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Adjudication and the Problems of Incommensurability

Brett G. Scharffs

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ADJUDICATION AND THE PROBLEMS OF INCOMMENSURABILITY

BRETT G. SCHARFFS*

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[A]ll law is universal but about some things it is not possible to make a universal statement which will be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. . . . [A]bout some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite, the rule also is indefinite

– Aristotle¹

Real dilemmas depend on various values' making autonomous, mutually irreducible demands upon us.

– David Wiggins²

To make such an omelette, there is surely no limit to the number of eggs that should be broken – that was the faith of Lenin, of Trotsky, of Mao, for all I know of Pol Pot.

– Isaiah Berlin³

INTRODUCTION

Oftentimes we find ourselves exasperated by reason's inability definitively to answer—or more precisely *our* inability to reason definitively to answers regarding—life's most pressing practical questions.⁴ This vexation is felt acutely when we try to convince

1. ARISTOTLE, *NICHOMACHEAN ETHICS*, Book V, Ch. 10, 1137b12-30, in *A NEW ARISTOTLE READER* (J.L. Ackrill ed., 1987).

2. David Wiggins, *Incommensurability: Four Proposals*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 52, 64 (Ruth Chang ed., 1997).

3. ISAAH BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* 15 (Henry Hardy ed., 1991).

4. Ronald Dworkin is perhaps the most articulate and persistent defender of the view that in the legal context, at least, there is usually one distinctly "correct" answer. See RONALD DWORKIN, *LAW'S EMPIRE* (1986); Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1, 30-32 (1978); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996) [hereinafter Dworkin, *Objectivity and Truth*]; see also Leo Katz, *Incommensurable Choices and the Problem of Moral Ignorance*, 146 U. PA. L. REV. 1465

others of good will and intelligence that a certain course of action is right or best, only to find that they remain unpersuaded by our best reasons and explanations.⁵ But this frustration occurs intrapersonally as well as interpersonally. Sometimes we ourselves remain uncertain whether our own best arguments and rationales provide a sufficient basis for choosing one alternative over another.⁶ We often feel a nagging suspicion that we are choosing and acting without being certain that our choices are correct or best.⁷

(1998) (arguing that simply being uninformed is often mistaken for problems of incommensurability).

5. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Sherman J. Clark, *Literate Lawyering: An Essay on Imagination and Persuasion*, 30 RUTGERS L.J. 575 (1999); Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677 (1999). John Rawls and Cass Sunstein have each argued that it is possible to persuade one another even when theoretical disagreement persists. See JOHN RAWLS, *POLITICAL LIBERALISM* 133-72 (1993) (discussing the idea of overlapping consensus); CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 46-47 (1996) (comparing "incompletely theorized agreements" to "overlapping consensus"); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233 (1989); John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987); Cass R. Sunstein, *From Consumer Sovereignty to Cost-Benefit Analysis: An Incompletely Theorized Agreement?*, 23 HARV. J.L. & PUB. POL'Y 203 (1999); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995) (conceptualizing adjudication as search for "incompletely theorized agreements").

6. See Richard Craswell, *Incommensurability, Welfare Economics, and the Law*, 146 U. PA. L. REV. 1419, 1426 (1998) (noting that utility "functions simply report the outcome or result" of choice "without trying to report anything about the reasons that might justify that outcome"); Richard Warner, *Does Incommensurability Matter? Incommensurability and Public Policy*, 146 U. PA. L. REV. 1287, 1321 (1998) (noting difficulty of producing relevant comparison of reasons to justify choice).

7. See Ruth Chang, *Comparison and the Justification of Choice*, 146 U. PA. L. REV. 1569, 1584-85 (1998) (discussing difficulty of justifying choices and criticizing maximization as pragmatic policy for yielding justified choice in the face of uncertainty); Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 15 n.3 ("To say that what I ought to do depends on the reasons that apply to me is not to say that the justification of everything I do is settled by reason and reason alone. There are many choices I am justified in making for which I cannot offer conclusory reasons. Still, reasons figure prominently in determining what I ought to do."); John Freeman, *Cognitive Dissonance and You*, 11-DEC. S.C. LAW 11 (1999). Justification in the public realm is even more difficult. See RAWLS, *supra* note 5, at 215-16 (arguing that justified political choice rests upon public reasons); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2193 (1990) (arguing that in a political democracy, "choices must be justified through publicly articulable and acceptable reasons"); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1544 (1988) ("Under republican approaches . . . , laws must be supported by argument and reasons Political actors must justify their choices by appealing to a broader public good.").

Nowhere should this concern us more than in the law, where the choices and outcomes of at least some actors, notably judges and prosecutors, matter: A judge decides and someone loses life, liberty, or property.⁸ Such uncertainty is felt acutely by first-year law students who often feel as if they haven't a clue how a judge is going to decide a given case,⁹ but it is also felt by experts, such as experienced observers trying to predict how the Supreme Court will decide a particular case.¹⁰ Such uncertainty is even—perhaps especially—felt by judges.¹¹

8. The classic account of the inveterately violent nature of the law was articulated by Robert Cover in *Violence and the Word*, 95 YALE L.J. 1601 (1986), reprinted in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 203 (Martha Minow et al. eds., 1992); see also Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); E. Nathaniel Gates, *Justice Stillborn: Lies, Lacunae, Incommensurability, and the Judicial Role*, 19 CARDOZO L. REV. 971 (1997); Richard K. Sherwin, *Law, Violence, and Illiberal Belief*, 78 GEO. L.J. 1785 (1990); Robin L. West, *Adjudication is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203 (1987).

9. For accounts of the disorientation experienced by first-year law students, see, for example, CHRIS GOODRICH, ANARCHY AND ELEGANCE (1991); RICHARD D. KAHLENBERG, BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL (1992); K.N. LEWELLYN, THE BRAMBLEBUSH: SOME LECTURES ON LAW AND ITS STUDY (1930); SCOTT TUROW, ONE L (1988).

10. See e.g., Peter Aronson, *Supreme Court's Qui Tam Case is Having An Impact: With Ruling Months Off, Some Lawyers Seek to Delay Old Cases, Reject New Ones*, NAT'L L.J., Jan. 20, 1999, at A9 (deciding whether to pursue cases requires "predict[ing] what the Supreme Court will do—no easy task"); Peter Schmidt, *Supreme Court Showdown Over Student Speech: Do Mandatory Fees at Public Colleges Buttress or Trample the First Amendment?*, CHRON. HIGHER EDUC., Nov. 12, 1999, at A31, A32 (stating, in case concerning whether mandatory fees at public colleges violate First Amendment, "[l]egal analysts say the issues raised . . . make the Supreme Court's decision, and its impact, exceptionally hard to predict"); Daniel Wise, *Forecast of Appellate Term Judges' Views Not Clear*, N.Y. L.J., Feb. 24, 2000, at 1.

11. See BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 8 (1977) ("I have not encountered a single lawyer, judge, or scholar who views existing case-law [on takings] as anything but a chaos of confused argument . . ."); JEROME FRANK, LAW AND THE MODERN MIND 133-34 (1930) ("[T]he hope for complete uniformity, certainty, continuity in law . . . is gone except to the extent that the personalities of all judges will be substantially alike, to the extent that the judges will have substantially identical mental and emotional habits."); Daniel J. Kornstein, *The Double Life of Wallace Stevens: Is Law Ever the "Necessary Angel" of Creative Art?*, 41 N.Y.L. SCH. L. REV. 1187, 1291 (1997) (describing Justice Oliver Wendell Holmes' doubt about his choice of a legal career); Judge Karen Nelson Moore, *Justice Harry A. Blackmun: The Model Judge*, 26 HASTINGS CONST. L.Q. 5, 7 (1998) (arguing that Justice Blackmun was a model judge in part because he was willing to reassess the correctness of earlier positions); Adrian Vermeule, *Interpretive Choice* 75 N.Y.U. L. REV. 74 (2000) (discussing judicial choice in selecting doctrines of statutory interpretation and discussing judicial choice in face of uncertainty); Charles Alan Wright, *A Modern Hamlet in the Judicial Pantheon*, 93 MICH. L. REV. 1841, 1844 (1995) (reviewing GERALD GUNTHER, LEARNED HAND:

Recent efforts to understand and evaluate the sources and nature of the limits on our ability to reason decisively and find uniquely correct outcomes or decisions have focused on the related concepts of incommensurability and incomparability.¹² The problems of incommensurability arise when we try to compare plural, irreducible, and conflicting values, or choose between options that exhibit or will result in the realization of plural, irreducible, and conflicting values.¹³

Incommensurability has been the focus of a sophisticated and technical debate in academic philosophy, where several books have been devoted to the subject.¹⁴ Law professors have even gotten involved in the debate; for example, the *University of Pennsylvania Law Review* recently published a 561-page symposium on the topic "Law and Incommensurability."¹⁵

THE MAN AND THE JUDGE (1994)) ("In spite of being a modern Hamlet—or more likely, because of it—Learned Hand is firmly enshrined in the small group of judges who universally are regarded as great.").

12. In addition to the recent collection of essays edited by Ruth Chang and the University of Pennsylvania Symposium on Law and Incommensurability, there have been several noteworthy contributions to the discussion of incommensurability and incomparability. See e.g., ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); MARTHA C. NUSSBAUM, *Plato on Commensurability and Desire*, in *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 106 (1990); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); HENRY S. RICHARDSON, *PRACTICAL REASONING ABOUT FINAL ENDS* (1994); MICHAEL STOCKER, *PLURAL AND CONFLICTING VALUES* (1990); Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683; James Griffin, *Are There Incommensurable Values?*, 7 PHIL. & PUB. AFF. 39 (1977); Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1199-203 (1997); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

13. Stated simply, to maintain that two values (such as justice and mercy) are incommensurable is to say that the values are plural, they sometimes conflict with each other (doing justice may be incompatible with being merciful), and are not reducible to a single common value (such as money or utility) that exhausts what is important about each. This is an initial and imprecise explanation of the meaning of incommensurability and the problems of incommensurability. See *infra* Part II.A.1 for a more precise definition of incommensurability.

