who argue for commensurability maintain that “all values, reasons, options, or norms can be compared to each other even if they cannot be reduced to a common metric”); T.K. Seung & D. Bonevac, “Plural Values and Indeterminate Rankings” (1992) 102 *Ethics* 799 at 799, n. 1 (“incommensurable” means the unavailability of a common scale for measuring two or more things we want to compare or rank); C.R. Sunstein, “Incommensurability and Valuation in Law” (1994) 92 *Mich. L. Rev.* 779 at 780, 796 (human goods are incommensurable if they cannot be assessed along a single purely quantitative “metric without doing violence to our considered judgments about how these goods are best characterized”).

longing to a higher-ranking class is always superior to an item that is a member of a lower-ranking class.¹³

We should note that even if the items to be compared belong to classes that are arranged in absolute hierarchical order, this does not guarantee ordinal commensurability. Assume that class A is always superior to class B and always superior to class C, and that class B is always superior to class C. If we are trying to compare an item belonging to class A with a combination of two items, one of which belongs to class B and one to class C, our hierarchy of classes does not yield a determinate comparison; it does not dictate that an A is superior to a combination of a B and a C.¹⁴ Although B is inferior to A, and C is inferior to A, the combined strength of B and C might match or exceed the strength of A. Another situation in which a fixed hierarchy among

¹³ It is sometimes claimed that incommensurability is present if items of class A should never be exchanged with or traded off for items of class B. See Raz, *Morality*, *supra* note 7 at 345-57 (suggesting that a value such as parenthood or friendship has "constitutive incommensurability" with money because refusing to exchange such a value for money is a constitutive aspect of the value; we cannot even compare parenthood or friendship with money, for to do so would make the relationship of parenthood or friendship impossible); Warner, *supra* note 7 at 1291-1303 (arguing that constitutive incommensurability exists when certain commitments exclude certain options or reasons from even being considered, from even being compared with the options or reasons to which one is committed).

Other writers, however, have suggested that this so-called constitutive incommensurability is actually ordinal commensurability. If items of class A must never be sacrificed in order to obtain items of class B, this must be because A is ordinally superior to B in a fixed hierarchy. See Chang, *supra* note 8 at 19-21; L. Alexander, "Banishing the Bogey of Incommensurability" (1998) 146 U. Pa. L. Rev. 1641 at 1647.

Raz maintains that refusing to sacrifice friendship for money is not based on a judgment that friendship is ordinally superior to money: if friendship were always superior to money, it would be wrong for a person to pass up an opportunity to *buy* friendship with money (a conclusion that should be rejected because it is incompatible with the view that friendship must be neither sold nor bought). See Raz, *Morality*, *supra* note 7 at 352. But the ordinal superiority of friendship over money would not entail that it is wrong to pass up an opportunity to purchase a (specious) friendship with money. We could consistently say that true friendship is always superior to money and that one should not attempt to sell or buy friendship because it cannot be done and because widespread attempts to do it would impair friendship as a social good.

We should distinguish between two different kinds of norms prohibiting trade-offs. A norm providing that A should never be sacrificed in order to obtain B but that B may be sacrificed in order to obtain A certainly reflects an ordinal ranking in which A is superior to B. A norm providing that A and B should not be traded in free market exchanges need not reflect any ordinal ranking of A and B. But neither does it necessarily reflect or create incommensurability. There may be a good reason to believe that A is always superior to B but that A and B should not be exchanged in free markets.

¹⁴ See Sinnott-Armstrong, *supra* note 6 at 68-69 (noting that the ordinal ranking of moral requirements does not achieve comparability if one requirement supports one action option while two lower-ranking requirements support an incompatible option).

classes does not yield a determinate comparison is that involving a conflict between two items belonging to the same class.

If the items to be compared do not belong to classes that are arranged in a fixed hierarchy, ordinal commensurability might still be possible if the classes are ordered in a variable hierarchy. We may, for example, have a rule providing that items in class A outrank items in class B, except in circumstances *x*, *y*, or *z*, where items in class B outrank items in class A.

Finally, ordinal commensurability may exist even in situations where the items to be compared do not belong to classes that appear in any hierarchical ranking, either fixed or variable. Here we would be comparing two items in their concrete particularity. It may be difficult to imagine how it could be true that one item is ordinally superior to the other if we have no rule creating an ordinal hierarchy between the classes to which the items belong.¹⁵ Nevertheless, there may be truths that do not depend on human-made rules, and some of these truths may relate to concrete particulars. We will consider such possibilities in the next subsection. As suggested in section B.2 below, there may also be rules made by humans requiring a judgment that two items belonging to the same class are ordinally commensurable, even though they are not metrically commensurable. For now, let us merely recognize the theoretical possibility that concrete, particular items can have ordinal commensurability without being members of ranked classes.

The conception of ordinal commensurability presented above would seem to be so broad that it can account for any commensurability that is not metrical commensurability. Based on the analysis so far, we can then say that incommensurability is a breakdown in ranking,¹⁶ the absence of both metrical commensurability and ordinal commensurability, so that it is not true that one item is superior to the other(s) and not true that the items are precisely, or even roughly, equal. This formulation cannot serve as our final definition of incommensurability, however, because of a critical ambiguity concerning the word “true”.

3. Real versus Rational Incommensurability

Law-making involves moral judgments, and the items that lawmakers try to compare are often moral values (human goods, moral principles, or moral virtues). If someone makes a statement in the form, “It is true that moral value A is superior to moral value B,” what kind of truth is being claimed? In the realm of moral discourse,

¹⁵ Note that all of my previous examples of ordinal commensurability involve some rule or rule-like notion that applies directly to classes of items and only indirectly to particular items.

¹⁶ See Griffin, *supra* note 8 at 35-36 (suggesting that the most serious threat to practical rationality comes from a breakdown in ranking).

the word "true" is apt to be ambiguous. It might mean that the moral proposition has real truth, or it might mean that the proposition has rational truth.

I am using "real moral truth" or "real truth" to refer to the kind of truth acknowledged by moral realists. Moral realism is the theory that at least some moral propositions or judgments are true in virtue of a moral reality that is part of the world in which we live but is independent of human beliefs, reasoning, or awareness concerning the moral issue to which the proposition or judgment is addressed.¹⁷ Real truth is true because of an independent reality, even if we humans deny its truth or fail to perceive it when we fully utilize our rational capacities. Such truth may be too deep down in the fabric of the universe for us to apprehend it.

¹⁷ For similar definitions of moral realism, see D. McNaughton, *Moral Vision: An Introduction to Ethics* (Oxford: Basil Blackwell, 1988) at 7, stating that moral realism "insists that there is a moral reality which is independent of our moral beliefs and which determines whether or not they are true or false." Moral properties are part of the "furniture of the world" and whether such a property is present "does not depend on what we think about the matter"; Sinnott-Armstrong, *supra* note 6 at 191, summarizing the definitions of David Wiggins, Mark Platts, and Thomas Nagel, which indicate that real moral truth is independent of our moral beliefs and our ability to recognize such truth. See also P. Foot, "Moral Realism and Moral Dilemma" in C.W. Gowans, ed., *Moral Dilemmas* (New York: Oxford University Press, 1987) 250 at 268-69 (suggesting that a realist theory refuses "to let the possession of truth or falsity by a particular ethical proposition stand or fall by our capacity or lack of capacity for assigning truth or falsity to it"); C.W. Gowans, "Introduction" in Gowans, *ibid.* 3 at 30 (noting that in one sense of the term, moral realism is the view that the truth-value of a moral statement or judgment is determined by a world that is independent of human reason, perception, or desire).

Although moral realism holds that real moral truth is independent of what we humans think *about the matter in question*, I see no reason why a moral realist must also assert that real moral truth is always independent of *all* human thoughts, attitudes, and feelings. Indeed, there would be no place for morality (as we experience it) in a world devoid of human thoughts and feelings. Any real moral truth relevant to human living must be a truth that is not totally independent of human nature, and our thoughts and feelings are integral parts of our human nature.

Even if I am wrong about this, and any real moral truth is entirely independent of all human mental states, this does not entail that *all* moral propositions or judgments have truth-conditions that are entirely independent of such mental states. The moral judgment that I should not call Jane an idiot might be derived from (1) a real moral truth that we should not hurt other peoples' feelings, in conjunction with (2) an empirical proposition that Jane's feelings will be hurt if I call her an idiot. The derived judgment has two truth conditions: premises (1) and (2) must be true in order for the derived moral judgment to be true. But while the first premise might be a real moral truth independent of human mental states, the second premise is an empirical proposition whose truth depends on the actual mental state of Jane. We thus cannot say that all moral propositions or judgments have truth-conditions that are entirely independent of human mental states. Although real moral truths may serve as our basic moral principles, our derived and more particular judgments will often require additional premises that are not real moral truths—premises the truth of which is dependent on human mental states.

One way we may interpret a statement that values A and B are truly incommensurable is therefore to regard it as an assertion that there is nothing in independent reality making it true that A is superior to B, that B is superior to A, or that A and B are precisely or roughly equal in value.¹⁸ According to this interpretation, incommensurability is not simply our inability to discern metrical or ordinal commensurability. It is more radical than that. Incommensurability is “real incommensurability”, incommensurability as a matter of real moral truth.¹⁹

Alternatively, a statement about the commensurability or incommensurability of values A and B might be interpreted as a statement claiming to have not real moral truth, but rational moral truth. By “rational moral truth” (or “rational truth”), I mean the kind of truth ascribed to moral propositions that are determinately true by virtue of the generally accepted rules of rationality that govern practical reasoning—reasoning employed in choosing among action options. Rational truth is determined by rules constructed by humans to govern human thinking and is therefore constructive truth, as distinguished from real truth.

Thus, a statement that values A and B are truly incommensurable might be interpreted as an assertion that the rules of rationality do not establish the truth of a proposition that A is superior to B, or a proposition that B is superior to A, or a proposition that A and B are precisely, or roughly, equal in value. Such “rational incommensurability” is the failure of any assertion of metrical or ordinal commensurability to be true under the generally accepted rules of rationality governing practical reason. Rational incommensurability results when no particular ranking of items is required by rational reason. A number of writers seem to have this notion of rational incommensurability in mind when they discuss incommensurability.²⁰

¹⁸ A slightly different interpretation would be an assertion that there actually is something in independent reality making it false that A is superior to B, false that B is superior to A, and false that A and B are precisely or roughly equal. But both interpretations yield assertions of real incommensurability based on the nature of an independent moral reality, and we can ignore the logical distinction between “not true” and “false”.

¹⁹ See J. Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (London: Routledge, 1995) at 70 [hereinafter Gray, *Enlightenment's Wake*] (suggesting that incommensurability is not an imperfection in our understanding, but a feature of the world, and that the thesis of value incommensurability is a species of moral realism).

