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Incommensurability and Valuation in Law

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INTRODUCTION

In this article I explore two claims and discuss their implications for law. The first claim is that human values are plural and diverse. By this I mean that we value things, events, and relationships in ways that are not reducible to some larger and more encompassing value. The second claim is that human goods are not commensurable. By this I mean that such goods are not assessed along a single metric. For reasons to be explored, the two claims, though related, are importantly different.

These claims are emphatically not meant to deny the existence of grounds for evaluating private and public choices, both among kinds of valuation and among incommensurable goods. But efforts to insist on a single kind of valuation and to make goods commensurable, while designed to aid in human reasoning, actually make such reasoning inferior to what it is when it is working well.

For the moment these claims must remain obscure; I will devote considerable space to the effort to make them more clear. If they are plausible, views of this sort are likely to have important implications for law. To be sure, endorsement of the two claims need not lead to any particular view about legal problems. To say that law ought to value something in a certain way, we need to make a substantive claim about some issue of the good or the right, and a mere reference to the diversity of values does not supply that claim. Nonetheless, I hope to show that debates over ways of valuing things, and over issues of commensurability, help to reveal what is at stake in many areas of the law. A unifying claim involves *the expressive function of law* — the law's role in reflecting and communicating particular ways of valuing human goods. Many legal debates actually involve the appropriateness of different kinds of valuation in different areas of law.

For example, a liberal society containing diverse social spheres — families, markets, politics, religious organizations — makes space for

different kinds of valuation. With an understanding of these diverse kinds, we will be able to see why voluntary exchanges should usually be protected, and also why they should sometimes be blocked. Some otherwise puzzling anomalies in the theory of environmental protection will take on new aspects. An understanding of diverse kinds of valuation will help shed light on certain claims about the nature of sex discrimination. I suggest that a Kantian norm, having to do with appropriate ways of valuing human beings, accounts for widespread views about abortion, the distribution of labor within marriage, sexual harassment, prostitution, pornography, surrogacy, and much else besides. With an understanding of this sort, it will be possible as well to understand some features of practical reason in law, especially in the old area of analogical thinking, but also in new areas involving the theory and practice of the regulatory state.

In pressing claims about incommensurability and diverse kinds of valuation, I have both a general target and a positive goal. The target consists of monistic theories of value, particularly as these appear in the study of law.[1] Monistic theories are pervasive; they have a strong philosophical pedigree; and, in various guises, they come up in many discussions of particular legal issues. To be sure, it may seem that few people really subscribe to such theories. Surely most people do not deny that human values are plural. But there is a distinguished tradition of thought, found in such diverse thinkers as Plato and Bentham,[2] that insists that values should be seen as unitary and that human goods should be seen as commensurable. In their most austere forms, these ideas are rarely endorsed explicitly in law; but more modest versions play a large role in the legal context — not simply in economic analysis,[3] but also in some aspects of rights-based thinking insofar as it takes a unitary value as the basis for evaluating law.[4] In any case, problems of commensurability have yet to receive sustained attention in law; and it is important to see exactly how goods are diverse, and in what ways goods are incommensurable, even if some version of these claims might turn out, upon reflection, to be widely shared.

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1. For a general account of and challenge to monistic theories, see ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 117-40 (1993).

2. On Plato, see MARTHA C. NUSSBAUM, *Plato on Commensurability and Desire, in* LOVE'S KNOWLEDGE 100, 106-24 (1990); David Wiggins, *Weakness of Will, Commensurability, and the Objects of Deliberation and Desire,* 79 PROC. OF THE ARISTOTELIAN SOCY. 251 (1978-1979). The best discussion of Bentham remains JOHN STUART MILL, MILL ON BENTHAM AND COLERIDGE (F.R. Leavis ed., 1962) (1838).

3. *See generally* GARY S. BECKER, A TREATISE ON THE FAMILY (2d ed. 1991); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981).

4. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180-83, 272-78 (1978) (applying a neo-Kantian value of "equal concern and respect" to various legal problems).

I particularly want to show some distinctive ways in which economic analysis of law, and most forms of utilitarianism as well, miss important commitments of a well-functioning legal system. I hope also to establish that a surprisingly wide range of legal disputes can be illuminated by an understanding of incommensurability and diverse kinds of valuation. The value of this enterprise consists not in dictating particular conclusions, which depend on the details, but in enabling us to see an important basis for widespread concerns and convictions. I emphasize that to see values as incommensurable, and to say that people are really disputing appropriate kinds (not levels) of valuation, is not by itself to resolve legal disputes. It is necessary to say something about the right kind — to offer a substantive theory — and to investigate the particulars in great detail, in order to make progress in hard cases in law. But an understanding of problems of incommensurability will make it easier to see what is at stake.

This article is organized into six Parts. The first three Parts explore some foundational issues. Part I describes diverse kinds of valuation and responds to the claim that we value different things in the same way. Part II offers a working definition of incommensurability. Part III discusses an important challenge to the claims in Parts I and II. It also offers some notes on the stakes, attempting to show why these issues matter.

Part IV makes general remarks about law, with particular emphasis on law's expressive function. The fifth and most detailed Part surveys areas in which an understanding of kinds of valuation and of incommensurability may affect our understanding of law. In this Part, I discuss a wide range of issues, including social differentiation, the Establishment Clause, political equality, cost-benefit analysis, contract remedies, environmental regulation, and feminism. The sixth Part ventures some preliminary remarks on the important issue of choice — choice among different kinds of valuation and choice among incommensurable goods. In the sixth Part, I also offer a few notes on the importance of the sense of tragedy in law.

I. KINDS OF VALUATION[5]

A. *Definitions and Examples*

Human beings value goods, things, relationships, and states of affairs in diverse ways.[6] Begin with the distinction between instrumen-

5. I owe much help in the discussion here to ANDERSON, *supra* note 1, at 8-16. Anderson uses the term *modes of valuation* to refer to the same basic idea.

6. For an especially instructive discussion of this point, see *id.* at 8-11. *See also* MICHAEL

tal and intrinsic goods. We value some things purely or principally for use; consider hammers, forks, or money. But we value other things at least in part for their own sake; consider knowledge or friendship. Because it is so pertinent to law, the distinction between instrumental and intrinsic value will play an important role here. But that distinction captures only a part of the picture. Intrinsically valued things produce a range of diverse responses. Some bring about wonder and awe; consider a mountain or certain artistic works. Toward some people, we feel respect; toward others, affection; toward others, love. People worship their deity. Some events produce gratitude; others produce joy; others are thrilling; others make us feel content; others bring about delight. Some things are valued if they meet certain standards, like a musical or athletic performance or perhaps a pun.[7]

Negative valuations are similarly diverse. To lose money is to lose an instrumental good — though one that might be used for intrinsic goods, like the preservation of human life. To lose a friend is a different matter. So, too, our responses to intrinsic bads are diverse. We might be horrified by an act of cruelty, disgusted by an ugly scene, shocked by a betrayal of friendship or love, made indignant by a failure of respect, frightened by the prospect of loss, angered by the infliction of a wound, saddened by undeserved hardship, or frustrated by the failure of our plans. These various terms themselves include a variety of experiences that embody diverse ideas about evaluation. Not all forms of sadness — very much an umbrella term — are the same; so too with disgust — compare reactions to cruelty and reactions to ugliness — and so on.

There are, then, different kinds of goods, and human beings experience their lives in ways that reflect a wide variety of *kinds of valuation.*[8] The term is meant to draw attention to our diverse stances toward relationships or prospects, or to the disparate theories of valuation through which we conceive and evaluate relationships, events, or prospects. Every kind of valuation embodies a qualitatively distinctive judgment or response. People react to events, to things, and to one another in accordance with the nature and clarity of distinctions

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STOCKER, PLURAL AND CONFLICTING VALUES 213 (1990); R.E. Chang, Irredeemabilities and Constitutive Incommensurabilities or Buying and Selling Friends (July 1993) (unpublished manuscript, on file with author). One could express the same general thought through a reference not to diverse kinds of valuation, but to diverse goods. For my purposes here, I do not believe that much is at stake between the two formulations. I refer to *kinds of valuation* because the term points explicitly to the interactive nature of valuation; goods are goods for reasons that human beings attribute to them.

7. *See* ANDERSON, *supra* note 1, at 3-4.

8. *Id.* at 6.

among possible kinds of valuation. Someone who does not make appropriate distinctions might be labeled odd or even weird.[9] Someone who does not make enough distinctions might seem thick or obtuse.

We could categorize kinds of valuation in many different ways. For purposes of law, it might make sense to focus on such things as love, affection, respect, wonder, worship, and use;[10] these notions come up in many places of legal dispute. But each of these terms captures a range of qualitatively distinct kinds of valuation. Love for a parent is different from love for a child, which is in turn different from love for a friend, a spouse, a pet, or a house. We might feel wonder toward an act of selfless courage, and also toward a musical performance or a beautiful beach. We might feel awe toward an athletic performance and also toward a mountain. How, and how finely, we should categorize kinds of valuation depends on the uses to which the categories will be put. For law and politics, the number of useful categories is undoubtedly smaller than it is for literature or poetry, which may be especially concerned to offer fine-grained accounts.

Distinctions among kinds of valuation are highly sensitive to the particular setting in which they operate. People do not value goods acontextually. In one setting — say, the workplace — the prevailing kinds of valuation might be quite different from what they are elsewhere — say, the home or the ballot box. Moreover, particular goods typically do not admit of a single kind of valuation. The prevailing kind has everything to do with the relationship among the various actors. Thus a cat might be valued in a certain way by its owner, but in a different way by a landlord, and in still a different way by a government agency. Much of social differentiation stems from this perception.[11] So, too, several kinds of valuation might be directed toward a single object. A person might, for example, both love and respect a friend or a lover.

Different kinds of valuation cannot without significant loss be reduced to a single "superconcept," like happiness, utility, or pleasure.[12] Any such reduction produces significant loss because it yields an inadequate description of our actual valuations when things are going well.

9. *Cf.* CHARLES TAYLOR, *What Is Human Agency?, in* 1 PHILOSOPHICAL PAPERS 15, 15-27 (1985) (discussing evaluative depth).

10. *Cf.* ANDERSON, *supra* note 1, at 8-11.

11. *See infra* section V.A.

12. By "reduced to" these things, I mean treated as simple aspects of them, in a way that erases qualitative differences. Consider John Dewey's criticism of utilitarianism's commitment to the idea of "a fixed, final and supreme end":

> Such a point of view treats concrete activities and specific interests not as worth while in themselves, or as constituents of happiness, but as mere external means to getting pleasures. The upholders of the old tradition could therefore easily accuse utilitarianism of making not

The inadequate description will impair predictive accounts[13] of human behavior. It will also impair normative judgments about ethics, law, and politics. In making this latter point, I mean to reject relativist or purely conventionalist accounts of kinds of valuation[14] and to suggest that some kinds are more appropriate than others. Judgments about what is appropriate depend of course on theories of the good or the right; from the bare fact that kinds of valuation are diverse, we have no basis for evaluating any legal or social practice. But it is important to have diverse kinds of valuation — indeed we could not make sense of our lives without them — and no matter what current conventions may be, some kinds are poorly suited to some contexts because they produce inferior lives. I begin to defend these controversial claims in more detail below.[15]

B. *Conflicts Among Kinds of Valuation, with Special Reference to Uses of Money*

Conflicts among diverse kinds of valuation permeate private and public choice. Suppose that Smith has arranged to have lunch with a friend today, but that he has become very busy and perhaps would like to cancel. Suppose Smith thinks in this way: if he cancels, his friend will be disappointed, because he would like Smith's company, and also a bit insulted, because it is cavalier and disrespectful to cancel lunch at the last minute. Maybe Smith should make it up to him, or provide compensation, by offering a nontrivial cash payment. This would be a hopelessly inadequate response. A cash payment would be inconsistent with *the way* that someone values a friend. Even if the friend would prefer $1, or $10, or $100, or $1000 to lunch with Smith — even though at some point the payment would in some sense be worth far more than the lunch and be readily accepted as an alternative — the offer of cash would be perceived as an insult rather than as compensation. In this context, the difference in kinds of valuation means

only virtue but art, poetry, religion and the state into mere servile means of attaining sensuous enjoyments. . . .

. . . The idea of a fixed and single end lying beyond the diversity of human needs and acts rendered utilitarianism incapable of being an adequate representation of the modern spirit. JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 180-81, 183 (1920).

13. Certain aspects of decision theory are untouched by these claims. A purely ordinal ranking, for example, would be possible even if the point in text is right. But the point may give us reason to question cost-benefit analysis, *see infra* text accompanying notes 235-42, and also the Coase Theorem, *see infra* text accompanying notes 232-33 (discussing offer-asking disparity), without necessarily questioning the use of indifference curves and utility functions to predict human behavior.

14. For one account verging on conventionalism, see the discussion of just distribution within caste societies in MICHAEL WALZER, SPHERES OF JUSTICE 312-16 (1987).

15. *See infra* Part II.

that a financial exchange would be inappropriate. The kind of valuation of a friend blocks the use of otherwise acceptable grounds for action.[16] As we will see, the law is pervaded by principles of this kind — principles that forbid resort to reasons for action that are acceptable in other contexts.

The case is not exotic. Similar issues permeate the exceptionally complex cluster of social norms regulating the appropriate use of money as an incentive for action. For example, if an employer tells you that, as an employee performing a certain job, you must spend a month away from your home and family, you might well agree. But if someone tells you that he will pay you a monthly salary *in order* to persuade you to spend a month away from home and family, you will probably feel insulted and degraded, and you may well turn him down.[17] This second offer reflects an inappropriate valuation of you and your family — it suggests that your relationship with your family is simply up for sale. The employer's offer treats you as an object of contempt and perhaps ridicule. In the first case, the same cannot be said. Even though in the first case the relationship might be thought to have been "traded for" cash, the absence from family is a by-product of employment, rather than something brought about as an end in itself, desired for its own sake by one's boss. To see the two cases as the same — as instances of trade-offs between family and income — is to overlook an important distinction in the meanings of the two offers.

Or suppose that we feel awe toward something. If we do, we will not believe that it should be valued in the same way as its cash equivalent. A simple or flat judgment that a mountain is "really worth" $10 million is inconsistent with the way that we (or most of us) value the mountain. This is because the mountain is valued through a different kind of valuation from the $10 million; the former produces awe and wonder, whereas the latter is for human use — though admittedly $10 million may produce a (different) sort of awe and wonder as well. These points hold even if many people might be indifferent between $10 million and the mountain in the sense that they do not

16. See *infra* the discussion of exclusionary reasons in section II.C. Note in this regard the social norm requiring that, in some circumstances, gifts should not take the form of cash, which is regarded as excessively impersonal. As compared with a gift of (say) $30, a gift of (say) a tie costing $30 establishes a distinctive and often preferable relationship between the recipient and the giver — even if in some contexts $30 in cash would be worth more to the recipient than the $30 tie, and even if in some contexts a gift of $30 would be less costly, to the giver, than the gift of a $30 tie. This point is interestingly missed in Joel Waldfogel, *The Deadweight Loss of Christmas*, 83 AM. ECON. REV. 1328, 1336 (1993), which finds four billion dollars in annual deadweight losses from noncash gifts and which assumes that cash gifts are always more efficient and therefore generally preferable.

17. The example comes from JOSEPH RAZ, THE MORALITY OF FREEDOM 348-49 (1986).

know which they would choose if both were offered; even if $10 million is in some sense the right amount to invest in protection of the mountain from degradation; and even if, as seems clear, infinite valuation of the mountain would be an irrational allocation of scarce social resources. The point does not suggest that pristine areas cannot be degraded. But it does have a range of important and sometimes overlooked consequences for how people involved in the legal system might think about environmental protection.[18] It also suggests that indifference curves have quite limited purposes and that they may be misleading on some important matters. It may even suggest that we should question the whole notion of indifference curves. Some people may not be "indifferent" between two goods even though they do not think that one is better than another.[19]

Attention to diverse kinds of valuation casts general light on the phenomenon of exchanges that are blocked by social norms. If someone offers to pay an adult neighbor to mow his lawn, the neighbor will often regard the request as an insult, because it reflects an inappropriate valuation of the neighbor. The request embodies an improper conception of what the relationship is, or of the attitude with which neighbors render services for each other. The impropriety remains even if the offeree ordinarily would regard the offered wage as a fair price for an hour of mowing services. In an extreme case, if someone asks an attractive person (or a spouse) for sexual relations in return for cash, the same would be said even more vehemently. Because of the existence of diverse kinds of valuation, we may not be able to generalize acontextual preferences from particular decisions. The point bears on law as well. For example, decisions not to insure certain goods — freedom from pain and suffering, the well-being of one's children — need not suggest a global judgment about whether injuries to those goods deserve compensation.[20]

There is often a connection between blocked exchanges and ideas about equal citizenship. The exchange may be barred by social norms or law because of a perception that, while there may be disparities in social wealth, the spheres in which people are very unequal ought not

18. *See infra* section V.D.

19. *See infra* notes 91-105 and accompanying text. For challenges to utilitarianism based on rejection of the claim that goodness is always of a particular kind, see ANDERSON, *supra* note 1; Judith J. Thomson, *Goodness and Utilitarianism,* PROCS. & ADDRESSES OF THE AM. PHIL. ASSN., Oct. 1993, at 145.

20. *See* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 153-54, 228-35, 245-54 (1987); Steven P. Croley & Jon D. Hanson, *What Liability Crisis?,* 8 YALE J. ON REG. 1, 57-67 (1991); *cf.* George L. Priest, *The Current Insurance Crisis and Modern Tort Law,* 96 YALE L.J. 1521, 1553 (1987). I am grateful to Jon Hanson for a helpful discussion of this point.

to invade realms of social life in which equality is a social goal.[21] Often this idea comes from the existence of a kind of valuation based on equal respect. The legal prohibition on vote trading is an example. So too with certain complex social bans on the use of wealth to buy services or goods from other people, such as a shoveled walk or a body part.[22] An intricate web of norms covers the exchange of money among both friends and strangers. Some of these norms are connected with the principle of civic equality. Monetary exchange would reflect forms of inequality that are not legitimate in certain spheres. In making these points, I am disregarding many complexities, and I have not tried to justify any particular set of outcomes in hard cases. I want to suggest only a general point: the refusal to allow economic exchanges is often based on familiar notions of equality that such exchanges would compromise.

There is a further point. We should distinguish between cases in which a monetary offer is entirely inappropriate — say, a large check offered in exchange for an academic article endorsing the offeror's position — and cases in which the monetary sum, while appropriately offered, does not reflect a full or fully accurate valuation of the item in question. Artists, actors, and teachers might well believe that dollar sums cannot truly reflect the social value of what they produce — certainly in the sense that money is not valued in the same way as art or education — without believing that monetary compensation itself is inappropriate. It is a pervasive and intriguing feature of markets that financial compensation is challenged as too low, rather than as inappropriate, or indeed willingly accepted, even in contexts in which the transaction involves a good that is not valued in the same way as money. But it is equally intriguing to note the occasional presence of norms and law that block exchanges on the grounds of an inappropriate kind of valuation.

An understanding of diverse kinds of valuation thus helps explain the anticommodification position for law or social norms — the view that some things ought not to be traded on markets and that market exchanges should therefore be prohibited.[23] The objection to commodification should be seen as a special case of the general problem of diverse kinds of valuation. The claim is that we ought not to trade (for

21. This theme recurs in WALZER, *supra* note 14. See especially his discussion of the case of the company town of Pullman, Illinois. *Id.* at 295-303.

22. I do not mean to approve of the blocking of these exchanges, a matter that turns on a complex range of considerations. *See infra* section V.H.

23. *See* STEVEN KELMAN, WHAT PRICE INCENTIVES? 54-83 (1985); Margaret J. Radin, *Market-Inalienability,* 100 HARV. L. REV. 1849 (1987).

example) sexuality or reproductive capacities on markets because economic valuation of these "things" is inconsistent with and may even undermine their appropriate kind (not level) of valuation.[24] The objection is not that markets value sexuality "too much" or "too little"; it is that markets value these activities in the wrong way. Judge Posner's well-known writings on the "baby market"[25] do not quite address this particular objection. A judgment about the appropriate way of valuing babies must itself be defended on some basis, and such a judgment does not automatically lead to a particular view about legal rules for adoption or the sale of young children. But the question of appropriate kinds of valuation plays a major role in these debates.[26]

Thus far I have dealt with cases that involve objections to the kind of valuation expressed through cash payments. But we can think of many cases not involving the issue of monetary equivalence. Imagine, for example, that John treats a beautiful diamond in the same way that most people treat friends, or that Jane values a plant in the same way that most people value their children, or that Sandy values her car like most people value art or literature. All of us know people with occasional tendencies of this sort. Indeed, all of us *are* people with occasional tendencies of this sort. But sometimes an improper kind of valuation seems odd, or disrespectful, or even pathological — and all these in part because it makes it impossible to sustain certain sorts of desirable social relationships. Disputes over law and social norms, which are related and sometimes mutually enforcing behavioral influences, often reflect disagreements over proper kinds of valuation, with adjectives of this sort moving to the fore.

Consider, for example, the animal rights movement. Some people think that animals should be treated with dignity and respect, and not as if they exist solely for human consumption and use.[27] This view need not entail the further claim that animal life is infinitely valuable.

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24. We should be wary, however, of a rapid movement from judgments about appropriate kinds of valuation to a particular position about law. *See infra* notes 134-40 and accompanying text. This is a basis, I think, for questioning some of the applications of the general claims in ANDERSON, *supra* note 1, at 168-89 (discussing surrogate motherhood), 203-10 (discussing environmental regulation).

25. *See* RICHARD A. POSNER, SEX AND REASON 409-17 (1992); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage,* 7 J. LEGAL STUD. 323 (1978); Richard A. Posner, *The Regulation of the Market in Adoptions,* 67 B.U. L. REV. 59 (1987).

26. See the discussion of symbolic value in ROBERT NOZICK, THE NATURE OF RATIONALITY 26-35 (1993).

27. *See generally* PETER SINGER, ANIMAL LIBERATION (1975); *see also* PAUL W. TAYLOR, RESPECT FOR NATURE (1986) (arguing that humans owe duties to all living things); Laurence A. Tribe, *Ways Not To Think About Plastic Trees,* 83 YALE L.J. 1315 (1974) (challenging the "homocentric" nature of environmental law). ROBERT E. GOODIN, GREEN POLITICAL THEORY (1992) provides a good overview of related issues.

It is best taken as a recommendation of a shift in the kind of valuation of animals, accompanied by a judgment that the new kind will have consequences for what human beings do. The recommendation may be based on the view that if we see animals (and nature) in this way, we will solve collective action problems faced by human beings in preserving animal life that is important for human lives; it may be based on a noninstrumental effort to extend ideals of basic dignity to all living things.[28] I reiterate that substantive judgments of this sort must be defended; by itself, the reference to diverse kinds of valuation gets us nowhere. The important point is that such judgments are a frequent, though often overlooked, part of social and legal discussion.

The existence of diverse kinds of valuation explains a good deal of private behavior. Norms governing address provide a familiar example. By using some part of a name — last name preceded by "Professor," "Doctor," "Mr.," "Ms.," "Mrs.," "Miss"; last name by itself; first name; nickname or diminutive; some term of endearment — a good deal of signaling takes place about prevailing kinds of valuation. Some of these signals connote respect and admiration; others show contempt; others show affection or love. Of course different cultures vary greatly on this score, and of course individual relationships change over time from one kind to another. Note in this regard that the Constitution forbids both the federal government and the states from conferring any "Title of Nobility."[29] In this way, it commits itself to a certain view of equality among human beings. Though the provision may seem like a historical curiosity to current observers, to the Framers it crucially exemplified this view; as we will see,[30] it is the forerunner of the Equal Protection Clause, with a close connection to judgments about appropriate kinds of valuation.