14. See, e.g., JOHN BROOME, *WEIGHING GOODS: EQUALITY, UNCERTAINTY AND TIME* (1991); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* ch. 5 (1980); JAMES GRIFFIN, *VALUE JUDGEMENT: IMPROVING OUR ETHICAL BELIEFS* (1996); RAZ, *supra* note 12, at ch. 13; RICHARDSON, *supra* note 12; STOCKER, *supra* note 12; DAVID WIGGINS, *NEEDS, VALUES, TRUTH* 215-67 (1991).

15. Symposium, *Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998) (collecting nineteen articles and comments about the problems of incommensurability).

In the face of this onslaught of analysis of the problems of incommensurability, one might expect that a consensus would have emerged as to what "incommensurability" means and what its implications are for practical reason.¹⁶ Although there is considerable overlap in usage,¹⁷ and although some common ground does appear to be emerging, reading the literature might give one the feeling that this is a debate about to collapse from its own weight.

If progress is to be made in our conceptualization and analysis of the problems of incommensurability, the law would appear to be a particularly promising place to focus our energies.¹⁸ This is because the law represents a complex social enterprise involving a large number of actors across a long period of time, where reasons of a discordant and heterogeneous nature are marshaled and cited in defense of particular choices or outcomes that further the realization of some among a variety of plural and conflicting values. It is also a social practice valuing outcomes that are correct, or at least predictable, reasonably certain, and knowable.¹⁹

My goal in this Article is modest. It is to give an introduction to the problems of incommensurability and try to explain why we should care about them.²⁰ I also propose to examine the law, and in particular adjudication, as a laboratory in which to study and draw conclusions about the problems of incommensurability.²¹ I hope to

16. See Matthew Adler, *Law and Incommensurability: Introduction*, 146 U. PA. L. REV. 1169, 1184 (1998):

The topic of law and incommensurability is, as yet, a fairly new one. The participants in the Symposium come to no consensus about the specific implications of incommensurability for law. Indeed, they come to no consensus about the best or most perspicuous definition of "incommensurability." But it is clear that incommensurability—however precisely defined—is a problem that properly engages sustained attention by legal scholars.

17. See definition of incommensurability *infra* Part II.A.1 and accompanying notes discussing alternative definitions.

18. See Cass R. Sunstein, *Incommensurability and Kinds of Valuation: Some Applications in Law*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 2, at 234; Symposium, *supra* note 15, at 1169-731.

19. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("It is said that one of emperor Nero's nasty practices was to post his edicts high on the columns so that they would be harder to read and easier to transgress.").

20. See *infra* Parts I-III.

21. See *infra* Part IV.

elucidate both what one can learn from the law about the nature of the problems of incommensurability and how we can constructively respond to those problems. I also hope to shed light on what judges and others can learn from a deeper understanding of the problems of incommensurability, and what the implications of those problems might be for the way judges go about deciding cases.

Judges routinely seek to accomplish the impossible—to commensurate incommensurable values. That they attempt to do so with regularity says something important about the problems of incommensurability, namely that such problems do not foreclose reasoned deliberation and choice. But if commensurating incommensurables really is impossible, then this tells us something important about adjudication, namely that it must remain somewhat tentative, open to reevaluation and reassessment, and that judges should approach their work with an open mind, creativity, and humility.

Part I is an introduction to the problems of incommensurability. My purpose is to explain to those who are not familiar with the debates about incommensurability, what incommensurability is, and why we should be concerned about it. I suggest several reasons to support the view that values are plural and sometimes conflict. This leads one to conclude that the problems of incommensurability pose real challenges to our ability to engage in practical reason, especially our ability to make and defend our choices as correct or best.²² I also describe three types of responses to the problems of incommensurability and suggest that an approach based upon what Aristotle called practical wisdom is the most promising approach.²³

Having provided an introduction to the problems of incommensurability, Part II seeks to provide straightforward, nontechnical definitions for several related and easily-confused terms, including “incommensurability,” “incomparability,” “impossibility,” “incompatibility,” “uncomputability,” and “uncertainty.”²⁴ Definitions of these terms are often extremely technical and sometimes serve to obscure, rather than illuminate,

22. See *infra* Part I.A.

23. See *infra* Part I.B.

24. See *infra* Part II.A-B.

the problems of incommensurability.²⁵ A large part of the confusion and controversy that exists in the debates over whether values are incommensurable, and what this means for practical reason, can be traced to the multiple, perplexing, and sometimes misguided definitions of incommensurability that have been proposed. For example, "incommensurability" and "incomparability" are often treated as synonyms, which leads to unfortunate conclusions.²⁶ Our ability to conduct a fruitful analysis of the limits of reason when dealing with plural and conflicting values will be greatly enhanced if we speak carefully about these terms.²⁷

In Part III, I argue that it is possible to think rationally about, and make reasoned choices between, options involving plural and conflicting values. Having defined these terms, it is possible to identify with greater clarity what I call the "problems of incommensurability"²⁸ and several important "keys" to unlocking these problems.

The first key to unlocking the problems of incommensurability, built upon the effort to clearly define and differentiate between related concepts, is the distinction between incommensurability and incomparability.²⁹ I argue that incommensurable values and choices that vindicate incommensurable values are ubiquitous. In contrast, choices that are genuinely incomparable are extremely rare. When we do not distinguish between incommensurability and incomparability, or if the distinction is drawn poorly, the problems of incommensurability can easily be misconstrued or exaggerated.³⁰

The commonplace nature of incommensurable values has important implications for practical rationality, including the confidence with which we can assert conclusions, the breadth of the conclusions we can assert, the specter of regret, and the importance of keeping an open mind characterized by an attitude of humility.³¹

25. See *infra* Part II.B and accompanying notes.

26. See *id.*

27. See *infra* Part II.B.

28. See *infra* Part III.A.

29. See *infra* Part III.B.

30. See *infra* Part III.A.

31. See Michael Stocker, *Abstract and Concrete Value: Plurality, Conflict, and Maximization*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 2, at 196, 198-99 (arguing that the reality of incommensurable values helps us

Conversely, I argue that incomparable values and choices that vindicate incomparable values are very rare. This also has important implications for practical rationality, including the possibility of shared practical reasonableness that transcends the differences (personal, cultural, etc.) that separate people.³² I also consider the problems of incommensurability in the context of choices that reflect radically different values, where genuine incomparability might arise.³³

The second key to unlocking the problems of incommensurability can be found in thinking carefully about what we are doing when we seek to defend our judgments as "best" or "correct."³⁴ I suggest that the problems of incommensurability are exaggerated by focusing unduly on which option, among two or more, is the "best," all things considered (ATC). For convenience, I sometimes refer to this as an ATC judgment. What are we asserting when we claim that a choice is best or correct, ATC? What facts are necessary for us to claim that a judgment is best, ATC? Under what circumstances is it important that we justify our judgments as being ATC?

Much pessimism about reason's ability to give reliable guidance in situations that demand a choice among alternatives rests upon our tendency to focus exclusively on ATC judgments, often without first clarifying what it means to make an ATC judgment.³⁵ Frequently, when we are faced with a practical decision, we need to do something other than make an ATC judgment, and that something is often much more straightforward and simple than making an ATC judgment. Even when an ATC judgment is called for, ATC judgments are on a better rational footing than we may have imagined. In adjudication, of course, often there is no getting around the need for giving ATC judgments, decisions that result in real-world consequences for particular people.³⁶ For this reason, we should expect in the practice of adjudicative decision making to be

understand why it might be appropriate to feel regret, or compunction, even when we act in ways that we believe to be correct).

32. See *infra*, Part II.A.2.

33. See *infra* Part III.C.

34. See *infra* Part III.D.

35. See *infra* Part III.D.

36. See *infra* Part IV.A.

able to identify sophisticated and subtle mechanisms for arriving at ATC judgments. Nevertheless, even adjudicative decisions are usually the result of a judgment that is not of the ATC variety.

In Part IV, I suggest that the law provides a useful laboratory for examining the problems of incommensurability, both for coming to an understanding of the pervasiveness and troublesomeness of incommensurable values and choices, and also with respect to the resources that we have available to reason in meaningful and powerful ways about values that are incommensurable.

Replacing weaker with stronger metaphors as a means for understanding how we reason about plural and conflicting values is the third key to unlocking the problems of incommensurability.³⁷ I suggest that much of our thinking about reasoning about incommensurables rests upon insufficient metaphors. Our primary metaphors for reasoning about values involve, on the one hand, images of maximizing some particular value,³⁸ and on the other, images of weighing, balancing, and measuring.³⁹ These metaphors are both powerful and problematic. Their power lies in their promise to provide objective and quantifiable answers to practical choices. The problem is that these very metaphors presuppose the commensurability of the values being weighed, balanced, and measured. It is very difficult to make sense of how we might reason about incommensurable values when the metaphors we are driven to employ presuppose commensurability. The use and limits of maximizing and weighing metaphors is also very evident in judicial decision making and justification. The problems of incommensurability are at the root of much of the discomfort we feel, or should feel, with judicial maximizing and balancing analyses.

I suggest several alternative metaphors for understanding what is involved in reasoning about incommensurables.⁴⁰ The first is an analysis of what is involved in perception; I discuss color perception as an example.⁴¹ A second metaphor emphasizes the idea that

37. See *infra* Part IV.A.

38. See *infra* Part IV.B.1

39. See *infra* Part IV.B.2.

40. See *infra* Part IV.C.

41. See *infra* Part IV.C.1.

alternatives can be evaluated in terms of "recipes" of values, rather than based upon a paradigm that mandates maximizing a relevant value.⁴² A third metaphor was suggested by the pragmatist philosopher C.S. Pierce, who compares "chains" of reason with "cables" of reason.⁴³ I argue that, when reasoning about practical choices, it is helpful to understand the enterprise as one of constructing a "cable" of reason, with mutually reinforcing strands, rather than to conceptualize our task as one of constructing a logical "chain" that is only as strong as its weakest link. A fourth metaphor is the notion of "craft," a concept that Aristotle contrasts with practical wisdom, but that I suggest should actually be integrated with practical wisdom for conceptualizing adjudication.⁴⁴ Each of these metaphors is present in judicial reasoning. From adjudication we can learn much about how each of these metaphors assists us in the task of reasoning about incommensurables.