²⁰ See e.g. Raz, *Morality*, *supra* note 7 at 324, 333 (suggesting that when two options are incommensurable, reason is indeterminate and has no judgment to make concerning their relative value); R.P. George, “Does the ‘Incommensurability Thesis’ Imperil Common Sense Moral Judgments?” (1992) 37 *Am. J. Juris.* 185 at 187, n. 9 [hereinafter George, “Moral Judgments”] (stating that the issue between critics and defenders of the incommensurability thesis is whether basic values and their instantiations are objectively commensurable by reason); L.A. Kornhauser, “No Best Answer?” (1998) 146 *U. Pa. L. Rev.* 1599 at 1604-05 (suggesting that two options are incommensurable, as in-

Whether two or more values are rationally commensurable or rationally incommensurable necessarily depends on what rational requirements are acknowledged.²¹ An assertion of commensurability does not have rational truth unless that assertion is required by generally accepted rules of rationality.²² These rules are not as easy to identify as one might think. The rules of rationality undoubtedly differ from one realm of reason to another,²³ and as Lewis Kornhauser notes, the criteria of rationality in law-making even differ from one branch of government to another.²⁴ Furthermore, even within one discrete branch of law-making, it may be impossible to identify a set of rules of rationality that is both sufficient for a decision and generally accepted by lawmakers. In the absence of any such set of rules, no conclusion of commensurability is required by reason.

There are a few rules of rationality that would be generally accepted in any realm of reasoning. Reasoning must be reflective and deliberate. One must not disregard known relevant facts. Conclusions must be based on premises or reasons. Reasoning must not violate the rules of logic.

In realms of law-making, there may be some additional rules of rationality governing public policy. Kornhauser has identified two plausible rules of rationality governing lawmakers who seek to integrate values for the purpose of choosing among alternative legal rules: (1) the rule of Pareto-superiority—if rule 1 serves each value better than rule 2 does, choose rule 1; and (2) the rule of “nondictatorship”—the values to be served must not be ranked in absolute lexical order.²⁵ As Kornhauser notes, (1) the rule of Pareto-superiority does not apply when rule 1 serves value A better than rule 2 does, but rule 2 serves value B better than rule 1 does, and (2) the nondictatorship rule may not be generally accepted in some contexts.²⁶ Kornhauser suggests that even with these two rules rationality will generally leave more than one permissi-

struments promoting ends, when rationality does not determine any particular ranking of the options, all values considered); E. Millgram, “Incommensurability and Practical Reasoning” in Chang, *supra* note 1, 151 at 151 (indicating that worries about the incommensurability of ends arise when practical reasoning seems to run out before determining a decision).

²¹ Kornhauser, *ibid.* at 1608, 1619 (noting that whether options are instrumentally incommensurable depends on the conditions that rationality imposes on the integration of ends).

²² An assertion of incommensurability, on the other hand, has rational truth, as a matter of default, when no statement of commensurability (that A is superior to B, that B is superior to A, or that A and B are precisely or roughly equal) is required by the rules of rational reason.

²³ See Finnis, “Commensuration”, *supra* note 10 at 219, 223 (suggesting that deliberation about moral options is just one of four distinct domains of reasoning).

²⁴ See Kornhauser, *supra* note 20 at 1619.

²⁵ *Ibid.* at 1608-11, 1617-18. I would state the Pareto rule somewhat differently: If rule 1 serves at least one value better than rule 2 does and does not serve any value less well than rule 2 does, choose rule 1.

²⁶ *Ibid.* at 1609-10 (concerning the Pareto rule), 1611 (concerning the nondictatorship rule).

ble ordering of options,²⁷ and it is difficult to cure this incommensurability by identifying any additional rules required by rationality.²⁸

Because of the distinction between real incommensurability and rational incommensurability, a moral proposition can have one kind of truth without the other. There are four possibilities. First, two or more values might be incommensurable as a matter of real moral truth and also rationally incommensurable. Second, it is also possible that the values are commensurable as a matter of real moral truth and rationally incommensurable, due to the inability of human reason to discern commensurability in a moral reality that is independent of human reason. Third, it is even possible that the values are incommensurable as a matter of real moral truth and rationally commensurable, due to human-made rules of rational reasoning that require a conclusion that certain values are commensurable when that conclusion is actually contrary to independent moral reality. Fourth, the values might be commensurable as a matter of real moral truth and also commensurable as a matter of rational truth.

Should we define incommensurability as real incommensurability or as rational incommensurability? We sometimes know whether conflicting values are rationally commensurable or incommensurable. For example, it is often obvious that the governing rules of rationality do not establish the truth of any statement asserting commensurability, and that the values are therefore incommensurable. However, we will almost never know whether conflicting values are really commensurable or incommensurable. Independent moral reality is very mysterious; it seems to lie beyond the reach of human epistemic capacities. Although a few mystics may be able to apprehend real moral truth by way of intuition or a leap of faith, they cannot support their beliefs by the kind of epistemically reliable methods that yield knowledge.

The fact—if it is a fact—that the conflicting values are commensurable or incommensurable as a matter of real moral truth will have no effect on law-making if lawmakers have no way of knowing that fact and are unwilling to act on the basis of mystical speculation about the real moral truth of assertions of commensurability or incommensurability. Although I believe (as a matter of faith) that there are some real moral truths concerning the commensurability or incommensurability of values, I propose that we define incommensurability as rational incommensurability, so that incommensurability can offer some practical implications for lawmakers who are not mystics.²⁹

²⁷ *Ibid.* at 1611.

²⁸ *Ibid.* at 1618.

²⁹ A moral realist may object that the existence of real moral truth about incommensurability does have important implications for law-making. Even if no one knows the real moral truth, it might be apprehended by intuition, and lawmakers should therefore put important moral decisions into the hands of those persons who are most likely to intuit the real moral truth concerning commensurability

We can now define incommensurability with respect to the conflicting values relevant to law-making. Two values are incommensurable if and only if generally accepted rules of rationality do not require, as a matter of either metrical or ordinal commensurability, that any of the following propositions be regarded as true: (1) value A is superior to value B; (2) value B is superior to value A; (3) A and B are precisely equal in value; or (4) A and B are roughly equal in value.

B. The Domains of Incommensurability

We have confined the scope of our analysis to moral values that lawmakers consider when they choose among alternative legal rules. Which kinds of moral values are rationally incommensurable? Human goods? Moral principles? Moral virtues?

1. Basic Human Goods

A number of writers assert that basic human goods are incommensurable with each other.³⁰ "Human goods" are things that should be desired as ends and should serve as reasons for action, because they are necessary, constituent aspects of human well-being or flourishing.³¹ "Basic" human goods are human goods that cannot be re-

and incommensurability (such persons may be lawmakers, or they may be private citizens). However, I do not see any reliable way of identifying such persons.

³⁰ See Finnis, *Ethics*, *supra* note 11 at 94 (asserting that "[t]he basic human goods at stake in any morally significant situation of choice are incommensurable"); J. Finnis, *Natural Law and Natural Rights* (New York: Clarendon Press, 1980) at 112 [hereinafter Finnis, *Natural Law*] (asserting that the basic aspects of human well-being are incommensurable); W.A. Galston, *Justice and the Human Good* (Chicago: University of Chicago Press, 1980) at 94 (asserting that "[n]one of the basic goods has absolute priority over any of the others," and that there is no common denominator by which they can be quantitatively compared); R.P. George, *Making Men Moral: Civil Liberties and Public Morality* (New York: Clarendon Press, 1993) at 13 [hereinafter George, *Making Men Moral*] (asserting that the basic human goods are many and incommensurable); G. Grisez, J. Boyle & J. Finnis, "Practical Principles, Moral Truth, and Ultimate Ends" (1987) 32 *Am. J. Juris.* 99 at 110 (asserting that the basic goods are incommensurable; no basic good as such can be meaningfully said to be better than another).

³¹ See Finnis, *Ethics*, *ibid.* at 35-36 (suggesting that human goods are ends that can be intelligently regarded as desirable), 50-51 (suggesting that the basic human goods are aspects of human well-being, forms of human flourishing); Finnis, *Natural Law*, *ibid.* at 85 (suggesting that forms of good are intelligently perceived as to-be-pursued), 64, 81, 87-88 (suggesting that human goods are aspects of human well-being); George, *Making Men Moral*, *ibid.* at 12-13 (stating that "[t]he human goods that provide basic reasons for action are fundamental aspects of human well-being and fulfillment"), 15 (stating that "[b]asic human goods are intrinsic and constitutive aspects of— ... [n]ot mere means to—complete human well-being and fulfillment"); Grisez, Boyle & Finnis, *ibid.* at 106 (stating that basic goods function as ultimate rational grounds for proposing actions).

duced to some more fundamental good.³²

When we view basic human goods as abstract concepts designating generic classes of items, it seems likely that all or most of them are rationally incommensurable. Using knowledge as an example of a basic human good, we view knowledge as an abstract good when we are concerned only with knowledge as such, without regard to any particular instantiation or example of knowledge. If we try to compare knowledge and friendship as abstract goods, we cannot compare them in terms of the measurable quantity of goodness each has, because they are merely abstract concepts. Trying to measure the quantity of goodness in an abstract concept of knowledge or friendship would be as futile as trying to measure the amount of light in an abstract concept of light, or the number of inches in an abstract concept of the human foot. Metrical commensurability is therefore elusive when we try to compare basic human goods as abstract goods, keeping in mind that if they are truly basic goods, they cannot be reduced to some other good that might have an appropriate metric.

Could knowledge and friendship, viewed as abstract goods, be rationally commensurable by virtue of some ordinal comparison? Perhaps one of these goods is more good than the other, not in the sense of having a greater quantity of goodness, but in the sense of always having a higher quality of goodness. Or perhaps, in this same qualitative sense, the two goods must always be ranked as equal. It does not seem, however, that we have any rules of rationality requiring us to rank knowledge and friendship in any particular hierarchal order, either fixed or variable. It thus appears that abstract goods like knowledge and friendship lack ordinal commensurability as well as metrical commensurability and are therefore rationally incommensurable. In the domain of basic human goods, viewed as abstract goods, rational incommensurability is undoubtedly widespread, if not ubiquitous.

2. Instantiations of Basic Human Goods

Another question that arises is whether instantiations of basic human goods can be rationally incommensurable. Here the items to be compared are not abstract basic goods (knowledge as such, friendship as such), but concrete, empirical instances or realizations of basic goods. Dr. Anderson's knowledge of patient Smith's medical history would be an instantiation of the basic human good we call knowledge. Although lawmakers are seldom forced to decide whether one abstract basic good is always more valuable than another, they must often choose between a law that will

³² See Finnis, *Natural Law*, *ibid.* at 92 (stating that a basic form of good cannot be analytically reduced to being merely an aspect of another form of good); George, *Making Men Moral*, *ibid.* at 13 (stating that basic human goods are irreducible); Grisez, Boyle & Finnis, *ibid.* at 110 (stating that basic goods are primary principles; "if they were reducible to something prior, they would not be primary").

likely produce one set of instantiations of basic human goods, and an alternative law that will probably yield a very different set of instantiations. Indeed, lawmakers are usually choosing between alternative sets of instantiations of basic human goods (typically, rather large sets involving many persons). Thus, if an incommensurability thesis is to have widespread jurisprudential significance, it must assert incommensurability among instantiations.

It would seem that in some cases, two instantiations of the same basic good are rationally commensurable. Empirical instantiations of one basic good may have attributes that can be measured (for example, amount, duration, or purity). This might permit metrical commensuration of two instantiations of the same basic good, so long as the metric does not ignore some significant attribute and measures the degree to which the basic good is actually realized in each instantiation.³³ For example, rationality may require the conclusion that Smith's health now is better than it was a year earlier, as measured in physiological tests. If so, these two instantiations of the basic good of health are rationally commensurable.