C. *Clarifications and Cautionary Notes*

Three major clarifications are necessary here. First, my claim about diverse kinds of valuation has largely been a claim about widespread current attitudes. I do believe that those attitudes go very deep and that it would be quite impossible to make sense of our experience

28. On intrinsic value and the sanctity of life, see RONALD DWORKIN, LIFE'S DOMINION 67-101 (1993). Dworkin's claim that life is "sacred" or "inviolable" is best taken, I think, as a claim about the appropriate kind of valuation of life, and his description of certain courses of action as showing "contempt" for life is highly compatible with the account I offer here.

29. U.S. CONST. art. I, § 9, cl. 8. For a description of the antiaristocratic tendencies of political thinking in the Revolutionary period, see GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 145-68, 229-43, 271-86 (1992).

30. *See infra* notes 179-81 and accompanying text.

without reference to diverse kinds of valuation.[31] But I do not intend to offer anything like a transcendental or metaphysical claim about valuation; I am speaking about how we value, not about nature or about valuation of goods apart from human attitudes.

Nor are existing kinds of valuation fixed and immutable. Norms change, and prevailing social conceptions about kinds of valuation change as well. Shifts from one kind of valuation to another are perfectly commonplace, both at the individual and social level. Respect can turn into love; love can turn into use; use can become love; love can become respect; love may or may not be accompanied by respect; respect can become affection; so too for love. Within societies, kinds of valuation change over time. The shift from feudalism to capitalism can hardly be described in a sentence, but one of its features involved changes in kinds of valuation of work and workers, and this was a prime area of contestation.[32] Marriage may once have involved more use, and less love and affection, than it now does.[33] The abolition of slavery represented a shift from use to a certain measure of respect; so too with the attack on racial hierarchy in the aftermath of *Brown v. Board of Education.*[34] Much of the change in race relations in the South involved a shift from connections built on deference and what was believed to be a sort of affection to principles of civic equality and respect.[35]

Some of the most heated disputes about law and policy actually turn on the appropriateness of a shift from one kind of valuation to another. In labor law, for example, many important controversies involve the appropriate kind of valuation of workers.[36] The dispute over at-will employment seems to turn in part on this issue. Critics of the at-will rule claim that the rule reflects an inadequate kind of valuation of workers because it subjects them to the whim of employers.[37] Here too notions of equality are at work in calling into question certain vol-

31. This view is defended in ANDERSON, *supra* note 1, at 65-90.

32. *See* KARL POLANYI, THE GREAT TRANSFORMATION 33-102 (1944).

33. *See, e.g.* POSNER, *supra* note 25, at 36-50 (sketching a history of Western sexual mores). For an argument against the use of women by men within the family, and in favor of norms of equality and respect, see SUSAN M. OKIN, JUSTICE, GENDER, AND THE FAMILY 134-69 (1989).

34. 347 U.S. 483 (1954).

35. *See generally* RICHARD KLUGER, SIMPLE JUSTICE (1976).

36. This is a general theme of Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation,* 106 HARV. L. REV. 1379 (1993).

37. *See* Jack M. Beermann & Joseph W. Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs,* 23 GA. L. REV. 911 (1989); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 COLUM. L. REV. 1404 (1967).

untary exchanges.[38]

Much of the theory of environmental protection involves similar issues. It is not entirely accurate to say that environmentalists value pristine areas "more" than do economists. It is also important to say that environmentalists value pristine areas in a different way. Whereas economists tend to think of the environment as something for human use and exploitation,[39] environmentalists tend to claim that we should view the environment with awe and wonder or value it for its own sake rather than as an instrumental good.[40] The debates over pollution taxes and tradable emissions permits are partly debates over kinds of valuation.[41] Of course it is unclear how these different kinds of valuation will or should affect environmental policy, a point to which I will return.[42]

Second, the existence of diverse kinds of valuation does not by itself have any clear implications for law, policy, or even social attitudes. There is a difference between how people should value and how law should value. I do not claim that, because people now value relationships, events, objects, or each other in certain ways, it follows that law should adopt those diverse kinds of valuation. We need not be conventionalists. If a particular kind of valuation were really superior with respect to what is appropriately valued in public or private life, the law might well adopt that kind of valuation notwithstanding its inconsistency with prevailing social norms. A good deal of constitutional law can be taken as an effort to constrain prevailing kinds of valuation; this is true both for principles of religious liberty and for antidiscrimination norms.[43] Or law might embody a certain kind of valuation precisely because it is law; we might think that cost-benefit analysis is appropriate for law even if we think that it is inappropriate for spouses or parents. If we are to draw conclusions about appropriate law, policy, and norms, it is because our best account of the good or the right supports a particular constellation of kinds of valuation and because we are able to show that a particular constellation makes

38. *Compare* Blades, *supra* note 37 *with* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984). This dispute implicitly involves diverse kinds of valuation. Epstein's view rests on a monistic conception of value in which workers "trade off" goods along a single metric; Blades does not directly address this question but appears to take a stand in the other direction.

39. *See, e.g.*, WILLIAM J. BAUMOL & WALLACE E. OATES, THE THEORY OF ENVIRONMENTAL POLICY (2d ed. 1988).

40. *See, e.g.*, GOODIN, *supra* note 27, at 8 ("The value of nature is no longer regarded as wholly reducible to its value to God or to humanity.").

41. *See* KELMAN, *supra* note 23, at 1-11.

42. *See infra* section V.D.

43. *See infra* section V.B.

sense for law.[44] I return to this complex issue in Part IV.

Third, those who believe that goods are valued in different ways need not reject the possibility of rational choice or even some form of trade-off among them.[45] On the contrary, believers in diverse kinds of valuation would do well to insist that choices occur and that they might well be judged rational or not. People choose among differently valued goods all the time, and these choices are not immune from evaluation on rational grounds. My affection for my dog and my desire for more cash reflect different kinds of valuation, but it would be quite irrational for me to allow my dog to be sold for fifty dollars. (If I were desperately poor, and if my family were ill and suffering, it could also be irrational for me to refuse to trade my dog for one million dollars, notwithstanding the presence of distinct kinds of valuation.) Someone might well sell for a price the products of her capacity to play Mozart — musical performances — or to write poetry, notwithstanding the fact that she values her capacity as something other than an income-producing asset. In some circumstances it would surely be irrational for a musician to refuse to perform for a fee. These claims about rationality need to be explained in some detail, but they should be sufficient to show that there may indeed be a point to deliberating about cases that involve goods that are valued in different ways.[46]

D. *Social Science, Economics, and Diverse Kinds of Valuation*

Is it useful to note that kinds of valuation are diverse and plural? Perhaps it is not. Perhaps we can make good predictions about social life simply by assuming that there is a single kind of valuation.[47] On this view, a claim about diverse kinds of valuation may usefully describe people's internal lives; it may have deeper psychological truth; it may better account for how lives and choices are actually experienced. But it is fully dispensable for social scientists and lawyers, who can work with an assumption of "as if unitariness" — that is, who can assume that people act as if they value all things in the same way, and who can make accurate predictions with that assumption. So long as we can model choices — so long as ordinal rankings are possible — social scientists need not worry about what I have said here.

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44. See the discussion of lexical ordering, *infra* text accompanying notes 206-10.

45. See the attack on incomparability in Chang, *supra* note 6, at 1-4, 15-25.

46. This suggestion is contrary to the claim in Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1058 (1989). *See infra* Part III.

47. *See, e.g.*, Douglas Baird et al., Strategic Behavior and the Law (forthcoming 1994) (manuscript at 1-56, on file with author) (using simplified assumptions in game-theoretic analysis to predict consequences of alternative tort regimes).

This conclusion seems partly right. If we assume that people want to maximize one thing — utility, value, welfare, well-being — we might well be able to make good predictions of various sorts.[48] We might be able to say what sorts of legislation will be enacted in what circumstances. People do make judgments among goods, and if so we need not decide whether they value these goods in the same way. Much of social science proceeds through simplifying assumptions, even with respect to nonmarket transactions. To the extent that we can make accurate predictions by assuming unitariness, we can indeed dispense with claims about diverse kinds of valuation.[49]

But I believe that, with the assumption of a unitary kind of valuation, we will sometimes offer inadequate predictions, explanations, and recommendations for law. The idea of "revealed preferences" is a predictive failure; to make predictions from choices, we need to offer an account of what lies behind choices,[50] and that account must take into consideration what I am discussing here. Behavior is often a product of judgments about what kinds of valuation are appropriate under what circumstances. As we will see, some of the "demand" for environmental regulation is best understood as a response to claims about the need to value things in different ways.[51] Much of individual conduct is best understood in similar terms. We might, for example, puzzle a great deal over the existence of social norms without apparent "maximizing" explanations.[52] Consider a few examples: the norm in favor of voting, norms of dress and etiquette, norms of vengeance,

48. An influential approach comes from the idea of revealed preferences, popular within economics. On this view, we do not hypothesize any supervalue such as utility, but work instead with a rank ordering of individual preferences, based on actual choices (revealed preferences). This approach will not work. We cannot get a good sense of what people value simply from choices since choices are a function of context and since they are inarticulate — poor predictors of future behavior — without some account of what lies behind them. *See* Amartya Sen, *Internal Consistency of Choice,* 61 ECONOMETRICA 495 (1993). Sen shows that even the weakest axioms of revealed preference theory can fail. For example, it is usually assumed that if someone prefers *A* to *B* in a situation of binary choice, he should also prefer *A* to *B* if some third alternative *C* is introduced. But this is wrong. Someone may prefer *A* to *B,* but *B* to *A* and *C,* because the choice of *A* over *B* shows no global or acontextual judgment. For example, the choice of *A* (a medium sized piece of cake) over *B* (a large piece of cake) may reflect a desire to be moderate, a desire that can also justify the choice of *B* over *A* and *C* (a huge piece of cake). *Id.* at 498-503. Thus we cannot rank order individual preferences on the basis of choices alone or without some account of what values underlie choices. *See also* RAZ, *supra* note 17, at 327; Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics,* 90 COLUM. L. REV. 2121 (1990).

49. The most striking example here is Gary Becker, who assumes a single kind of valuation in his work on nonmarket behavior, most notably in BECKER, *supra* note 3.

50. *See supra* note 48.

51. *See infra* notes 231-33 and accompanying text; *see also* Cass R. Sunstein, *Endogenous Preferences, Environmental Law,* 22 J. LEGAL STUD. 217, 248-53 (1993).

52. *See* JON ELSTER, THE CEMENT OF SOCIETY 97-152 (1989); JON ELSTER, SOLOMONIC JUDGMENTS 32-35 (1989).

norms against sale.[53] Some anomalies in expected utility theory might result from diverse kinds of valuation.[54] There is much more to say about these complex matters. Nothing said in this paragraph refutes the possibility of complete ordinal rankings. But we can make some progress in thinking about human behavior by examining the role of diverse valuations.

In this light, we can also make sense out of a familiar debate within the legal culture. In some subjects — contracts, torts, property — people often propose that something important — like a risk to life or health — is in some deep sense equivalent to a certain amount of cash. At this point, some participant in the conversation (perhaps a student) rejects the proposal, whereupon the original speaker suggests that the resistance must depend on a claim of infinite valuation, at which point it is clear that the original proposal was correct. But perhaps the resistance rests on a claim about appropriate kinds, not levels, of valuation.[55] If so, the participant who is making this claim has a lot to explain. She has to explain how to make choices among goods that are valued in different ways. But at least we will be able to understand what she is saying.

We might also begin to see why it might be jarring to conceive of the various harms imposed by law as simple "costs." This formulation begs important questions and ignores qualitative distinctions. It does so by assuming a unitary kind of valuation. In that way, this formulation loads the dice — that is, it prejudices analysis by pointing it in certain controversial directions. As we will see, the point bears on the question of commensurability.[56]

II. INCOMMENSURABILITY

A. *A Provisional Definition*

The subject of incommensurability raises many complexities, and I want to bracket at least some of the philosophical debate here, concentrating instead on what is particularly relevant to law.[57] Begin with a

53. Many of these are subject to intriguing, but in my view incomplete, analysis on economic or utilitarian grounds. *See, e.g.*, RICHARD A. POSNER, LAW AND LITERATURE 26-70 (discussing vengeance).

54. Consider offer-asking disparities and wide variations in expenditures per life saved. *See infra* note 219 and accompanying text.

55. The point seems to me to require some qualifications of the discussion in GUIDO CALABRESI, THE COSTS OF ACCIDENTS 16-20 (1970) (discussing trade-offs between human fatalities and offsetting social benefits). It also helps explain the account of the "sacred" in DWORKIN, *supra* note 28, at 68-101.

56. *See infra* notes 231-33 and accompanying text.

57. For discussions of commensurability, see ANDERSON, *supra* note 1, at 44-73; JAMES

rough working definition, designed especially for the legal context: *Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.* Let me briefly describe the four major elements of this definition. First, by "our considered judgments," I mean our reflective assessments of how certain relationships and events should be understood, evaluated, and experienced. Such reflection involves identifying the nature and depth of various goods in our lives.

Second, the notion of a "single metric" should be understood quite literally.[58] By this I mean a standard of valuation that (1) operates at a workable level of specificity; (2) involves no qualitative distinctions; and (3) allows comparison of different goods along the same dimension. One example of a real-world metric — indeed the most important for present purposes — is money. Ten dollars and $100 can be confidently measured by such a standard, so that ten dollars is simply a small quantity of the same thing of which $100 is a substantial amount. If two goods are fungible, they are also commensurable. Other metrics include feet, yards, pounds, and of course meters. The difference between lengths of ten yards and 100 yards, or between 1000 pounds and 400 pounds, involves no qualitative distinctions.

An important and contested utilitarian claim is that "utility" furnishes a single metric along which goods can be evaluated. Some utilitarians believe that a single metric is indeed available for ordering valuations. The great utilitarian John Stuart Mill, of course, was unwilling to commit himself fully to this view.[59] I use the term *metric*

GRIFFIN, WELL-BEING 75-92 (1986); NUSSBAUM, *supra* note 2, at 106-24; RAZ, *supra* note 17, at 321-66; STOCKER, *supra* note 6, at 130-207; CHARLES TAYLOR, *The Diversity of Goods, in* PHILOSOPHY AND THE HUMAN SCIENCES 230, 243 (1985); Elizabeth Anderson, *Values, Risks, and Markets Norms,* 17 PHIL. & PUB. AFF. 54, 57-59 (1987); Pildes & Anderson, *supra* note 48, at 2145-66; Amartya Sen, *Plural Utility, in* 81 PROC. OF THE ARISTOTELIAN SOCY. 193, 197-89 (1981); Richard Warner, *Incommensurability as a Jurisprudential Puzzle,* 68 CHI.-KENT L. REV. 147 (1992); Richard H. Pildes, *Conceptions of Value in Legal Thought,* 90 MICH. L. REV. 1520 (1992) (book review); *cf.* Radin, *supra* note 23. Compare the discussion of an "integrated personality" in Frank Hahn, *Benevolence, in* THOUGHTFUL ECONOMIC MAN 7, 8 (J. Gay T. Meeds ed., 1991) (asserting intrapersonal comparability of options grounded in self- and other-regarding motives) with the response in Amartya Sen, *Beneconfusion, in* THOUGHTFUL ECONOMIC MAN, *supra,* at 12, 12-14 (denying this thesis).

58. Charles Larmore says that incommensurability occurs when there is no "common denominator of value," an understanding that parallels the notion of a metric, but is not identical to it. Charles Larmore, *Pluralism and Reasonable Disagreement,* 11 SOC. PHIL. & POLICY (forthcoming 1994) (manuscript at 65, on file with author). At least for purposes of law, I think that the notion of a single metric is more useful than that of a common denominator of value. We could identify common denominators of value at a high level of generality — excellence, generosity, and so forth — but because such common denominators, including qualitatively different features, can be found for most legal problems, the term may lead to confusion.

59. *See* JOHN STUART MILL, UTILITARIANISM (Oskar Priest ed., 1957) (1861).

largely because of the special importance of the metric of dollars to law. As we will see,[60] the use of a single metric is often unhelpful for law, and this point has a wide range of consequences for particular legal disputes. Under this general definition of metric, many possible standards — excellence, well-being, affective allegiance — count as criteria, but not as metrics. Kinds of valuation — love, respect, wonder, worship — embody no metric at all.[61]

Third, with the phrase "doing violence," I mean to suggest that the use of a single metric is inconsistent with the way certain goods are actually experienced, or tend to be experienced when people's lives are going well. The phrase is intended to show that a single metric, nominally descriptive of experience, would actually transform it, in a way that would make a great deal of difference. It would make a great deal of difference because it would elide certain qualitative differences that are important in both life and law. We might label many choices involving commensurable goods *investment decisions.* The decision how to invest so as to maximize expected return does indeed involve commensurable goods. Some people write as if all or most decisions have this form — as if all or most decisions are investment decisions. Some people write as if life is full of investment decisions, so that a decision made in one context will show a global, acontextual judgment about valuation.[62] It is these points that I am rejecting here. If we saw all human decisions as investment decisions, we would make human ex-

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It is quite compatible with the principle of utility to recognize the fact that some kinds of pleasure are more desirable and more valuable than others. It would be absurd that, while in estimating all other things quality is considered as well as quantity, the estimation of pleasure should be supposed to depend on quantity alone.

Id. at 12. See also Mill's criticism of Bentham:

> Nothing is more curious than the absence of recognition in any of his writings of the existence of conscience, as a thing distinct from philanthropy, from affection for God or man, and from self-interest in this world or in the next. . . .
>
> Nor is it only the moral part of man's nature . . . that he overlooks; he but faintly recognises, as a fact in human nature, the pursuit of any other ideal end for its own sake. The sense of *honour,* and personal dignity . . . the love of *beauty,* the passion of the artist; the love of *order* . . . the love of *power* . . . the love of *action* . . . the love of ease: — None of these powerful constituents of human nature are thought worthy of a place among the "Springs of Action;" . . . .

MILL, *supra* note 2, at 66-68.

Other general meditations on this theme appear in JOHN STUART MILL, AUTOBIOGRAPHY (1873); for an illuminating discussion see Elizabeth Anderson, *John Stuart Mill on Experiments in Living,* 102 ETHICS 4 (1991).

60. *See infra* Part V.

61. Hence ordinal rankings do not produce commensurability as I understand it here.

62. *See, e.g.,* W. KIP VISCUSI, FATAL TRADEOFFS 34-74 (1992) (discussing risk trade-offs). Compare Viscusi's analysis with Amartya Sen, *Freedom and Needs,* NEW REPUBLIC, Jan. 10 & 17, 1994, at 31, 32-33 ("There are deep and fundamental and intuitively understood grounds for rejecting the view that confines itself merely to checking the parity of outcomes, the view that matches death for death, happiness for happiness, fulfillment for fulfillment, irrespective of how all this death, happiness, and fulfillment comes about.").

perience barely recognizable. There is an additional point. Particular choices reflect the context in which they are made, and those choices rarely reveal a general statement, reflecting an acontextual considered judgment about valuation.

Finally, by "doing violence to our considered judgments," I mean disrupting our reflective assessments of how certain relationships and events should be understood, evaluated, and experienced. To see dating, for example, as "participation in the marriage market" may be inconsistent with prevailing convictions about what dating behavior entails.

Incommensurability in this very thin[63] sense is a familiar phenomenon. Indeed it seems that it is closer to the rule than the exception. A decision whether to vacation at the beach in the Indiana Dunes or in Florence entails no single metric. So too with the decision whether to see a movie about dinosaurs or instead about Wittgenstein. So too with a decision whether to reduce permissible exposure levels to benzene in the workplace to one part per million.

We might also believe that goods are comparable without believing that they are commensurable — that is, we might think that choices can be made among incommensurable goods, and that such choices are subject to reasoned evaluation, without believing that the relevant goods can be aligned along a single metric.[64] Incommensurability need not entail incomparability. But incommensurability is still an important part of practical reason in life and law. For example, some people do not believe that any unitary metric can capture their diverse valuations of music, friendship, and work. It also seems possible that different forms of music, or different kinds of work and friendship, cannot be made commensurable in this way. To be sure, we can imagine a life or a world in which valuation along a single metric would not be experientially false. Certainly we can imagine social changes in which some incommensurable things become commensurable, and vice versa. Some such changes have undoubtedly occurred, and indeed are occurring all the time. But a fully commensurable life or world would be the stuff of science fiction. It would change experi-

63. This sense of incommensurability is different from the sense captured in the idea that "conceptual schemes" or "paradigms" are incommensurable. *Cf.* DONALD DAVIDSON, *On the Very Idea of a Conceptual Scheme, in* INQUIRIES INTO TRUTH AND INTERPRETATION 183 (1984) (analyzing and criticizing the latter claim).

For a much thicker notion of incommensurability involving value-incomparability, see RAZ, *supra* note 17, at 321-66.

64. Incommensurability and incomparability are used interchangeably in many places, including *Raz*, *supra* note 17, at 322. The two are distinguished in STOCKER, *supra* note 6, at 175-78; Larmore, *supra* note 58, at 61; Chang, *supra* note 6, at 2-4.

ence, not "just" words.[65] An argument on its behalf would call for a large-scale revision of current experience.

B. *Valuation and Commensurability*

What is the relationship between kinds of valuation and commensurability? It may be tempting to think that there is incommensurability if and only if diverse kinds of valuation are at work. There is an association between these two ideas.[66] But they are not the same. Two points are relevant here. First and most important, cases of incommensurability can occur even within the same kind of valuation. A parent may value one child in the same way that she values another child, but the two may be incommensurably valued in the sense that they are not valued along the same metric. The valuation of one cannot be understood as simply some fraction of the valuation of another. There is nothing like fungibility. There are important qualitative distinctions.

Consider in this regard the mother's dilemma in *Sophie's Choice*:[67] which of her two children should be handed over to the Nazi officer? The dilemma is tragic partly because the two lives are not fungible. The mother is forced to assume personal responsibility for the loss of a life for which there is no substitute. This is a common though usually less excruciating phenomenon in the presence of multiple intrinsic goods, when we might have a single kind of valuation, or a few such kinds, without a metric for decisions. Indeed we might think that commensurability in the sense used here can occur only in the case of instrumental goods having many possible uses.

Second, some people might think that goods are commensurable even if they are valued in different ways. Consider the suggestion that a single metric is available with which to align our different kinds of valuation. For example, Mozart may be valued in a different way from Bob Dylan, but there may be a metric by which to value different composers; and, along that metric, Mozart may be superior to Dylan. (I believe that any such metric would be false to our experience of music, and hence I do not think that this sort of approach will work;

65. See the tale of the super-Benthamites in HILARY PUTNAM, REASON, TRUTH, AND HISTORY 139-41 (1983); *cf.* ELSTER, THE CEMENT OF SOCIETY, *supra* note 52:

> It would be misleading to say that people throughout the Roman Empire believed in the "same" gods, while perhaps worshipping them in different ways, as people who live in different parts of a country see the "same" mountain from different perspectives. . . . Practices at opposite ends of the empire might have little but the names of the gods in common.

Id. at 249.

66. *See, e.g.*, ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 169-72 (1969).