In Part V, I conclude with a plea for good will and tolerance as we seek to reason together and persuade each other in the public square. Although the commonplace and widespread nature of incommensurable values ensures that people of good will and intelligence will disagree with each other about issues large and small, understanding the resources of practical reasonableness that are available should enable us to conduct our disagreements in a manner that need not be destructive of civil public discourse.

In the end, my analysis is not an unrestrained endorsement of reason's ability to enable us to calculate the uniquely correct choice in all practical matters. In fact, although I believe it is usually possible to ascertain better or worse alternatives in most practical choice situations, it is sometimes impossible or very difficult to find the single correct choice, especially when options are not severely limited by circumstance. This account is meant to be an impassioned defense of the view that reason holds a valuable place in practical deliberation and choice, including situations involving plural, irreducible, and conflicting values. In fact, choices involving plural, irreducible, and conflicting values present occasions when our powers of reason and imagination are most remarkable, most

42. See *infra* Part IV.C.2.

43. See *infra* Part IV.C.3.

44. See *infra* Part IV.C.5.

fruitful, and most inspiring. It is through deliberating about these choices that we glimpse and experience an important part of what it means to be human.

I. SHOULD WE CARE ABOUT THE "PROBLEMS" OF INCOMMENSURABILITY?

A. The Incommensurability Thesis

What I call the "Incommensurability Thesis" maintains that values are plural, sometimes conflict, and cannot always be reconciled or simultaneously realized. Realizing one value can sometimes only be done at the cost of sacrificing some other value. It is for this reason that *choices*, as well as values, may be incommensurable.⁴⁵ To some, the incommensurability of values will be intuitively obvious. Others will question whether values really are incommensurable; perhaps plurality and conflict are only apparent because of our failure to adequately conceptualize or reason about such values.

What can be said in defense of the Incommensurability Thesis? I briefly discuss three perspectives on the question of whether values are sometimes incommensurable. The first perspective is Isaiah Berlin's critique of value monism; the second is a reflection about the nature and purpose of war; and the third is an introductory comment concerning what we might learn about incommensurability from law and adjudication.

1. Isaiah Berlin and the Possibility of a Final Solution

Perhaps the most moving commentary ever written regarding the plural and conflicting nature of values is found in the final section of Isaiah Berlin's celebrated essay, "Two Concepts of Liberty."⁴⁶ To

45. It does not ultimately matter whether we focus on the incommensurability of "values," or on the incommensurability of "choices" that are the bearers of values that are incommensurable. The question of whether justified choice between alternatives exists remains in either case. See Ruth Chang, *Introduction to INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON*, *supra* note 2, at 1.

46. ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 118 (1969).

my mind, these half-dozen pages contain some of the most searing ideas communicated in the twentieth century. Berlin begins this section with an assertion that is sweeping in its scope and devastating in its implications:

One belief, more than any other, is responsible for the slaughter of individuals on the altars of the great historical ideals—justice or progress or the happiness of future generations, or the sacred mission or emancipation of a nation or race or class, or even liberty itself, which demands the sacrifice of individuals for the freedom of society. This is the belief that somewhere, in the past or in the future, in divine revelation or in the mind of an individual thinker, in the pronouncements of history or science, or in the simple heart of an uncorrupted good man, there is a *final solution*. This ancient faith rests on the conviction that all the positive values in which men have believed must, in the end, be *compatible*, and perhaps even *entail* one another.⁴⁷

Written in the decade following the Second World War, it is impossible to suppose that Berlin's allusion to the Nazi's monistic "final solution" was anything less than coldly calculated.⁴⁸ But Berlin's target was not some particular value monism, but the very possibility of monism. In an introduction to *Four Essays On Liberty*, written in response to various critics, Berlin assails all "[s]ingle-minded monists, ruthless fanatics, men possessed by an all-embracing coherent vision," for their inability to "know the doubts and agonies of those who cannot wholly blind themselves to reality."⁴⁹

Berlin insists that some values are not compatible. Values often conflict, sometimes violently, and cannot all be harmonized or reconciled. The realization of some values "may in principle make the fulfillment of others impossible."⁵⁰ In fact, Berlin suggests, it is the inevitability of conflict between independently desirable values that makes freedom and choice so important:

47. *Id.* at 167 (emphasis added).

48. That Berlin had Hitler in mind is even more clear in a later essay. See BERLIN, *supra* note 3, at 225.

49. BERLIN, *supra* note 46, at lv.

50. *Id.* at 168.

The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others. Indeed, it is because this is their situation that men place such immense value upon the freedom to choose; for if they had assurance that in some perfect state, realizable by men on earth, no ends pursued by them would ever be in conflict, the necessity and agony of choice would disappear, and with it the central importance of the freedom to choose.⁵¹

Pluralism, and with it a commitment to negative⁵² liberty, is preferable to monism, Berlin argues, because "[i]t is truer, because it does, at least, recognize the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another."⁵³ Berlin points out that the assumption that all values can be graded on a single metric or scale makes the mistake of representing "moral decision as an operation which a slide-rule could, in principle, perform."⁵⁴ In other words, if all value is unitary, if all value can be reduced to a single quantum of measurement, then moral reasoning is simply a matter of calculation. This is not to say that the calculations will be simple, but that the nature of the problem is simply one of quantification.

In spite of the rhetorical force of Berlin's observations, he does not systematically establish that values are plural, much less incommensurable. Berlin does suggest several examples of values that he thinks are commonly understood to conflict. "It is a commonplace that neither political equality nor efficient organization nor social justice is compatible with more than a modicum of individual liberty, and certainly not with unrestricted *laissez-faire*."⁵⁵ This example of incompatible values is followed immediately by others—"justice and generosity, public and private

51. *Id.*

52. Isaiah Berlin distinguished positive and negative freedom in *Two Concepts of Liberty*, in BERLIN, *supra* note 46, at 118, 121-34.

53. *Id.* at 171.

54. *Id.*

55. *Id.* at 167.

loyalties, the demands of genius and the claims of society, can conflict violently with each other."⁵⁶

But these and other similar examples do not necessarily prove that values are plural and conflicting, nor do they establish that choices will necessarily involve conflicts between plural and conflicting values. Perhaps, for example, we only think justice and generosity conflict because we have an inadequate conception of one or both of these concepts, or because our imagination or ability to synthesize these values is insufficient. The absence of argumentation to establish that these values are really incompatible or in conflict with each other can perhaps be explained by Berlin's belief that the reality of such conflicts is "commonplace" and would readily be recognized as such by his readers. Another possible explanation is that perhaps it is extremely difficult, if not impossible, to establish conclusively that values are plural. Perhaps the plurality and conflicting nature of values that we identify as independently important is something we "see," confirmed by reflecting upon the important life decisions that are components of the life of any person or community. If this is true, all Berlin can do is ask us to open our eyes and not be wholly blind to reality.⁵⁷

I side with Berlin when it comes to defending the reality of plural and conflicting values. For many of us, we need only look inward for examples of difficult choices that involved plural and conflicting values. Nevertheless, it must be acknowledged that proving that values are plural and conflicting is notoriously difficult.

2. *War and Monism*

One example of the plural and conflicting nature of values, suggested by Berlin's reference to the Nazi's mistaken belief in a "final solution," is war. In war, one side often finds itself pitted against an adversary who is self-consciously committed to a monistic ideal, a supreme value or "final solution" that is used to justify the violence and death that war necessarily inflicts. Waging war and inflicting costs and casualties on the other side can be

56. *Id.*

57. *See id.* at lv.

viewed as an extreme way of "persuading" one's adversaries that they are not really monists after all.

If, for example, the Nazis were devoted to a particular noxious brand of monism, based upon theories of racial superiority and national destiny, then the Allies' actions can be understood as an effort to convince the Germans that they were not so devoted to this monistic ideal that they were willing to give up everything in furtherance of that ideal. Some costs are too high, even in pursuit of a self-styled utopia or "final solution." From the point of view of an incommensurabilist, war can be seen, in part, as an effort to convince one's adversaries that they are committed to ideals and values, even if only self-preservation, that are sufficiently important that they justify the abandonment of the ideals and values that seem to justify the adversaries' commitment to waging war. War is the ultimate exercise in persuading would-be monists that they are not monists after all.

3. *Law and Incommensurability*

One of the primary themes of this Article is that in the law we see both evidence of incommensurability of values and examples of many of the resources we have for making and justifying decisions in the face of incommensurable values. Justice and mercy, efficiency and due process, original intent and current needs are just a few of the values that come into conflict in the law. When we consider the problems of incommensurability from the perspective of law, several observations are suggested. These suggestions will be developed in greater detail below.⁵⁸ First, the problems of incommensurability are ubiquitous. The law often seeks to weigh and balance values that are heterogeneous and sometimes incommensurable. Second, the problems of incommensurability in the law do not foreclose the possibility of making choices that are rationally defensible. Although the problems of incommensurability are real, incommensurable values do not stop us from making and defending choices as correct and defensible. Indeed, the law provides a rich variety of resources for dealing with the problems of reasoning about incommensurables. Third, due in part to the problems of

58. See *infra* Part IV.

incommensurability, answers to legal questions often must remain somewhat tentative or contestable, subject to revision and correction.

B. Responses to the Incommensurability Thesis

There are several foreseeable responses to the Incommensurability Thesis. Two responses, in particular, warrant mention because they are seductive as well as misguided.

1. Two Temptations

The first temptation is to deny the premise and assert a single monistic value that subsumes, or at least stands as a surrogate for, all other values and, perhaps, to insist on our ability to maximize that supreme or ultimate value.⁵⁹ The second temptation is to throw up our hands in the face of plural and conflicting values and abandon the project of seeking a rational footing for our most important decisions and devotions.⁶⁰

The dangers of yielding to the first temptation, which we might label "monism," are considerable. As Berlin explained:

If one really believes that such a solution is possible, then surely no cost would be too high to obtain it: to make mankind just and happy and creative and harmonious for ever—what could be too high a price to pay for that? To make such an omelette, there is surely no limit to the number of eggs that should be broken—that was the faith of Lenin, of Trotsky, of Mao, for all I know of Pol Pot.⁶¹

59. Charles Taylor has noted that "[i]n the philosophical world, big battalions follow views that rather deny the diversity of goods and make unity unproblematic. I am thinking of the various forms of utilitarianism, on one hand, and the theories inspired by Kant, on the other." Charles Taylor, *Leading a Life*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 2, at 170, 171.