If the extent to which a basic good is realized in instantiations cannot be measured, two instantiations of that good may still have ordinal commensurability. We can often distinguish between an instantiation that increases the realization of a good and an instantiation that decreases the realization of that good, even though we cannot measure the extent of the increase or decrease. Assuming that all other things are equal, rationality may require that increasing the depth of my friendship with the Andersons be preferred to the atrophy of that friendship. As well, even though some or all aspects of a basic good are not measurable, rationality may require the judgment that one instantiation of that good is inferior to another instantiation of that same good if the latter instantiation is exactly like the former instantiation in every aspect except for one aspect that only the second instantiation provides. I may, for example, be choosing between two equally priced recreational fishing trips, both of which involve the same waters at the same time with equivalent equipment, but only one of which provides an experienced guide.

As the unusual nature of the preceding examples indicates, there are many cases in which two instantiations of the same basic human good are rationally incommensurable.³⁴ Frequently, the extent to which that good is realized in alternative instantia-

³³ What may appear to be a measure of the extent to which a basic good is realized is often only a measure of a means to such realization. Four years of university education is a measure of a means of realizing the basic good of knowledge, but it is not a measure of the knowledge a student has acquired.

³⁴ See George, "Moral Judgments", *supra* note 20 at 189 (stating that alternative instantiations of the same basic value are often incommensurable); Grisez, Boyle & Finnis, *supra* note 30 at 110 (indicating that instantiations of the same basic good are incommensurable when each alternative instantiation offers some appealing aspect that the other instantiation does not).

tions cannot be measured, and rationality does not require any particular ordinal ranking of the instantiations. How, for example, could rationality dictate any particular ranking of two instantiations of the basic good of aesthetic experience, when one instantiation comes from attending a Metropolitan Opera production of Rossini's *La Cenerentola*, and the other instantiation is brought about by attending a Met production of Verdi's *La Traviata*?

Instantiations of *different* and incommensurable basic human goods will usually be rationally incommensurable.³⁵ As instantiations of diverse basic goods, they are unlikely to have a common measure. As instantiations of basic goods that are not ordinally ranked, they cannot themselves be ranked on the basis of their membership in ranked classes. Nevertheless, there may be situations in which rationality requires some particular ranking between instantiations of different basic goods. For example, it may be unreasonable to deny that an instantiation of good A should be preferred to an instantiation of good B in a situation where there is a dire need for A and B is already realized to the extent necessary for a good life.³⁶

We must conclude that instantiations of basic human goods are often rationally incommensurable. Instantiations of the same basic good are sometimes rationally commensurable and sometimes rationally incommensurable. Instantiations of different basic goods are usually rationally incommensurable, but might be rationally commensurable in certain situations.

3. Moral Principles and Moral Virtues

Moral principles often conflict and may be rationally incommensurable.³⁷ It is unlikely that all moral principles can be ranked in one fixed order. However, there may

³⁵ See G. Grisez, "Against Consequentialism" (1978) 23 Am. J. Juris. 21 at 39 (stating that in choosing between "participations" of two different and incommensurable goods, the "greatest net good" is meaningless); Grisez, Boyle & Finnis, *ibid.* (stating that incommensurability obtains "even" between instantiations of the same basic good, and thus implying that incommensurability obtains between instantiations of different basic goods).

³⁶ Compare J. Kekes, *The Morality of Pluralism* (Princeton: Princeton University Press, 1993) at 50 [hereinafter Kekes, *Pluralism*] (suggesting that a claim for religious fasting (a particular form of the secondary good of religious observance) can defeat a claim for bread (a particular form of the primary good of nutrition) if minimum requirements for nutrition are already generally satisfied).

³⁷ See J. Gray, *Isaiah Berlin* (Princeton: Princeton University Press, 1996) at 146-49 [hereinafter Gray, *Berlin*] (summarizing Berlin as holding that conflicts between deontic principles of justice are sometimes not rationally arbitrable); Hampshire, *supra* note 3 at 116-18 (suggesting that conflicts between moral principles sometimes result in a breakdown of clear reasoning); McNaughton, *supra* note 17 at 196 (arguing that it is "implausible to suppose that our moral principles can be ranked in an invariable order"); Sinnott-Armstrong, *supra* note 6 at 96-97 (suggesting that moral principles cannot all be ranked in a fixed, absolute order because some principles will cover both important and trivial

be other ways to make conflicting moral principles ordinarily commensurable (metrical commensurability would seem to be out of the question). Much depends, of course, on the structure of our deontic system of moral principles. In a complete deontic system, all conflicts between principles could be resolved by one or more master principles.³⁸ But our lawmakers use moral principles that serve diverse ends and purposes, and it is unlikely that they will recognize, as rationally compelling, any deontic system involving master principles that resolve, authoritatively and a priori, all conflicts between moral principles.

Moral virtues such as justice and mercy can come into conflict that cannot be resolved by rational analysis. In such cases, virtues are rationally incommensurable.³⁹

Basic human goods are often rationally incommensurable with each other, moral principles are often rationally incommensurable with each other, and moral virtues are often rationally incommensurable with each other. It is therefore not surprising that values in one domain will often be rationally incommensurable with values in another domain. Basic goods will be incommensurable with moral principles; moral principles will be incommensurable with moral virtues; moral virtues will be incommensurable with basic goods.

C. The Extent of Incommensurability

It thus appears that we live in a world replete with moral conflict and the rational incommensurability of conflicting moral values. In the remainder of this article, we will inquire how conflicts between rationally incommensurable values might be resolved and will consider some possible jurisprudential implications of value incommensurability. In the interests of brevity and simplicity, we will focus on incommensurability between basic human goods or between instantiations of basic human goods.

instances, and an important instance of one principle must be ranked above a trivial instance of another principle, and vice versa. However, any such ranking of particular instances is merely intuitive); Griffin, *supra* note 8 at 51 (stating that we will likely encounter incomparable (incommensurable) moral norms from time to time).

³⁸ Such a master principle need not involve a fixed hierarchy for all subordinate principles. It might provide that in all private law disputes, the moral principle that best promotes individual responsibility will have priority, whereas in all public law disputes, the moral principle that best promotes domestic tranquility will have priority. We might be able to imagine some such master principle (or set of master principles) that would resolve all conflicts among moral principles, though I doubt that we would like what we had imagined.

³⁹ See Hampshire, *supra* note 3 at 116-18 (suggesting that conflicts between virtues, like conflicts between moral principles, sometimes result in a breakdown of clear reasoning).

First we must clarify the incommensurability thesis with respect to the extent of incommensurability being asserted. For abstract basic human goods, there would seem to be three possibilities:

- (a1) All abstract goods are commensurable with each other;
- (a2) Some pairs of abstract goods are commensurable, and other pairs of abstract goods are incommensurable;
- (a3) All abstract goods are incommensurable with each other.

Similarly, with respect to instantiations of abstract basic human goods, there seem to be three possibilities:

- (i1) Instantiations are always commensurable with each other;
- (i2) Some pairs of instantiations are commensurable, and other pairs of instantiations are incommensurable;
- (i3) Instantiations are always incommensurable with each other.

Our preceding analysis should lead us to reject (a1) and (i1). In the realm of rational rather than real commensurability, it seems clear that some abstract goods are incommensurable with each other and that some instantiations are incommensurable with each other. We have seen also that some pairs of instantiations are commensurable and should thus reject (i3). The proposition in (a3) will be controversial. Some of us will accept it,⁴⁰ while others will maintain that human life has an absolute ordinal priority over other (or at least some other) basic human goods and is rationally commensurable with them as abstract concepts.⁴¹

In order to present the incommensurability thesis in its more moderate form, we will assume that it asserts (a2) and (i2). Confining our thesis to basic human goods and their instantiations, and interpreting incommensurability as rational incommensurability, we get the following incommensurability thesis: with respect to some pairs of basic human goods and some pairs of sets of instantiations of basic human goods, A and B are incommensurable in the sense that generally accepted rules of rationality do not require, as a matter of either metrical or ordinal comparison, that any of the following propositions be regarded as true: (1) A is superior to B; (2) B is superior to A; (3) A and B are precisely equal in value; or (4) A and B are roughly equal in value.

⁴⁰ See e.g. Finnis, *Natural Law*, *supra* note 30 at 92-93 (arguing that there is no objective hierarchy among the basic goods, not even a priority for life as such); Kekes, *Pluralism*, *supra* note 36 at 122-23 (arguing that life does not always override other values; if we believed it did, we would lower the speed limit for motorists and outlaw parachute jumping and Himalayan expeditions).

⁴¹ See e.g. Grisez, *supra* note 35 at 50 (stating that life is a greater good than health).

I suspect that whatever the generally accepted rules of rationality are, this incommensurability thesis is sound. Our next task is to consider some possible implications of this thesis. In Part II, we will ask whether incommensurability precludes rational choice in law-making. In Part III, we will consider a number of arguments claiming that incommensurability implies a particular position on a given substantive jurisprudential issue.

II. How Lawmakers Can Resolve Conflicts between Incommensurable Goods

Suppose that a body of lawmakers has ascertained that A is a basic human good that would be promoted by the implementation of legal rule X. The lawmakers thus have teleological reasons for adopting rule X. The lawmakers have also ascertained that B is a basic human good that can be promoted by the implementation of legal rule Y. The lawmakers thus have teleological reasons for adopting rule Y. Suppose further that X and Y are contrary and incompatible legal rules dealing with the same issue; the lawmakers must choose between rule X and rule Y and must thus choose between promoting good A and promoting good B in this area of the law. Suppose, finally, that the lawmakers have considered all relevant rules of rationality and have correctly perceived that the foreseeable instantiations of good A produced by rule X are rationally incommensurable with the foreseeable instantiations of good B produced by rule Y; the rules of rationality do not require that the lawmakers prefer good A over good B and do not require a preference for B over A. Does this mean that either preference (adoption of either rule X or rule Y) would be irrational? Not at all.

A. Choice Permitted by Reason

A choice to promote one good over another conflicting good will merit one of three possible judgments concerning the rational status of that choice: (1) the choice was required by reason; (2) the choice was permitted but not required by reason; or (3) the choice was prohibited by reason (was irrational). Assume that our hypothetical lawmakers choose to promote good A rather than good B. Such a choice is obviously not required by reason, because we are assuming that the projected instantiations of A and the projected instantiations of B are rationally incommensurable, which means that neither a choice for A nor a choice for B is required by rationality.

Nor can we say that the lawmakers' choice to promote A is prohibited by reason. I assume that no rule of rationality prohibits the lawmakers from choosing between conflicting goods whenever those goods are incommensurable. Given the frequency of incommensurability, any rule requiring lawmaker abstention in the face of incom-

mensurability would unduly restrict the lawmakers' ability to deal with social problems. In assuming that the instantiations of good A are rationally incommensurable with the instantiations of good B, we are assuming that the instantiations of A are not inferior to the instantiations of B by virtue of the rules of rationality; in other words, that a choice to promote B is not required by reason.⁴² Now, if the rules of rationality permit the lawmakers to make a choice and do not require a choice in favour of B, a choice in favour of A is not prohibited by reason. So we cannot judge the lawmakers' choice of A to be irrational, in the sense of being contrary to the rules of rationality and thus prohibited by reason.