67. WILLIAM STYRON, SOPHIE'S CHOICE (1979).

but I am trying here to show how the two claims might be separated.) In any case some people think that there are diverse values — pleasure from a warm sun, gratitude from unexpected kindness, and so forth — while also believing that these can all be reduced to a general concept like utility, happiness, or pleasure. Utilitarians need not deny the diversity of human goods, or that pleasures and pains come in different forms.[68]

The claim of incommensurability is that no unitary metric accounts for how we actually think and that the effort to introduce one misdescribes experience. There is a further claim (of course requiring an independent defense) that the misdescription can yield both inaccurate predictions and bad recommendations for ethics and politics.[69] It would do so even if human beings also should decide, free from metrics but equipped with reasons, in favor of some relationships and events instead of others, and even in favor of Mozart over Dylan if some such judgment becomes useful.[70] Recall that incommensurability, as I have defined it, does not entail incomparability. It may be, for example, that there are describable and workable criteria for finding a composer to be good, and that these criteria, while hardly algorithmic, make it possible to say that some composers are better than others.

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68. Hence Mill:

> The ingredients of happiness are very various, and each of them is desirable in itself, and not merely when considered as swelling an aggregate. The principle of utility does not mean that any given pleasure, as music, for instance, or any given exemption from pain, as for example health, are to be looked upon as means to a collective something termed happiness, and to be desired on that account. They are desired and desirable in and for themselves; besides being means, they are a part of the end.

MILL, UTILITARIANISM, *supra* note 59, at 179. J.J.C. Smart, more cautious on this point, simply states: "[T]he more complex pleasures are incomparably more fecund than the less complex ones; not only are they enjoyable in themselves but they are a means to further enjoyment." J.J.C. Smart, *An Outline of a System of Utilitarian Ethics, in* J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973). In light of these descriptions we might not see "utility" as a metric at all.

69. Sometimes, however, it may be pragmatically valuable to construct a metric consisting of heterogeneous items. The "human development index" used by the United Nations to measure well-being by amalgamating literacy, longevity, and per capita income, provides a useful example. *See* U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 10 (1993). Similarly, the National Football League measures quarterback proficiency with an index based on heterogeneous qualities, including completion percentage, average gain per attempt, touchdown percentage, and interception percentage. *See* Dan Pierson, *Harbaugh Passes the Ratings Test,* CHI. TRIB., Nov. 4, 1990, at C9. The risk with both indices is that the aggregate numbers may deflect attention from important qualitative differences. Under the 1993 UNDP Report, for example, the United States ranks sixth overall, but it ranks first in educational attainment and in per capita income, and seventeenth in longevity, in part because of high rates of infant mortality and violent crime; it is this disaggregated data that is most informative. *See* Cass R. Sunstein, *Well-Being and the State,* 107 HARV. L. REV. (forthcoming 1994) (manuscript at 18-21, on file with author). Much the same could be said about quarterbacks.

70. These points leave many complexities. Perhaps the best standard is a general concept of excellence (for music) or well-being (for human beings), amounting to an index of differently valued qualities. But a concept of this sort ought not to count as a metric as I understand it here.

Indeed, it seems clear that this is the case. We can make similar arguments about hard cases in law, a point taken up in more detail below.[71]

C. *Excluding Reasons for Action*

Some of the most intriguing instances of incommensurability arise when the relevant kind of valuation not only prevents use of a single metric, but also excludes certain reasons for action altogether.[72] We need to introduce here the important notion of *exclusionary reasons.*[73] Sometimes social custom or law invokes a second-order reason that excludes certain first-order reasons for action, even if those reasons are perfectly legitimate in some settings. In such cases, the basic goal of the custom or laws is to prohibit people from making choices on the basis of certain identifiable considerations. Those considerations are ruled off limits; they are not merely found insufficiently weighty.

Someone may, for example, value loyalty to a lover or spouse in a way that absolutely precludes the acceptance of favors, or cash, as a reason for infidelity. The kind of valuation of the person and relationship rules out a set of reasons that would be perfectly legitimate bases for action in other contexts. The particular kind of valuation is inconsistent with allowing the admission of certain otherwise conventional reasons for behaving in a certain way. The same idea permeates the legal system. Thus, for example, a jury in a tort case is not ordinarily permitted to take into account a defendant's wealth; in interpreting a statute, a judge is usually not supposed to consider what she thinks a good statute would say.[74] Companies may not invoke the need to increase employment — ordinarily an important social goal — as a ground to engage in price fixing.[75] In the law of free speech, offense at the content of ideas is not a legitimate reason to regulate speech, even if the offense is very widespread and intense.[76] Administrative law consists in large part of the identification of a range of statutorily irrel-

71. *See infra* Part V.

72. The treatment of incommensurability in the legal context in Warner, *supra* note 57, makes extensive use of this notion. See also the discussion of constitutive incommensurabilities in RAZ, *supra* note 17, at 345-53.

73. *See* JOSEPH RAZ, PRACTICAL THINKING AND NORMS 35-48 (1975). The idea is controversial. *See* William A. Edmunson, Book Note, 12 LAW & PHIL. 329 (1993) (reviewing 1990 republication of RAZ, *supra*).

74. I overlook some complexities here, discussed in RONALD DWORKIN, LAW'S EMPIRE 313-54 (1986). *See also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State,* 103 HARV. L. REV. 405 (1989).

75. Indeed, under current antitrust law, no social goal, however worthy, can justify price fixing; all price-fixing agreements are per se illegal because of their presumptively anticompetitive potential. *See, e.g.,* Arizona v. Maricopa County Med. Socy., 457 U.S. 332 (1982); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

76. Cohen v. California, 403 U.S. 15 (1971).

evant factors — bases for decision that may not be introduced at all, however pertinent they may seem in the abstract.[77]

Sometimes the very admission of the relevant reasons is entirely off limits. Sometimes the reasons, though usually barred, may be introduced, but only if they are extraordinarily strong in the specific case. This is a characteristic structure of legal protection of constitutional rights under judge-made doctrine.[78] I want to claim that, in both instances, we have a form of incommensurability as I understand it here.[79]

Consider a general example. One might think that, in constitutional law, intrusions on certain rights are acceptable only if government can generate an interest both of a certain type and of a certain strength.[80] In an interesting discussion of the First Amendment, for example, John Rawls argues that the mere existence of a clear and present danger of some sort will not justify government suppression of speech.[81] On his account, government must show a clear and present danger to the democratic order itself.[82] As I read him, Rawls does not mean to argue that this is simply a greater degree of danger than any other; instead he means to argue that, to regulate political speech, government needs an interest of a particular sort. Whether or not the

77. *See, e.g.*, National Resources Defense Council v. EPA, 824 F.2d 1146 (D.C. Cir. 1987) (holding that EPA may consider cost and feasibility in setting emissions standards under Clean Air Act); National Coalition Against the Misuse of Pesticides v. Thomas, 809 F.2d 875 (D.C. Cir. 1987) (holding that EPA must give greater weight to statutorily specified factors than unspecified factors in issuing pesticide regulations under the Food, Drug, and Cosmetics Act); D.C. Fedn. of Civic Assns. v. Volpe, 459 F.2d 1231, 1246-49 (D.C. Cir. 1971) (treating pressure from individual congressional representatives as improper basis for approving bridge construction project).

78. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (requiring gender classifications to serve important governmental objective); Roe v. Wade, 410 U.S. 113 (1973) (requiring compelling state interest for regulation of abortion); Brandenburg v. Ohio, 395 U.S. 444 (1969) (requiring imminent threat of lawless action for regulation of public speech).

79. This is not simply a problem of lexical ordering, unless that notion is understood to entail a commitment to incommensurability. *See infra* notes 206-10 and accompanying text.

80. *See supra* note 78. Consider other examples. One might think that the right kind of valuation of promise-keeping forbids someone from breaching a contract merely because changed circumstances have rendered performance significantly more costly. Here too the argument is far from self-evident, but one could imagine a conception of promise-keeping that would have this consequence. Indeed, these ideas appear at work in current law. *See* Warner, *supra* note 57, at 165-67. Similarly, some people might believe that the appropriate kind of valuation of the environment forbids the use of cost-benefit balancing as a reason for allowing people to be exposed to significant safety risks. *Cf.* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 509 (1981) (holding cost-benefit analysis unnecessary to justify occupational health standard). It would not be simple to spell out this argument, but perhaps an industry should be barred from deliberately subjecting people to certain risks without their full knowledge and consent, when the ground for the decision is that the costs of eliminating those risks outweigh the benefits, economically defined.

81. *See* JOHN RAWLS, POLITICAL LIBERALISM 348-56 (1993).

82. *Id.* at 354.

argument is right, it shows that we might want to impose constraints on the sorts of interests that can be invoked to justify restrictions on constitutional rights.[83]

The exclusion of certain reasons for action is an extreme case of the more conventional and modest sort of incommensurability I am describing here. It is of course possible to deny that two items *X* and *Y* can be aligned along a single metric while also believing that an especially large amount of *X* is worth more than an especially small amount of *Y*. One might believe, for example, that a pristine area and cash are incommensurable in value, while also thinking that dollars are not excluded as reasons for action, and that one would allow degradation of a pristine area if an enormous amount of money were at stake. This is especially true to the extent that money, which is by definition only of instrumental value, can be devoted to enterprises that are of intrinsic value, like the protection of wildlife or of other environmental goods. Consider here the controversial but reasonable efforts to claim that, while OSHA may not base outcomes on cost-benefit analysis (that is, trade off life for dollars), it may engage in "risk-risk" analysis (that is, compare one risk to life and health with another). On this view, OSHA may take into account the possibility that regulation that produces unemployment and poverty imposes greater risks to life and health.[84]

There is a further and closely related point. Many problems of incommensurability arise because of a conviction that an event, a person, or a relationship is intrinsically good, or an end in itself, rather than something properly treated as a means to some other generalized end, such as wealth or utility or maximized value.[85] It is easy to use a single metric when all human events are seen as instrumental to im-

83. A familiar version of this idea is the notion that "administrative convenience" cannot justify discrimination or intrusion on rights, even if the inconvenience is very great. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 198 (1976) (rejecting statute establishing different legal drinking ages for males and females based on highway safety concerns); Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (rejecting statute that accorded differential treatment to male and female members of armed services); Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (holding that pretermination hearing is required before state can halt welfare benefits).

Many constitutions allow abridgment of rights only for reasons that are compatible with the operation of a democratic society. *See, e.g.*, CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1 (guaranteeing the rights and freedoms set out therein "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"). In this way, they mark out a limit not simply on the weight but also on the nature of the reasons that may be invoked to support intrusions on rights.

84. See the proposed OSHA regulations in 57 Fed. Reg. 26,002, 26,006 (1992). *See also* International Union v. OSHA, 938 F.2d 1310, 1326-27 (D.C. Cir. 1991) (Williams, J., concurring).

85. Warner, *supra* note 57, at 157. See also Mill's notations on Bentham. MILL, *supra* note 2, at 66-70.

provements along a unitary dimension.[86] If we thought, for example, that all acts were attempts to increase social utility — defined, say, as aggregate human happiness — then it would be utility that would be of intrinsic value, and all else would be instrumental to it. Analysis might therefore be greatly simplified. The same is true of some understandings of maximized wealth. Often issues of incommensurability arise because of the presence of a range of intrinsic goods that are not seen as means to some other end, particularly in law.

An example may help. Of course a society cannot spend an infinite amount of resources to improve workplace safety and hence must make complex trade-offs. But many people find it jarring to hear that, in light of actual occupational choices, a worker values his life at (say) eight million dollars, or that the protection of a life is "worth" eight million dollars.[87] These claims are jarring not because we believe infinite social resources should be devoted to occupational safety. The claims are jarring because of the widespread perception that a life is not instrumental to some aggregate social goal, but worthy in itself — a belief in tension with applying the language of prices to human life. This is a plausible concern even if one ultimately concludes that (say) an eight million dollar expenditure is fully appropriate in cases of lives at risk. Certainly intrinsic goods do not have infinite value for purposes of law and policy. But even though they do not, the fact that we find it jarring to hear that a life is "worth" a specified amount of money is socially desirable, and not a product of simple confusion.

In sum, the recognition of an intrinsic good may entail an evaluative attitude that is incompatible with the use of certain reasons to compromise it.[88] For example, the intrinsic — rather than instrumental — values at stake in a parent-child relationship generally preclude compromising that relationship for cash, unless, perhaps, the cash can be used for other important intrinsic goods. The same may well be true of equal liberty or of much of what falls within the category of rights. Commensurability will not obtain in a world of multiple intrinsic goods, which is emphatically not to say that we do not choose among intrinsic goods, or that rationality does not help in selecting various courses of action.

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86. *See* ANDERSON, *supra* note 1, at 37-38, 45-46.

87. *See* VISCUSI, *supra* note 62, at 17-33.

88. Consider in this regard Bernard Williams's remark:

> It could be a feature of a man's moral outlook that he regarded certain courses of action as unthinkable, in the sense that he would not entertain the idea of doing them . . . . Entertaining certain alternatives, regarding them indeed as *alternatives,* is itself something that he regards as dishonourable or morally absurd.

Bernard Williams, *A Critique of Utilitarianism, in* SMART & WILLIAMS, *supra* note 68, at 75, 92.

D. *Incommensurability and Freedom*

It might be tempting to think that incommensurability works as a barrier to certain forms of freedom — to the use of a single metric, to certain sorts of exchange, to certain reasons for action. This is true; we have seen cases in which a recognition of incommensurability stops people from doing things. But it is also plausible to see incommensurability as constitutive of some valuable forms of freedom. These forms are not easily dispensable. The presence of incommensurability helps make possible certain relationships, attachments, and attitudes that would otherwise be unavailable.[89]

If friendship and cash were commensurable, or if a park and $100,000 were valued in the same way, we could not have certain attitudes toward friendship and toward parks. Indeed, if parks and $100,000 could be aligned along the same metric, parks would not be parks as we now understand them. If speech were valued in the same way as forks, we could not understand political freedom in the way that we now do. Incommensurability operates as an obstacle to certain sorts of behavior; but it constitutes others, and makes them an option for us. For this reason, both social norms and life might insist that incommensurability of various sorts is desirable as a means of maintaining attitudes and relationships that are parts of good lives. I will return to this point below.[90]

E. *Comparability, Transitivity, and Other Definitions*

The definition I have offered has a relation to Joseph Raz's important and influential discussion of the problem.[91] Raz offers a distinctive understanding of incommensurability. He says that "A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value."[92] To this definition, Raz adds a claim about the "mark" of incommensurability: "Two valuable options are incommensurable if (1) neither is better than the other, and (2) there is (or could be) another option which is better than one but is not better than the other."[93]

These statements point to an extremely puzzling state of affairs. How could one option be neither worse than, nor better than, nor

89. *See* RAZ, *supra* note 17, at 345-57.

90. *See infra* Part V.

91. *See* RAZ, *supra* note 17, at 325. According to Raz, "[t]he test of incommensurability is failure of transitivity." *Id.* Compare the discussion in ANDERSON, *supra* note 1, at 55-59, which analyzes incommensurability in terms of diverse standards yielded by a single scale of value.

92. RAZ, *supra* note 17, at 322.

93. *Id.* at 325.

equal to another? Isn't this a failure of rationality? If two options are neither better nor worse than one another, how could some third option be better than one but not better than the other? In beginning to answer these questions, Raz notes that sometimes value is a function of several diverse criteria. This is true, for example, with respect to judgments about the excellence of a novel. Our understanding of the criteria that make up excellence in a novel may impair efforts to produce a complete ranking. It could thus be wrong to say that Dickens is better or worse than Joyce, and also wrong to say that Dickens and Joyce are (even roughly) equal in value. Any of these three possibilities could reasonably be thought obtuse. Dickens and Joyce are not roughly equal in value because, on one view of their merit, the choice for either one over the other could be supported by very different and quite substantial reasons.[94]

Some further examples may help. Smith may have no clear preference between lunch with a friend and a fifty dollar gift; the one is neither better nor worse than the other. Nor are the two equal in value. At the same time, Smith would prefer a sixty dollar gift to a fifty dollar gift. But Smith has no clear preference between lunch with a friend and a sixty dollar gift; the one is still neither better nor worse than the other. Or there is a political initiative that seems to Jones neither better nor worse than another: a reduction in the staff of the White House by ten percent, and a new restriction on lobbying by government employees. Jones would prefer a fifteen percent reduction in the staff of the White House to a ten percent reduction. But Jones does not think that a fifteen percent reduction in the White House staff is better or worse than a new restriction on lobbying by government employees. When incommensurability occurs, Raz claims,[95] there is a failure of transitivity: *A* is neither better nor worse than *B; A1* is better than *A;* but *A1* is neither better nor worse than *B.* If it occurs, the

94. I am therefore questioning the familiar idea that an agent is able to say, for any given pair of options, whether he prefers the first to the second, the second to the first, or is indifferent between them. An agent may not regard one option as more valuable than the other and yet also not be indifferent between them. Agents remain able to choose between them, perhaps because of reasons grounded in expressive differences, as suggested in ANDERSON, *supra* note 1, at 59, or because of psychological factors, as Raz suggests. *See* RAZ, *supra* note 17, at 32. It also remains possible that we can generate a utility function on the basis of choice, either retrospectively or prospectively. *See infra* text accompanying note 105.

95. It is possible, however, to question whether Raz is really describing a failure of transitivity. Such a failure might be thought to assume commensurability; the concepts of transitivity and intransitivity seem to work only with commensurable things. The problem discussed in the text is a special case in which relevant goods are not equal in value, but are not better or worse than one another. Perhaps real failures of transitivity cannot occur in this setting. I am grateful to Jon Elster for pressing this point. For a helpful discussion, see Joseph Raz, *Value Incommensurability: Some Preliminaries,* 86 PROC. OF THE ARISTOTELIAN SOCY. 117, 123-24 (1986).

apparent failure of transitivity is troubling to many understandings about rational choice, but we can imagine many settings in which the failure seems to appear.[96]

It is right but not really responsive to say that, once the amounts change, assessments of these problems change as well. To be sure, Smith might unambiguously prefer $1000 to lunch with a friend, or the lunch to five dollars. It is true that Jones's uncertainty might dissipate if she is asked to choose between a fifty percent reduction in White House staff and a new restriction on lobbying. But these truths do not undermine the basic claim, which is vindicated if some apparent failures of transitivity can be found. To insist that such apparent failures occur, it is not necessary to say that people will not find large amounts of one good better than smaller amounts of another with which it is not commensurable.[97] Below I will take up some of the ambiguities in this argument.[98]

Raz's formulation is related to the definition I have offered. If there were a metric along which all judgments could be aligned, transitivity would always be found. A problem of intransitivity can arise when the use of a unitary metric does violence to our considered judgments. Thus *A* might be incommensurable with *B,* because the two cannot be assessed along the same metric; but *C* might be better than *A,* because it can be assessed along the same metric as *A,* without — and this is the key point — being better than the differently valued *B.*

But the approach I am offering has some differences from Raz's formulation. Raz does not speak of metrics; he addresses a much larger problem than I identify here, and his claim is, I think, much more ambitious (and hence more controversial). One can admit the failure of metrics in the sense in which I use the term while also denying the possibility of failures of transitivity.[99] Although Raz insists

96. *See* Sen, *supra* note 48, at 498-503. Compare the failures of transitivity as outlined in DOUGLAS D. DAVIS & CHARLES A. HOLT, EXPERIMENTAL ECONOMICS 468-72 (1993); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk,* 47 ECONOMETRICA 263 (1979).

97. It is important to distinguish this point from the fact that two things can appear neither better nor worse than each other simply because of a lack of full information. We might be indifferent between being tall and being thin, just because we do not know enough about the relevant options, which have been described too abstractly. We might be indifferent between a dozen widgets and a dozen pidgets, simply because the statement of this choice leaves us ignorant of so much.

It is also important to distinguish between incommensurability and a situation in which people's preferences are incomplete. People may prefer *A* over *C, C* over *E, B* over *D,* and *D* over *E;* but they may not have a preference between *A* and *B, A* and *D, B* and *C,* or *C* and *D.* The problem of incompleteness is different from the problem discussed in text.

98. *See infra* text accompanying notes 130-31.

99. *See supra* note 95.

that incommensurability does not preclude choice,[100] he identifies incommensurability with incomparability; the identification is also suggested by the use of the word *better* in the statement quoted above.[101] Thus Raz says that incommensurability "marks the inability of reason to guide our action."[102] For Raz, we can make and even predict choices, perhaps by reference to psychological factors, even in the midst of widespread incommensurabilities, and in the absence of reason-guided outcomes.[103] Choices may have causes, and hence be predictable, without reasons.[104]

But there is yet another possibility: goods may be incommensurable in something very much like Raz's sense without being incomparable, in the sense that we cannot choose among them for good reasons.[105] There may be incommensurability between goods *A* and *B* even though there are good (nonalgorithmic) reasons for choosing one over the other, and in this sense for thinking that one is better. Options can be incommensurable in this way while still being very much subject to reasonable choice (and to evaluation and certainly to ordinal ranking). Indeed, reasonable choices among incommensurable options are the stuff not merely of law, but of everyday life. It remains to provide a description of what accounts for those choices. But we might conclude that, when incommensurability in Raz's sense occurs, reasons are likely to be available by which to choose among options. Incomparability need not be involved.

F. *Scales and Choices*

This way of understanding things is supported by Elizabeth Anderson's illuminating discussion of the problem. In Anderson's view, "[t]wo goods are incommensurable with respect to some scale if one is neither better, worse, nor equal in value to the other in the respects measured by the scale."[106] Anderson says that the problem of incommensurability tends to arise when three conditions are met. First, the relevant goods meet the scale's standard in quite different

100. RAZ, *supra* note 17, at 339; *see also* Joseph Raz, *Mixing Values*, 65 PROC. OF THE ARISTOTELIAN SOCY. 83 (1991).

101. *See supra* text accompanying note 93.

102. RAZ, *supra* note 17, at 334.

103. *Id.* at 339.

104. Decision theory seems to be untouched by Raz's account: "We are, it is essential to remember, inquiring into the structure of practical reasoning, i.e. of the ways people conceive of themselves and their options and judge them." *Id.*

105. See the instructive discussions in T.K. Seung & Daniel Bonevac, *Plural Values and Indeterminate Rankings*, 102 ETHICS 799 (1992). *See also* GRIFFIN, *supra* note 57, at 77.

106. ANDERSON, *supra* note 1, at 55.

ways. Second, there are no large-scale differences in the degree to which each good meets the standard in its own way. Third, the way one good meets the standard is not categorically superior to the way the other good meets the standard.[107] Possible examples include artistic excellence, individual well-being, and generosity. Picasso may be neither equal to nor better or worse than Velasquez in terms of artistic excellence. If Picasso had been a little bit better than in fact he was, this could still be the case. A decision to become a lawyer in New York may be incommensurate, in terms of individual well-being, with a decision to become an artist in a small town in Colorado. A well-known philanthropist is neither more nor less generous than someone who does innumerable small favors for his friends; nor is it true that the two are equally generous.

As Anderson suggests, incommensurability always operates with respect to some scale. Whether there is commensurability depends on the particular scale that is in use. Scales are of course not metrics in the sense in which I have used that term. A metric is designed to erase qualitative differences, most notably the problem of how goods meet the metric's standard. We know that good *A* costs $100 and good *B* $500; no question of qualitative difference arises. Scales, in contrast, can exist without metrics, and there may be diverse ways to meet a scale's standard. Problems of incommensurability cannot occur when we are using a metric (dollars, yards). But such problems may well arise when we are using a scale (artistic excellence, generosity).