60. In describing the temptations that arise in the face of plural and conflicting values, I do not mean to suggest that succumbing to these temptations is inevitable or even commonplace (at least beyond the realm of academic theorizing). Nevertheless, advocates of viewpoints reflecting the seduction of these temptations are vocal and influential.

61. BERLIN, *supra* note 3, at 15.

The notion of the perfect whole, the ultimate solution, in which all good things coexist, seems to me to be not merely unattainable—that is a truism—but

The costs of monism are indeed high, both because it is reductionistic, seeking to shoehorn all value into a common metric, and because it dictates a model of reason based on the notion of maximization, which compounds the reductionistic folly.⁶²

The danger of yielding to the second temptation, which we might label "skepticism," is that one too easily moves to the pessimistic conclusion that choices can never be anything more than arbitrary expressions of ir- or a-rational preferences. Reason is replaced by will as the "creative function of man."⁶³ One version of this tendency, often inaccurately ascribed to Aristotle, is to view reason as concerned with means only, with ends determined by our passions, preferences, or characteristic dispositions.⁶⁴ Following Hume, we may conclude that reason is only the slave of the passions; reason is merely instrumental, enabling us to calculate how to accomplish our ends, which are impervious to rational evaluation.⁶⁵ Such skepticism can easily degenerate into epistemological nihilism or romanticism. The skeptic might draw conclusions such as the following from the observation that values are plural and conflicting:

- Since values are incommensurable it is impossible to make comparisons among them.

conceptually incoherent; I do not know what is meant by a harmony of this kind. Some among the Great Goods cannot live together. That is a conceptual truth. We are doomed to choose, and every choice may entail an irreparable loss.

Id. at 13.

62. Powerful critiques of practical choice based upon strategies of maximization have been offered by John Finnis, David Wiggins, and Michael Stocker. See John Finnis, *Commensuration and Public Reason*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 2, at 215; Stocker, *supra* note 31, at 196; David Wiggins, *Incommensurability: Four Proposals*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 2, at 52.

63. BERLIN, *supra* note 3, at 41.

64. See David Wiggins, *Deliberation and Practical Reason*, in NEEDS, VALUES, TRUTH, *supra* note 14, at 215-38.

65. See David Hume, *An Enquiry Concerning the Principles of Morals*, paras. 240-46, in ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 169 (3d ed., L.A. Selby-Bigge ed., revised by P.H. Nidditch, Clarendon Press 1975). For an account of practical reason that challenges an instrumentalist conception, see Elijah Millgram, *Incommensurability and Practical Reasoning*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 2, at 151 (arguing that it is possible to commensurate values that appear to be incommensurable).

- There is no rational way to compare and choose between plural values.
- Plurality and conflict preclude sound judgment and choice, with the result that we must either vacillate, wallow in indecision, or just opt for an alternative on a basis other than reason.⁶⁶

2. *A Third Alternative*

Both monism and skepticism are mistaken. The primary claim of this Article is that it is usually possible to reason meaningfully about incommensurable values, and to make choices that are rationally defensible between alternatives that involve plural and conflicting values.⁶⁷ In addition, we are almost always able to defend certain choices as better or worse than other available alternatives. Moreover, we are able to do this through a variety of time-tested, reason-and-experience-based problem-solving methods or techniques that are neither obscure nor technocratic.

These approaches to practical problem solving are best understood under the rubric of what Aristotle called practical wisdom. He described practical wisdom as a virtue of both intellect and character that enables one to reason well in situations that call for choice.⁶⁸ The use of these techniques are usefully illustrated by examining the approaches taken, and the mistakes made, by judges deciding cases.⁶⁹

66. Michael Stocker opposes similar mistaken conclusions in *PLURAL AND CONFLICTING VALUES*, *supra* note 12, at 1. I am indebted to Stocker on a number of counts, particularly for the manner in which he distinguishes between incomparability and incommensurability. See *infra* Part III.A.

67. This is not to say that it is always possible to reason about conflicting values. I attempt to identify what it is about some situations involving conflicting values that limits the efficacy of reason. See *infra* Part III.A.

68. There are a number of excellent introductory accounts of what Aristotle means by *phronesis*, or "practical wisdom." See, e.g., J.L. ACKRILL, *ARISTOTLE THE PHILOSOPHER*, 138-41 (1981); W.F.R. HARDIE, *ARISTOTLE'S ETHICAL THEORY* (2d ed. 1980); W.D. ROSS, *ARISTOTLE* (1923); NANCY SHERMAN, *THE FABRIC OF CHARACTER* (1989).

69. Indeed, judicial decision making is best understood as a paradigmatic example of Aristotelean practical wisdom. For representative defenses of this view, see, for example, ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); Anthony Kronman, *Practical Wisdom and Professional Character*, in *PHILOSOPHY AND LAW* 203 (Jules Coleman & Ellen Frankel Paul eds., 1987); Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747

Before analyzing the ways in which the problems of incommensurability and the techniques for practical choice in the face of incommensurable values are illustrated by the law, it is helpful to set the stage in two ways. The first is an effort to define, in an untechnical and straightforward manner, the terms "incommensurable" and "incomparable," as well as several other related but distinct terms. The second is to consider, in somewhat greater detail, the problems of incommensurability that we face when choosing how to act.

II. CLARIFYING THE PROBLEMS OF INCOMMENSURABILITY

A. Seeking Workable Definitions

One difficulty in discussions of incommensurability is that, frequently, the term is not clearly defined, and it is often confused with related concepts that are significantly different.⁷⁰

(1989); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism and the Rule of Law*, 45 VAND. L. REV. 533 (1992); Brett Scharffs, *supra* note *, Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U.COLO. L. REV. 45 (1985). As the use of legal decision making as an illustration of what it means to reason about incommensurables should make clear, this does not mean that our reason giving will necessarily (or even usually) end all discussion or result in conclusions that are incontestable. This should be neither surprising, nor demoralizing, for it is evidence of a rich, creative, developing social practice that is a tribute to human ingenuity and resourcefulness, as well as rationality.

70. What individual writers mean by terms such as "incommensurability" and "incomparability" differs dramatically. Some writers themselves propose multiple definitions of these concepts in an attempt to understand them from different perspectives. *See, e.g.*, Wiggins, *supra* note 64, at 52-66.

Different writers mean different things when they speak of incommensurability. According to Chang, Thomas Kuhn suggests that incommensurability refers to the impossibility of making comparisons across cultures, ways of life or conceptual schemes. *See* Chang, *supra* note 45, at 1. Incommensurability in this sense should not be our primary concern, Chang correctly suggests, because what incommensuralists are concerned about is the "possibility of evaluation for us—that is, within a conceptual scheme, way of life, or culture." *Id.*

For example, Bernard Williams uses the term "incommensurable" to refer to theories or ways of life that, while not necessarily contradictory, are mutually exclusive. For Williams, the identifying feature of incommensurables is that they cannot be combined. *See* BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 157 (1985). This understanding of incommensurability is very different than that of Isaiah Berlin. Berlin suggests equality and freedom as paradigm examples of incommensurables, but freedom and equality are—unavoidably—combined in all known (and probably all conceivable) ways of life. Thus, it is

Thus, one reason for proposing definitions of "incommensurability" and related terms is to suggest an understanding of these terms that is less technical and opaque than many definitions that have been offered. Recent discussions of the problems of incommensurability by philosophers, and philosophically sophisticated lawyers, have not lacked for definitions.⁷¹ My hope

more accurate to say that the impossibility of combining two theories or ways of life reflects impossibility (the impossibility of living both ways of life at once) or incompatibility (that living one makes it more difficult to live the other), rather than incommensurability.

Others emphasize the complexity and irreducibility of values to simple unitary metrics that purport to provide ordinal and cardinal rankings of alternatives. "Cass Sunstein urges that certain items, like pristine beaches, love relationships, and civil rights, cannot be precisely measured by any monetary scale, and so economic approaches to valuation such as cost-benefit analysis are inappropriate for these goods." Chang, *supra* note 45, at 2. John Finnis concludes from incommensurabilist premises that utilitarianism and expected utility theory are doomed to failure. See *id.* John Finnis, David Wiggins, and Michael Stocker each argue that if values are incommensurable, then programs that base decision making on some sort of value maximization must be rejected. See *id.*

In a manner somewhat related to my proposal, James Griffin differentiates between incomparability and related concepts such as incompatibility, unsubstitutability, nonadditivity, and irreplaceability of values. See James Griffin, *Incommensurability: What's the Problem?*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 2, at 35-38.

71. See Chang, *supra* note 45, at 1 ("Philosophical investigation of 'incommensurability' is as yet in an early stage. Perhaps as a symptom of this, there is even disagreement over what 'incommensurability' means."). Chang identifies "two main ideas that pass under the 'incommensurability' label." *Id.* The first "is that incommensurable items cannot be precisely measured by a single 'scale' of units of value." *Id.* This emphasis on the absence of a common scale or metric is helpful, but obscures what is most problematic about comparing or choosing among incommensurables. The problem is not just the absence of a scale, but that the available scales do not adequately capture what is compelling about each value or choice that is being compared. I develop this idea in greater detail below, see *infra* Part II.B.6. The second idea identified by Chang as passing under the incommensurability label focuses "instead on *incomparability*, the idea that items cannot be compared. Joseph Raz, for example, has used 'incommensurability' as synonymous with 'incomparability.'" Chang, *supra* note 45, at 1 (citing RAZ, *supra* note 12, ch. 13, and Joseph Raz, *Incommensurability and Agency*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 2, at 110, n.1). In this Article, I argue that failing to distinguish between incommensurability and incomparability is one of the chief reasons why discussions of incommensurability are so confused and problematic. I argue that correctly distinguishing between incommensurability and incomparability is the first key to dealing constructively with the problems of incommensurability. See *infra* Part II.C.

David Wiggins notes that "the ideas of commensurability and incommensurability have long since had a life of their own in moral philosophy," but notes that "it is doubtful even now whether the language of philosophy can simply carry them along and sustain an agreed signification for them." Wiggins, *supra* note 64, at 52. He notes that "explicit definition" would be best, but notes that "so much has now been argued under their mysterious auspices

is to find some common ground among these definitions, and to propose a series of definitions that are less technical and easier to understand than other suggestions. I will propose definitions of several important terms.