Of the three possible judgments listed above, the only judgment we can make about the rational status of the lawmakers' choice for A is that this choice was permitted but not required by reason, permitted in the sense of not being contrary to the rules of rationality. So long as rationality does not require abstaining from choice, any choice between incommensurables would seem to be permitted by reason.

B. Rational Choice and Arational Choice

Choices permitted but not required by reason, however, include two different kinds of choice. We will use the term "rational choice" to designate any choice that is not required by reason, but is permitted by reason (not contrary to the rules of rationality) and is also supported by one or more articulable reasons that are both "undefeated" and "undefeating".⁴³ A reason for choosing a particular alternative is undefeated if there is no rationally conclusive reason for choosing some other alternative. A reason for choosing a particular alternative is undefeating if it does not rationally override the reasons supporting the other alternatives. If the reasons for choosing a particular alternative were defeated, rather than undefeated, choosing that alternative would not be permitted by reason. If the reasons for choosing that alternative were defeating, rather than undefeating, choosing that alternative would be required by reason.

⁴² If the promotion of A in this situation were prohibited by some moral norm that has been incorporated into the rules of rationality, while the promotion of B were not so prohibited, the set of A instantiations would be an inferior choice compared to the set of B instantiations, and the two sets of instantiations would be rationally commensurable. But we are assuming that they are rationally incommensurable, and are thus assuming that the rules of rationality do not prohibit the promotion of A while permitting the promotion of B.

⁴³ Similar conceptions of rational choice are easily found. See *e.g.* Raz, *Morality*, *supra* note 7 at 339 (suggesting that rational action is action for what the agent takes to be an undefeated reason); J. Finnis, "Concluding Reflections" (1990) 38 *Clev. St. L. Rev.* 231 at 237-38 (suggesting that choice between incommensurable options is rational when it is made for reasons "which make that option rationally appealing" and when the choice "conforms to all the requirements of practical reasonableness"); Warner, *supra* note 7 at 1321-23 (arguing that a choice between incommensurable reasons can be a rational choice in the sense that the choice is made for reasons that are not defeated by other reasons).

As the above definitions indicate, the choice of a particular alternative is not a "rational choice" unless it is supported by articulable reasons that are both undefeated and undefeating *when compared to the reasons supporting the other alternatives*. Thus, in the context of our hypothetical lawmakers choosing between promoting good A and promoting good B, their choice in favour of A is not a rational choice unless it is supported by reasons for choosing A over B. The lawmakers have teleological reasons for adopting a rule that would promote good A (A is a basic human good, A can be instantiated through adoption of rule X), but these are not reasons for choosing A over B in a conflict situation. (The lawmakers also have similar teleological reasons for promoting good B by means of rule Y.) To make a rational choice, the lawmakers also need reasons yielding a comparative judgment about the relative strength of the teleological reasons for promoting A and the teleological reasons for promoting B. The reasons for a comparative judgment in favour of A over B would be undefeating reasons involving norms that are not generally accepted rules of rationality. They would be reasons that some reasonable persons would reject (we are assuming that the instantiations of A and the instantiations of B are rationally incommensurable, i.e., that a choice in favour of A is not rationally required) but they would provide some rational support for a choice in favour of good A over good B, and that choice would thus deserve to be called rational.

A second kind of choice permitted but not required by reason must now be distinguished from rational choice. A choice of this second type is *not* supported by any articulable reason suggesting that that choice is better than any alternative choice. We will refer to any such choice as an "arational choice". Like the rational choice, the arational choice is not contrary to the rules of rationality and is thus permitted by reason. Unlike the rational choice, however, the arational choice is not made for any articulable reason yielding a judgment about the comparative merits of the available alternatives. The decision to choose one alternative over the other is not the result of a reasoning process. It may be the result of an intuitive judgment based on subconscious and inarticulable factors. It may even be entirely arbitrary, so long as it is made in a context in which the rules of rationality do not prohibit arbitrary choice. In most law-making contexts, arbitrary choice is probably prohibited by applicable rules of rationality and would thus be irrational (contrary to reason), rather than arational and permitted by reason.⁴⁴

⁴⁴ When a choice between incommensurables is irrational because arbitrary, what is irrational (contrary to the rules of rationality) is not the content of the choice (for example, a preference for good A over good B), but the way in which the choice is made (arbitrarily). We are assuming that the conflicting goods are rationally incommensurable, and must therefore assume that reason permits a choice for A and permits a choice for B.

We have seen that when lawmakers choose between rationally incommensurable goods (or, more likely, between rationally incommensurable instantiations of one or more goods), their choice cannot be required by reason. Nor will their choice be prohibited by reason or contrary to reason, so long as it is not arbitrary or otherwise in violation of the rules of rationality governing the lawmakers.⁴⁵ In most cases, their choice will be permitted by reason. We will now see that lawmakers have a number of resources that enable them to make choices that are not only permitted by reason, but actually have considerable support, so that, although they are not required by reason, they deserve our intellectual and moral respect.

C. Moral Principles

One such resource will be a set of moral principles that a lawmaker has accepted as normative guidelines for law-making. We expect lawmakers to use moral principles and would think that something was wrong if a lawmaker was not guided by moral principles.⁴⁶ The moral principles I have in mind are principles that are *not* required by the rules of rationality. (If a particular choice were dictated by a moral principle that is incorporated into the rules of rationality, that choice would be required by reason; we are now dealing with law-making choices that are merely permitted, and not required, by reason.) I do not profess to know which moral principles are requirements of rationality and which are not. I suspect that most of the moral principles used by lawmakers are not principles that every, or almost every, rational person would accept, and thus are not mandatory rules of rationality.

For example, a lawmaker might employ a moral principle of distributive justice whereby scarce educational opportunities related to the professions (admission to state law schools, for example) should be distributed according to merit, with merit being defined broadly so as to include factors such as the likelihood that candidates will use their education to serve citizens with the greatest need for their services. This moral principle is not generally accepted in our society and has certainly not been incorporated into our rules of rationality. Many North Americans hold that scarce educational opportunities should be distributed according to merit, with merit narrowly defined as a matter of past grades and standard test scores. The two positions conflict, but neither is irrational. When a lawmaker votes for a legal rule specifying criteria that may be used or may not be used in distributing scarce educational opportunities, he or she will be choosing among alternative sets of instantiations of the basic human goods

⁴⁵ Even then, the content of the choice will not be contrary to reason. The choice will be contrary to reason because of the way it is made. See *supra* note 44.

⁴⁶ See Grisez, *supra* note 35 at 59 (suggesting that in constructing a legal system, lawmakers should be guided by moral norms when they choose between the incommensurable goods that ought to be protected by law).

of knowledge and meaningful work. Each alternative legal rule will instantiate these goods somewhat unpredictably in different ways and in a different set of human lives. The instantiations will therefore probably be rationally incommensurable. If the lawmaker resolves the conflict between incommensurables by using a meritocratic principle of distributive justice that defines merit broadly, his or her choice will not be required by reason or prohibited by reason. It will be permitted by reason. Yet we can say more than this. We can say that his or her choice is a rational choice, supported by a reason in the form of a moral principle that could explain why one choice is better than its alternatives. This moral principle of justice provides a premise concerning what counts as merit, and this premise leads to a decision favouring one legal rule over alternative legal rules. The premise can itself be supported by arguments concerning the state's duty to train professionals who will benefit society and promote the common good. These arguments and this premise can be rejected by rational persons. But no issue-resolving legal argument begins with premises, all of which are required by reason and invulnerable to rational objection. Practical reason does not require the impossible.

D. Social Traditions

Although lawmakers may not accept a particular norm as a moral truth, they may feel obligated to employ that norm in their law-making activity if the norm has been established as an important tradition in their society. (This sense of obligation will be especially strong if the tradition has been a source of constitutional doctrine or a basis for legal rules in other areas of law.) Such social traditions provide a second type of resource for lawmakers who must choose between incommensurable goods or instantiations. Even though the conflicting goods cannot be ranked in any objective, rationally compelling hierarchy, a society might establish its own subjective ranking. Lawmakers can resolve conflicts between incommensurables by respecting such social rankings.⁴⁷

For example, a lawmaker might believe that the goods of education and religion are more important than any conflicting good of religious liberty, and that the ideal state would subsidize educational institutions operated by religious organizations. Nevertheless, this lawmaker might vote against a proposal for a particular form of merely partial and indirect subsidization because it seems contrary to a firm and long-

⁴⁷ See J. Gray, *Post-liberalism: Studies in Political Thought* (New York: Routledge, 1993) at 325 (interpreting Isaiah Berlin as holding that conflicts between incommensurable conceptions of the good may properly be resolved by social tradition). At one point, Berlin himself goes even further and suggests that the choice between conflicting goods is ultimately "dictated by the forms of life of the society to which one belongs ..." See Berlin, *Crooked Timber*, *supra* note 2 at 17-18. See also Kekes, *Pluralism*, *supra* note 36 at 60-63 (arguing that the social resolution of conflicts between incommensurable values requires a tradition, an ordered set of social conventions).

standing social tradition requiring strict separation of church and state. Even though this separation principle is not accepted as a moral truth, the lawmaker uses it to resolve a conflict between incommensurables because of its status as a social tradition.

Our hypothetical lawmaker's use of a social tradition is not irrational. It is not prohibited by reason. Assuming that the conflicting goods are rationally incommensurable, such a choice would be permitted by reason.⁴³ Furthermore, a choice made on the basis of a social tradition is a rational choice when supported by undefeated reasons, such as the reasons for the particular tradition and the reasons for respecting traditions in general.

E. Prudential Principles

Some principles of prudence may not qualify as either moral principles or established social traditions but may nonetheless serve as reasonable guidelines for lawmakers who seek to resolve conflicts between incommensurable goods or instantiations. These prudential principles tend to be pragmatic law-making techniques, rather than requirements of justice, but they make up an important part of political wisdom and can be used to resolve conflicts in ways that reduce social friction and provide smoother sailing for the ship of state.

⁴³ See Kekes, *Pluralism, ibid.* at 56 (stating that incommensurability merely precludes the possibility of any ranking of values that is based on intrinsic characteristics and would be acceptable to all reasonable persons (required by reason)), 76-78 (suggesting that conflicts between incommensurable values can be reasonably resolved by social traditions); Finnis, "Commensuration", *supra* note 10 at 233 (arguing that community commitments enable societies to reasonably rank options that are rationally incommensurable).

Even if a society were to establish traditions fixing some or all basic human goods in an absolute hierarchy, that need not be irrational. It might seem that any such absolute hierarchy is somehow inconsistent with an acknowledgment that the goods are rationally incommensurable, that the rules of rationality do not yield ordinal commensurability among the goods as abstract concepts. But such an acknowledgment merely precludes the claim that a particular ranking is required by reason; it does not prohibit a society from making a subjective ranking and making it absolute. It would seem that a fixed, absolute social ranking of rationally incommensurable abstract goods is irrational only where (1) the instantiations of such goods are rationally *commensurable*, and (2) instantiations of one such good are sometimes superior, and sometimes inferior, to instantiations of another such good. In such a situation, it would be irrational always to treat good A as superior to good B when reason dictates that instantiations of B are sometimes superior to instantiations of A. But where the abstract goods and their instantiations are always rationally incommensurable, reason permits society to subjectively rank abstract goods in any fashion, including a fixed, absolute hierarchy. See, however, text accompanying note 36 above, suggesting that even instantiations of different abstract basic goods may sometimes be rationally commensurable.