As Anderson also suggests, rational choice can occur among incommensurable options, not because one option has a higher abstract "value" than another, but because of expressive considerations that help us decide what option makes most sense in situations of choice.[108] Those expressive considerations give diverse values their point; they focus attention on how it is that different goods are appropriately valued. For example, someone facing an important career choice may perceive a problem of incommensurability, but may nonetheless be able to choose rationally — that is, on the basis of reasons. For example, the agent may be committed to an ideal about what sort of person she should be. She may find that one choice damages her most important ends. She may see that her own motivations, with respect to one choice, are founded on bad reasons, such as unjustified fear. She may be able to see that one choice makes more narrative sense of her life.[109]

107. *See id.*

108. *Id.* at 59-64.

109. *See id.* at 60.

Unlike Raz, Anderson claims that choices among incommensurables can be based on an assessment of reasons. There are many complexities in this account, and I cannot explore them here. But I think that something like it is fundamentally correct and that it also has close parallels in hard cases in law.[110]

We are left at this stage with an obvious question: Does the fact of choice show that options are commensurable after all? I do not think that it does, for choice can occur among incommensurable goods. We should not identify the actuality of choice with a claim of commensurability. It is odd and unnecessary to say that commensurability necessarily "lies behind" or "justifies" all rational or irrational choices.[111] We choose whether to take an exciting job in a new city, when the move would unsettle our family; we decide hard tort cases; we choose between work and leisure; we decide how much to spend to promote worker safety or energy conservation. These choices are based on reasons and evaluated by reference to them. Commensurability is not required for choice.

A claim of *radical incommensurability* would deny this possibility.[112] On this view, choices among incommensurable options are impossible on rational grounds, or relevant goods are so radically incommensurate that there is no process by which human beings can reasonably choose among them. Reasons run out. I think that it is very rare for this form of incommensurability to occur in the intrapersonal case. People often face incommensurability — either in the sense that I have emphasized or in the Raz-Anderson sense — without being at all paralyzed about what to do, and while thinking, rightly, that their judgments are based on reasons. But the interpersonal case is different, and this point is important for law. In some contexts, people who sharply disagree do seem to be close to the unhappy state of radical incommensurability. This is so in the sense that they appear to belong to different cultures, and the difference makes it hard for them to reason together. If two people value something in entirely different ways — a religious object, an act of apparent discrimination, a form of liberty, the free market — they may be unable to talk to one an-

110. *Cf. infra* section V.I (discussing the role of analogical reasoning in law).

111. *Cf.* RAZ, *supra* note 17, at 327:

> The mistake in this thought is that it assumes that there is a true value behind the ranking of options, and that the ranking is a sort of technique for measuring this value. It is true of course that when we express a judgment about the value of options we strive to identify what is true independently of our valuation. But the ranking which determines the relative value of options is not a way of getting at some deeper truth, it constitutes the value of the options.

112. *See id.* at 329; Pildes & Anderson, *supra* note 48, at 2158-66.

other.[113] Indeed, we may say that one of the marks of a genuine cultural difference is sharp or unbridgeable distinctions in kinds of valuation.

Most of the time, however, radical incommensurability is not present. Both people and societies do make choices among incommensurable goods, and they do so on the basis of reasons. Indeed, this is a principal task for practical reason, especially in law. It follows that we should not identify the existence of good reasons for action with the existence of a unitary metric. Some choices among incommensurable goods are rational, and others are not, because of the connection between any particular choice and the achievement of good lives or good societies (these are of course vague ideas, on which I will say a bit more in Part III).[114] A decision to work through lunch is incommensurable with the option to have lunch with a good friend in town just for the day, but it may well be irrational, in these circumstances, to work through lunch. Economic growth is incommensurable with the reduction of race discrimination, but it may well be irrational to refuse to outlaw race discrimination even if that step involves some loss in social wealth. A resistance to these claims about rationality would be based on a highly sectarian conception of what rationality is — that is, a conception that begs the question on the commensurability issue by assuming that there cannot be rationality without commensurability.

If grounds exist for evaluating choices among incommensurable goods, it is reasonable to think that a second-order desire or goal — to be a good person, to have a fair society, to hear an excellent composer — provides a framework for evaluating seemingly diverse and plural goods. If described at a low or intermediate level of abstraction, however, our higher-order goals are themselves plural and incommensura-

113. This may be so in the sense that mutual understanding is impossible and hence conflicts cannot be resolved, or in the sense that some third-party observer may have a hard time in resolving their conflict in view of the difference in kinds of valuation. In this light, perhaps one of the goals of the "overlapping consensus" sought by political liberalism is to avoid a situation in which resolution must be sought amidst conditions of radical incommensurability. For a discussion of overlapping consensus, see RAWLS, *supra* note 81, at 133-72; see also the discussion of the Establishment Clause, *infra* text accompanying notes 175-77. Of course it is possible that one participant in the discussion is wrong even if, or because, he is not subject to persuasion; he may reject reason-giving altogether or be unable to see good reasons even when they are invoked. Hence relativism is not justified by the existence of radical incommensurability.

114. I am questioning here Raz's suggestion that cases of incommensurability "mark[ ] the inability of reason to guide our action," RAZ, *supra* note 17, at 334, and that "in the choice between the incommensurate options reason is unable to provide any guidance," *id.* at 334 n.1, though I am not sure that Raz's subtle discussion is really at odds with what I am saying here. *See id.* at 339 ("Saying that two options are incommensurate does not preclude choice. Rational choice is action for (what the agent takes to be) an undefeated reason."). See also Joseph Raz, *supra* note 100, for some clarifications and a discussion of how comparisons occur among goods that are valued in different ways.

ble, even though there is still choice and even reasonable choice. Nevertheless, it is certainly plausible to say that, if the second-order goal operates at a high level of abstraction, we can generate criteria for private and public choice that do help in the assessment of diverse and plural goods. This is a promising strategy;[115] but the relevant criteria cannot be fairly characterized as a metric. I will say more on these points below.[116]

III. CHALLENGES AND STAKES

Some people may find claims about incommensurability, and distinctions among kinds of valuation, to be abstruse or of no practical use. Perhaps we are dealing here with a linguistic or rhetorical debate, one that has no consequences for law, ethics, or politics. Or perhaps it is possible to translate relevant descriptions into different terms without losing anything important.

Begin with the question whether claims of incommensurability are right as a description of how people perceive certain situations of choice. Donald Regan, for example, says that when someone refuses to specify the monetary value of friendship, "I think what such a person is most likely to mean is that friendship is more valuable than any amount of money, or in other words, that the value of friendship is incomparably greater."[117] With respect to social disapproval of a parent's "purchasing" children, Regan thinks that "it is closer to the truth to say that we regard the value of parenthood as incomparably greater than the value of money, than to say that we regard these values as incommensurable."[118] Regan also thinks that the fact that people deliberate hard and long about choices among incommensurable values weakens the claim of incommensurability, since "[t]he decision process would necessarily be arbitrary. So what is the point?"[119]

Regan's challenge to incommensurability, as a description of what

115. Instances of this strategy include the discussion of primary goods in RAWLS, *supra* note 81, at 178-90; the discussion of capabilities in Amartya Sen, *Capability and Well-Being, in* THE QUALITY OF LIFE 30 (Martha Nussbaum & Amartya Sen eds., 1993); and the similar discussion in Martha Nussbaum, *Aristotelian Social Democracy, in* LIBERALISM AND THE GOOD 203, 217-40 (R. Bruce Douglass et al. eds., 1990). Mill's form of utilitarianism, with its recognition of diverse kinds of valuation and of intrinsic goods, comes close to this general view. *See supra* note 59. *Cf.* MILL, *supra* note 2, at 90-91 ("We think utility, or happiness, much too complex and indefinite an end to be sought except through the medium of various secondary ends, concerning which there may be, and often is, agreement among persons who differ in their ultimate standard.").

116. *See infra* section V.E.

117. Regan, *supra* note 46, at 1058. Chang, *supra* note 6, at 11-16, offers a similar analysis.

118. Regan, *supra* note 46, at 1068-69.

119. *Id.* at 1063.

people mean, what they experience, and how they really think, seems to me unsuccessful. Let us take the example of friendship. We can certainly imagine someone who thinks that the value of friendship, or the value of a particular friendship, is just greater than the value of any sum of money. But many people do not think in this way. Some people — perhaps especially desperately poor people — might be willing to sacrifice a friendship in return for a great deal of money. In such cases, friendship does not appear "more" valuable than money. In purely quantitative terms, the friendship appears "less" valuable than the sum of money involved. Yet those who accept the trade might nonetheless find it disturbing — because, I think, the friendship is not more valuable or less valuable, but differently valuable, and *we do violence to the way that it is valuable if we trade it for money straight-up.* Friendship involves companionship, and it is in the very nature of companionship to be beyond purchase. Recall that some incommensurabilities are freedom-producing, because they allow certain relationships and attachments that would otherwise be impossible.[120]

Or take the issue of parenthood. A parent who is asked to trade a child for some sum of money might well react with outrage and shock and regard the request as insulting. This reaction is not that of someone asked to sell something very valuable at a discount — of someone asked to sell an expensive suit for a dollar. The recipient of the offer objects not because the amount offered is unconscionably low, but because the kind of valuation is grotesquely unsuitable. The experience of parenthood is inconsistent with having an evaluative attitude that would permit consideration of dollar compensation for its sacrifice. The experience of parenthood rules that alternative off limits. It is this important point of the subject that Regan's challenge misses.

I do not suggest that Regan describes a conceptually impossible attitude toward things. We could imagine someone who believed simply that friendship and parenthood were especially valuable versions of the same thing of which money is just another instance. But this view would not simply describe existing attitudes. It would call for their renovation, and in an extremely dramatic way.[121] If people really valued friendship, parenthood, and money in the same way, they would be fundamentally different from what they now are. In some guises, this would be the stuff of science fiction or horror. In some

120. *See supra* note 89 and accompanying text.

121. See the discussion of Plato's proposal to this effect in NUSSBAUM, *supra* note 2, at 119-23. To the same effect see also RAZ, *supra* note 17, at 357; Anderson, *supra* note 59.

areas of life or law, the renovation may be justified, all things considered. But it would be a renovation nonetheless.

A tempting response is that the stakes here are purely linguistic — a matter of rhetoric, not substance. Perhaps people who disagree about kinds of valuation, and about commensurability, are just disagreeing about how to talk. Certainly recognizable emotions and sentiments underlie these disagreements. But perhaps substantive analysis can ultimately proceed in the same way however we decide these matters. Even if legal and policy arguments based on commensurability meet a good deal of verbal resistance at the outset, perhaps rational argument can overcome the resistance.

For example, economic analysis of nonmarket relations often runs into difficulty because of such initially jarring terms as "investment" in one's children, the notion that education is a way of improving "human capital," and the idea of a "marriage market."[122] The terms seem to suggest that intrinsic goods are of only instrumental value. But once we think about these issues, we can see that these terms are simply a means of describing real-world phenomena, and of doing so in a way that makes complex, seemingly intractable problems more manageable.

In particular, consider the striking change in reactions to the recommendation on behalf of transferable pollution rights in environmental law.[123] The government creates such rights by licensing firms to emit a certain level of pollution and then granting them the right to sell part or all of that license for a fee. Initially many people resisted the idea that one could pollute for a price — as if the idea were itself offensive to the proper kind of valuation of the environment, and as if environmental degradation should be treated as if it were incommensurable with cash.[124] But now a general consensus has emerged that along all or almost all relevant dimensions — both economic and environmental — a system of economic incentives is superior to command-and-control regulation.[125] There seems to have occurred a process of learning through which people are no longer so disturbed by the redescription of the environmental problem in terms that tend, perhaps, to assume commensurability and unitary kinds of valuation.

This example suggests that the assumption of commensurability

122. *See generally* BECKER, *supra* note 3.

123. *See* Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives,* 13 COLUM. J. ENVTL. L. 171, 188-98 (1988).

124. The best discussion is KELMAN, *supra* note 23, at 54-83.

125. *See, e.g., supra* note 123; *see also* Cass R. Sunstein, *Administrative Substance,* 1991 DUKE L.J. 607, 634-40 (discussing advantages of incentives).

aids positive and normative analysis, and that people who reject that assumption should spend their time on more important matters. There is something in this response. It should go without saying that economic descriptions of nonmarket relationships are often highly illuminating, partly because they produce testable hypotheses and usefully model how private and public choices are made amidst scarcity even without dollar exchanges. Just as it is possible to engage in social science under an assumption of "as if unitariness," so too it is fully possible for lawyers and policymakers to act on the assumption of "as if commensurability." In modeling and predicting choices among incommensurable goods, much progress can be made through the simplifying assumption that everything is aligned along a single metric. Or we might dispense with talk of metrics and simply try to rank choices. This enterprise does not seem threatened in any way by what I have said here.

But we can acknowledge all this while also insisting that certain redescriptions of human phenomena — redescriptions that push in the direction of commensurability — are far from unimportant. The redescriptions are important both because they describe in inadequate ways and because they do not merely redescribe.[126] They also have an important constitutive dimension — that is, they may help transform how (but not necessarily how much) we value or experience various events and relationships.[127] Thus, for example, one might happily endorse economic incentives in the environmental area while also insisting that environmental amenities ought to be valued in a distinctive way, and that there is no metric along which to align our diverse valu-

126. Consider, for example, Becker's characterization of the "marriage market":

> [A]n efficient marriage market assigns imputed income or "prices" to all participants that attract them to suitable polygamous or monogamous marriages. Imputed prices are also used to match men and women of different qualities: some participants . . . choose to be matched with "inferior" persons because they feel "superior" persons are too expensive. . . .
>
> . . . [A]n efficient marriage market usually has positive assortative mating, where high-quality men are matched with high-quality women and low-quality men with low-quality women, although negative assortative mating is sometimes important.

BECKER, *supra* note 3, at 108. See also the astonishing discussion in Waldfogel, *supra* note 16.

127. *See* PUTNAM, *supra* note 65, at 139-41 (examining the transformative effect of life as a "super-Benthamite"); James B. White, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014, 2020-24 (1989) (book review) (comparing different effects of seeing the practice of law as a science or as an art). Consider, in this light, the following passage:

> It has, however, been demonstrated that many esoteric things may be evaluated on a numerical scale: for example, the quality of wine, a musical performance, commodity testing, etc. . . . When we are first confronted with such numerical evaluations they look strange and unfamiliar. When we have got some experience with this type of rating, they become ingrained in our value pattern and we begin to think in those numerical terms. Hence, we do not reject the idea that more general situations may be evaluated by human beings in terms of numbers on a numerical scale . . . .

B.M.S. van Praag, *The Relativity of the Welfare Concept*, *in* THE QUALITY OF LIFE, *supra* note 115, at 362, 363.

ations of the various goods at stake — higher gross national product, lower employment, cleaner air, and so forth — in stringent environmental proposals. An insistence on these points should lead to better thought about the relevant values, and it will likely lead to better outcomes as well.

Let us return to some familiar economic redescriptions of human endeavors. If someone really thought about dating and romance as participation in "a marriage market," he would be a strange creature indeed (and unlikely, perhaps, to fare especially well in the relevant practices). If someone thought that she was "selling" an idea, she would have an odd conception of intellectual life and perhaps be unable fully to participate in it, because she would be rejecting its own foundational norms. If a parent thought that, through the provision of love and education, he was simply "investing" in his children, he would have an odd and barely recognizable understanding of the parental role. No one should deny what seems obvious — that people often learn at least partly because of the economic benefits of learning. But if someone really thought that learning was solely a matter of "investing in human capital," she would have a thin and even debased conception of the purpose of learning. She would be thinking of her own capacities and hopes as a sort of commodity, like a bit of silver or gold — or perhaps as a simple source of commodities, like a tractor or an oil well. It is difficult even to imagine the self-conception entailed by this view. To think and talk in these terms may have unfortunate consequences for both thought and action.[128] At the same time, certain values — parenthood, education, and so forth — may be adequately realized only if people refuse to contemplate certain choices or attitudes. It is in this sense that incommensurability is constitutive of our values[129] and not easily dispensable.

It is sometimes said that trade-offs of the relevant sort are happening "implicitly" all the time.[130] People may not trade dollars for lunch

128. *Cf.* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 335 (1986) ("[B]ecause they do not merely ascribe properties to objects, but instruct us about how to think about them, characterizations do not leave the phenomena unchanged."). In the same vein, Bernard Williams suggests that use of the utilitarian method leads one to

> provide those things [susceptible to utilitarian calculus] with prestige, to give them an unjustifiably large role in the decision, and to dismiss to a greater distance those things which do not respond to the same methods. . . . To regard this as a matter of half a loaf, is to presuppose both that the selective application of those techniques to some elements in the situation does not in itself bias the result, and also that to take in a wider set of considerations will necessarily, in the long run, be a matter of more of the same; and often both of those presuppositions are false.

See Williams, *supra* note 88, at 148.

129. *See* RAZ, *supra* note 17, at 345-53 (discussing constitutive incommensurabilities).

130. *See, e.g.*, BECKER, *supra* note 3, at 24 (characterizing "children, prestige and health,

engagements with friends, but they do trade off a range of variables in deciding when and with whom to have lunch, and some of these variables are financial. Indeed, it would not be odd for a busy lawyer to cancel lunch with a friend, with a promise to buy lunch next time. People may not think that they are "investing" in their children, but they do allocate limited resources among, for example, leisure, consumer goods, vacation, and education for their offspring. But much depends on what the ambiguous word "implicitly" means. The fact that the trade-off is not made explicitly is hardly a matter of indifference. When the trade-off is made only "implicitly," it is not well-described as an ordinary trade-off at all. The actor may be showing a commitment to a certain set of judgments about how relationships and prospects should be valued, and if the trade-offs were made explicitly, that commitment would be undermined or even violated. The explicit trade is not equivalent to the implicit one; the absence of explicitness maintains certain social norms. In an analogous context, Holmes wrote, "[e]ven a dog distinguishes between being stumbled over and being kicked";[131] the difference between a trip and a kick — identical in effect but conveying very different attitudes — is related to the difference between an implicit and an explicit trade. In these circumstances, it is hopelessly underdescriptive to claim that someone "implicitly" trades off (say) cash and friendship in making lunch decisions, even though this way of seeing things might be quite helpful for predictive purposes.

Economic or utilitarian descriptions of human behavior are unlikely by themselves to alter social norms or law in any significant way.[132] But social norms are in a constant process of evaluation and flux, and the description of kinds of valuation is one method by which norms are created and altered. The making of law reflects this process of description and valuation; law can have effects on kinds of valuation as well.[133] Indeed, many of the sharpest disputes in law relate to the appropriate kinds of valuation to bring to bear on disputed problems. Here a pervasive question is what sorts of valuations the law ought to encourage or extinguish.

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altruism, envy and pleasures of the senses" as "commodities"); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 4 (4th ed. 1992); Chang, *supra* note 6, at 12-13, 20.

131. OLIVER WENDELL HOLMES, THE COMMON LAW 3 (1881).

132. Note, however, the fact that students in economics appear to engage in altruistic behavior less frequently than others, and thus to fail to adhere to social norms that solve collective action problems. *See* Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, J. ECON. PERSP., Spring 1993, at 159 (answering title question in the affirmative).

133. This is a difficult empirical question. For a skeptical view, see generally GERALD N. ROSENBERG, THE HOLLOW HOPE (1991).

If kinds of valuation matter to human life, judgments about such kinds will matter a great deal to law as well. And, in many areas of law, the question of commensurability occupies a surprisingly important place.

IV. Law in General

A. *Preliminaries*

The diverse kinds of valuation do not map neatly onto legal categories. We cannot say that, because people value different events in different ways, it follows that law should have a particular content. Nor can we draw lessons for law from the bare fact of incommensurability in any of the senses discussed here.[134] This is so for several reasons.

First, we need an account of which kinds of valuation are appropriate in order to make recommendations for law.[135] We are not and should not be agnostics or skeptics about appropriate kinds of valuation; they can be evaluated on the basis of reasons.[136] Nor should we be simple conventionalists, thinking that, because people value a certain thing in a certain way, the law ought to do so as well. Of course democracy has its claims; but there may be good reason to challenge any particular popularly endorsed judgment on kinds of valuation. Indeed, some aspects of constitutional law represent an effort to discipline democratic discussion by limiting possible kinds of valuation, on the ground that they are too sectarian or inconsistent with principles of civic equality.[137] When there are no constitutional barriers, the democratic process is formally unconstrained, but an important part of democratic debate consists of challenges to kinds of valuation that prevail among the democratic majority.

Any judgments about appropriate kinds of valuation are of course a complex matter. This is so not least because, in a heterogeneous society, the state ought to allow a wide range of diverse valuations. The regulation of valuations can be a stifling matter.[138] At least as a

134. Here I am questioning some apparent suggestions in Warner, *supra* note 57, at 157-67, and Pildes & Anderson, *supra* note 48, at 2154-55. *See also supra* note 24 and accompanying text.

135. There are lurking questions here on underlying criteria. I am assuming that a theory that can make no sense of our experience is vulnerable for that reason. In speaking of our experience, I am relying on our deepest self-understandings. These understandings, I suggest, would be violated by certain forms of monism.

136. *See infra* section VI.B.

137. *See infra* sections V.B and V.C.

138. This is not to deny that the state inevitably has large effects on kinds of valuation because of law's expressive function. *See infra* section IV.B. Respect for diverse valuations is a theme in Rawls, *supra* note 81, at 190-200 (arguing that a liberal political regime preserves

presumption, the state ought to allow people to value in the way that they see best. These considerations, however, do not imply that the state should remain agnostic about proper kinds of valuation. Incommensurabilities — even of the form that block certain reasons for action — are not merely freedom-reducing, but constitutive of certain sorts of freedom, for they make possible certain valuable relationships and commitments. Moreover, a state will have a hard time if it seeks to be entirely neutral about valuations. Global neutrality is impossible.[139] The state has to make decisions about how to allocate rights and entitlements; it has to decide what can be traded on markets and what will be subject to politics, and these decisions inevitably will take some sort of stand on appropriate valuations.

Second, a judgment about the appropriate kind of valuation, even if it can be reached and persuasively defended, need not entail a particular conclusion for law. For example, it might be shown that prostitution entails an improper valuation of human sexuality, but this need not mean that prostitution should be outlawed. To justify outlawing prostitution, we must make an additional set of arguments about both the likely effectiveness of the ban and the principle that supports use of the coercive power of the state. Or we might think that the best human life involves a certain way of valuing the environment, without thereby rejecting, for example, tradable emissions permits as a regulatory tool. Perhaps tradable permits do not affect valuations of the environment; perhaps any such effects are minimal and well justified by the various gains. Or we might believe that animals deserve consideration and therefore ought not to be eaten, but also believe that the law should not require vegetarianism. State-compelled vegetarianism might well be ineffectual and inconsistent with individual liberty, rightly conceived. These examples show that any general claim about the right kind of valuation needs a great deal of supplementation to result in concrete recommendations for law and policy. There are also recurring questions about the feasibility of various legal strategies.

More generally, we can defend one kind of valuation for law and government and other kinds for family, church, and civil society. The law might, for example, insist on calculating the value of human life through conventional economic measures. The calculation might be acceptable if there is an "acoustic separation"[140] between legal meas-

diverse conceptions of the good). For a more explicit discussion of diverse valuations, see also RAZ, *supra* note 17, at 321-66.