1. *Incommensurability*

*Definition: Value A and value B are incommensurable if (1) everything of value in A cannot be expressed or measured in terms of B, (2) everything of value in B cannot be expressed or measured in terms of A, and (3) everything of value in A and everything of value in B cannot be expressed or measured in terms of some other value, C.*⁷²

and believed in their name that not just any definitions will suffice." *Id.* Wiggins then suggests a series of definitions for the concept of incommensurability. *See id.* at 52-66.

72. This definition is very similar to that proposed by David Wiggins who suggests that:

Option A is commensurable with option B if and only if there is a valuational measure of more and less, and some however complex property ϕ that is correlative with choice and rationally antecedent to choice and rationally determinant of choice, such that A and B can be exhaustively compared by the said measure in respect of being more ϕ and less ϕ ; where an exhaustive comparison in respect of ϕ -ness is a comparison in respect of everything that matters about either A or B. A is incommensurable with B just if A is not commensurable with B.

Wiggins, *supra* note 64, at 53. In addition to its precision, Wiggins' definition is helpful because it focuses upon the difficulty of making "exhaustive comparisons" when plural and conflicting values are involved. Wiggins' refinements of this definition are even more complex. *See id.* at 55. Choices between claims that are incommensurable in this sense can be expected, Wiggins explains, to leave what Bernard Williams calls a residue:

Even where you make the (in-context) right choice, something important may be left over for which the winning option can afford no compensation in kind. For even by the uncontroversially right choice, some legitimate claim may go completely unsatisfied. The winning choice may not reflect all the claims—the valid claims—of the losing choice.

Id. at 53. Cass Sunstein's proposed definition captures some of the same nuances my definition intends to capture. *See Sunstein, Incommensurability and Kinds of Valuation: Some Applications in Law, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, supra* note 2, at 235, 238 ("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.").

Matthew Adler, in the introduction to the University of Pennsylvania Law Review symposium on Law and Incommensurability, defines incommensurability as "the absence of a scale or metric." Adler, *supra* note 16, at 1170. Equating incommensurability with nonmetricity is somewhat misleading, as Adler acknowledges, because "what . . . nonmetricity involves can be fleshed out in a large number of different ways." *Id.* Adler notes

Or to put it in the language of choices: Two choices are incommensurable when everything that matters about the first choice and everything that matters about the second choice cannot be sufficiently expressed in terms of some shared value.

The primary implication of this definition is that the central idea of incommensurability is irreducibility. If values can be expressed in terms of a common value, or if everything that matters about two competing options can be expressed in terms of a common value, then the values or options are commensurable. An example of a commensurable value is deciding whether to measure length in inches or centimeters. Both inches and centimeters measure length, which is one sort of value. A length expressed in centimeters can also be expressed in inches without any value being lost. Each is reducible to the other. There may be problems of precision, but these are due to technical limitations in our ability to measure and express with exactness. Problems of precision do not pose a

that nonmetricity may mean "that no numerical ranking of the options in the order of their comparative worth is possible." *Id.* This problem is misleadingly labeled "incomparability," misleading, because, as I will argue in greater detail below, it is often possible to compare two options in a variety of meaningful ways, even when we are uncertain of our ability to render final judgments about their "comparative worth." The second thing that nonmetricity might mean is "the failure of a particular kind of scale, such as a monetary scale or a consequentialist scale, to track the comparative worth of options." *Id.* This understanding of nonmetricity gets closer to my definition, because it seems to focus upon the problem of values being plural and irreducible. The primary problem with various "scales" such as monetary or utility scales is not that they cannot successfully differentiate between options, but that the comparisons they provide may not exhaust what is important about the competing alternatives. The third possible meaning of "nonmetricity" identified by Adler is "the fact that a *scaling procedure* . . . is not the best procedure by which to choose among options." *Id.*

My definition departs significantly from the very influential definition of incommensurability suggested by Joseph Raz in his book, *The Morality of Freedom*. RAZ, *supra* note 12, at 321. Raz defines incommensurables as follows: "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." *Id.* at 322. According to this definition, "commensurability" refers to the ability to measure value, but the definition is limited to one particular value: goodness. Raz's definition of "incommensurability" is helpful in that it identifies "incommensurability" as a term that has to do with the measurement of value. But his definition is deficient in that it does not make clear that incommensurability is a concept that applies to the ability to measure all values, including, but not limited to, goodness. Raz defines "incommensurability" as equivalent with incomparability, a move which, I argue below, sends discussions of incommensurability off on a wrong track. *See infra* Part III.B.

conceptual challenge to our ability to evaluate commensurable values or options.

An example of incommensurable values is length and weight. Although both of these values are expressible in quantitative terms, the values measured by each of these systems of measurement is different. The value expressed when length is measured cannot be reexpressed in terms of weight and vice versa. Likewise, the value of both weight and length cannot be fully expressed by some other value. Each is not reducible to the other.

Incommensurability is often defined as the absence of a common metric, but this definition is problematic.⁷³ This book and that man may be incommensurable, but each may be weighed. Weight is a common metric. The problem is that the metric of weight may not be meaningful for the purposes of the comparison we want to make.⁷⁴ Even when common metrics for comparing two values or options are available, the values or options may nevertheless be incommensurable.

For two options to be commensurable or comeasurable, what makes each option worthy or appealing must be measurable in terms of some common value or set of values. Additionally, that common value must also exhaust those factors that make the options choice worthy. When selecting a value as the basis for a comparison between options, what will matter is that the value *exhausts* what is important about each of the competing options, at least for purposes of that comparison.

73. For example, in his introductory essay to the University of Pennsylvania Law Review symposium on Law and Incommensurability, Matthew Adler states, "Roughly speaking, 'incommensurability' means the absence of a scale or metric." Adler, *supra* note 16, at 1170. Adler next observes that the ways in which nonmetricity can be fleshed out vary. *See id.*

74. One of the variations on the meaning of incommensurability identified by Adler is more sensitive on this point. Adler observes that the incommensurability of options or choices might mean "the failure of a particular kind of scale, such as a monetary scale or a consequentialist scale, to track the comparative worth of options." *Id.* This definition comes closer to my suggestion, which focuses on the *irreducibility* of what is important in competing choices to a *single* value or metric which can be used decisively to evaluate the relative worth of the options. But the problems of incommensurability are not the result primarily of the *absence* of a "common metric" but the *insufficiency* of the available common metrics to get to the heart of, or to exhaust, what is important or compelling about competing options. For example, we can always ask, "As between Option A and Option B, which will cost more?," but even if we are capable of answering that question with a degree of confidence with which we feel comfortable, it is much more difficult to be certain that we are asking the right question.

For example, if one is trying to choose between two potential investments (U.S. government bonds versus an equity investment in an Internet start-up company for example) and the only relevant consideration is which has the greater upside potential to make money, then the options are commensurable. They are commensurable because there is a common metric to evaluate the two choices (upside monetary potential), and (by hypothesis) that metric is all that matters. Thus stipulated, the choice should be easy; we may be able to conclude with confidence that the Internet stock is better.

Note, however, that the hypothetical is unrealistic: usually there will be something other than upside monetary potential that matters (such as risk, in our example). Economic models may help us commensurate risk and upside monetary potential into a common metric of expected return. From the standpoint of expected return, it may be that our two investments are equal (expected return would suggest that we would be indifferent between a low rate of return multiplied by a high probability and a high rate of return multiplied by a low probability), or that one provides a higher expected rate of return than the other.

But even this may be an unacceptable oversimplification, because expected return may not exhaust what concerns us about these two choices. For one thing, expected return does not place any value on peace of mind. We may be able to quantify how important peace of mind is in the overall equation; it may be possible to find a recipe of values (e.g., we could weigh upside potential 40%, risk 40%, and peace of mind 20%) that enables us to calculate values for our respective choices. On the other hand, we may not be able to accommodate every element that is important to us about the choice into an economic model. At some point, we may decide that peace of mind is so important that it cannot be traded off against upside potential. If the important values cannot be reduced to a common value, or recipe of values, then the choices will be incommensurable. This is not to say that we cannot compare or reason among the choices. But there is something important we cannot do. We will not have access to a common metric that exhausts the value of each of the options. As a result, our practical deliberations and choices will be less definite than they would be if the choices were commensurable.

2. Incomparability

*Definition: A and B are incomparable if A has nothing in common with B that can be measured in terms of more or less.*⁷⁵

75. This definition of "incomparability" departs significantly from other definitions that have been suggested. For example, Adler maintains that "[t]wo options are incomparable if it is false that one option is better than the other ('better,' in light of the normative criteria relevant for choice between the two), false that one is worse than the other, but also false that the two are equally good." Adler, *supra* note 16, at 1170. This definition is problematic, both because it focuses exclusively on determining which is "better," and because it presupposes some relevant "normative criteria" for making an ultimate comparison. But comparison is often possible even if we are not trying to determine "better" or "worse" and even if we are in disagreement about what the truly important "normative criteria" might be. In fact, it may be through making a series of comparisons that we (individually or collectively) come to a view as to what it might mean for one option to be "better" than another, and what the appropriate normative criteria for a particular choice might be.

Adler's definition of "incomparability" can be traced to an example Joseph Raz suggests in *The Morality of Freedom*. If I have the options of spending an afternoon walking in the park, enjoying a glass of scotch, or enjoying a glass of port, and if the port option is better than the scotch option, and if neither the port option nor the scotch option is better or worse than the park option, then I have a choice between incomparables on my hands, because each of the drink options is not better, than worse than, or equally good as the park option. See RAZ, *supra* note 12, at 328; Adler, *supra* note 16, at 1171.