One such principle provides that lawmakers should try to reach a compromise or balance between conflicting social interests. Legislative or judicial compromise is often useful in avoiding the radical political disaffection that can result when one interest group's goals are entirely frustrated. Conflicts between social interests are apt to be conflicts between incommensurable sets of instantiations of basic human goods. The compromise principle suggests that lawmakers resolve such conflicts by producing legal rules that provide each group with at least some of the particular good it desires.⁴⁹

When a particular legal issue involves two conflicting basic abstract goods, one of which is preferred by some persons while the other is preferred by other persons, and the lawmakers can fashion a rule that promotes both goods to some extent, but more of either good entails less of the other good, the lawmakers can compromise by selecting a legal rule that promotes each good to a moderate degree, rather than a rule that promotes one good to a high degree and promotes the other good to a low degree or not at all. When only one basic abstract good is involved, and the lawmakers are choosing between alternative sets of instantiations of that good, the lawmakers may be able to compromise by selecting a legal rule that is likely to produce at least some instantiations of that good for every interested citizen, rather than a rule that will provide abundant instantiations to one interest group and no instantiations to a competing interest group.

Even when the particular legal issue does not permit compromise, lawmakers can seek an overall balance between conflicting goods or between citizens. In choosing between two basic abstract goods that are totally incompatible in the context of the particular legal issue (totally incompatible in the sense that each alternative legal rule can promote one good but not the other), the lawmakers can choose to promote the good that has been less favoured in other law-making decisions. Such a choice tends to compensate for past law-making decisions that largely ignored a particular basic abstract good; it thus tends to provide society with a more balanced array of basic human goods.

In choosing between alternative sets of instantiations of the same abstract good, where no matter which legal rule is selected all the instantiations will benefit one

⁴⁹ A number of commentators have suggested that compromise is a good way to resolve conflicts between incommensurable values. See *e.g.* Berlin, *Crooked Timber*, *supra* note 2 at 47 (proposing that when ultimate values are incompatible, "perhaps, the best one can do is to try to promote some kind of equilibrium ... between the different aspirations of different groups of human beings"); Kekes, *Pluralism*, *ibid.* at 88-89 (suggesting that some conflicts between incommensurable values can be resolved by achieving a compromise between the conflicting values); A.T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1993) at 88-92 (suggesting that conflicts between conflicting and incommensurable values should be resolved through compromise, or at least dealt with by lawmakers in a way that promotes political fraternity).

group of citizens while another group of citizens gets nothing, the lawmakers can choose a legal rule that favours the group of citizens who were less favoured in past law-making decisions involving the distribution of that same abstract good.

Applying a principle of compromise or overall balance will seldom be as simple as I have described it. Conflict situations will be more complex, and judgments will be even more imprecise. But some such principle will often provide a reasonable way of resolving conflicts between incommensurable goods or instantiations. When the resolution is supported by reasons (social harmony, social stability, availability of all basic human goods, equilibrium among basic human goods, or concern for the needs of each citizen), it can even be a rational choice, as we have defined that term.

F. Intuition

When a conflict between rationally incommensurable goods or instantiations cannot be resolved by moral or prudential principles, or by social traditions, lawmakers can make an intuitive moral choice. A moral intuition is an immediate judgment, made without any conscious process of inference.⁵⁰ It is the product of unanalyzed experience.⁵¹ Stuart Hampshire describes the analogous intuition of the connoisseur:

Connoisseurs ... are ... able to discriminate with consistent success, but not knowing at all precisely how they do it. ... They know that ... they are guided by a weight of experience of many similar cases and by many associations and memories, not all of which they can disentangle and recall. The memories are too extensive to be accessible, but methodically stored and linked by a causality which they do not understand and which is too complex to trace. The connoisseur ... must not impose a ready-made rational structure on his observations, if this entails attending to ordinarily expected features ... and attending only with set ideas of what is relevant.

The connoisseur may never know, and be able to distinguish, the separate steps, or the separate inputs, which led him to his conclusion, and he may never be able to put his inference into any standard form.⁵²

When lawmakers make an intuitive choice between incommensurables (typically a choice between incommensurable instantiations of one or more abstract goods), the choice cannot be rational (as we have defined this term), because it is not made for articulable reasons. The lawmakers may have articulable reasons for desiring one alternative, and articulable reasons for desiring the other alternative, but they do not have articulable reasons for choosing the chosen alternative over the other alternative.

⁵⁰ See Hampshire, *supra* note 3 at 15-16.

⁵¹ *Ibid.* at 14.

⁵² *Ibid.* at 111.

However, the intuitive choice is not necessarily irrational.⁵³ If our intuitions in a particular context are based on extensive experience and have generally proven to be satisfactory, it is rational to continue to follow them. There are thus situations in which we should follow our moral intuitions, even though we cannot specify the reasons supporting them.⁵⁴ Lawmakers typically have extensive experience in making intuitive moral judgments. When they must choose between incommensurables, and logic fails and reason runs out, they may properly resort to intuition.⁵⁵

Intuition is often necessary in framing a legal compromise. When lawmakers establish a speed limit for a particular highway, they will probably want to achieve a compromise between preserving human life and health, and facilitating recreation, friendship, and commerce through speedy transportation. But even with abundant information about accident rates at various speeds, the lawmakers must use intuition in deciding whether the speed limit should be set at 45 miles per hour or at 55 miles per hour. In addition to legal compromises, there are many other law-making decisions that ultimately depend upon intuition. For example, when the good called liberty conflicts with the good called equality or the good called security, there is often no relevant moral principle or social tradition to apply, and no opportunity for compromise or balancing. Here the lawmakers' choice between permitting all acts of a certain type and prohibiting all acts of that type must be largely intuitive.

III. The Jurisprudential Implications of Incommensurability

A number of writers claim that the incommensurability thesis has significant substantive implications for jurisprudence and public policy. Part III will examine some of the claims most often asserted.

A. Arguments against Consequentialism

Does acceptance of the incommensurability thesis imply the rejection of consequentialism as a comprehensive guide to moral choice in law-making?⁵⁶ Utilitarian-

⁵³ Compare *ibid.* at 14 (arguing that intuitive beliefs are not normally rendered irrational by the believer's inability to explain why the belief is held).

⁵⁴ See *ibid.* at 111 (arguing that "we ought sometimes, even in serious issues of public policy, to follow our moral intuitions").

⁵⁵ See Saint Thomas Aquinas, *The Treatise on Law*, ed. and trans. by R.J. Henle (Notre Dame, Ind.: University of Notre Dame Press, 1993) at 74-75 (editor's summary of Aquinas: in hard cases, where there are a number of heterogeneous factors lacking any common denominator, logic fails and insight—a direct apprehension not arrived at by applying rules of inference—must take over).

⁵⁶ We noted above in Part I.B.2 that conflicting instantiations of one or more basic human goods may sometimes be commensurable. In such pockets of commensurability, consequentialism may be an appropriate decision procedure for lawmakers. And if it is inappropriate, this cannot be due to any

ism, welfare economics, cost-benefit analysis, Economic Analysis of Law, and many other forms of consequentialism prescribe that lawmakers always choose the legal rule that has expected consequences that maximize net aggregate value throughout society (the rule that is likely to produce a greater amount of net aggregate value than any alternative rule would).⁵⁷ However value is conceived (as utility, welfare, economic wealth, or something else), it is to be maximized on net (with total losses in value subtracted from total gains in value) and in the aggregate (what counts is net value for society, not net value for any individual citizen). Any such consequentialist approach obviously requires some attempt to measure and compare the value inhering in different predicted consequences, different states of affairs that might be brought about by different legal rules.

It is thus not surprising that a number of writers have claimed that consequentialism must be rejected because it requires the metrical commensuration of goods or instantiations that are usually incommensurable in value.⁵⁸

incommensurability. The thesis that incommensurability is widespread thus does not imply that consequentialist methods should never be used by lawmakers. In this section, we are dealing with the question whether consequentialist methods should be avoided in the numerous situations of incommensurability, or, in other words, whether widespread incommensurability implies that consequentialism is not suitable as a comprehensive method for all or most situations.

⁵⁷ Although there are other possible approaches that evaluate an act of law-making solely in terms of its consequences, I will use the term “consequentialism” in a restricted sense that refers to the quantitative maximization type of theory described in the text.

⁵⁸ See e.g. Finnis, *Natural Law*, *supra* note 30 at 112-13, 115 (arguing that as a general strategy of moral reasoning, consequentialism is irrational because it pretends to commensurate basic goods that lack a common yardstick and are incommensurable; the notion of the greatest net good is not merely unworkable, but senseless); Raz, *Morality*, *supra* note 7 at 358 (suggesting that widespread incommensurability undermines consequentialist maximization as a general system of practical reasoning); J. Finnis, “Natural Law and Legal Reasoning” in R.P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992) 134 at 150-51 [hereinafter Finnis, “Legal Reasoning”] (arguing that incommensurability rules out Economic Analysis of Law, which attempts to resolve social issues by using wealth as a commensurating maximand); Grisez, *supra* note 35 at 29 (arguing that consequentialism is rationally unacceptable because the notion of the “greater good” lacks referent; it implies that goods are measurable and commensurable, but goods cannot be measured by any common standard); M.C. Nussbaum, “Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics” (1997) 64 U. Chi. L. Rev. 1197 at 1199 (noting that Law and Economics is committed to the commensurability of all ends), 1202 (suggesting that it is irrational to treat two ends as commensurable when there is good reason to think they are not); R.P. George, “Recent Criticism of Natural Law Theory,” Book Review of *Natural Law and Justice* by L.L. Weinreb and *A Critique of the New Natural Law Theory* by R. Hittinger (1988) 55 U. Chi. L. Rev. 1371 at 1395 (summarizing Grisez and Finnis as rejecting the consequentialist principle of producing the greatest net proportion of good to bad consequences, because it falsely assumes that the instantiations of human goods and bads are commensurable in a way that permits the measuring of value necessary for consequentialist calculations).