139. See CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 162-94 (1993), for citations and discussion.

140. *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in*

ures and private life. At least if the measures do not affect prevailing kinds of valuation and can operate autonomously in their own sphere, the law may be acceptable even if it does not reflect an appropriate kind of valuation for other contexts.

Third, the legal system has crude remedial tools. Usually it must use monetary remedies. In view of this limitation, the fact that these remedies are not commensurable with some harms is often merely an interesting theoretical point. When someone has lost an arm, or when a river has been polluted, the legal system has to work with money. The tools of the legal system lack sufficient refinement fully to take account of diverse kinds of valuation. What can be said about personal valuations cannot be said about legal institutions. It may follow that public policy ought to operate on the assumption of commensurability even if human beings should not; or it may follow that the legal system often must put problems of incommensurability to one side, leaving those problems for ethics rather than for law.

These disclaimers are important. Nonetheless, the fact of incommensurability, and the existence of diverse kinds of valuation, do help illuminate a wide range of disputes about the substance of law, about legal institutions, and about legal reasoning. In the next section, I offer several examples of pertinent legal debates. My goal is emphatically not to resolve these debates. To do this I would have to say a great deal more than I will be able to do here. I intend only to suggest that an understanding of questions of commensurability and appropriate kinds of valuation helps explain the nature of these debates.

B. *The Expressive Function of Law*

A unifying theme for the discussion is *the expressive function of law.*[141] When evaluating a legal rule, we might ask whether the rule expresses an appropriate valuation of an event, person, group, or practice. The point matters for two reasons. The first and most important is based on a prediction about the facts: an incorrect valuation may influence social norms and push them in the wrong direction. For example, if the law says that the act of murder can or cannot be met with the death penalty, social norms may be influenced. If the law wrongly treats something — say, reproductive capacities — as a com-

Criminal Law, 97 HARV. L. REV. 625, 625-34 (1984) (distinguishing between decision rules addressed to officials and conduct rules addressed to the public).

141. I am indebted here to ANDERSON, *supra* note 1, at 17-43; Jean Hampton, *An Expressive Theory of Retribution, in* RETRIBUTIVISM AND ITS CRITICS 1 (Wesley Cragg ed., 1992); Richard Pildes, *The Unintended Cultural Consequences of Public Policy,* 89 MICH. L. REV. 936 (1991). *See also* NOZICK, *supra* note 26, at 48-50 (discussing symbolic effects of decisions as part of decision value).

modity, the social kind of valuation may be adversely affected. If the law mandates recycling, subsidizes national service, or requires mandatory pro bono work, it may have healthy effects on social valuations of the relevant activities. It is appropriate to evaluate the law on this ground.[142]

We can go further. Some people seem to think that it is possible to assess law solely on the basis of consequences — that an open-ended inquiry into consequences is a feasible way of evaluating legal rules. But this is not actually possible. The effects of any legal rule can be described in an infinite number of ways. Any particular characterization or accounting of consequences will rest not on some specification of the brute facts; instead it will be mediated by a set of (often tacit) norms determining how to describe or conceive of consequences. Part of the expressive function of law consists in the identification of what consequences count and how they should be described. Because any conception of consequences is interpretive and thus evaluative in character, simple consequentialism is not a feasible project for law.

The point emerges from an important development in the law of standing. In 1970, the Supreme Court decided that people would have standing to challenge government action if they could show an "injury in fact"; a legal interest was not required.[143] The Court's goal was to ensure that standing decisions would rest solely on facts, without an inquiry into values or law. It is, however, quite impossible to decide whether there is "injury in fact" without values or law.[144] Anyone who initiates a lawsuit believes that he is injured; the question is which consequences or injuries count and how they are to be characterized. Jones likes classical music, and he is unhappy about the Federal Communication Commission's decision to award a license to a rock music station on 104.3 FM. Is his injury the actual unavailability of classical music in the area? His diminished opportunity to hear classical music? The unavailability of classical music on 104.3 FM? Offense at the presence of rock music on the airwaves? To answer such questions, we cannot look only at consequences or facts. We have to make some sort of judgment about which consequences count and how to describe them.

The point can be generalized far beyond the law of standing. Any

142. *See* Pildes, *supra* note 141.

143. Data Processing v. Camp, 397 U.S. 150, 152 (1970).

144. *See* William A. Fletcher, *The Structure of Standing,* 98 YALE L.J. 221, 230-34 (1988); Cass R. Sunstein, *Standing Injuries,* 1993 SUP. CT. REV. (forthcoming) (manuscript at 10-12, on file with author); Cass R. Sunstein, *What's Standing After* Lujan, 91 MICH. L. REV. 163, 188-92 (1992).

description of the effects of some legal rule is a product of expressive norms that give consequences identifiable social meanings — including norms that deny legal significance to certain consequences. We can therefore see the expressive function both in the effects of law on social attitudes and in the use of law to decide what sorts of consequences matter for legal purposes. When it seems as if we can talk about consequences alone, it is only because the mediating expressive norms are so widely shared that there is no controversy about them.[145]

I have emphasized the possibility that the kinds of valuation reflected in law will affect social valuations in general.[146] Sometimes this claim is right; valuations, like preferences and beliefs, are not a presocial given, but a product of a complex set of social forces, including law. But sometimes law will have little or no effect on valuations. Society is filled with legal provisions for market exchanges of goods and services — like pets and babysitting, for example — that are valued for reasons other than use. Market exchange need not affect social valuations; certainly intrinsic goods are purchased and sold. The question therefore remains whether the claimed effect on social norms will occur. It is fully plausible, for example, to say that, although a law that permits prostitution reflects an inappropriate valuation of sexuality, any adverse effect of the law on social norms is so small as to be an implausible basis for objection.

But there is a second ground for endorsing the expressive function of law, and this ground does not concern social effects in the same sense. The ground is connected with the individual interest in integrity. Following the brief but suggestive discussion by Bernard Williams,[147] we might say that personal behavior is not concerned solely with producing states of affairs, and that, if it were, we would have a hard time in making sense of important aspects of our lives. There are also issues involving personal integrity, commitment, and the narrative continuity of a life. Williams offers several examples. Someone might refuse to kill an innocent person at the request of a

145. A broad conclusion seems to follow. There is no form of consequentialism that is nonsectarian. Every form embodies a controversial claim about the right or the good. This is of course a familiar point for utilitarians, whose consequentialism is made workable only through a set of defining commitments.

146. In a similar vein, Bernard Williams criticizes utilitarianism as trading on

> the illusion that preferences are already given, that the role of the social decision process is just to *follow* them. There is no such thing as just following. To engage in those processes which utilitarianism regards as just "following" is . . . itself doing something; it is choosing to endorse those preferences, or some set of them, which lie on the surface, as determined by such things as what people at a given moment regard as possible — something which in its turn is affected by the activities of government.

Williams, *supra* note 88, at 147-48.

147. *Id.* at 108-18.

terrorist, even if the consequence of the refusal is that many more people will be killed. Or a pacifist might refuse to take a job in a munitions factory, even if the refusal will have no salutary effects.

Our responses to these cases are not adequately captured in purely consequentialist terms.[148] Now it is possible that, for example, the refusal to kill an innocent person is consequentially justified on balance, for people who refuse to commit bad acts may cultivate attitudes that lead to value-maximizing behavior.[149] But this is a complex matter. My point is only that consequentialist accounts do not fully describe our evaluative attitudes toward such acts.

Moreover, the expression of the appropriate evaluative attitude should be understood as a human good, constitutive of desirable characteristics. By making certain choices and not others, people express various conceptions both of themselves and of others. This is an independently important matter. We should agree on this point even if we also believe that consequences count (mediated as they are by expressive norms) and that people ought not to be fanatical.

There is a rough analog at the social and legal level.[150] A society might identify the kind of valuation to which it is committed and insist on that kind, even if the consequences of the insistence are obscure or unknown. A society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups. A society might protect endangered species partly because it believes that the protection makes best sense of its self-understanding, by expressing an appropriate valuation of what it means for one species to eliminate another. A society might endorse or reject capital punishment because it wants to express a certain understanding of the appropriate course of action after one person has taken the life of another.

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148. Consider these remarks by a participant in civil rights demonstrations:

> If I had known that not a single lunch counter would open as a result of my action I could not have done differently than I did. If I had known violence would result, I could not have done differently than I did. I am thankful for the sit-ins if for no other reason than that they provided me with an opportunity for making a slogan into reality, by turning a decision into an action. It seems to me that this is what life is all about.

JAMES MILLER, "DEMOCRACY IS IN THE STREETS" 52 (1987). Compare Herbert Simon's concern that the 1960s student movement was "plagued by Expressionism":

> We are all Expressionists part of the time. Sometimes we just want to scream loudly at injustice, or to stand up and be counted. These are noble motives, but any serious revolutionist must often deprive himself of the pleasures of self-expression. He must judge his actions by their ultimate effects on institutions.

HERBERT SIMON, MODELS OF MY LIFE 281 (1991).

149. See ROBERT FRANK, PASSIONS WITHIN REASON 43-70 (1988) for one such argument.

150. There are differences as well. Perhaps we ought not to want to coerce a minority to make "statements" with which it disagrees. Or perhaps it can be unnecessary and even oppressive to insist on social "integrity" in a heterogeneous nation.

The point bears on the cultural role of adjudication and especially of Supreme Court decisions. The empirical effects of those decisions are highly disputed.[151] When the Supreme Court says that capital punishment is unconstitutional, that segregation is unlawful, that certain restrictions on hate speech violate the First Amendment, or that students cannot be asked to pray in school, the real-world consequences may be much smaller than we think. But the close attention paid to the Court's pronouncements may well be connected with their expressive or symbolic character.[152] When the Court makes a decision, it is often taken to be speaking on behalf of the nation's basic principles and commitments. This is a matter of importance quite apart from consequences, conventionally understood. It is customary and helpful to point to the Court's educative effect.[153] But perhaps its expressive effect, or its expressive character, better captures what is often at stake.

I do not claim that the expressive effects of law, thus understood, are decisive or that they cannot be countered by a demonstration of more conventional bad consequences. Indeed, I think that this understanding of the expressive function, unaccompanied by educative effects, ought to play little role in deciding on the content of law. There is a further point. As noted above — and it is important here — we might insist on a sort of acoustic separation between the domain of law and other spheres, hoping and believing that the kind of valuation appropriate to government will not affect the generally prevailing kind. If OSHA engages in cost-benefit analysis, surely people will not begin to think of their spouses as commodities. But I do suggest that the expressive function is a part of political and legal debate. Without understanding the expressive function of law, we will have a hard time in getting an adequate handle on public views with respect to, for example, civil rights, prostitution, the environment, endangered species, capital punishment, and abortion.

V. LAW IN PARTICULAR

In this Part, I discuss a number of areas of law in which kinds of valuation are at stake. In some of these areas, issues of commensurability also move to the fore. Of course there are important differences

151. *See supra* note 133 and accompanying text.

152. This argument plays a role on both sides of the "speech codes" debate. See the discussion in Henry Louis Gates, *Let Them Talk,* NEW REPUBLIC, Sept. 20 & 27, 1993, at 37 (1993) (reviewing MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT (1993)).

153. *See generally* Christopher Eisgruber, *Is the Supreme Court an Educative Institution?,* 67 N.Y.U. L. REV. 961 (1992).

among these areas, each of which raises distinctive issues of its own. Some of the issues are connected to problems of individual or social choices amidst scarcity; others are not. But I believe that it is impossible to obtain a full understanding of these areas of law without reference to ideas of this general sort. In this sense, these very diverse areas share a common subject. They are united by the presence of important questions about appropriate kinds of valuation and about commensurability.

A. *Social Differentiation*

A liberal society allows a high degree of social differentiation.[154] It includes the political sphere, the family, markets, intermediate organizations — especially religious organizations — and much more. Michael Walzer's influential book[155] offers an instructive discussion of these different "spheres." It would be especially valuable to be able to understand the social function or purpose of this sort of differentiation. Why might it be a good thing to carve life up in this way? And what exactly is the role of law in this endeavor?

The liberal commitment to social differentiation can be understood as an effort to make appropriate spaces for different kinds of valuation.[156] Without accepting naive conceptions of the public-private distinction, we can see the family as the characteristic liberal sphere for the expression of love. At its best, politics embodies the forms of respect entailed by processes of reason-giving.[157] In many intermediate organizations, people express affection and admiration. In religious organizations, the prevailing kind of valuation is usually one of worship and reverence. The market is typically the sphere for use. Things bought and sold on markets are typically valued in the way associated with pure commodities, although it is important and also true that many things sold on markets — music, vacations in beautiful places, art, childcare — are valued for reasons other than simple use.

Law plays an important and often overlooked role in the construction and maintenance of these various spheres, which are anything but

154. *See* DON HERZOG, HAPPY SLAVES 148-81 (1989) (describing liberal state's neutrality on competing conceptions of the good); Richard Pildes, Separate Spheres of Constitutional and Political Value (Dec. 1, 1992) (unpublished manuscript, on file with author).

155. WALZER, *supra* note 14.

156. *See* ANDERSON, *supra* note 1, at 143 (discussing sphere differentiation); Pildes, *supra* note 154, at 47-54.

157. See the discussion in Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, AM. PROSPECT, Spring 1993, at 77, favoring a system of campaign finance that separates ordinary money from the "red, white, and blue" money to be used in elections. This is a method for preserving spaces for different kinds of valuation.

natural. We know far too little to say that, in the state of nature, there is any such division (though there may well be antecedents[158]). Markets are of course a function of the law of property, contract, and tort, without which voluntary agreements would not be possible.[159] It is law that decides what can be traded on markets, and how trades can occur. Undoubtedly families of various sorts would arise in the state of nature, but the particular families we have are emphatically a function of law. The law helps to create an independent familial sphere; it also determines who may be entitled to its protections and disabilities.[160]

To some extent, the state also insulates the public sphere from civil society, through, for example, the rule of one person, one vote[161] and limitations on expenditures on campaigns.[162] Intermediate organizations, like religious groups and labor unions, also receive various protections, insulations, and disabilities by laws designed to recognize independent social spheres.[163] The creation of diverse social spheres, understood as a mechanism for allowing diverse kinds of valuation, is also an important social good, providing a form of liberty that is indispensable in modern society.[164]

It would be foolish to idealize current practices. Institutional practice often deviates from institutional aspiration. Politics is often a realm for use; it has important marketlike features. It is hardly a simple process of exchanging reasons. The family is not only a place for the expression of love. Women and children have often been used without their consent, sometimes like commodities. People who believe in different kinds of valuation do not deny the gap between current practice and current aspiration. Much social criticism consists of an insistence on that gap, and of a claim for reform in the interest of producing conformity to the aspiration.

158. *See generally* ROBERT ELLICKSON, ORDER WITHOUT LAW (1992) (arguing that large areas of social life arise spontaneously and are shaped independently of legal institutions).

159. But see *id.* at 123-264 for a discussion of the role of (nonlegal) social norms and social sanctions in sustaining ownership rights, bargains, and duties of care.

160. *See* OKIN, *supra* note 33, at 129-31.

161. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 579 (1964) (requiring state electoral districts that render all citizens' votes "approximately equal in weight").

162. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (upholding some limitations but rejecting others).

163. These include charitable deductions, refusal to intervene in internal religious disputes, and insulation from civil rights laws. For criticism, see Mary Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453 (1992). For example, labor unions are protected from the antitrust laws, which would otherwise be a serious obstacle to success. *See* 15 U.S.C. § 17 (1988).

164. This is part of the project of political liberalism, as discussed in RAWLS, *supra* note 81, and Charles Larmore, *Political Liberalism*, 18 POL. THEORY 339, 343-46 (1990).

Moreover, it is possible to conceive of prevailing institutions in quite different ways. Some familiar social criticism consists of a claim that an existing sphere of social differentiation embodies an inadequate kind of valuation. Thus, for example, the family has often been a place for hierarchy and deference, and it is sometimes suggested that processes of mutual respect and reason-giving should displace this unjust kind of valuation.[165] The political process has often been conceived as appropriately a realm of reason-giving; the characteristic American attack on hierarchy and privilege is an attempt to replace a system of authority with a system of reasons.[166] Some people think that the attack has not gone far enough and that if reason-giving is to prevail, legal changes are needed to ensure against (for example) the corrosive effects on democratic deliberation of disparities in wealth.[167] Others argue that bonds of affection and even love ought to replace or supplement the kinds of reason-giving that are characteristic of modern politics.[168]

Often, of course, market thinking is said to be at least a descriptively and perhaps a normatively superior alternative to current kinds of valuation. Thus it is sometimes suggested that family life, sexual choice, and markets ought all to be conceived as systems of exchange and use.[169] Some especially ambitious forms of social criticism involve an effort to claim that one kind of valuation — use, respect, love, worship — ought to be the universal one.[170] Most modestly, it is sometimes suggested that things would be better if the family were made more marketlike, or if the market were made more familylike.[171]

These debates show that many claims for social reform are really arguments for revision of the kinds of valuation prevailing in different social institutions. In some forms, these claims point to the constitutive role of law, urging that existing arrangements are hardly natural, that they could not exist without certain legal choices, and that revi-

165. *See* OKIN, *supra* note 33, at 17; *cf.* Jean Hampton, *Feminist Contractarianism, in* A MIND OF ONE'S OWN 227 (Louise M. Anthony & Charlotte Witt eds., 1993) (suggesting the use of contractualist analysis in the moral evaluation of private relationships).

166. This is, I think, the principal theme of WOOD, *supra* note 29.

167. *See, e.g.*, RAWLS, *supra* note 81, at 359-63; Joshua Cohen, *Deliberation and Democratic Legitimacy, in* THE GOOD POLITY 17, 18 (Alan Hamlin & Philip Pettit eds., 1989).

168. *See, e.g.*, NEL NODDINGS, CARING (1984); Joan Tronto, *Beyond Gender Difference to a Theory of Care, in* AN ETHIC OF CARE 240, 251-52 (Mary J. Larrabee ed., 1993); *cf.* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (arguing that liberalism ignores contribution of communal bonds to individual identity).

169. *See generally* BECKER, *supra* note 3. As noted, much may be gained by the assumption of "as if commensurability," at least for predictive purposes.

170. *Cf.* NODDINGS, *supra* note 168 (arguing for "caring" as foundation of ethical behavior).

171. *See* ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 62-66 (1986).

sions in law would make sense from the standpoint of justice or some other value. Of course a traditional liberal view is that widely diverse kinds of valuation are an important social good.[172]

B. *Religion, Civic Equality, and Political Liberalism*

Our system is one of liberal republicanism.[173] As such, it is committed to a principle of political equality and to a certain view about the relationship between political life and religious conviction. We can make some progress on these abstractions by observing that a liberal republic attempts to exclude certain kinds of valuation from public life. Those kinds of valuation may be too sectarian, or they may be inconsistent with the premise of political equality. A liberal republic thus bans particular "inputs" into politics either because they express a kind of valuation that is suited only to private life, or because they deny political equality, a commitment that entails certain evaluative attitudes toward fellow citizens. What I want to emphasize is that we can get a distinctive purchase on certain constitutional issues in this light.

Under the Constitution, the Establishment Clause[174] is the key example of the ban on certain kinds of valuation. The Constitution rules out valuations that assume certain conceptions of what is sacred, at least those that invoke religious commitments. For example, a law making Easter a national holiday may not rest on the ground that it reflects the sanctity of Jesus Christ.[175] The Establishment Clause generally rules sectarian justifications for statutes out of bounds,[176] even if other, neutral factors could support the same laws.[177] Political liberalism is constituted in part through the idea that certain kinds of valuation are too contentious to be a legitimate part of public life, even if they are a fully legitimate part of private citizenship.[178]

A liberal republic also excludes certain kinds of valuation of human beings as inconsistent with constitutionally prescribed norms of political equality. I have referred to the prohibition on "titles of

172. *Cf.* HERZOG, *supra* note 154.

173. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE 30-32 (1991); *see also* SUNSTEIN, *supra* note 139, ch. 5.

174. U.S. CONST. amend. I, cl. 1.

175. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980).

176. This is a controversial claim. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 103-23 (1993). A subtle discussion is John Rawls, *The Idea of Public Reason: Further Considerations*, 161 U. CHI. L. REV. (forthcoming 1994).

177. See *Stone*, 449 U.S. at 41.

178. *See generally* RAWLS, *supra* note 81.

nobility,"[179] a key to the American tradition in this regard. The Equal Protection Clause is now understood very much in these terms. Thus, for example, a law cannot be premised on the ground that blacks are inferior to whites,[180] or women inferior to men.[181] This idea may help make sense of the controversial claim that discriminatory intent is a necessary and sufficient condition for invalidating legislation.[182] One would have to say much more to justify this proposition.[183] But we can get at what underlies the emphasis on discriminatory intent by seeing it as a ban on certain kinds of valuation of human beings. At the very least, we can see why discriminatory intent is by itself enough to doom a legislative enactment.

Similar ideas help make sense of the apparent anomaly that the same law may be valid if produced by a neutral justification but invalid when produced by a discriminatory justification. For example, literacy tests for voting are unconstitutional if motivated by racial animus, but acceptable if supported on racially neutral grounds.[184] The reason for the asymmetry is that, by hypothesis, the first law reflects an appropriate kind of valuation, whereas the second does not. This simple idea underlies the prevailing conception of equality under the Fourteenth Amendment, which bans those kinds of valuation that deny the forms of respect that are prerequisites for political equality.[185] In the same vein, recall Holmes's aphorism: "[e]ven a dog knows the difference between being tripped over and being kicked."[186] The difference has everything to do with the relevant kind of valuation. It is closely connected with the expressive function of law, which, in this context, calls for invalidation of any measure that denies the principle of equal dignity and respect.

C. *Broadcasting and Free Speech, with a Note on Rights Generally*

Many of the sharpest debates in the theory of free speech raise the question whether government may legitimately regulate the broadcast-

179. *See supra* text accompanying notes 29-30.

180. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 494 (1954). This idea underlies the Court's antidiscrimination holdings in subsequent cases, such as Washington v. Davis, 426 U.S. 229 (1976).

181. *Cf.* Personnel Admr. v. Feeney, 442 U.S. 256, 273 (1979) (noting that discriminatory purposes cannot legitimately account for legislation).

182. *See Feeney*, 442 U.S. at 274; Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977); *Washington*, 426 U.S. at 240.

183. See discussion and citations in GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 600-05 (2d ed. 1990).

184. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959).

185. See also *infra* the discussion of sex equality in section V.G.

186. *See supra* note 131.

ing media in the interest of promoting democratic goals.[187] In at least two ways, issues of appropriate kinds of valuation and of commensurability underlie these debates. The first issue is whether to treat speech as an ordinary commodity, valued in the same way as other commodities. The second issue is whether free speech values are unitary or instead plural and diverse.

Substantial government deregulation of the airwaves has spurred much of the recent debate concerning the first issue.[188] Some people think that, in terms of actual programming, deregulation has promoted a sort of accelerating race to the bottom, rather than furthering the democratic goals of attention to public issues and diversity of view.[189] The result has been a split between the democratic conception of free speech and the belief in satisfying consumption choices. If we satisfy consumer desires, we may fail to promote democratic goals of intelligent and informed political participation.[190]

In these circumstances, many of the recent challenges to deregulated markets in expression reject the notion that speech should be valued in the same way or for the same purposes as ordinary consumer products. This claim suggests that a system of free markets is not necessarily compatible with a well-functioning system of free expression. These are two very different things. If a free speech market promotes democratic goals, it is not because it is a conceptual truth, but because the forces of supply and demand work out that way.[191] It may well turn out that market forces disserve democratic ideals by deterring substantive coverage of public issues and sufficient diversity of view. If so, democratic correctives may promote the purposes of the free speech guarantee.