This example is extremely unhelpful in defining what it means for options to be incomparable. The problem is that Raz's options are comparable in significant and meaningful ways, even if we cannot decisively say which is "best." As between the scotch and port, we can ask which has more alcohol?, which is sweeter?, which is more robust?, which is more soothing?, which is more fashionable?, which would add more variety to my life?, which did I enjoy more the last time I drank it? The list could go on. Answering each question will result in a comparison, although our conclusions with respect to some comparisons may be uncertain. The impossibility of comparison is not a problem; if there is a problem, it is knowing which comparisons we should regard as decisive for our choice. Comparing these options in these, or other ways, may help bring into focus what really is important in deciding which option is "better," at least for me on this occasion. In comparing the drink options with the park option, we can ask, which would be healthier, which would be more relaxing, which would be more invigorating, which would be more helpful in getting me ready for a productive evening? As a result of making these comparisons, one might reach a conclusion that one has considerable confidence in that there is a "better" choice, at least for oneself, in one's circumstances, on a particular day. Even if no conclusion as to which is "best" is forthcoming, one might still illuminate the choice in interesting and thoughtful ways that will facilitate making a choice. It may not be that the choice is "best," but it will be grounded on reasons, reasons that can make sense to oneself, and that can even be explained to others. Even if someone else doesn't agree that we got the choice "right," even if in the abstract there is no "right" answer, they might learn something interesting about what is important to us. For example, if I am a recovering alcoholic, or a Mormon who is committed to living a health code that eschews the consumption of alcohol, comparison between these options—including choosing which is "best"—is easy and meaningful. In any event, it only confuses our conception of "comparability" to say that a failure to be able to say definitively that one

This definition holds for both values and choices. If *A* and *B* have something in common, then they can be compared in terms of whatever it is that they have in common. Two values are incomparable if they are valuable for completely different reasons. Two things are incomparable if the values that are characteristic of each thing are completely different. Choices or states of affairs are incomparable if the values realized through the actualization of each choice or state of affairs are completely different.

I argue below that, although incommensurable values and choices are common, alternatives that are genuinely incomparable are rare.⁷⁶

3. Impossibility

*Definition: A and B are impossible if A has value and B has value and it is possible for either A or B, but not both, to be actualized.*⁷⁷

choice is "best" suggests that the options are incomparable.

Joseph Raz has elsewhere said that "[i]ncommensurability is the absence of a common measure." Raz, *supra* note 71, at 110. This understanding of incommensurability seems to come closer to my understanding of incomparability, because when two values or choices have nothing in common there will be no common measure to compare them. However, Raz goes on to say, "[t]he incommensurability that I will be concerned with is the incommensurability of value: the possibility that the value of two items, or that the goodness of two options is incommensurate, in that neither of them is better than the other nor are they of equal value." *Id.* This explication of the meaning of incommensurability does not fit well with my definition of "incomparability," because we may be able to compare two values or choices even if we cannot confidently defend one as better or best.

76. One interesting question is whether opposites such as good and evil, light and dark, and left and right are comparable. According to my definition, it would seem that they are not comparable, for good and evil appear to have nothing in common: they are opposites. Upon reflection, however, it is clear that good and evil do have something in common: they are each terms for evaluating moral worth. Good and evil are each understandable only in terms of each other; that is, without the other concept, the one concept does not make any sense. Light and dark are related in a similar way: each is a term expressing the presence or absence of the value light. Something similar is true for left and right: each expresses a relational presence relative to some object.

77. This type of conflict is considered at length in STOCKER, *supra* note 12, at 14; see also F. Jackson, *Internal Conflicts in Desires and Morals*, 22 AM. PHIL. Q., 105-14 (1985). Some authors have characterized this type of conflict as incompatibility. James Griffin, for example, has stated that "values, being irreducibly plural, can, and often do, exclude one another; life sometimes forces us to sacrifice one value for another. But this is the incompatibility of values (they cannot both be realized together), not their incomparability." Griffin, *supra* note 70, at 36. In my view, it is more helpful to differentiate between

The term "impossibility" usually refers to states of affairs, either choices or acts. For example, your being in both New York and Paris right now is an impossibility; they are jointly impossible states of affairs. But values might also be impossible if the realization of one necessarily makes it impossible to realize the other. For example, honesty and tact may be impossible, at least in certain situations. Ways of living one's life may also be impossible. It is jointly impossible to live the life of a Tibetan monk and live the life of a movie star. We can imagine a monk in the movies, and an actor portraying a monk is commonplace, but one person living these two lives at the same time is not possible. These two lives are impossible. Other states of affairs are impossible as a matter of definition, rather than as a matter of practical possibility. For example, being a bachelor and being married at the same time are impossible as a matter of definition.

Sometimes the source of impossibility is temporal. My being in Paris and New York at the same time is an impossibility. Sometimes impossibilities are practical, such as being simultaneously honest and tactful, or being simultaneously a monk and a movie star. Other instances of impossibility are conceptual. For example, certain scientific theories are impossible; it is jointly impossible for each of them to be correct. Overlap between these sources of impossibility is also possible.

4. *Incompatibility*

Definition: A and B are incompatible if the occurrence or realization of A undermines or decreases the likelihood of the occurrence or realization of B.

Incompatibility is a less absolute sort of impossibility and might apply to either values or choices. Impossibles are jointly impossible; incompatibles pull in different directions. Certain values are incompatible, at least in certain circumstances. For

impossibility (the impossibility of joint realization) and incompatibility (values that tend towards the impossibility of realizing each other), which I conceive as a less absolute form of impossibility. See *infra* Part II.B.4 for a definition and discussion of incompatibility.

example, efficiency and equality often pull in different directions, as do humility and fame.

Choices or ways of life may also be incompatible. Being a professional football player may be incompatible with being a concert pianist, or being a lawyer may be incompatible with being a poet; developing the characteristics that make it possible to excel at one of these activities may undermine your ability to excel at the other. Being a professional football player and a concert pianist is not, however, an impossibility; these two activities are not jointly impossible.⁷⁸

5. Uncomputability

Definition: A is uncomputable if it cannot be generated by an algorithm.

Real numbers whose expansions can be generated by algorithms are called computable numbers. The real numbers π and the square root of two are examples of computable numbers. Something is uncomputable if it is not calculable. Mathematicians have proven that many irrational numbers cannot be produced by any algorithmic method.⁷⁹

In contrast with the other previously defined terms, computability may refer to a single value, rather than the relationship between two values. Values such as numbers may be uncomputable, as may certain mathematical relationships or concepts. Roger Penrose points out that noncomputable sequences may, nevertheless, be perfectly well defined.⁸⁰

78. The individual who can excel in multiple roles is often an object of respect, awe, or wonder. It is in part the ability to juggle, balance, or integrate the various, sometimes competing, characteristics and values that are indicative of each role, that impresses us. But the individual who divides her time and energy between too many competing pursuits runs the risk of failing to do any of them particularly well, or at least as well as she is capable of doing them. One explanation for this is that various commitments and objectives are incompatible with each other; the characteristic excellences of some activities are so different that doing what is necessary to become better at one may actually make it more difficult to excel at the other.

79. See ROGER PENROSE, *THE EMPEROR'S NEW MIND* 50, 82, 107, 170 (1990).

80. See *id.*

The concept of incomputability is relevant to our discussion because many philosophers, and others, have argued that values such as utility or pleasure are incomputable; that is, it is impossible in principle to calculate sums or quantities of these values.⁸¹ Incomputability is also important because, at times, problems of incomputability have been called problems of incommensurability.⁸²

6. Uncertainty

Definition: A state of being in doubt.

Uncertainty is the mental state of doubt.⁸³ For example, one may be uncertain which alternative is the best option under the circumstances. Uncertainty can also exist with respect to simple evaluative problems. One may be uncertain as to which of two books is heavier. This type of uncertainty does not pose a conceptual problem, although it may pose a technical problem, if, for example, I do not have access to a scale, or if the difference in weight is very small and my scale is not precise enough to measure

81. Closely related to the concept of incomputability is the distinction between ordinal rankings (rankings on a list, e.g., A is heavier than B) and cardinal rankings (precise rankings in terms of some unity of value, e.g., A is 2.131 pounds heavier than B). It may be that we can make an ordinal comparison even if we are unable to compute precise cardinal rankings. This will usually be the result of uncertainty, either based upon our inability to predict the result of choices with precision, or other shortcomings in our ability to make precise measurements (e.g., lack of a precise weighing mechanism). Some authors distinguish incommensurability from incomparability on the grounds that incommensurability implies the impossibility of cardinal rankings and incomparability implies the impossibility of ordinal rankings. See Chang, *supra* note 45, at 2. This way of conceptualizing the difference between incommensurability and incomparability is misguided, because incommensurability is not primarily a problem of precision, but rather one of exhaustion or coverage. If no ordinal rankings are possible with respect to two values or choices, then those values or choices will be incomparable. For a definition and discussion of incomparability, see *supra* Part II.A.2.

82. See STOCKER, *supra* note 12, at 175-78.

83. For a related discussion of the relationship between incommensurability and vagueness, see John Broome, *Is Incommensurability Vagueness?*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 2, at 67. See also Katz, *supra* note 4, at 1465 (noting that apparently incomparable options may only appear so due to our normative ignorance); Eric A. Posner, *The Strategic Basis of Principles Behavior: A Critique of the Incommensurability Thesis*, 146 U. PA. L. REV. 1185 (1998) (arguing difficulty in comparing options is not reliable evidence of their incomparability since people have strategic reasons for claiming values are incommensurable).

the difference. Thus, sometimes uncertainty is a result of imprecision.

But incommensurability is not simply a matter of being unable to make precise measurements along an accepted scale (such as a monetary scale). Even if we are able to measure choices along such a scale, something important about at least one of the choices may not have been given proper weight in the calculation. If so, the problem may be that the values are incommensurable. In other words, what is important about them cannot be reduced to a single scale of value and, in measuring them along such a scale, something important is left out.⁸⁴ Problems of uncertainty are sometimes construed as problems of incommensurability and vice versa.⁸⁵

B. Significance of the Distinctions

Distinguishing these terms is important. Often when someone speaks of values being incommensurable, what they really mean is that the values are either incomparable, incompatible, or incomputable. Each of these concepts pose challenges for practical rationality, but the challenges they pose are different.