A good example of the argument that incommensurability entails the rejection of consequentialism is provided by John Finnis as a "response to notions that social choice can and should be guided by measuring the expected value of alternative foreseeable outcomes."⁵⁹ Finnis readily acknowledges that "[c]ommensuration of the goods and bads in alternative available courses of action is possible . . . in the technical domain," the proper domain of cost-benefit analysis.⁶⁰ In this technical domain, all significant costs and benefits can be quantified and compared by means of some definite unit of value (money, for example) that renders them commensurable.⁶¹ But, says Finnis, law-making involves deliberation, not in the technical domain, but in the very different domain of morally significant choice.⁶² In the domain of morally significant choice, none of the features of the technical domain, such as quantifiability and commensuration of costs and benefits, are present.⁶³ Thus,

it is not possible to commensurate ... the goods and bads in alternative available courses of action considered as options between which an individual or group has occasion to make a morally significant choice. In particular, it is not possible to make the type of commensuration required by utilitarianism in any of its forms, or by its consequentialist or proportionalist or economic successors.⁶⁴

Finnis seems to be saying that consequentialist approaches to law-making must be rejected because they require metrical commensurability among instantiations (of human goods) that are metrically incommensurable. Consequentialist methods are precluded by "the incommensurability of the goodness of alternative options."⁶⁵

When Finnis refers to incommensurability, he is apparently referring to what I call rational incommensurability, as opposed to incommensurability as a matter of real moral truth.⁶⁶ Herein lies the problem in Finnis's argument and all similar arguments. If two basic goods or two sets of instantiations of basic goods or two law-making options are rationally incommensurable, neither is better than the other as a matter of reason. Neither alternative is required by reason to be chosen, as would be the case if one were the better alternative. As well, neither alternative is prohibited by reason, as would be the case if one were the worse alternative. If neither alternative is required by reason, and neither alternative is prohibited by reason, each alternative must be

⁵⁹ Finnis, "Commensuration", *supra* note 10 at 218.

⁶⁰ *Ibid.* at 218-19.

⁶¹ *Ibid.* at 219.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ See *ibid.* at 233 (referring to "options which by reason's own standards are incommensurable" and "options neither (or none) of which is required by reason's principles and norms").

permitted by reason. As far as rationality is concerned, choosing one alternative based on consequentialist calculations is no better or worse than choosing the other alternative as a matter of purely intuitive choice.

It may be objected that while reason permits either rationally incommensurable *alternative* to be chosen, it does not permit lawmakers to employ consequentialist *decision procedures* in reaching that choice. I think the objection fails. Surely, there is no rule of rationality prohibiting lawmakers from subjectively ranking alternatives that are rationally incommensurable. If there were, the enterprise of law-making would collapse. Is there a rule of rationality prohibiting lawmakers from ranking rationally incommensurable alternatives in terms of aggregates of cardinal numbers representing presumed individual utilities or presumed individual willingness to pay for something? It is difficult to see how reason could prohibit such consequentialist decision procedures if it permits purely intuitive or subjective rankings.

In any event, no rule prohibiting consequentialist decision procedures has been generally accepted as a rule of rationality. Rules of rationality are established only by general acceptance, seen in social practices. Just as there is no private language, there is no private rationality. It therefore follows that consequentialist decision procedures are not prohibited by reason when lawmakers choose between rationally incommensurable alternatives.⁶⁷ The incommensurability thesis, employed in conjunction with the rules of rationality, does not imply that we should reject consequentialism.

The rational incommensurability of basic goods or their instantiations merely implies that lawmakers must go beyond objective rationality in making their choices. The only forms of consequentialism that are incompatible with rational incommensurability are dogmatic forms asserting that certain consequentialist decision procedures and particular determinate choices are *required* by reason. Cost-benefit analysis, welfare economics, the Economic Analysis of Law, and similar consequentialist approaches can probably be interpreted as non-dogmatic theories that do not claim that their methods are required by reason.⁶⁸ There are good reasons to reject consequentialist theories as comprehensive approaches to jurisprudence. The thesis of wide-

⁶⁷ See M. Adler, "Incommensurability and Cost-Benefit Analysis" (1998) 146 U. Pa. L. Rev. 1371 at 1401 (arguing that the fact that cost-benefit analysis fails to represent how incomparable options relate does not count as a reason against the use of cost-benefit analysis in favour of some other decision procedure), 1406-07 (arguing that assigning numerical rankings of incomparable options in a cost-benefit analysis is not in itself better or worse than any alternative decision procedure).

⁶⁸ See Craswell, *supra* note 12 at 1424 (suggesting that metrical incommensurability does not undermine welfare economics: welfare economics uses presumed individual choices without claiming that such choices would be justified), 1449 (suggesting that welfare economics uses social welfare functions (such as the Kaldor-Hicks criterion) to rank social choice options without claiming that the social welfare function justifies the choice).

spread rational incommensurability among basic goods and among instantiations is not one of them.

B. Arguments for Liberalism

According to John Rawls, a crucial assumption of liberalism is that there are many conflicting, reasonable, and incommensurable conceptions of the good.⁶⁹ Indeed, liberals do sometimes suggest that incommensurability of goods, or conceptions of the good, implies certain liberal doctrines requiring extensive individual liberty, the widest possible diversity of ways of life, government neutrality about the good, or the use of free markets.

1. Individual Liberty

A common theme in liberal philosophy is that a political system should give individual liberty a high priority among human values. It has been suggested that the special status of liberty stems from the plurality and incommensurability of human goods.⁷⁰

Rational incommensurability among goods, however, does not in itself entail that liberty should have priority over other goods.⁷¹ If certain goods are rationally incommensurable, no one of those goods is superior to the others as a matter of reason. This is what rational incommensurability means. There may be good reasons for regarding liberty as a high-priority value, but no priority for liberty can be derived by logical implication from incommensurability.

Not only does incommensurability not imply a priority for liberty, it does not even imply that the legal system should accord citizens a wide zone of unfettered negative liberty. When good A and good B conflict, and a citizen must pursue one good or the other, a choice must be made. An assertion that the goods are rationally incommensurable, however, does not imply anything as to who should make that choice, whether it should be the citizen or the state. The state might decide: to leave the citizen free to make his or her own choice, to prevent the citizen from pursuing good A, or to prevent the citizen from pursuing good B. If the alternative instantiations of goods that

⁶⁹ See J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1996) at 135, 303.

⁷⁰ See Berlin, *Four Essays*, *supra* note 3 at 171 (stating that pluralism, which recognizes that human goals are many and not always commensurable, entails a large measure of negative liberty); see also Gray, *Berlin*, *supra* note 37 at 143-44 (interpreting Berlin as arguing that if goods are rationally incommensurable, the state cannot have any "good reason to impose any particular combination of them on any of its citizens" [emphasis in original]).

⁷¹ See Gray, *Enlightenment's Wake*, *supra* note 19 at 133 (noting that a priority for one value, liberty, does not follow from "the truth of a plurality of incommensurable values").

can be pursued by the citizen are rationally incommensurable, none of the state's alternatives is required by reason or prohibited by reason. As far as reason is concerned, the state's officials are free to make a subjective choice. Because the goods and instantiations at stake are rationally incommensurable, the citizen can have no rationally compelling ground for objecting that the state imposed the wrong choice on him or her, just as the state officials can have no rationally compelling ground for claiming that they made the correct choice. Incommensurability, by itself, does not even imply that it would be wrong for lawmakers to coercively impose their own value ranking on citizens in *every* situation where conflicting goods or instantiations are incommensurable.

The rational incommensurability of basic goods or their instantiations implies a large measure of individual liberty only if this incommensurability premise is used in conjunction with a second premise asserting that the state should allow freedom of choice for citizens in any conflict situation where reasonable persons could disagree about how a conflict between goods or instantiations should be resolved. If the conflicting goods or instantiations are rationally incommensurable, reason does not require any particular choice. Reasonable persons could therefore disagree in their choices, and according to the second premise, the state must allow freedom of choice whenever such reasonable disagreement is possible. This second premise has been advanced by a number of liberal thinkers.⁷²

The problem with this argument is that the second premise is not plausible. On most important moral issues involving conflicting goods or instantiations, reasonable people (persons who do not violate any of the socially established rules of rationality) would disagree. They would adhere to different principles of justice, and they would resolve conflicts between incommensurable goods or instantiations in differing ways. Acceptance of the second premise would thus paralyze lawmakers. It would not only prevent lawmakers from resolving those everyday interpersonal conflicts that are really conflicts between competing but incommensurable goods or instantiations, it would preclude lawmakers from establishing basic constitutional principles fixing the

⁷² See Rawls, *supra* note 69 at 139-40 (asserting that when constitutional essentials and basic questions of justice are at stake, the coercive power of the state should be exercised "only in ways that all citizens can reasonably be expected to endorse in the light of their common human reason"); J. Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993) at 50-57 (suggesting that the fundamental liberal thesis is that political action is not morally justified without the hypothetical consent of all reasonable citizens); W.A. Galston, "The Legal and Political Implications of Moral Pluralism" (1998) 57 Md. L. Rev. 236 at 242 (asserting that the liberty of individuals should not be restricted by the state without a rationally binding reason, and arguing that because no rationally binding reason is available for choosing between incommensurable values, citizens should be allowed to make their own free choices among such incommensurable values).

scope of those fundamental rights that protect important goods but whose precise boundaries are so obviously and reasonably controversial.

2. Diversity

A liberal might acknowledge that the desirability of extensive liberty is not directly implied by the incommensurability of goods, and then make a different argument for liberty: extensive individual liberty is necessary for the widest possible diversity of lifestyles or ways of life. If citizens are not free to choose among all the basic goods and free to use a sufficiently wide variety of modes of instantiating those goods, the diversity of ways of life will be reduced. The maximization of this diversity is a worthy goal, because “[c]ivilization is a garden made rich and beautiful by the variety of its flowers.”⁷³

The incommensurability thesis does not, however, entail this goal of diversity. The notion that a number of alternative ways of life are rationally incommensurable because they combine incommensurable goods in different ways does not imply that society should tolerate or promote as many of these ways of life as possible; it merely asserts that none of these ways of life is required by reason or prohibited by reason. Reason leaves society free to foster all of the incommensurable ways of life or to allow only one of them.

Liberal diversity is implied by a form of pluralism that identifies a number of basic goods; asserts that individuals can have good lives only if they realize all of these basic goods; further asserts that because individuals differ in their capacities and appetites, they need a wide variety of modes of instantiating each basic good; and asserts finally that the state should promote good lives for all citizens. Such a pluralistic theory does not imply that the legal system should tolerate all possible modes of instantiating basic goods; it merely suggests that the legal system should permit enough modes so that each citizen can realize each of the basic goods. The theory, however, does entail allowing a wide diversity of ways of life. It condemns any law that totally precludes citizens from pursuing one of the necessary basic goods. It also condemns any law that prohibits citizens from instantiating a basic good in the only mode of which they are capable. In this argument, however, it is not incommensurability that implies a wide diversity of ways of life (incommensurability is not even mentioned), rather a particular version of value-pluralism.

⁷³ Berlin, *Crooked Timber*, *supra* note 2 at 223. See also Gray, *Berlin*, *supra* note 37 at 36 (interpreting Berlin as holding that liberal liberty is justified because “it permits a ... greater variety of forms of self-creation through choice-making”), 144 (interpreting Berlin as holding that a good reason for the state not to impose a particular pattern of incommensurable goods is that any such imposition would reduce the number of goods and combinations of goods actually realized).

3. State Neutrality

A number of liberal theorists assert that lawmakers should be neutral as to rival conceptions of the good.⁷⁴ This neutrality thesis is clearly not implied by the incommensurability of basic human goods or by the incommensurability of various conceptions of the good, conceptions that rank the basic goods in different ways and may not even recognize the same set of basic goods. The rational incommensurability of rival conceptions of the good merely means that reason does not require a judgment that one conception of the good is superior to another or a judgment that the conceptions are equally sound. Rational incommensurability by itself implies nothing as to the question of whether lawmakers should promote one conception of the good or remain neutral about conceptions of the good. Reason leaves lawmakers free to take either approach. The incommensurability thesis is thus neutral about the state neutrality thesis.