Those who think of speech as a commodity, to be valued in the same way as other things that people desire, are often unable to understand the complaints of people who urge a democratic conception. This is because they have a distinctive conception of what speech is *for,* one that makes it hard to come to terms with the different conception of the democrats. Thus the former chairman of the Federal

187. *See, e.g.,* L. SCOTT POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987); Owen Fiss, *Free Speech and Social Structure,* 71 IOWA L. REV. 1405 (1986). *See generally* DEMOCRACY AND THE MASS MEDIA (Judith Lichtenberg ed., 1990).

188. The developments are outlined in DWIGHT L. TEETER, JR. & DON R. LE DUC, LAW OF MASS COMMUNICATIONS 402-31 (7th ed. 1992).

189. See CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 17-51 (1993) for such an argument and relevant citations.

190. *See* C. Edwin Baker, *Advertising and a Democratic Press,* 140 U. PA. L. REV. 2097 (1992).

191. *See* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment,* 1990 DUKE L.J. 376; Fiss, *supra* note 187, at 1411-13.

Communications Commission, Mark Fowler, said that "television is just another appliance. It's a toaster with pictures."[192] This is a conspicuous statement of the market conception of free speech, and it is jarring because it reveals an unusually stark view of how to value the products of the broadcast media.

The most basic objection to this claim is that it shows an improper kind (not necessarily level) of valuation of some forms of speech. If we value speech either as an intrinsic good or because it is instrumental to a well-functioning deliberative process, we will value it in a quite different way from toasters. The assessment of legal policy will change accordingly. Of course it remains possible that we would conclude that, because of the dangers of content-based regulation of the speech market, deregulation is the right legal strategy, all things considered. But this complex institutional argument — about the role of the First Amendment in a second-best world — strikingly differs from that offered by Chairman Fowler.

With respect to the second issue, it seems clear that free speech values are plural and diverse rather than unitary.[193] Much inventive and instructive work has attempted to identify a single value animating the protection of free speech, like democracy, self-realization, autonomy, or consumer satisfaction.[194] But it would be most surprising if free speech were connected with any single value.[195] This is true for most constitutional rights, which serve a range of purposes. The protection of property rights, for example, helps to promote economic prosperity by creating appropriate incentives for productive activity. But it also safeguards individual security — an important noneconomic value — and, by limiting government discretion over personal holdings, it serves democratic goals as well.[196] The problem with unitary or monistic theories of constitutional value is that they are insufficiently differentiated.

It would be especially obtuse to suggest that the free speech principle serves only political values. A system of free communication

192. Bernard Nossiter, *The FCC's Big Giveaway Show,* NATION, Oct. 26, 1985, at 402.

193. *See* Joshua Cohen, *Freedom of Expression,* 22 PHIL. & PUB. AFF. 207, 223-30 (1993).

194. *See* Martin Redish, *The Value of Free Speech,* 130 U. PA. L. REV. 591 (1982); *see also infra* notes 197-98.

195. *See generally* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment,* 78 NW. U. L. REV. 1212 (1983).

196. *See* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 284-322 (1988). Plural values are promoted by other constitutional rights as well. Consider the hearing rights guaranteed by the Due Process Clause, the protection against unreasonable searches and seizures under the Fourth Amendment, and the barrier to cruel and unusual punishment provided by the Eighth Amendment.

yields a wide variety of diverse social goods.[197] Significant autonomy interests, quite independent of democracy, help justify the protection of free speech.[198] There is also an important connection between free speech and individual self-development. The opportunity to create art or literature, like the opportunity to read the products of other minds, is part of the development of human capacities. A vigorous free speech principle also helps secure scientific progress. Finally, free communication is indispensable to economic development.[199] A well-functioning system of free expression should be alert to the wide range of values at stake, and to the qualitative distinctions among those values.

An understanding of diverse values will not lead to a simple set of judgments about the meaning of the First Amendment. But it should help inform the constitutional inquiry. Many debates in the First Amendment area are about different kinds of valuation of speech and about the relationship of those kinds to constitutional inquiry.[200]

The point applies to most constitutional rights. As simply one other example, consider the debate over whether the Supreme Court should protect "fundamental rights" under the Due Process Clause. In an influential if extreme formulation, Judge Bork asks how the Court can protect the right to sexual privacy if it does not protect the right to pollute. On Bork's view, both rights amount to "gratifications," and there is no essential difference between them.[201] A less extreme version of this view is the concern whether the Court can consistently protect sexual privacy without protecting property interests; who is to say that the former is more important than the latter?[202]

We might be able to handle this question better if we insist on qualitative rather than merely quantitative differences among rights. It is not necessarily true that someone will value sexual privacy more than continued employment for longer hours at better wages, but it is possible to have a distinct concern about government regulation of the former, and it may be because of the way that sexual privacy is valued

197. *See* Cohen, *supra* note 193, at 223-30.

198. *See* Thomas Scanlon, *A Theory of Free Expression*, 1 PHIL. & PUB. AFF. 204, 215-22 (1972).

199. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1975) (rejecting ban on advertising by pharmacies).

200. See, for example, SUNSTEIN, *supra* note 189, at 121-65 and citations therein.

201. *See* ROBERT BORK, THE TEMPTING OF AMERICA 257-59 (1990).

202. *Cf.* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, *in* THE BILL OF RIGHTS IN THE MODERN STATE (Geoffrey R. Stone et al. eds., 1992) (arguing that the logical structure of free speech analysis applies just as readily to property rights under the Takings Clause).

that constitutional protection is appropriate.[203] Once claims for constitutional protection are not aligned along a single scale and assessed in purely quantitative terms, it becomes easier to make progress in thinking about fundamental rights.

This general understanding may cast light on some familiar and somewhat mysterious notions in legal and social theory.[204] Consider, for example, Dworkin's account of rights as "trumps,"[205] or Rawls's claim that, under the appropriate theory of justice, the principle calling for equal basic liberty is lexically prior to better economic arrangements.[206]

Much might be said about these complex ideas. It is possible to think that, when we treat rights as trumps, we mean simply that rights are very highly valued and that they may not be violated without extremely strong justifications.[207] Because of the high premium we place on free speech, or because of our distrust of ad hoc judgments, we ban case-by-case trade-offs. On this view, there is no issue of incommensurability. Or we might think that when *A* is lexically prior to *B*, it is simply because we place an especially high premium on *A*. It would indeed seem fanatical to suggest that any right, to qualify as such, must be respected regardless of the consequences.

But perhaps it is inadequate to formulate these issues in purely quantitative terms. If we treat rights as "trumps," we may be taken to

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203. For such an argument, see Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 802-06 (1989).

204. For a related view, compare ANDERSON, *supra* note 1, at 67, on whom I draw here.

205. *See* DWORKIN, *supra* note 4, at xi-xii, 184-205.

206. JOHN RAWLS, A THEORY OF JUSTICE 61 (1971) ("[A] departure from the institutions of equal liberty . . . cannot be justified by, or compensated for, by greater social and economic advantages."). Note also Rawls's at least implicit recognition of incommensurability as I understand it here:

> If someone denies that liberty of conscience is a basic liberty and maintains that all human interests are commensurable, and that between any two there always exists some rate of exchange in terms of which it is rational to balance the protection of one against the protection of the other, then we have reached an impasse.

RAWLS, *supra* note 81, at 312.

207. This appears to have been Mill's position. Mill described the claim to (a right of) personal security as having "that character of absoluteness, that apparent infinity and incommensurability with all other considerations which constitute the distinction between the feeling of right and wrong and that of ordinary expediency and inexpediency." MILL, *supra* note 59, at 67. Compare Mill's analysis of "justice":

> [J]ustice is a name for certain moral requirements which, regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others . . . .
>
> . . . Justice remains the appropriate name for certain social utilities which are vastly more important, and therefore more absolute and imperative, than any others are as a class . . . and which, therefore, ought to be, as well as naturally are, guarded by a sentiment not only different in degree, but also in kind . . . .

Id. at 78-79.

be saying not that they are infinitely or even extraordinarily valuable when viewed solely in terms of aggregate levels, but that they are valued in a distinctive way — a way quite different from, and qualitatively higher than, the way we value the competing interests. Because of the distinctive way that they are valued, it is necessary that the competing interests be (a) of a certain qualitative sort and (b) extraordinary in amount or level, in order to count as reasons for abridgment.[208]

Similarly, in speaking of the lexical priority of equal liberty, we may mean that a just society values this interest in a way that precludes its violation for social and economic advantages. The lexical priority of liberty thus represents an effort to restate Kantian ideals about the priority of equal dignity and respect.[209] We can imagine cases in which this judgment could be fanatical.[210] But it seems clear that, in some cases, a belief in lexical priority may well reflect claims about incommensurability. We might treat equal liberty as a reflection of the foundational commitment to equal dignity and respect, and believe that we do violence to the way we value that commitment if we allow it to be compromised for the sake of greater social and economic advantages. On this view, the lexical priority of equal liberty is structurally akin to the refusal to allow a child to be traded for cash, or a promise to be breached as a result of mildly changed circumstances. It reflects a judgment that the prevalent kind of valuation forbids compromising the good for certain reasons, even though those reasons are legitimate bases for action in other contexts.

D. *Environmental Protection*

Most positive theories of government regulation assess environmental issues[211] by reference to people's "preferences" for environmental quality viewed abstractly, through a unitary scale, along the same metric — that of utility or of willingness to pay.[212] But there are some apparent anomalies in individual behavior here. In particular, ordinary people appear to resist the use of a unitary scale and the

208. As noted, this is John Rawls's understanding of the clear and present danger test in RAWLS, *supra* note 81; see also the discussion of hierarchical incommensurability in Pildes & Anderson, *supra* note 48, at 2147-58.

209. See RAWLS, *supra* note 81, at 289-371 (discussing the priority of basic liberties).

210. Note that Rawls qualifies the priority of liberty to assume reasonably good background conditions. *See id.* at 297. The charge of fanaticism may provide a basis for challenging Rawls's understanding of the clear and present danger test. *See supra* notes 81-82 and accompanying text.

211. I draw in this section on the discussion in Sunstein, *supra* note 51, at 247-53.

212. *See, e.g.*, B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests Are Being Protected?, in* CHICAGO STUDIES IN POLITICAL ECONOMY 489, 529 (George J. Stigler ed., 1989).

claim of commensurability. Perhaps the discussion thus far can help make sense of some of the most puzzling phenomena relating to the public's environmental judgments. Through this route we may be able to understand some features of the apparent demand for environmental regulation, even if we ultimately conclude that the demand often involves irrationality. Consider a few examples.

(a) Some people feel extremely insulted when asked how much they would accept (WTA) for a specified level of environmental deterioration, treating the question as outrageous or a form of bribery, rather as if they had been asked to sell a child or a part of their body. Studies using WTA questions consistently receive a large number of protest answers, such as "I refuse to sell" or "I want an extremely large or infinite amount of compensation for agreeing to this"; such studies frequently experience protest rates of fifty percent or more.[213]

(b) Some people say that environmental goods have infinite value or that the effort to achieve a clean environment should not be "traded off" against other important values. In opinion polls, people sometimes say that we should achieve a clean environment "regardless of cost." In 1992, eighty percent of respondents agreed with this statement, up from sixty-nine percent the year before.[214]

(c) Some apparently popular statutes reflect a sort of environmental absolutism. The Endangered Species Act[215] forbids balancing except in the rarest of circumstances.[216] To the same effect, the Delaney Clause[217] forbids any entry of carcinogenic substances onto the market, banning trade-offs of any sort.[218]

(d) There are extraordinary disparities in federal expenditures for each life saved.[219] Some environmental programs prevent risks at enormous cost; the government is willing to spend relatively little to stop other risks. All current efforts to produce uniformity in expendi-

213. Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias,* 5 J. ECON. PERSP. 193, 202-03 (1991) (citation omitted). The authors comment: "These extreme responses reflect the feelings of outrage often seen when communities are faced with the prospect of accepting a new risk such as a nuclear power plant or waste disposal facility." *Id.* at 203.

214. *See Poll Shows Four of Five Americans Support Environment, Even Over Economy,* 23 Env. Rep. (BNA) 1155 (Aug. 7, 1992).

215. Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884 (codified as amended principally at 16 U.S.C. §§ 1531-1544 (1988)).

216. 16 U.S.C. § 1539(a)-(d) (1988).

217. Food Additive Amendments Act of 1953, Pub. L. No. 85-929, § 4, 72 Stat. 1784 (codified as amended at 21 U.S.C. § 348(c)(3)(A) (1988)).

218. 21 U.S.C. § 348(c)(3)(A) (1988).

219. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 24-27 (1993); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 238-41 (1990). Consider the following table:

tures — understood, for example, as equivalent amounts of dollar expenditures for each statistical life saved — have failed.

Such phenomena may in the end reflect irrationality, confusion, poor framing of relevant questions, interest-group power, or sheer chance. But it would be useful to explore other possible explanations. When people are thinking in these various ways, exactly what are they doing?

We might hypothesize that social valuation of environmental goods comes partly from an insistence that diverse social goods should not be assessed according to the same metric, and that those goods ought to be valued in different ways. With this hypothesis, some apparent anomalies dissolve or become more readily explicable. Some people, for example, insistently rebel against the idea that we should see all of the following, environmentally related consequences as "costs": unemployment, higher prices, greater poverty, dirtier air, more cancer, respiratory problems, the loss of species. If we understand all these things as "costs," to be assessed via the same metric, we will disable ourselves from making important distinctions. It might be hypothesized that when people refuse to trade off environmental quality and other goods, they are making a claim about the diversity of goods and incommensurability. They are claiming that one set of goods is superior to another not in the sense that it is infinitely valuable, but in the sense that it stands higher in a hierarchy of public val-

Cost-Effectivencess of Selected Regulations

Regulation	Agency	Cost per premature death averted ($millions 1990)
Unvented Space Heater Ban	CPSC	0.1
Underground Construction Standards	OSHA-S	0.1
Auto Fuel-System Integrity Standard	NHTSA	0.4
Standards for Servicing Auto Wheel Rims	OSHA-S	0.4
Side-Impact Standards for Autos (Dynamic)	NHTSA	0.8
Low Altitude Windshear Equipment & Training Standards	FAA	1.3
Hazard Communication Standard	OSHA-S	1.6
Standards for Radionuclides in Uranium Mines	EPA	3.4
Benzene NESHAP (Revised: Coke Byproducts)	EPA	6.1
Electrical Equipment Standards (Coal Mines)	MSHA	9.2
Arsenic/Copper NESHAP	EPA	23.0
Benzene NESHAP (Revised: Transfer Operations)	EPA	32.9
Coke Ovens Occupational Exposure Limit	OSHA-H	63.5
Arsenic Occupational Exposure Limit	OSHA-H	106.9
Asbestos Ban	EPA	110.7
1,2 Dichloropropane Drinking Water Standard	EPA	653.0
Hazardous Waste Land Disposal Ban (1st 3rd)	EPA	4,190.4
Formaldehyde Occupational Exposure Limit	OSHA-H	86,201.8
Atrazine/Alachlor Drinking Water Standard	EPA	92,069.7
Hazardous Waste Listing for Wood-Preserving Chemicals	EPA	5,700,000.0

See BREYER, *supra*.

ues.[220] The refusal to accept certain sorts of trade-offs reflects and expresses this judgment. As in the context of lexical priority, the kind of valuation of the environment forbids compromises on the basis of reasons that are fully legitimate in other settings.

Or consider the issue of environmental risks in the workplace. People regularly take jobs that expose them to certain risks to health and safety. This fact makes it tempting to say that people value a risk of level *A* at some dollar amount *X*.[221] Thus, for example — in a slightly different context — one of the most prominent writers on risk regulation refers approvingly to an "ingenious effort" to infer "a value of life from data on individual seat belt use."[222] There are many studies to this general effect, especially in the area of workplace safety.[223] Indeed we might well find out a good deal about valuation of safety and health by exploring the required risk premium in different settings.[224]

In a way this approach makes obvious sense. For purposes of allocating resources to reduce risk, it is a promising alternative. But suppose that even after their behavior is explained in this way, people firmly resist (as is predictable) the conclusion that, to them, risk *A,* or their lives, is *really* worth *X.* Suppose they claim that this is not in fact their view. To the evidence of their behavior, suppose that employees respond that they did indeed "take the job," but they adamantly resist any broader or acontextual inference about their trade-offs between risk and dollars.[225] They say that whatever they did, it is unreasonable to say that they value their lives at the amount represented by the discounted value of their life. Is it so clear that they are not making sense?

Even if these people are indeed not making sense, we might be able to use their responses to understand some otherwise peculiar features of the social demand for environmental regulation. It is even possible that they are making sense.[226] If so, it is because their valuation is not

220. See the discussion of hierarchical incommensurability in Pildes & Anderson, *supra* note 48, at 2147-58.

221. *See* W. KIP VISCUSI, RISK BY CHOICE 37-39 (1983); VISCUSI, *supra* note 62, at 6.

222. W. Kip Viscusi, *Strategic and Ethical Issues in the Valuation of Life, in* STRATEGY AND CHOICE 359, 365 (Richard J. Zeckhauser ed., 1991).

223. *See* VISCUSI, *supra* note 62, at 52-53 (summarizing 20 occupational risk value-of-life studies).

224. See the summary in *id.* at 51-74.

225. *See* Sen, *supra* note 57, at 206 (denying that the choice of *X* over *Y* reflects a "statement" about the acontextual merits of *X* and *Y*); *see also* RAZ, *supra* note 17, at 336-39 (to the same general effect).

226. *See* ANDERSON, *supra* note 1, at 195-203; Pildes & Anderson, *supra* note 48, at 2143-62; Sen, *supra* note 57, at 200.

an acontextual one or a global judgment about valuation or optimization, but instead highly dependent on and geared only to the particular setting in which the choice is made. When a worker accepts a risky job for cash, it may mischaracterize his choice to say that he "really" thinks that the risk is equivalent to that amount of cash — if the word "really" is intended to capture an abstract, acontextual judgment. Instead he has simply taken this job in preference to others among a specific range of opportunities, and this decision, in its context, means nothing more general.[227]

Through this route, we might help come to terms with phenomena (a) through (d) above.[228] For example, the risk charts might reflect qualitative distinctions among different sorts of hazards. People might be interested not only in cost for each life saved, but also in whether the risk was assumed knowingly and voluntarily, whether the exposing entity knows the facts, whether the underlying activity produces valuable goods, whether the hazard is common, whether the exposure is essential, whether the risk is encountered occupationally or elsewhere, and whether the people subjected to risk were able to participate in relevant decisions.[229] They might also be interested in the nature of the risk, thinking, for example, that certain deaths are worse than others. Through this route, we might well discover that people's valuations of different risks will vary a good deal with context. Hence the varying valuations will reflect not only irrationality or interest-group pressure, but also diverse judgments about diverse risks.

I do not claim that this approach fully justifies the current disparities. In view of their obvious irrationality, that conclusion would be extravagant.[230] But it may well be rational to allow widely varying

227. This is the argument in Sen, *supra* note 57, at 205-07. As Raz puts it:

> Revealed preferences are a very incomplete and misleading clue to people's valuations. These can be accurately gauged only if one takes account of people's own reasons for different valuations (a delicate task which is in principle incapable of completion, as it is impossible completely and exhaustively to describe a person's set of values at any given time).

RAZ, *supra* note 17, at 325.

228. It would be possible to think here that we have an issue of lexicographic preferences — of preferences so strong for certain goods as to bar trade-offs with other goods. Many puzzles are raised by this view. Without attention to issues of incommensurability, the lexicographic preference seems best understood as a case of an especially intense preference for goods of a certain sort, and in that case it is not obviously helpful to speak of lexicographic preferences at all. It might well be better to speak of highly valued goods. For present purposes, I suggest that a lexicographic preference might really suggest an issue of hierarchical incommensurability — that is, of a good favored via a kind of valuation that prevents it from being compromised for goods valued in some other way, at least unless those goods are extraordinary in terms of sheer number.

229. For a discussion of some of these factors, see WILLIAM W. LOWRANCE, OF ACCEPTABLE RISK 86-94 (1976).

230. Various heuristics, many of them productive of bias, are operative too. *See* VISCUSI, *supra* note 62, at 111-37; Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747 (1990); Sunstein, *supra* note 51, at 42.

expenditures in light of the diverse factors outlined above, and at least some of the current variations might have some such foundation.

Similarly, the protest answers to certain questions might reflect not sentimentality or simple confusion, but a judgment that people value the environment in a way that forecloses acceptance of even high amounts of money in return for degradation. Such judgments are analogous to the extreme cases of incommensurability, discussed above, in which people value a certain relationship or good through a kind of valuation that disqualifies certain conventional reasons for action — especially acceptance of money as a basis for compromising or eliminating it. For example, if a pet owner were asked how much he would accept to allow use of his pet dog for laboratory experiments, he would be insulted and probably respond very much like the people in (a).[231] This response stems from the fact that the pet owner's ordinary attitude toward his pet is incompatible with treating the pet as an object solely for human consumption or use. In these circumstances the very idea of sale for the purpose of experimentation seems illegitimate. This is so even though economic valuation of pets — in terms of purchase price, sale price, and medical expenditures — is perfectly common. It is not contradictory to think that there are limits to the amount that one will pay to prolong the life of one's pet while also thinking that, realistically, no price is high enough to allow that pet to be used for laboratory experiments. The reason for the difference is that, because of the difference in context, a different kind of valuation is expressed through these different choices.

Some people think of freedom from certain environmental risks, and the protection of pristine areas, in just this way. They value the relevant goods not for their use, but for their beauty or their independence from human artifice. The emphasis in law on "use value" inadequately captures the way they value the relevant goods. It is not an adequate response to note that there is an asymmetry[232] between the

231. It is not responsive to say that some or many people might, under imaginable circumstances, allow the experiments if the amount were extraordinary high. *See supra* text accompanying notes 45-46.

232. Studies in the environmental area observing this asymmetry include JUDD HAMMACK & GARDNER M. BROWN, WATERFOWL AND WETLANDS: TOWARD BIOECONOMIC ANALYSIS (1974); Elizabeth Hoffman & Matthew L. Spitzer, *Willingness-to-Pay vs. Willingness-to-Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59 (1993); Robert D. Rowe et al., *An Experiment on the Economic Value of Visibility*, 7 J. ENVTL. ECON. & MGMT. 1 (1980); Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980). Other studies making this observation include Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1342-46 (1990); *see also* Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277, 1282-83 (1989); Jack L. Knetsch & J.A. Sinden, *Willingness To Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 99 Q.J. ECON. 507, 507-09 (1984); William Samuelson & Richard Zeckhauser, *Status Quo*

answer to the two questions: "How much would you have to be paid to *allow* degradation?" and "How much would you pay to *avoid* degradation?" People are perfectly willing to answer the second question with numbers that are systematically lower than those produced by the first. In the environmental area, the asymmetry is especially large, and it creates a considerable puzzle for conventional views about rationality. But it would be wrong to think that the answers to the second question are in some deep sense more revealing of "true" preferences, while the responses to the first question are mistaken.