One of the central arguments of this Article is that, although most complex choices are incommensurable, very few are incomparable. Additionally, impossibles may not be incommensurable (we can compare the alternatives of vacationing

84. Cass Sunstein makes a similar point in his essay *Incommensurability and Kinds of Valuation: Some Applications in Law*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 2, at 234, where he argues that some things, such as pristine beaches, love relationships, and civil rights, cannot be precisely measured by any monetary scale, so economic approaches such as cost-benefit analysis are inappropriate for these goods. *See id.* at 239-42. It would be a mistake to locate problems of "precision" at the heart of the difficulty of making such tradeoffs. We can sometimes conclude with discouraging accuracy how much money it will take for people to betray someone they love, or to trade unspoiled nature for a monetary payment. The problem is not that the answers are imprecise, but that a monetary tradeoff can never account for what is truly important or valuable in a loving relationship or an unspoiled natural vista. The problem is not so much one of precision in measurement, as that the values in opposition are both important (e.g., conservation and freedom), what is important about one cannot be reduced to the other, and what is important about both cannot be reduced to a third value. *See* definition and discussion of incommensurability, *supra* Part II.A.1.

85. Ronald Dworkin has suggested that assertions that values are incommensurable reflect uncertainty rather than demonstrate incommensurability. *See* Dworkin, *Objectivity and Truth*, *supra* note 4, at 87; *see also* Broome, *supra* note 83, at 67.

this summer in the mountains or on the beach); that incompatibles are not impossible (it is not impossible to be a lawyer and a poet); that incommensurables are not impossible (equality and justice coexist in single states of affairs); that incommensurables are not incompatible (truth and justice are mutually reinforcing) and so on.

Consider, for example, two important values: pleasure and understanding. Are these values incommensurable? The answer is yes. The value of pleasure is not completely comprehensible in terms of the value understanding; part of the value of understanding has nothing to do with pleasure; both of these values are not fully understandable in terms of some third value. Are these two values incomparable? The answer is no. We are all familiar with ways in which experiences involving pleasure increase understanding, and we all have experienced the pleasure of increased understanding. Yet, pleasure is not reducible to understanding and understanding is not reducible to pleasure. Are pleasure and understanding impossible? The answer is no. Many states of affairs will include elements of both understanding and pleasure. Are pleasure and understanding incompatible? The answer is sometimes. Studying long hours in order to gain understanding may make it difficult to spend time doing things that are pleasurable.

III. IMPLICATIONS FOR PRACTICAL REASON

A. *Problems of Incommensurability*

Having defined these terms, it is possible to state the problems of incommensurability more completely. The philosopher John Finnis describes the central problem of incommensurability as follows:

[T]here are many basic forms of human good, all equally or incommensurably basic and none reducible to any or all of the others; none of them is attainable by any one choice or finite set of choices; to commit oneself to one course of action, project, commitment, even life-plan, is to turn one's back on perhaps

countless other opportunities of worthwhile action, project, commitment, life⁸⁶

Later, Finnis utilizes the concept of incommensurability in an analysis of proportionalism—the ethical view that tells us to weigh benefits and harms and choose the option that gives a better proportion than any other option (i.e. that option which maximizes the good over bad).⁸⁷ Proportionalism's directive is clear: make a computation. Finnis points out that this is not just impracticable, but senseless:

It is senseless in the way that it is senseless to try to sum up the quantity of the size of this page, the quantity of the weight of this book, and the quantity of the number six. At first glance, the computation seems possible; after all, each of those quantities is a quantity, and thus has in common with the others the feature that, of it, one can sensibly ask: How much? Yet, on reflection, it is clear that the different kinds of quantity—volume, weight, and cardinal numbers are objectively incommensurable.⁸⁸

In these passages, Finnis succinctly states the problems of incommensurability.

First, values are plural and irreducible. Where Finnis speaks of different kinds of quantity—weight, volume, and cardinal numbers—I would speak of different kinds of value. But Finnis' basic point is sound: We recognize different sorts of value; these values are quantifiable through appropriate systems of measurement (pounds, cubic inches, Arabic numerals); systems of measurement for a single sort of value are commensurable (inches and centimeters are commensurable, as are pounds and kilograms); the system of measurement appropriate for one sort of value is not appropriate for another sort of value (inches are not an appropriate measure of weight); and many values are not only different but are *irreducible* (the value of weight cannot be expressed in terms of length, the value of length cannot be expressed in terms of weight,

86. JOHN FINNIS, FUNDAMENTALS OF ETHICS 66-67 (1983).

87. See *id.* at 85-86.

88. *Id.* at 87.

and the value of both cannot be expressed in terms of some other value).⁸⁹

Second, if values are incommensurable, considerable doubt is cast on reason's ability to adjudicate between the competing claims made by plural and conflicting values. Reasoned deliberation about incommensurables cannot at root be a matter of calculation, no matter how subtle or complex. If all values can be reduced to one ultimate value, then the demands of rationality seem clear: maximize. This is not to say that reasoning will be simple or straightforward, as conducting the necessary calculations may be extremely complicated. But if values are multiple and irreducible, then, as a conceptual matter, a strategy of maximization is not only futile, but senseless.

Third, incommensurability is not just a problem of uncertainty or vagueness. If your ambition is to determine the best course of action under certain circumstances, and you find it difficult to determine whether one alternative is rationally superior to all other alternatives, you might conclude that the source of the problem is that the values reflected in the competing alternatives are incommensurable. A critic of the view that values are plural and irreducible might respond that the problem is really not one of incommensurability, but rather uncertainty. This critic would

89. Some authors acknowledge the irreducibility of values, but distance the problem of incommensurability. For example, James Griffin notes that:

We tend to think that incommensurable values are not at all rare because a certain sort of conflict between them is quite common. Happiness can conflict with knowledge, mercy with justice, liberty with fraternity, and so on. And they can conflict in a way that allows no resolution without often wrenching loss of value. It is a fact of life that some values, by their nature, exclude others. We can choose between them because the demands of living often mean that we must, but the choice is not a matter of deciding which, if either, has compensatingly more of some deep value than the other. Our choices can leave us with uncompensated loss.

Griffin, *supra* note 70, at 36. But while Griffin sees such conflict and absence of a "deep value" that adequately represents all that is important about a value as "undeniable," he argues that it is "not a matter of strict incommensurability." *Id.* What Griffin has in mind here seems to be quite similar to my definition of "incomparability," which refers to situations where values or choices have nothing in common, which renders any comparison between them impossible. I argue that situations of genuine incomparability are extremely rare and do not pose a significant obstacle to practical rationality. See *supra* Parts III.B-D. According to Griffin, incommensurability refers to situations where there is no scale available to compare values as "greater," "less," or "equal," and arises when cardinal rankings are not possible. See Griffin, *supra* note 70, at 37.

maintain that the problem is not that there is no best alternative, but rather that, as of yet, you are uncertain what it is. This critic might also maintain that when we declare that values are incommensurable, we are mistaken or confused. What we are really doing is expressing frustration at our inability or unwillingness to do the rational work necessary to achieve certainty. In this view, our powers of reason may be insufficient to determine what the best alternative is, but this is due to our own (personal or collective) shortcomings, rather than anything inherent in the situation. This critic might further claim that all instances of apparent incommensurability are, in fact, situations of uncertainty.

This critic would, however, be mistaken. Not all problems of incommensurability are really problems of uncertainty.⁹⁰ As Finnis points out, if you are unable to conclude which is heavier the number six or the color red, your problem is not one of uncertainty, but rather that the underlying values are incommensurable.⁹¹ In some situations, making a calculation is not just impracticable, it is also senseless. This is not to say that it is impossible or senseless to make judgments that claim to be correct or best. Rather, it will be necessary to develop a conception of reason that accounts for incommensurability, and strategies of maximization and calculation are not up to this task.⁹²

90. Even without the complication of incommensurability, uncertainty can create seemingly intractable ethical conundrums. For example, if I am clear that my goal is to select the option that will bring me the most happiness, I may find it exceedingly difficult to choose between available alternatives. This is in part because happiness itself is a complex value that reflects a plurality of constituent values (e.g., pleasure, accomplishment, peace of mind, meaningful interpersonal relationships, etc.). Even if happiness is understood as a simple, unitary value, uncertainty may be inescapable. The list of considerations that will make it difficult to compute the respective implications for one's happiness of alternatives is long and open-ended, and will include difficulties of computation, uncertainty in predicting future contingencies, the need to estimate statistical probabilities, and the need to account for the decisions and actions of others.

Uncertainty presents real difficulties, but those difficulties are not conceptually reducible or identical to the problems of incommensurability.

91. See FINNIS, *supra* note 86, at 87-89.

92. From Finnis' explanation of the problems of incommensurability a number of other insights can be gleaned. Incommensurability is a term that properly refers to values, not things. Finnis does not assert that this book is incommensurable with this page, but that the "size" of this page is incommensurable with the "weight" of this book. The incommensurables are the two values, weight and size. The terms "size" and "weight" are each used to make quantifications, and each denotes different sorts of value. It would be a mistake to say that this book is incommensurable with this page because this book and this page do share

What, then, are the prospects for rationality? If values may be incommensurable, incomparable, impossible, incompatible, or incomputable, then what is the role of reason in practical deliberation and choice?

B. Incommensurability and Incomparability

Perhaps the most important distinction between these terms is the difference between incommensurability and incomparability. Many commentators do not make much of this distinction and some explicitly conflate these terms.⁹³ Others distinguish the terms, but define them in ways that are problematic.⁹⁴

Many states of affairs that are incommensurable are nevertheless comparable. Let us consider an example of incommensurables suggested by philosopher Joseph Raz:

qualities, properties, or values in common. For example, each shares the property weight. It is not senseless to ask the question, which weighs more, this book or this piece of paper?

The term "incommensurability" also refers to relationships between systems of measurement. It makes sense to say that inches and centimeters are commensurable. This is because both of these systems of measurement measure the same value, length. It also makes sense to say that inches and pounds are incommensurable because these systems of measurement measure different values, length and weight respectively. If we are to speak with precision, the term "commensurability" refers to values rather than systems of value. But since systems of value always measure some particular value, it is not difficult to ascertain the value at issue when the term "incommensurability" is used when talking about systems of measuring value. But, when we speak of systems of measurement being incommensurable we are speaking derivatively; it is the values being measured that are incommensurable.