Some of the liberals who assert the neutrality thesis combine an incommensurability premise with another premise very similar to the one described above in our discussion of individual liberty. The argument goes something like this:

(1) The state should impose or promote a particular conception of the good only if that conception would be endorsed by all reasonable citizens, and the state should suppress a particular conception of the good only if that conception would be rejected by all reasonable citizens;

(2) Except for conceptions that all reasonable citizens would reject, conceptions of the good are rationally incommensurable with each other (reason does not require the endorsement or rejection of any of them); therefore,

(3) Although the state may justifiably suppress a conception that all reasonable citizens would reject, the state should not otherwise impose, promote, or suppress any conception of the good.⁷⁵

⁷⁴ See e.g. B. Barry, *Justice as Impartiality: A Treatise on Social Justice*, vol. 2 (Oxford: Clarendon Press, 1995) at 12 (suggesting that impartial justice requires neutrality among conflicting conceptions of the good); R. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) at 191-92 (stating, as an important principle of liberalism, that government must be neutral toward conceptions of the good life); Waldron, *supra* note 72 at 160-63 (presenting the liberal view that lawmakers should be neutral about conceptions of the good life).

⁷⁵ Although the argument is usually not this explicit, it can be traced in a number of liberal works. See Barry, *ibid.* at 7, 160-73 (arguing that a basic constitutional principle should be imposed on citizens only if it could not be reasonably rejected by any citizen, that all conceptions of the good can be reasonably rejected, and that, therefore, no conception of the good should be imposed as a basic constitutional principle); C.E. Larmore, *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1987) at 22-23 (presenting the liberal assertion that conceptions of the good are plural and incommensurable), 68 (presenting the liberal notion that "reasonable people differ and disagree about the nature of the good life"), 42-44 (suggesting that the liberal proposal for state neutrality as to con-

I have inserted the exceptions involving conceptions that all reasonable citizens would reject, because I presume that liberal neutralists would acknowledge that although there is no conception of the good that all reasonable citizens would endorse, there are some conceptions that all reasonable citizens would reject (for example, conceptions that violate rational requirements of consistency).

So stated, the argument seems to be a valid inference; if the premises are accepted, the conclusion must be accepted. The problem is that premise (1) is not tenable. Like the similar premise in the liberty argument examined above, its acceptance would paralyze lawmakers. If lawmakers were allowed to use only those conceptions of the good that all reasonable citizens would endorse, that is, conceptions required by the generally accepted rules of rationality, lawmakers would not be allowed to use any conception of the good if all rationally permissible conceptions are rationally incommensurable with each other. The legal system could no longer promote human life or human health or the advancement of human knowledge; these goods are components of conceptions of the good, and any legislation that promotes such goods would favour the conceptions of which they are components, conceptions toward which the government is supposed to remain neutral. Denied the right to use any conception of the good, lawmakers would have to rely on deontological principles lacking any basis in notions of human well-being. Government's duty to promote the welfare of its citizens would become an empty relic of a pre-neutralist age; welfare could not be given any meaning because lawmakers would be prohibited from using any conception of the good life.

4. Free Markets

Liberals typically agree that an economic system should rely on free markets to a great extent. Cass Sunstein notes that the incommensurable ways in which people value goods may explain why liberals generally favour voluntary free-market exchange:

If people value things in different ways, the state should allow them to sort things out as they choose. If values were commensurable, perhaps we could seek to block certain voluntary exchanges simply because we had better information about relevant costs and benefits than the parties themselves. But, in the

ceptions of the good life is a response to pluralistic conceptions of the good life and reasonable disagreement); Rawls, *supra* note 69 at 303 (stating that liberalism assumes that equal citizens have different and incommensurable conceptions of the good), 135 (stating that there are many conflicting but reasonable and rational conceptions of the good), 137 (suggesting that the exercise of political power is justified only when it is in accordance with principles that all reasonable citizens would accept). For an explication of the two-premise neutrality argument, similar to that in my text, see S. Gardbaum, "Liberalism, Autonomy, and Moral Conflict" (1996) 48 *Stan. L. Rev.* 385 at 389.

face of diverse kinds of valuation, it is best to permit people to value as they like.⁷⁶

Suppose that Sam Seller owns an automobile and values it low enough so that he would be willing to sell it for \$5000. Betty Buyer values Seller's automobile high enough so that she would be willing to pay \$7000 for it. If the automobile is rationally incommensurable in value with any particular amount of money, neither Seller's subjective valuation of \$5000 nor Buyer's subjective valuation of \$7000 is contrary to reason. If, in the absence of commensurability, what counts is any person's subjective valuation, Seller's sale of the automobile to Buyer for \$6000 would be mutually beneficial and should be permitted.⁷⁷

Sunstein suggests, however, that some exchanges are justifiably prohibited by law.⁷⁸ An exchange may produce negative externalities, harms to third persons who were not parties to, and did not consent to, the exchange. Market sales of babies, for example, could have negative effects on the babies (there is little reason to suppose that the highest bidders are also suitable parents) and could have negative effects on other members of society (such sales could lead people to value babies in ways that impair or destroy a traditional parent-child relationship that many of us value).⁷⁹ These negative externalities may exceed the sum of net benefits to the parties and positive externalities. If so, lawmakers have a good reason to block the exchange.

If the harms and benefits resulting from a series of exchanges are rationally incommensurable, reason does not indicate whether the harms exceed the benefits. We have been assuming that when valuations of goods are rationally incommensurable, subjective valuations may properly be used. When an exchange produces negative externalities, however, we usually cannot ascertain the subjective (negative) valuations of the third-party victims. We would not want to believe what the victims tell us, for they would probably overstate their losses.

This was not a problem in our automobile hypothetical, in which we were concerned only with Sam Seller and Betty Buyer. We could not know that Seller valued the car at \$5000 or that Buyer valued the car at \$7000. But in the absence of fraud or duress, we could safely assume that if the car was actually sold for \$6000, Seller valued the car at less than \$6000 and Buyer valued the car at more than \$6000, so that

⁷⁶ Sunstein, *supra* note 12 at 849.

⁷⁷ This is another example of the liberal premise (already noted in connection with individual liberty and state neutrality) that when reasonable people can disagree about valuations of goods, citizens should be permitted to do whatever they want to do. The upshot is that the more incommensurability we recognize, the closer we come to anarchy. Liberals beware! (Not of incommensurability, but of the notion that incommensurability precludes legal regulation.)

⁷⁸ Sunstein, *supra* note 12 at 849-50.

⁷⁹ See *ibid.* at 850.

both parties would receive net subjective benefits. We can make no similar assumptions, however, concerning the subjective valuations of third parties who never consented to an exchange.

When the consequences of an exchange are rationally incommensurable and we cannot adequately ascertain the subjective valuations of all persons affected by the exchange because externalities are involved, should lawmakers permit the exchange or block the exchange? However we answer this question, our answer will not be entailed by the incommensurability of different ways of valuing goods or instantiations.

If voluntary exchanges seldom produced negative externalities, incommensurability in conjunction with a premise honouring subjective evaluations in the presence of rational incommensurability would seem to imply very extensive use of free markets. Our world, however, is replete with negative externalities, and thus few of the relevant subjective valuations are ascertainable, and incommensurability implies neither widespread use nor greatly restricted use of free markets. It does not imply that most market exchanges should be permitted, just as it does not imply that market exchanges should generally be prohibited.⁸⁰

C. Arguments against Liberalism

It might be argued that incommensurability implies not liberalism, but the rejection of liberalism. The incommensurability thesis asserts that, with respect to some set of values, no one value is superior to the others as a matter of rational truth, whereas liberal theory asserts that individual freedom of choice has a special priority over other values.

In his discussions of Isaiah Berlin's liberalism, John Gray seems to suggest that it may be inconsistent to affirm the incommensurability of human values and also assert that negative freedom has a general priority over other political goods.⁸¹ Gray notes that the elevation of choice-making to a central place in the human good cannot be de-

⁸⁰ Incommensurability, in conjunction with some other premise, might imply that lawmakers should make intuitive estimates of the subjective valuations of every person who will be affected by a particular type of exchange. But incommensurability does not imply that the result of such intuitive estimates would be a legal system that generally permits free market exchange. To make such an inference, liberals would have to use some very questionable empirical premises concerning citizens' actual subjective valuations and lawmakers' intuitions.

⁸¹ See Gray, *Berlin*, *supra* note 37 at 97 (raising a question: "If fundamental human values are incommensurable, ... what can justify according negative freedom even a general priority over other ... political goods?"). See also Gray, *Enlightenment's Wake*, *supra* note 19 at 141 (suggesting that Berlin's claim that liberty and other values are incommensurable "is not easily reconciled" with his claim that negative liberty "is to be accorded a general, though never absolute priority over other ultimate values").

rived from the thesis of value incommensurability.⁸² Gray then makes the further assertion that the incommensurability thesis is “incompatible with any claim that freedom of choice has universal and pre-eminent value.”⁸³

I agree with Gray that a priority for free choice cannot be derived from the incommensurability thesis. The thesis of rational incommensurability merely asserts that reason does not require or prohibit any particular priority ranking among values, and thus does not imply any priority for free choice. Yet this does not make a “pre-eminent” priority for free choice “incompatible” with incommensurability. The fact that thesis B cannot be derived from thesis A does not entail that B is inconsistent with A. Because no particular priority ranking among incommensurable values is prohibited by reason, a theorist or a society may, without being inconsistent or irrational, subjectively assign freedom of choice a general priority over other values. A liberal priority for freedom is therefore not incompatible with the incommensurability of values.

A liberal claim that free choice has “universal” value is also not incompatible with the incommensurability thesis. One can maintain that free choice is incommensurable with other values and also maintain that free choice is always and everywhere a value worthy of human aspiration.

An assertion that reason requires that every human society assign a high priority to individual free choice would be incompatible with rational incommensurability. If this is the assertion Gray means to deny in the passage quoted above, I would agree with his denial. But this denial is not a reason to reject liberal theories that do not claim that a priority for free choice is required by reason. A liberal may claim a priority for free choice, yet acknowledge that this priority is based on cultural tradition or intuition and neither required nor prohibited by the rules of rationality.

John Kekes has provided the pieces for an argument that purports to block even this last liberal claim. Kekes asserts that it is unjustifiable and unreasonable to regard any value as having absolute, unconditional priority over other values with which it is rationally incommensurable.⁸⁴ It is unreasonable to regard any of these values as unconditionally overriding the others, because good lives require a balance among a plurality of values.⁸⁵ Thus, if (1) liberal values, such as individual freedom, are rationally incommensurable with other important values, and (2) it is unreasonable even subjectively to regard any incommensurable value as unconditionally overriding, then (3) it is unreasonable to assign any liberal value absolute priority over other values. But,

⁸² See Gray, *Berlin*, *ibid.* at 161.

⁸³ *Ibid.*

⁸⁴ Kekes, *Pluralism*, *supra* note 36 at 202.

⁸⁵ See *ibid.* at 212-13.

says Kekes, liberals do regard certain liberal values as having absolute priority.⁸⁶ Liberalism is therefore inconsistent with the conjunction of premise (1), incommensurability, and premise (2), making it unreasonable to regard—even subjectively—one incommensurable value as unconditionally overriding another.