The asymmetry may have a good deal to do with diverse kinds of valuation. In particular, people may believe that a species or a pristine area has intrinsic rather than instrumental value. When this is so, they do not want to assume the sort of responsibility that is entailed by allowing its elimination for cash.[233] The asymmetry reflects a belief that an answer to the first question above entails a different sort of act from an answer to the second. This may not be irrational at all. In the first case, the reference state or status quo is nondegradation, and the respondent is asked to interfere with that state of affairs. In the second case, the reference state is degradation, which the respondent is asked to help alleviate. The asymmetry reflects a judgment that these are answers to two very different questions.

The asymmetry thus suggests that people think that the loss, through their deliberate action, of a pristine area or an endangered species is incommensurably bad, and that this thought should be expressed through regulatory proscriptions. To say the least, this view raises many complexities. It is by no means clear that the relevant judgments about responsibility can be defended. I mean to suggest only that the idea is both common and intelligible.

E. *Cost-Benefit Analysis*[234]

One of the most hotly disputed issues in law and policy involves the role of cost-benefit analysis (CBA). In the most dramatic victory for CBA, the Reagan administration adopted two important executive

Bias in Decision Making, 1 J. RISK & UNCERTAINTY 7 (1988); W. Kip Viscusi et al., *An Investigation of the Rationality of Consumer Valuations of Multiple Health Risks*, 18 RAND J. ECON. 465 (1987).

233. *See* Rebecca R. Boyce et al., *An Experimental Examination of Intrinsic Values as a Source of the WTA-WTP Disparity*, 82 AM. ECON. REV. 1366, 1366-67 (1992). See also the discussion of responsibility and the action-omission distinction in Williams, *supra* note 88, at 93-100.

234. I draw in this section on Sunstein, *supra* note 69, at 25-26.

orders calling for the application of CBA to all regulatory decisions.[235] These orders were withdrawn by President Clinton and replaced by a new executive order, which also places a high premium on cost-benefit analysis.[236]

There is of course much to be said in favor of CBA. Federal regulation is notoriously and pervasively chaotic and irrational.[237] Who could object to the idea that we should systematize costs and benefits and compare them? The question seems especially powerful when combined with the plausible claim that some opponents of CBA are confused about their real objection. In fact, it is sometimes said,[238] the opponents' real complaint is that some of the relevant variables have been insufficiently valued. Would it not be a sufficient response to say to the critics of this form of analysis that perhaps we should place a higher premium on, for example, human health, or the environment, and then proceed with CBA?

It would be difficult to challenge the view that law and policy should be assessed on the basis of an inquiry into the advantages and disadvantages of different courses of action, and CBA often appears to be a way of systematizing that sort of approach. But at least for some purposes, I do not think this response would be sufficient. Nor is it entirely adequate to say, as critics of CBA typically do, that this sort of approach fails to address distributional issues or is biased against the poor.[239]

The real problem with any form of conventional CBA is that it is obtuse. CBA is obtuse because it tries to measure diverse social goods along the same metric.[240] Suppose, for example, that we are told that the "cost" of a certain occupational safety regulation is $1 million, and that the "benefit" is $1.2 million. To make a sensible evaluation, we need to know a great deal more. To what do these numbers refer? Do they include greater unemployment, higher inflation, and the scaled-back production of important goods? Do they mean more poverty? At least in principle, it would be much better to have a highly disag-

235. Exec. Order No. 12,498, 3 C.F.R. 323 (1986), *reprinted in* 5 U.S.C. § 601 (1988); Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1988).

236. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993).

237. *See, e.g.*, BREYER, *supra* note 219.

238. *See* PETER ASCH, CONSUMER SAFETY REGULATION 1-13, 64-69 (1988).

239. There is something to these objections. Willingness to pay, the typical criterion for calculating costs and benefits, depends on ability to pay, and in this sense there is a bias against the poor. Note that President Clinton's new order requires attention to "equity" and "distributive impacts."

240. I am assuming here that diverse kinds of valuation are an affirmative good, a claim defended in Part III.

gregated system for assessing the qualitatively different effects of regulatory impositions. People should be allowed to see those diverse effects for themselves and to make judgments based on an understanding of the qualitative differences. If all of the relevant goods are aligned along a single metric, they become less visible, or perhaps invisible.

Through considerations of this sort, we might be able to make some progress toward assessment of the Reagan and Clinton administrations' executive orders on regulation. Instead of conventional cost-benefit analysis, what is necessary is a full accounting of the various social consequences of regulation. Those consequences should be described in a way that allows a detailed view of what the costs and benefits specifically are. Once greater specificity is added, we will not be thinking in terms of simple costs and benefits at all. President Clinton's order[241] makes some modest steps in this direction, but the steps are erratic and unconnected with any clear theory of how to assess regulation.[242]

The best response to this claim is pragmatic and institutional. It would be that at least for law and public policy, it makes sense to act as if diverse goods were commensurable, because this way of proceeding makes decisions tractable where they would otherwise be ad hoc, and because ad hoc decisions lead to a systematic misallocation of resources and a perverse system of priorities. CBA may offer a less than full description of what is really at stake, but perhaps it counteracts the forms of inconsistency and ultimate irrationality that result in the public sector if we proceed without quantitative help.

This is a plausible defense of CBA in the real world. Whether it is right depends on pragmatic judgments that cannot be resolved in the

241. *See supra* note 236 and accompanying text.

242. The Clinton order is cautious and even ambiguous about cost-benefit analysis as a tool of decision. It says "qualitative" costs and benefits will be included as part of the analysis: "Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider." Exec. Order No. 12,866, 58 Fed. Reg. 51,735, at 51,735 (1993). The order further states: "Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." *Id.* at 51,736. The order also contains a vague reference to the relevance of "equity" and "distributive impacts." *Id.*

But these are odd and in some ways not entirely coherent formulations. If quantification is impossible or misleading, we are not weighing costs and benefits at all, but instead assessing advantages and disadvantages. "Qualitative" costs and benefits are not easy to conceive. In any case, some of the advantages and disadvantages of regulatory action are not adequately described as costs and benefits at all. The Clinton order should be seen as a halfway house between CBA and a more differentiated analysis that draws close attention to the diverse goods at stake. Of course it remains possible that this halfway house is the best way of combining good theory with administrative concerns and sensible priority setting, but the current theory seems confused.

abstract. My point is that if goods are diverse and valued in different ways, there will be considerable crudeness in this approach to regulation. Much will be lost even if much is also gained. We should therefore have a presumption in favor of a much more disaggregated accounting of the effects of regulation, one that exposes to public view the full set of effects.

F. *Specific Performance, Damages, Private Law Remedies: Another View of the Cathedral*

The legal system usually insists on an award of damages for the infliction of harm; a damages award appears to reflect a judgment in favor of commensurability. But sometimes damages are insufficient. We can approach a large subject — the relationship between compensation and commensurability[243] — by examining a pervasive issue in the law of contract: whether to award a damages remedy or instead to require specific performance.[244] From an exploration of this issue, we may be able to offer a few tentative generalizations.

It is typically said that specific performance will be awarded when damages are "inadequate." But what could this possibly mean? Suppose that Jones has contracted to buy a painting, and that the seller defaults on the agreement. It is far from clear why a court should order the seller to hand over the painting, rather than to pay damages to Jones. If the damages seem inadequate, we might think that they have been set too low, and that the right solution is simply to require the seller to pay more. Surely there is some level at which the court will set the proper amount. Why, then, is specific performance ever available?

A conventional answer is that damages remedies are inadequate when the good at issue is unique.[245] But the notion of uniqueness is itself a puzzle. At least for economists, the term points at most to "questions of degree."[246] All goods have substitutes of some sort; this is part of the usual understanding of choice amidst scarcity. In explaining the notion of uniqueness, some people have stressed that a damages remedy might well be inaccurate for certain goods. Subjective value is peculiarly hard to ascertain in some cases, and the goods may involve high search costs that judges cannot easily determine.

243. *See generally* Margaret J. Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993).

244. For a good modern treatment of this issue, see generally Anthony Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978).

245. *See, e.g., id.* at 355-58.

246. *Id.* at 359.

The subjective value of Jones's painting is nearly impossible to know and may well substantially exceed the market value, if a market exists. The particular costs incurred by Jones in finding that particular painting are hard to establish. In these circumstances, the existence of a specific performance remedy can be seen as a natural response to information costs faced by the legal system in ascertaining the appropriate damages remedy.

We might conclude that, when it is especially expensive to determine damages, courts will order specific performance. In a brief but notable description of the doctrine, Judge Posner says that the doctrine represents an exception to the usual damages decree for cases in which "damages are difficult to compute because of a lack of good market substitutes for the performance of the contract breaker."[247] This is a notable description because it suggests that behind the specific performance remedy lies the simple problem of cost of computation.

There is undoubtedly a good deal of truth to this; but another factor may be at work. The specific performance remedy can be understood to stem from a resistance to commensurability. Specific performance must be awarded because the good in question is not commensurable with cash. This is not to say that it is more valuable than cash. Indeed, it is less valuable, often, than a great deal of cash. The claim is instead that the good is valued in a way that is inconsistent with cash valuation. What the plaintiff wants, and what she is entitled to get, is a good that she values in the way that she values the object for which she has contracted. A good that she values "equally," in market terms, is not a perfect substitute.[248] Hence one would expect the specific performance remedy to reflect a stand in favor of diverse kinds of valuation.

There is no simple way to test this hypothesis against its economic competitor. The two would suggest parallel results. But both the rhetoric and the outcomes of some of the cases suggest that specific performance is awarded at least in part because cash does not reflect the way in which the promisee values the good in question.[249]

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247. POSNER, *supra* note 130, at 130.

248. *See supra* note 94 on why the quotation marks are necessary.

249. *See, e.g.*, Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp., 992 F.2d 430, 436 (2d Cir. 1993) (granting specific performance when franchisee's very existence as business was threatened); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (granting temporary injunction when plaintiff sought right to continue 20-year-old business); City Stores Co. v. Ammerman, 266 F. Supp. 766, 776 (D.D.C. 1967) (granting specific performance when there was a disputed lease critical to future expansion of business); Forman v. Benson, 446 N.E.2d 535, 541 (Ill. App. Ct. 1983) (granting specific performance for breach of contract for sale of land); Kitchen v. Herring, 42 N.C. 137, 138 (1851) (same); *see also* David Cohen, *The*

This point suggests the need to supplement Guido Calabresi and Douglas Melamed's well-known discussion of the choice between liability and property rules.[250] In their terminology, a right is protected by a liability rule if it can be taken upon a payment of compensation. A right is protected by a property rule if it can be taken only through voluntary exchange, and if market compensation is therefore an inadequate justification for the taking. Calabresi and Melamed's important discussion rightly emphasizes the relevance of transactions costs, including information costs, to the choice between the two methods of legal protection.[251] But this account provides only part of the picture. As the discussion above suggests, property rules are also appropriate when the relevant right or good is valued in a different way from money. In such cases, courts hesitate to use liability rules, not only because courts doubt their ability to calculate a proper cost for the forgone good, but also because a dollar amount will reflect the wrong kind of valuation of the good at issue. The litigant is entitled to the good and its existing kind of valuation, rather than to a substitute valued in a different way, even if in some aggregative sense "equally."[252]

The point bears on damage remedies generally, most obviously for emotional distress or pain and suffering.[253] As Margaret Jane Radin

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Relationship of Contractual Remedies to Political and Social Status: A Preliminary Inquiry, 32 U. TORONTO L.J. 31 (1982).

250. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

251. *Id.* at 1093-98.

252. The point may help justify the requirement that a "public use" be shown before government may undertake even a compensated taking of private property. *See* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

253. Thus RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (1977) states:

> [C]ompensatory damages [for pecuniary loss] are designed to place [the damaged party] in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed. When[,] however, the tort causes bodily harm or emotional distress, the law cannot restore the injured person to his previous position. The sensations caused by harm to the body or by pain or humiliation are not in any way analogous to a pecuniary loss, and a sum of money is not the equivalent of peace of mind. . . . There is no scale by which the detriment caused by suffering can be measured and hence there can only be a very rough correspondence between the amount awarded as damages and the extent of the suffering.

See generally Radin, *supra* note 243, at 269-83.

Consider in this regard the debate on whether people's failure to insure for nonpecuniary harms reflects a social judgment against mandating insurance through the tort system. *See supra* note 20 and accompanying text. It is possible to think that the failure to insure has no such implications. Perhaps there is a norm against purchasing insurance for certain risks. Perhaps commodifying — in the form of insuring against — those risks would reflect a strange kind (not amount) of valuation of the underlying good. People do not ordinarily insure against death of their children, or their own physical pain, in part because their attitudes make the decision to insure seem peculiar, as if one viewed one's children or freedom from pain as a sort of asset or commodity. On this view, the failure to insure reflects a quite particular judgment, and it does not mean that these events are not harms deserving compensation when they occur. Hence the inference drawn in Priest, *supra* note 20, at 1546-47, 1553, and Shavell, *supra* note 20, at 228-35.

has argued, we might think of financial compensation not as commensurable with many injuries at issue in tort law, and thus not as a means of truly restoring the status quo ante, but less ambitiously as an effort to establish and recognize that a wrong has been done and to deter wrongdoing while ensuring that some redress has been paid. Even if a legal system can do no better, that redress does not fully rectify the wrong, because monetary sums are not commensurable with the relevant injury.[254]

The same ideas underlie an important debate in environmental law, having to do with the appropriate measure of damages for injury to natural resources. The "restoration cost" for, say, a portion of the Alaska seashore may diverge from its "use value," understood as aggregated private willingness to purchase the area in question. Through an important regulation, the Department of the Interior indicated its preference for use value if it was lower than restoration cost.[255] The Court of Appeals for the District of Columbia Circuit invalidated the regulation on the theory that Congress had expressed a preference for restoration.[256] The decision of the court reflects an understanding that those who injure natural resources should be required to restore the status quo ante, not because it is more valuable, but because the public is entitled to have a good that it values in the way that it values natural resources, rather than the so-called cash equivalent.[257]

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may be unwarranted. *See* Croley & Hanson, *supra* note 20, at 59-67. The unwarranted inference is a version of that committed in Viscusi, *supra* note 222, at 362-65 — seeing particular choices as reflecting global or acontextual judgments. *See also* Sen, *supra* note 57, at 206 (rejecting such an inference). Alan Schwartz illuminates this puzzle by describing financial remedies for nonpecuniary losses as involving "substitutes rather than replacements": "Nonpecuniary harms are not replaceable by insurance payments or damage judgments; rather, these transfers are used to purchase substitutes that make up for or assuage the pain of accidents." Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 408 (1988).

254. *See* Radin, *supra* note 243, at 60-61.

255. 43 C.F.R. § 11.35(b)(2) (1987).

256. Ohio v. U.S. Dept. of Interior, 880 F.2d 432, 441 (D.C. Cir. 1989).

257. The court stated:

> The fatal flaw of [the Department of the] Interior's approach, however, is that it assumes that natural resources are fungible goods, just like any other . . . . [But] Congress was skeptical of the ability of human beings to measure the true "value" of a natural resource. Indeed, even the common law recognizes that restoration is the proper remedy for injury to property where measurement of damages by some other method will fail to compensate fully for the injury. . . . [N]atural resources have value that is not readily measured by traditional means.

880 F.2d at 456-57 (footnotes omitted). There are complex relations among restoration cost, use value, option value (the amount people would pay to have an option to see a natural asset), and existence value (the amount that people would pay to ensure continued existence of a good). The latter two measures help respond to people's concerns about the need to replicate the original kind of valuation. The Department of the Interior is now wrestling with these issues. For example, see the proposal in 56 Fed. Reg. 19,756 (1991), using the term *compensable value* to include

G. *Feminism in Law*

An understanding of issues of commensurability, and of diverse kinds of valuation, should help explain a number of claims by and debates among feminists, both inside law and elsewhere. Some of these claims and debates have been inadequately understood in the legal culture, in part because of the importance of kinds of valuation[258] and because of the infrequency with which such kinds are understood to be part of legal theory and practice.

To offer a brief summary: In a statement that has now been frequently quoted (by, among others, MacKinnon herself[259]), Richard Rorty takes Catharine MacKinnon to have claimed that "being a woman is not yet a way of being a human being."[260] What does this mean? It may well mean that women are often not valued in the way that a human being is entitled to be valued. More concretely, we might understand some feminist thought to be insisting that, as human beings, women are entitled to be treated with dignity and respect,[261] and that frequently they are not so treated. Instead women are treated with affection or love, or, much worse, as objects for the use and control of others.

Consider in this regard a frequent response — offered famously by former heavyweight champion Mike Tyson, but also by an astonishing number of other people — to claims of sex discrimination or even sexual assault: "I love women."[262] It is interesting to think about the nature of this response and the reason that it is inadequate. It is tempting, but not sufficient, to say that such responses are insincere or false. Instead the response connotes a high level of valuation or a sort of intense and real appreciation. But the response is obtuse when the

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"all of the public economic values associated with an injured resource, including use values and nonuse values such as option, existence, and bequest values." 56 Fed. Reg. at 19,760. A leading textbook, interestingly, comments that: "the concept of 'compensable value' recognizes that resources are valued for many different reasons, not all of which are reflected accurately in market prices." ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 362 (1992). For subsequent public commentary and updating of the proposed regulation, see 58 Fed. Reg. 39,328 (1993).

258. *See, e.g.*, Hampton, *supra* note 165, at 236-38; *see also* ANDERSON, *supra* note 1, at 8-11, 117-40.

259. *See, e.g.*, Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1299 & n.85 (1991).

260. Richard Rorty, *Feminism and Pragmatism*, 30 MICH. Q. REV. 231 (1989).

261. Of course some feminists have questioned Kantian understandings. *See* NODDINGS, *supra* note 168; Tronto, *supra* note 168.

262. *Tyson Pleads Not Guilty to Rape Charge*, N.Y. TIMES, Sept. 12, 1991, at B18. A recent LEXIS search discovered 124 entries containing the phrase "I love women," many of which were responsive to charges of sexism, sexual discrimination, or sexual assault. Search of LEXIS, Nexis library, Major Papers file (Dec. 27, 1993).

claim is that women have not been treated with basic dignity and respect. The invocation of love or affection, even if sincerely and intensely felt, is unresponsive to the relevant concern, which is about the appropriate kind and not the appropriate level of valuation.

In fact many claims about issues related to sex equality — including the distribution of labor within marriage, pornography, sexual harassment, and abortion — might be taken to be claims that law and social norms should treat women in a certain way, one that involves dignity and respect, or a principle of civic equality. On this account, a distinctive norm underlies the objection to certain forms of sex inequality, and the norm is connected with a claim about proper kinds of valuation.[263] Hence the objection to sexual harassment is that this practice treats women as objects for the enjoyment and use of men. Hence the objection to legal proscriptions on abortion is that the law ought not to use women's reproductive capacities against women's will and for the protection of third parties, at least when it does not similarly use men's capacities. Similarly, the objection to pornography has a good deal to do with the way in which certain forms of sexually explicit material treat women's sexual capacities as objects for the use of others, especially through sexual violence.[264] Thus pornography is challenged not as offensive, but as embodying an improper means of valuing human beings.[265] Similar issues are raised by the sale of sexual and reproductive capacities through markets, as in the practices of prostitution and surrogacy.[266]

A good deal would have to be said in order to support the view that these claims entail any particular legal reform. All I mean to say is that an important strand in recent writing about sex discrimination

263. Compare Locke's assertion, as a governing principle in the State of Nature, that "there cannot be supposed any such *Subordination* among us, that may Authorize us to destroy one another, as if we were made for one another's uses." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 271 (Peter Laslett ed., student ed. 1988) (3d ed. 1698). This is an essentially liberal idea. It shows the deep continuity between certain strands of feminism and the liberal tradition, notwithstanding the purported antiliberalism of some feminist thought. *See, e.g.*, CATHARINE MACKINNON, FEMINISM UNMODIFIED (1987); *cf.* OKIN, *supra* note 33, at 61 ("[A] number of the basic tenets of liberalism . . . have been basic tenets in the development of feminism, too."); Susan M. Okin, *Reason and Feeling in Thinking About Justice*, 99 ETHICS 229 (1989) (drawing connections between Rawls's work and feminist thought).

264. For one such unified treatment of abortion and pornography, see SUNSTEIN, *supra* note 139, ch. 9.

265. *See* MACKINNON, *supra* note 263, at 154 ("To define the pornographic as the 'patently offensive' further misconstrues its harm. . . . [P]ornography, in a feminist view, furthers the idea of the sexual inferiority of women . . . .").

266. *See* Elizabeth Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71 (1990) (arguing that commercial surrogacy improperly commodifies reproductive capacity). *But see* Debra Satz, *Markets in Women's Reproductive Labor*, 21 PHIL. & PUB. AFF. 107 (1992) (questioning the view that reproductive labor is not a commodity).

should be taken to argue that an improper kind of valuation has pervaded norms and law relating to women, and that changes are required that would embody a different kind.

H. *Blocked Exchanges*

An understanding of diverse kinds of valuation helps explain why liberal regimes generally respect voluntary agreements. 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 face of diverse kinds of valuation, it is best to permit people to value as they like.[267]

But even a system that generally respects freedom of contract may block exchanges on several grounds. Typically such grounds involve some form of market failure: a party may lack relevant information, a collective action problem may exist, third parties may be affected, a party may be myopic. But an additional and distinct reason is that some exchanges involve and encourage improper kinds of valuation.

I think that more common arguments stressing distributive considerations or unequal bargaining power often depend, upon reflection, on an unarticulated claim about inappropriate valuation. The claim is that to allow purchase and sale of a good will mean that the good will be wrongly valued in a qualitative sense.[268] Consider, for example, the right to vote. Vote trading is objectionable in part because it would allow inappropriate concentration of political power in the hands of a few. The prohibition therefore overcomes a collective action problem.[269] But perhaps the ban on vote trading also stems from a concern about kinds of valuation. If votes were freely tradable, we would have a different conception of what voting is *for* — about the values that it embodies — and this changed conception would have corrosive effects on politics.

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267. This is a large part of the argument in FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 57-59 (1944):

> The welfare and the happiness of millions cannot be measured on a single scale of less and more. The welfare of people . . . cannot be adequately expressed as a single end . . . . [N]othing but partial scales of value exist — scales which are inevitably different and often inconsistent with each other. From this the individualist concludes that the individuals should be allowed, within defined limits, to follow their own values and preferences rather than somebody else's.

268. These claims are made explicit in Radin, *supra* note 23, at 1863-70, and KELMAN, *supra* note 23, at 77-84.

269. *See* Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 984-88 (1985).

Some reactions to Judge Posner's argument on behalf of a form of "baby selling" stem from a similar concern.[270] Judge Posner contends that a market for babies would serve most of the relevant policies better than does the current system. In some ways his argument is persuasive. Certainly the desire of infertile couples for children would be better satisfied through a market system. But part of the objection to free markets in babies is not quite engaged by Judge Posner. Instead the objection is that a system of purchase and sale would value children in the wrong way. This system would treat human beings as commodities, a view that is itself wrong, and a practice with possible harmful consequences for social valuation in general. This is at most a summary of a complex argument, based partly on uncertain empirical judgments, and it is hardly by itself decisive. But we cannot get an adequate grasp on the problem without seeing this concern.