The major problem with this argument is that it can imply the rejection of only those liberal theories that assert that some liberal value has absolute priority. Many liberals claim a special importance or general priority for individual liberty and other liberal values but do not claim absolute priority for any such value. Isaiah Berlin, for example, regarded negative freedom as an especially important value but denied that it had absolute priority over other values.⁸⁷

D. Arguments against Absolute Rights and Duties

Does incommensurability imply any answer to the question whether basic or fundamental legal rights and their correlative legal duties should be absolute? We will first consider an argument that incommensurability implies a negative answer.

The Kekesian argument outlined in the previous section might be used, not to refute all liberal theories, but to refute any theory holding that some basic legal rights and their correlative legal duties should be made absolute. The argument would first assert that all basic human goods are rationally incommensurable and would then assert that it is unreasonable for lawmakers to regard, even by way of a subjective judgment that is not claimed to be required by reason, one basic human good as having absolute priority over other goods with which it is rationally incommensurable. It would therefore be unreasonable for lawmakers to assign absolute priority to any basic human good.

The next steps in the argument apply this conclusion to the realm of legal rights and duties. A legal right is a legal guarantee against interference with a citizen's moral right to enjoy or pursue some basic human good in a certain way. Each such moral and legal right is guaranteed and protected by a set of legal duties prohibiting state officials and other citizens from interfering with a citizen's exercise of this right. A legal right is tied to, and derives its strength from, a moral right, which in turn is tied to, and

⁸⁶ *Ibid.* at 202; J. Kekes, *Against Liberalism* (Ithaca, N.Y.: Cornell University Press, 1997) at 171.

⁸⁷ See Berlin, *Four Essays*, *supra* note 3 at lvi (stating that negative freedom is not absolutely superior to other ultimate values), 169 (disclaiming any assertion that individual freedom is the sole, or even dominant, criterion for social action); Berlin, *Crooked Timber*, *supra* note 2 at 12-13 (suggesting that liberty may sometimes have to be curtailed for the sake of other values).

A second problem with Kekes's argument involves the assertion in his premise (2) that it is unreasonable to subjectively recognize absolute priorities between incommensurable values. For arguments against this premise, see *supra* note 48 and Section D below.

derives its strength from, some basic human good. If it is unreasonable for lawmakers to regard that good as having absolute priority over other goods, it would seem unreasonable for lawmakers to regard a citizen's moral right to pursue that good as having absolute priority over other citizens' moral rights to pursue other goods. If it is unreasonable for lawmakers to assign absolute priority to the moral right, it would seem unreasonable to assign absolute priority to the legal right derived from it.

We need not accept this argument, because we need not accept the crucial Kekeian premise asserting that it would be unreasonable for lawmakers to regard any basic human good as having absolute priority over other goods with which it is rationally incommensurable. Recall that the reason for this premise was that good lives require a balance among a plurality of values. We could acknowledge that the well-being of our fellow citizens *generally* requires a balance among conflicting goods. But we could nevertheless assert that there is some basic good (or some aspect of a basic good) that deserves absolute priority because it is especially vital to human well-being (at least in our society) and would *not* destroy the required balance among goods if it were given absolute priority. If there is such a good or aspect of a good, the reason for the Kekeian premise falls. A healthy balance among goods does not preclude absolute priority for one good.

Before denying the possibility that there is such a good, we should recognize that reason cannot require any particular balance among rationally incommensurable goods. It would thus be difficult for an opponent of absolute rights to maintain that the required balance would be destroyed by an absolute priority for any good whatsoever. If absolute priority for a particular good promotes a vital human interest and produces only infrequent and slight impairments to the realization of other goods, a reasonable person might well contend that such a priority actually improves the balance among goods.

E. Arguments for Absolute Rights and Duties

John Finnis maintains that there are absolute human rights, for example, the right not to be killed as a means to some further end and the right not to be deprived of one's procreative capacity.⁸⁸ Finnis argues that these absolute rights are correlative to the absolute duties entailed by the moral principle prohibiting lawmakers and citizens from intentionally and directly destroying, damaging, or impeding any instantiation of a basic human good in order to indirectly bring about some other instantiation of a basic human good.⁸⁹

⁸⁸ See Finnis, *Natural Law*, *supra* note 30 at 225.

⁸⁹ See *ibid.* at 118-21 (asserting that the strict inviolability of basic human rights rests on the requirement that one should not choose to directly impair an instantiation of one or more basic human

According to Finnis, the rationality of these absolute moral duties and the legal norms drawn from them “depends upon the incommensurability of the human goods and bads at stake in morally significant options for choice.”⁹⁰ Finnis tries to explain how the duties to refrain from directly impairing instantiations of basic goods depend upon the rational incommensurability of the instantiations that would be impaired and the alternative instantiations that might be realized by means of this impairment:

[I]nstantiations of human good constitute *reasons against* any option which involves choosing (intending) to destroy or damage any of them. The significance of the incommensurability of goods involved in such morally significant options is that no reason *for* such an option can be rationally preferable to such a reason against.⁹¹

It is difficult to follow Finnis’s inference and see how the incommensurability of alternative instantiations implies a principle that instantiations of good must never be harmed in order to bring about other instantiations. If instantiation B could only be

goods), 225 (stating that absolute rights are correlative to the exceptionless duties entailed by the requirement to never choose directly against any basic value). See also Finnis, “Commensuration”, *supra* note 10 at 226 (stating that the principle that evil may not be done for the sake of good (the principle prohibiting the harming of an instantiation of a basic good as a means of bringing about some other instantiation of a basic good) is the foundation of absolute human rights); Finnis, “Legal Reasoning”, *supra* note 58 at 147-48 (asserting that the moral absolutes imposed by the moral principle prohibiting choosing to destroy or damage any basic human good in any of its instantiations in any human person constitute basic human rights).

⁹⁰ Finnis, “Legal Reasoning”, *ibid.* at 148.

⁹¹ *Ibid.* at 147 [emphasis in original]. Elsewhere in the same essay, Finnis provides the same explanation:

A basic human good always is a reason for action and always gives a reason *not* to choose to destroy, damage, or impede some instantiation of that good; but since the instantiations of human good at stake in any morally significant choice are not commensurable by *reason* prior to choice, there can never be a sufficient reason not to take that reason-not-to as decisive for choice.

Ibid. at 138 [emphasis in original]. See also J. Finnis, *Moral Absolutes* (Washington, D.C.: Catholic University of America Press, 1991) at 54-55 (arguing that because basic goods are rationally incommensurable, there can be no rationally preferable reason for destroying, damaging, or blocking a basic good in order to realize a basic good); J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 120 (arguing that directly damaging an instantiation of a basic good in order to indirectly promote some other instantiation of a good is to treat the instantiations as commensurable); Finnis, “Commensuration”, *supra* note 10 at 226 (arguing that promoting an instantiation of a good as an end (E) cannot be a reason to impair an instantiation of a good as a means (M) unless E and M could be commensurated and E rationally judged to be the greater good, which is impossible).

A similar argument from incommensurability is made in George, “Moral Judgments”, *supra* note 20 at 192 (arguing that the incommensurability thesis entails that one cannot have conclusive reasons for choosing to damage or destroy a basic good in any of its instantiations in order to bring about instantiations of another basic good).

produced by destroying instantiation A, and A and B are rationally incommensurable as teleological ends, neither A nor B is rationally superior to the other as instantiations of good. As Finnis suggests, B is not rationally preferable to A. But neither is A rationally preferable to B. Reason seems to leave the agent free either to protect A or promote B by destroying A. Obviously, incommensurability by itself does not imply that A must be protected and not harmed. Finnis needs an additional premise.

Finnis's other premise might be a moral principle providing that we should never choose an option that directly harms any instantiation of a basic good, unless such a choice is required by reason. With this premise, Finnis can reason as follows:

(1) An instantiation of a basic good must never be directly destroyed, damaged, or impeded in order to produce some alternative instantiation, unless this is required by reason;

(2) Alternative instantiations of basic goods are always rationally incommensurable (neither is required by reason); therefore,

(3) An instantiation of a basic good must never be directly destroyed, damaged, or impeded in order to produce some alternative instantiation.

Should we accept the first premise?²² Why not accept a contrary premise that sometimes allows us to impair an instantiation of good in order to bring about some other (admittedly rationally incommensurable) instantiation that we (subjectively) value more highly? Is avoiding harm always more important than doing good?

Finnis suggests, in answer to these questions, that an absolute duty to promote good whenever there is an opportunity to do so could not possibly be complied with, whereas an absolute duty to refrain from harming good can always be adhered to and leaves open a wider field of choice.²³ But must we choose between two absolute duties? Lawmakers could recognize a conditional duty to avoid harming any instantiation of good, a duty that would sometimes permit them, for example, to directly deprive a citizen of recreational play for a short time in order to enable other citizens to realize instantiations of other basic goods.²⁴

Finnis has not shown why lawmakers should accept a premise absolutely prohibiting them from directly impairing an instantiation of good in order to promote another instantiation whenever such an impairment is not required by reason. Without

²² This question has been raised by David J. Luban in "Incommensurable Values, Rational Choice, and Moral Absolutes" (1990) 38 *Clev. St. L. Rev.* 65 at 79, 81 (questioning why the reason against an option should prevail over the reason for that option, when neither reason is rationally stronger than the other).

²³ See Finnis, "Legal Reasoning", *supra* note 58 at 147-48.

²⁴ Finnis regards play as one of the basic human goods. See Finnis, *Natural Law*, *supra* note 30 at 87.

such a premise, the incommensurability thesis does not lead to the conclusion that lawmakers have an absolute duty not to directly destroy, damage, or impair any instantiation of a basic human good in order to bring about some other instantiation. Without such an absolute duty, Finnis's argument for absolute rights collapses.

Conclusion

For jurisprudential purposes, value incommensurability can be defined as the absence of rational commensurability, either metrical or ordinal. Values are rationally incommensurable if the generally accepted rules of rationality do not require a judgment that one value is superior to the other(s) or that the values are precisely or roughly equal. This article has focused on basic human goods and their instantiations. I have suggested that abstract basic human goods are usually, if not always, rationally incommensurable and that instantiations of such goods are often, though not always, rationally incommensurable.

When confronted with conflicting goods or instantiations that are rationally incommensurable, lawmakers can make choices that are not irrational. They can use intuition to make arational choices not prohibited by reason. They can use moral principles, social traditions, and prudential principles to make rational choices. These arational or rational choices will be neither required by reason nor prohibited by reason.

We have considered a number of arguments claiming that incommensurability implies some particular substantive position in jurisprudential theory: the rejection of consequentialism, the adoption of liberalism, the rejection of liberalism, the rejection of absolute legal rights and duties, or the moral necessity for absolute rights and duties. All such arguments should be rejected. The incommensurability thesis merely asserts that rational persons can disagree as to how certain conflicts between goods or instantiations should be resolved. It does not tell lawmakers which rationally permissible resolution they should prefer.

Although philosophical reflection on incommensurability may not enable us to solve any substantive problem in jurisprudence, such reflection is still worthwhile. It can remind us of the limits of human reason and serve as an antidote to dogmatism. It can teach us intellectual and moral humility, philosophy's greatest lesson and one we sorely need.