Or consider a possible application of the widely held view that market incentives are preferable to command-and-control regulation. Might it not be preferable, for example, to allocate tradable racial discrimination rights, so that discriminators, or people who refuse to act affirmatively, can purchase rights from people who do not discriminate or who engage in affirmative action?[271] Suppose it could be shown that an approach of this sort would be more efficient than the approach in the current civil rights laws, and also that it would produce equal or better outcomes in terms of aggregate hiring of minority group members. Even if this were so, it might be thought unacceptable to permit employers to discriminate for a fee, because the way that we do or should value nondiscrimination is inconsistent with granting that permission. This argument might be educative: if discriminators could buy the right to discriminate, perhaps discrimination would not be stigmatized in the way we want. Or it might be expressive: perhaps society would like to condemn discrimination quite apart from consequential arguments.[272]

In coming to terms with the issue of blocked exchanges, some further points are important. As noted, the recognition of diverse kinds of valuation might well be made part of a conception of law that places a high premium on individual liberty and choice. At least as a general rule, the state should not say that one kind of valuation will be required. Within broad outlines, people ought to be permitted to value

270. *See supra* notes 25-26 and accompanying text.

271. *See* Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. (forthcoming 1994). The idea is proposed as satire in DERRICK BELL, FACES AT THE BOTTOM OF THE WELL ch. 5. (1993).

272. Notations to this effect are made in Cooter, *supra* note 271.

as they wish, though we should recognize that any kind of valuation will inevitably be affected by social norms and by law.

Moreover, there is an important difference between urging changes in social norms and urging changes in law. There may be a justified norm against asking a neighbor to mow one's lawn without a law to that effect. Similarly, one might speak on behalf of a powerful norm against certain attitudes toward animals without also recommending laws that, for example, forbid people to eat meat. It is possible to urge people to value animals in a certain way without thinking that the law should require that kind of valuation.

We might understand the distinction between norms and laws in two different ways. First, the distinction might be largely pragmatic. A law imposed on people who do not share the relevant norm may breed frustration and resentment. It may be counterproductive or futile. Second, the difference might be rooted in a principle of liberty, one that calls for a strong presumption in favor of governmental respect for diverse kinds of valuation. A legal mandate may be simply too sectarian or intrusive for a heterogeneous society. Both pragmatism and principle seem to argue in favor of a sharp distinction between norms and law.

There is a final point. Markets are filled with agreements to transfer goods that are not valued simply for use. People purchase music, even if they regard the performances as deserving awe and wonder. They buy human care for their children.[273] They trade the right to see beautiful areas. They purchase pets for whom they feel affection or even love, and whom they hardly regard as solely for human exploitation and use. The objection to the use of markets in certain areas must depend on the view that markets will have adverse effects on existing kinds of valuation, and it is not a simple matter to show when and why this will be the case. For all these reasons, opposition to commensurability, and insistence on diverse kinds of valuation, do not by themselves amount to opposition to market exchange, which is pervaded by choice among goods that participants value in diverse ways.

I. *Legal Reasoning*

A belief in diverse kinds of valuation has consequences for current debates about the actual and appropriate nature of legal reasoning. If it can be shown that a well-functioning system of law is alert to these

273. It is interesting, however, that these exchanges are also regulated by a complex system of norms. It would be odd to tell a babysitter that she will get a premium for being loving, or a reduced rate for being merely affectionate. Implicit deals on this front undoubtedly occur, but the fact that they are only implicit is itself important. *See supra* text accompanying notes 130-31.

diverse kinds of valuation, theories of legislation, administration, and adjudication may be affected.

Consider, for example, economic analysis of law. It is clear that this form of analysis has produced enormous gains in the positive and normative study of law. Nonetheless, the approach has been criticized on many grounds, most familiarly that it is insufficiently attuned to distributive arguments.[274] But perhaps the resistance to economic analysis stems from something quite different and less noticed. In its normative form, economic analysis depends on too thin, flat, and sectarian a conception of value, captured in the notion that legal rules should be designed so as to maximize wealth. The problem with this idea is that the word *wealth* elides qualitative distinctions among the different goods typically at stake in legal disputes. Instead of maximizing wealth, it is desirable to have a highly disaggregated picture of the consequences of legal rules, a picture that enables the judge to see the various goods at stake. This is true not only of the law of free speech and religious liberty, but also of the law of contract and tort. At least under ideal circumstances, it would be good to have a full sense of the qualitatively distinct interests at stake before reaching a decision.

We still lack an account of practical reason in law. But what I have said here offers some considerations in support of analogical reasoning, the conventional method of Anglo-American law. Analogical reasoning, unlike economic analysis, need not insist on assessing plural and diverse social goods according to a single metric. The analogical thinker is alert to the manifold dimensions of social situations and to the many relevant similarities and differences. In picking out relevant similarities, the analogizer does not engage in an act of deduction. Instead she identifies common features in a way that helps constitute both legal and cultural categories, rather than being constrained by some particular theory of value given in advance. Unequipped with or unburdened by a unitary theory of the good or the right, she is in a position to see clearly and for herself the diverse and plural goods that are involved and to make choices among them without reducing them to a single metric.[275] This is one description of the characteristic style

274. *See, e.g.*, Morton Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980).

275. *See* ANDERSON, *supra* note 1, at 91-116; Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993). The distinction between incommensurability and incomparability, *see supra* text accompanying notes 64-65, may well suggest that the absence of commensurability (as I understand it here) does not endanger the claim that there are right answers in law. I cannot, however, discuss that complex issue here. *See* John Mackie, *The Third Theory of Law*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 161, 165 (Marshall Cohen ed.,

of Anglo-American law in its idealized form.

A distinctive feature of analogical thinking is that it is a "bottom-up" approach, building principles of a low or intermediate level of generality from engagement with particular cases. In this respect, it is quite different from "top-down" theories, which test particular judgments by reference to general theory.[276] Because analogy works from particular judgments, it is likely to reflect the plural and diverse goods that people really value. Of course there are nonanalogical approaches that insist on the plurality of goods,[277] and those approaches also have a "top-down" character.

Of course this approach has disadvantages as well. The use of a single metric makes things simple and orderly where they would otherwise be chaotic. In certain areas of the law, this may be a decisive advantage, all things considered. Certainly it has been taken as an important advantage in many areas of contemporary law, in which the displacement of common law courts by legislation has been designed to promote rule-of-law virtues inaccessible to ordinary adjudication.[278]

VI. CHOICES

I have not yet dealt with two major questions. The first involves the choice among different kinds of valuation and, more particularly, the decision whether or not to make things commensurable. The second involves the issue of how to make choices among incommensurable goods. The two questions are obviously related. They are also large and complex; to answer them, we would need to answer many of the major questions in ethical and political theory. As I have emphasized, most answers must be developed in the context of particular problems. I offer only a few notations here.

1984) (questioning Dworkin's right-answer thesis on the grounds that strengths are not always commensurable on a linear scale).

276. *See* Smart, *supra* note 68, at 56:

> In science general principles must be tested by reference to particular facts of observation. In ethics we may well take the opposite attitude, and test our particular moral attitudes by reference to more general ones. The utilitarian can contend that since his principle[] rests on something so simple and natural as generalized benevolence it is more securely founded than our particular feelings, which may be subtly distorted by analogies with similar looking (but in reality totally different) types of case[s], and by all sorts of hangovers from traditional and uncritical ethical thinking.

For discussion of related issues, see Sunstein, *supra* note 275, at 767-90.

277. An example is Sen's "capability approach." *See* AMARTYA SEN, INEQUALITY REEXAMINED 39-55, 73-87 (1992); *see also* Sen, *supra* note 57, at 207-10. Rawls's list of primary goods has similar characteristics. *See* RAWLS, *supra* note 81, at 181.

278. *Cf.* Bruce Ackerman, *The Common Law Constitutionalism of John Marshall Harlan*, 36 N.Y. L. SCH. L. REV. 5 (1991).

A. *Which Kinds of Valuation?*

To come to terms with the question of appropriate kinds of valuation, we should begin by asking whether diversity in kinds is desirable at all. Perhaps we should adopt a unitary kind of valuation, or seek to obtain some sort of commensurability. In many ways this project unites such diverse thinkers as Plato, Bentham, and, in law, Richard Posner.[279] It seems clear that this approach would have many advantages. It would simplify and order decisions by placing the various goods along a single metric. According to one familiar conception of rationality, this step would increase rationality. Would it not be a large improvement if commensurability could be obtained?

Let us put law to one side for the moment and think about claims for unitariness and commensurability in human life generally. It seems obvious that an answer to this question should turn on what leads to a better conception of the human good. There is no transcendental or external standpoint from which to offer this answer. Our evaluation will inevitably be a reflection of what we think. But this should hardly be thought disabling.[280] We might make some progress by considering what the world would be like if kinds of valuation really were unitary or if commensurability really did obtain. In such a world, for example, a loss of friendship or the death of a parent would really be like a loss of money, though undoubtedly a lot of it.[281] An achievement in something that one prizes — like art or music — would be valued in the same way as an increase in net worth, or the birth of a new child, or falling in love, or the relief of human suffering, or the victory of a favorite sports team. Offers of cash exchange would really be evaluated solely on the basis of their amount. The distinction between instrumental and intrinsic goods would collapse, in the sense that many intrinsic goods would become both fungible and instrumental.

A great deal would be lost in such a world.[282] A life with genuine commensurability would be flat and dehumanized. It would eliminate

279. *See supra* notes 2-3 and accompanying text.

280. Note the fallacy of thinking that, without transcendental or external grounds, our evaluations have no basis at all; they are ultimately grounded in human experience, and none the worse for that. *See generally* HILARY PUTNAM, RENEWING PHILOSOPHY (1992).

281. This is related to Putnam's attack on utilitarianism, captured in the tale of the super-Benthamites, whose understanding of experience would not be readily accessible to us. *See supra* note 65.

282. In this vein Williams criticizes utilitarianism for "its great simple-mindedness. . . . [It has] too few thoughts and feelings to match the world as it really is." Williams, *supra* note 88, at 149; *cf.* RAZ, *supra* note 17, at 344 ("There is no need, nor any way, to justify pervasive features of human thought. But there is a need for an explanation which make them intelligible.").

delight, bewilderment, and surprise. It would be inconsistent with an appropriately diversified approach to a good human life. It would eliminate desirable relationships and attitudes. In fact it would be barely recognizable.[283]

On the other hand, nothing in this brief account is fatal to the view that law and public policy sometimes ought to rest on unitary kinds of valuation or on assumptions of commensurability. It is possible to think that under ideal conditions, the best system of valuation is diverse and plural, but that in light of the weaknesses of human institutions and the constant prospect of bias and arbitrariness, public choices should assume a single kind or a unitary metric as the best way of promoting all of the relevant goods.[284] This question cannot be answered a priori or in the abstract. But those who favor legal approaches based on unitary kinds of valuation and commensurability should understand that their approach is best defended as a means of overcoming certain institutional obstacles, and not as reflecting a fully adequate understanding of the relevant problems. I have suggested as well that even if, say, government officials align the diverse effects of regulation along a single metric, they should also provide a disaggregated picture, so that citizens can be aware of qualitative differences and of the various goods at stake.

All this leaves much uncertainty. But it does suggest that, institutional issues aside, we should approve of a large degree of diversity in kinds of valuation. From this it does not follow that any particular kind of valuation is appropriate for any particular sphere. To evaluate kinds of valuation, we also have to think very concretely about what kinds in what places are parts of a good life or a good political system. To come to terms with this question, it would be necessary to say a great deal. For present purposes, a few observations may suffice to give a sense of the sorts of things that might emerge.

Some families exist in which people are valued solely for their use, and this is a pervasive source of deprivation and injustice.[285] A family

283. Thus Wittgenstein:

> Some philosophers (or whatever you like to call them) suffer from what may be called "loss of problems." Then everything seems quite simple to them, no deep problems seem to exist any more, the world becomes broad and flat and loses all depth, and what they write becomes immeasurably shallow and trivial.

LUDWIG WITTGENSTEIN, ZETTEL para. 456 (G.E.M. Anscombe & G.H. von Wright eds. & G.E.M. Anscombe trans., 1967). For Mill's related critique of Bentham, *see supra* note 59.

284. "[Risk analysis] allows many environmental problems to be measured and compared in common terms, and it allows different risk reduction options to be evaluated from a common basis." RELATIVE RISK REDUCTION STRATEGIC COMMITTEE, SCIENCE ADVISORY BD., REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION 2 (1990).

285. *See* Okin, *supra* note 33.

in which reason-giving is the sole or pervasive kind of valuation would have different problems; but it seems clear that it would have problems as well. The bonds that unite people in a family are not adequately captured by the exchange of reasons. But this is not to say that injustice within families cannot be exposed through that exchange. A measure of respect is a condition for a well-functioning relationship between spouses.[286]

So, too, a political system dominated not by reasons but instead by self-interested bargaining may well produce inferior law, and precisely because the absence of reason-giving will fail to uncover difficulties with some of the various proposals.[287] Such a political system will also violate principles of political equality to the extent that it allows the translation of economic disparities into law. A political system that depended on bonds of affection or love would probably prove unworkable, certainly in a large, heterogeneous society.

These various observations are no more than assertions. They are meant simply to point toward the sorts of concrete inquiries that are required for an evaluation of what kinds of valuation are appropriate in what contexts.

B. *Choices Among Incommensurable Goods*

How are choices made among incommensurable goods? How can those choices be assessed? The first point is that there is no algorithm or formula by which to answer this question. If we are looking for a certain sort of answer — the sort characteristic of some believers in commensurability — we will be unable to find it. Relatively little can be said in the abstract. Instead we need to offer detailed descriptions of how such choices are made, and how to tell whether such choices turn out well. Here there are many possible criteria for public and private action, and a mere reference to the existence of incommensurabilities will be unhelpful standing by itself.

The search for criteria may well emphasize the need to secure a form of narrative continuity within a life or within a society. When someone chooses one option over another, it may be because the chosen option makes for coherence over the course of time, whereas the disregarded option, even if attractive, would ensure that things make little or no sense. There is also a connection between different self-understandings and the choice between incommensurable options *A*

286. *See* Hampton, *supra* note 165, at 251.

287. *See* Robert Goodin, *Laundering Preferences, in* THE FOUNDATIONS OF SOCIAL CHOICE THEORY 75 (Jon Elster & Aanund Hylland eds., 1986).

and *B.* The selected option may conform to the agent's preferred self-understanding. To achieve that self-understanding, we need to be clear about what we value most deeply and to make choices that properly express the deepest valuations.[288] Thus, for example, it may be irrational to value a certain amount of cash over spending time with one's family, because this would lead to a self-understanding that is either inconsistent with what has gone before or otherwise indefensible for those asking what a good life contains. Individual and social ideals play a large role in this assessment.[289] These are inadequate and abstract remarks, but they may help explain how choices are made among incommensurables, and how choices tend to go right or wrong.

Some of the same things can be said of law and the public sphere. Suppose that a society is deciding whether to sacrifice a number of jobs in return for protecting an endangered species. No unitary metric can be helpful here. But perhaps the people entrusted with the power of decision will ask, as part of the inquiry, about the society's prevailing ideals, about ways minimally to damage relevant goods, and about what decision best fits with the community's self-understanding as this has been established over time. This is not merely a descriptive inquiry. It involves asking what choice puts that self-understanding in its best or most attractive light. On this view, choice among incommensurables is an act of interpretation, one that involves a dimension of fidelity to the past, but that is also constructive.[290]

In law and politics, a diverse set of standards — liberty, equality, prosperity, excellence, all of these umbrella terms — will be brought to bear on hard cases. A particular goal is to find solutions that will minimally damage the relevant goods. Perhaps an approach that promotes a recognizable form of liberty will only modestly compromise a recognizable conception of equality. Here too there is no escape from close examination of particular cases.

Consider, for example, the issue of surrogacy. It would be plausible to conclude that the legal system ought not to criminalize surrogacy but also ought not to require surrogate mothers to hand over their children to the purchasing parents, at least during a brief period

288. For the view that choice reflects the articulation of value commitments, see Charles Taylor, *Responsibility for Self, in* FREE WILL 111 (Gary Watson ed., 1982). I am suggesting that this point applies to legal and political choice as well. See also the discussion of commitment in Amartya Sen, *Rational Fools, reprinted in* BEYOND SELF-INTEREST 25, 31-43 (Jane J. Mansbridge ed., 1991).

289. *See supra* section I.B.

290. *Cf.* DWORKIN, *supra* note 74, at 45-113 (describing legal interpretation in similar terms).

after birth.[291] Criminalization would entail difficult enforcement problems and might also discourage arrangements that do much good and little harm. We can understand why surrogacy arrangements might be thought to be connected with sex inequality, but the contribution to discrimination is probably too attenuated to justify criminalization. On the other hand, it may be damaging to the birth mother to force her to hand over a child against her will, especially because before the fact it may be quite difficult for her to know exactly what this action entails. The failure of the legal system to order specific performance is unlikely to have serious adverse consequences on prospective participants in such arrangements. This is of course an inadequate treatment of a complex problem. All I mean to do is to suggest some of the lines along which the inquiry might occur. (Compare an approach that would insist on commensurability. Such an approach would be laughably inadequate; it would prevent us from seeing what is really at stake.)

Much of the relevant work here is done in two ways: through analogies and through understanding consequences, mediated as these are through expressive norms. When incommensurable goods are at stake, it is typically asked: What was the resolution of a previous case with similar features? Through this process, people seek to produce vertical and horizontal consistency among their various judgments. This system of testing is designed not to line goods up along a single metric, but to produce the sort of consistency and rigor that characterizes the successful operation of practical reason. The inquiry into consequences avoids monism while still examining the real-world effects of different courses of action. How, for example, will a particular result compromise or promote the relevant goods? This is a characteristic part of practical reasoning in law.

In the context of emissions trading in environmental law, for example, it seems hard to support the empirical claim that the shift from command-and-control government to financial incentives will have serious adverse effects on people's thinking about pollution. Many claims about the educative function of law are actually claims about real-world consequences, understood through expressive norms on which there is no dispute. It is possible to think well about those consequences, and sometimes we can see that the feared effects will not materialize. In this way it is possible to explore whether there will be damage to some of the goods that are allegedly threatened by certain

291. *See* JONATHAN GLOVER, ETHICS OF NEW REPRODUCTIVE TECHNOLOGIES: THE GLOVER REPORT TO THE EUROPEAN COMMISSION 77-78, 151 (1989).

initiatives. Of course it is true that, on some issues, we will lack relevant data.

C. *A Note on Tragedy*

There is a final point. A recognition of incommensurability is necessary to keep alive the sense of tragedy, and in certain ways this is an individual and collective good, perhaps especially in law.[292] Recognition that all outcomes "impose costs" is not quite the same thing as a sense of tragedy. Though I can hardly discuss this complex matter here, the very notion of tragedy seems to embody a commitment to an understanding of the uniqueness of certain goods, or the irreversibility and irreplaceability of certain losses.[293] If tragedy were understood to mean instead high costs, or the existence of losses that accompany benefits (Kaldor-Hicks rather than Pareto improvements, for example), the sense of tragedy would be dramatically changed. Here too we would not have a simple redescription of the problem.

A sense of tragedy is an individual good because it accompanies certain relationships and attitudes that are an important part of a good life. It is a collective good for this reason and also because it focuses attention on the fact that, even when the law is doing the right thing, all things considered, much may be lost as well. This is valuable in, for example, current thinking about the environment and occupational safety. In the presence of tragedy, there is a large incentive to create social arrangements so that people do not face that prospect.

This is so with respect to pervasive conflicts among valuable things — employment versus environment, diminishing poverty versus national security, attention to family versus attention to work. Such conflicts themselves may be an artifact of legal and social arrangements. On monistic theories of value, it is easy to believe that nothing is really lost — or at least nothing that is unique, intrinsically valuable, or irretrievable. This understanding diminishes the incentive to find a solution that will not create tragic choices. When tragedy is understood to be present, there is a constant and conspicuous social interest in seeking solutions that simultaneously promote all of the relevant goods.

At its best, the Anglo-American legal system is alert to the fact that diverse goods are at stake in many disputes. Judges know that not all of these goods can simultaneously be preserved. This awareness is itself desirable because of the pressure that it tends to exert on

292. *Cf.* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 57-64 (1978).

293. For discussions of the defining characteristics of tragedy, *see id. See also* MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS 23-84 (1986) (discussing the role of conflict among ethical claims in Greek tragedy).

judges and legislators as well. A redescription of tragedy in terms that assume a monistic theory of value would not create the same sort of pressure.

CONCLUSION

Human beings value goods, events, and relationships in diverse and plural ways. Sometimes we face serious problems of commensurability. This problem does not entail paralysis, indeterminacy, or arbitrariness. Decisions are made all the time among incommensurable goods, at the personal, social, and legal levels, and these decisions may well be rational or irrational. It might even be possible to convert our kinds of valuation for use on a unitary metric, or to make goods, events, and relationships commensurable. But if what I have said here is correct, this would be a sort of tragedy, not least because it would make the very fact of tragedy puzzling or even incomprehensible.

The fact of diverse kinds of valuation, and the existence of incommensurable goods, have not yet played a major role in legal theory. But these issues underlie a surprisingly wide range of legal disputes. No unitary "top-down" theory can account for the complexities of most controversies in law. Perhaps most dramatically, the liberal insistence on social differentiation — markets, families, religious groups, politics, and more — is best justified as an attempt to make a space for distinct kinds of valuation and to give each of them its appropriate place in human life. The Establishment and Equal Protection Clauses are centrally concerned with regulating kinds of valuation. In environmental law, the major issue of contestation is frequently the appropriate kind of valuation of environmental amenities; if beaches, species, and mountains were valued solely for their use, we would not be able to understand them in the way that we now do.

The same issue arises in the law of contract, especially in the award of specific performance remedies. It also plays a role in thinking about the point of damage remedies in tort. In both settings, it is wrong to ignore the highly contextual nature of choice and to act as if a particular decision — not to take out insurance for a certain danger, to accept a job at a certain risk premium — reflects some global judgment simply adaptable for policy use. No global judgment need underlie particular choices. Many blocked exchanges, moreover, attest to social resistance to commensurability. I have also suggested that attention to these issues shows that cost-benefit analysis is obtuse, because it aligns qualitatively distinct goods along a single metric. Instead of cost-benefit analysis — which might of course be helpful in our at most second-best world — what is desirable is a disaggregated picture of the effects

of different courses of action, so that officials and citizens can see those effects for themselves.

In disputes over free speech, large questions are whether speech ought to be valued in the same way as commodities traded on markets, and whether free speech values are unitary or plural. I have suggested that we ought not to treat free speech as an ordinary commodity and that we should recognize the diverse ends it embodies. In contemporary feminism, an important and basic claim is that women have not been valued in the right way — that is, they have been valued through love and affection, and for use, but too infrequently treated with dignity and respect. This claim helps explain current disputes over pornography, surrogacy, prostitution, and the division of labor within the family. Various arguments for revision of existing understandings — market thinking for families and politics, extension of the metaphor of the family, the view that reason-giving ought to occupy all social spheres — might be seen as attempts to renovate current forms of valuation in favor of a new or even unitary kind.

An especially large task for legal theory is to offer an adequate description of how, in legal contexts, choices should be made among incommensurable goods and among different possible kinds of valuation. I have at best started to undertake that task here. There are limits to how much can be said in the abstract; a close inspection of particular contexts will be indispensable to this endeavor. But I conclude with two large suggestions. An insistence on incommensurability and on diverse kinds of valuation is one of the most important conclusions emerging from the study of Anglo-American legal practice, and an appreciation of those diverse kinds will yield major gains to those seeking to understand and to evaluate both public and private law.