93. Joseph Raz uses the terms "incommensurable" and "incomparable" interchangeably. See RAZ, *supra* note 12, at 322; see also Griffin, *supra* note 70, at 35 ("What nearly all of us, on reflection, mean by the 'incommensurability' of values is their 'incomparability'—that there are values that cannot be got on *any* scale, that they cannot even be compared as to 'greater', 'less', or 'equal'."). Steven Lukes, *Comparing the Incomparable: Trade-offs and Sacrifices*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 2, at 184 ("Following Raz, I shall say that two alternatives are incommensurable if they are incomparable: that is, if neither is better than nor equal to the other."). One philosopher who does distinguish between incommensurability and incomparability is Michael Stocker, although he draws the distinction somewhat differently. See STOCKER, *supra* note 12, at 175-78. Cass Sunstein also maintains that incommensurability "does not entail incomparability," and notes that "this understanding is different from that offered by many others." Sunstein, *supra* note 84, at 239.

94. See *supra* Part II.B.

Let us take as our example the case of a person who has to choose between two options. The one will irrevocably commit him to a career in the law, the other will irrevocably commit him to a career as a clarinettist. He is equally suited for both, and he stands an equal chance of success in both.⁹⁵

Raz asks us to assume that, although we know all this, we do not know which option is better. "It hardly needs arguing," Raz maintains, "that in that case they are incommensurable."⁹⁶

Raz is correct that these options are incommensurable. Some of the values exhibited and realizable with a career as a clarinettist are different than the values exhibited and realizable with a career in the law; there is no single measure for the values associated with being a lawyer, nor is there a single measure for the values associated with being a clarinettist.

But it would be a mistake to say that these options are incomparable, or immune from rational evaluation. We can compare these options in a number of ways. Each option has values in common with the other. We may reasonably ask questions such as: Which will make me happier? Which will provide more money? Which will be a better use of my strengths and talents? Which promises the most free time? Which will offer the better prospects for travel? Which affords the greater prospects for fame and glory? Which will enable me to meet more interesting people? The list of ways in which we can make comparisons is virtually endless, and some comparisons, if not these particular ones, will not be trivial.

Admittedly, it may be difficult, if not impossible, to give answers with any degree of definiteness to many of these questions. Our answers may be largely speculative, or based on calculating statistical probabilities that are difficult to project. Thus, the role of imagination and foresight are valued skills or character traits for practical deliberation. It may turn out that, in spite of our best calculations, the future being unforeseen and unpredictable, we may be wrong in any number of ways. But we can think rationally about the choice.⁹⁷

95. RAZ, *supra* note 12, at 332. Raz correctly points out that this is the sort of decision that one should care about deeply. See *id.*

96. *Id.*

97. See Taylor, *supra* note 59, at 183 ("I am not saying that all conflicts are arbitrable.

Perhaps, however, I have misconstrued the claim that these two options are incommensurable. Consider the claim that these options are incommensurable: becoming a clarinettist will, to the best of my ability to calculate, result in the realization of values A, B, and C in some quantity I can roughly estimate; becoming a lawyer will, to the best of my ability to calculate, result in the realization of values X, Y, and Z in some quantity I can roughly estimate; values A, B, and C on the one hand and values X, Y, and Z on the other are completely different and have nothing in common. Value A may itself be a complex value, exhibiting other values, A₁, A₂, and A₃. But these constituent values also have nothing in common with the values X, Y, and Z, although each of these values may also be complex values.

Here, we have a case of two sets of values that are not only incommensurable, but also incomparable. These two options, as defined, have nothing in common.⁹⁸ According to the foregoing stipulations, the values realized by becoming a clarinettist are completely different than the values realized by becoming a lawyer.⁹⁹

At this point, as a defender of the view that very few practical choices are incomparable, I would be forced to concede that this may be one such incomparable situation.¹⁰⁰ If the values associated

Far from it. But our resources for arbitration are greater than they are normally supposed to be in moral philosophy, and they lie part in our sense of our lives as a whole, the lives we are leading.”).

98. We can still say that one choice will facilitate the realization of certain values and the other choice will facilitate the realization of other values, and this may enable us to make a judgment about which is better, although such a judgment would rest upon a (perhaps rationally groundless) preference for one value or set of values over others.

99. In fact, one might concede that there are some values that are shared by both becoming a clarinettist and becoming a lawyer, and still maintain that the choices are virtually incomparable. Each activity will, for example, have an impact upon posture; and good posture, one might concede, is a value. But, one might maintain, these shared values are so tangential to the true worth of either option that the similarities are trivial. On this scenario, one could thus reasonably conclude, in spite of trivial similarities, the options are incomparable, or at least incomparable as to their most significant or defining features.

100. Even this concession must be qualified. If one choice makes attainable values A, B, and C and another choice makes attainable values X, Y, and Z, then in one sense comparison is not only possible, but very easy. If values A, B, and C are really important (either objectively, or to me) and values X, Y, and Z are not important (either objectively, or to me) then comparison is possible and choice will be easy. This is to suggest, then, that incomparability may not even be a conceptual possibility, except among alternatives that reflect no values at all.

with becoming a clarinetist and the values associated with becoming a lawyer really do have nothing in common, then it would seem to be very difficult to make meaningful comparisons between them, although it would still be possible to clarify the implications of each choice.¹⁰¹

I would argue, however, that I have conceded only the trivially true. Whereas options that have nothing in common cannot be compared, options that have nothing meaningful in common are extremely rare. They are, in fact, virtually nonexistent.¹⁰²

C. Radically Different Choices

Perhaps I will be accused, however, of trivializing the nature of the differences that separate alternative ways of life, or difficult practical choices among very different alternatives. Perhaps alternatives can be compared in a variety of ways, and perhaps some of those comparisons will be interesting, informative, or enlightening. Maybe, however, these comparisons will not ultimately matter. An individual trying to choose between two radically different, impossible ways of life might concede that the two alternative ways of life have overlapping values, but still maintain that the values that are truly important, or definitive, for one kind of life may be different and incomparable with the values that are truly important, or definitive, for another kind of life. If this is the case, how could we ever conclude, even tentatively, that one option is better than another? This is a difficult question, one which must be answered if there is to be a meaningful role for reason in adjudicating between radically different alternatives. I will briefly sketch two preliminary lines of response to a skeptic who claims that reason is powerless in the face of alternatives reflecting incommensurable values.

101. It might also still be possible to defend one choice as "better," based upon a defense of the superiority of the value or mix of values attainable through one option, which are entirely unattainable from the other option.

102. A complimentary account of the possibility of reasoning about incommensurables is found in Millgram, *supra* note 65, at 156.

1. *The Search for Common Ground*

A first line of response to the skeptic begins with an examination of the different values exhibited by each alternative. Is it true that different life pursuits each have identifiable, truly important, or definitive values? Initially, it does seem that different careers, or at least different ways of life, have different definitive values. For example, one might say that the definitive value of medicine is health, the definitive value of philosophy is truth, the definitive value of politics is power, the definitive value of art is beauty, and the definitive value of religion is salvation. Surely, however, it is not as simple as this. Most readers, I hope, would take exception with the "definitive" value identified for one or more of these professions. There are several reasons for our reluctance to accept single definitive values for life pursuits such as medicine or religion.

First, the values important to the life of the doctor, philosopher, politician, or artist are not unitary, but are themselves multiple, complex, and diverse. Doctors *qua* doctors are, at times, concerned with truth, with beauty, with power. These may not be a doctor's primary concern, but they are often not trivial or unimportant ones. Yet, these are examples of values that seem definitive of other careers. Life does not exhibit single, unitary values.

Second, many important values overlap between different life pursuits. Surely it is professional snobbery or narrow-mindedness to suppose that only lawyers are concerned with justice, although justice is undoubtedly one value that is central to the legal profession. It would also be a mistake to suppose that salvation or eternal life is only a concern for professional clerics.

Third, even if a certain form of life exhibits only a few truly important, definitive, or essential values, those values, upon scrutiny, would be so complex, rich, and multifaceted that they would admit of comparisons to other related values. For example, we may agree *ex hypothesi* that the life of a monk is devoted to salvation and nothing else. Unless, however, we define the value of salvation in a way that uncharitably trivializes it, we will recognize it as complex and rich. A single-minded concern for salvation surely exhibits other values that even those for whom salvation is a distant, silly, or nonsensical ideal can identify with—love,

commitment, discipline, sacrifice, truth, life, and beauty are but a few examples. To deny this is to dismiss a form of life unfairly because it seems at first to be alien or unfamiliar.

A proponent of incomparability might interrupt to suggest that I have simply reiterated my earlier argument that individual ways of life do not exhibit single, unitary values. It is true that I have worked back to the earlier conclusion. I believe if we examine them closely, even apparently incomparable ways of life can be evaluated in terms of meaningful shared values. Upon reflection, I think it will become evident that ways of living that are rich or complex enough to vie seriously for our allegiance will exhibit a multitude of important, definitive, essential values; and each of these significant important values are themselves complex and rich. We may not be able to reach a conclusion, through even a thorough process of reason and deliberation, about which alternative is best, but it is romantic overkill to say that we cannot reason meaningfully about even alternatives that appear to offer radically different values.

2. Alternatives to All-Things-Considered (ATC) Judgments

A second line of response to the skeptic of reason's ability to guide our deliberations about alternatives that reflect incommensurable values is to question our obsession with ATC judgments. Even if we are committed to thinking rationally about the relevant similarities between radically different life plans—if we are committed to thinking about the respective reasons for becoming a lawyer or a clarinetist—this does not mean that we must seek a conclusion that one option is “best,” ATC.

When we reason about the implications or consequences of pursuing a particular course of action, our primary objective need not be to determine how it stacks up against all other options, ATC. We can seek and achieve a better understanding of which values are realizable through an energetic pursuit of a particular option. When we think about whether to become a lawyer or a clarinetist, perhaps our main concern should not be which is better, ATC, but what the values are that we might reasonably expect to realize through the successful pursuit of each of these options. Through our deliberation we create not only a comparison between the two options, but we also clarify our understanding of the set of ideals,

opportunities, and implications characteristic of each option. The value of such deliberation will lie, in part, in enabling us to make a considered judgment and choice about how we *want* to spend our life.

One source of the tendency to think there is some right answer that we must, or should, be reasoning towards is associated with the mistaken belief that all argumentation, reason, and analysis must lead in a linear fashion towards a fixed, certain conclusion. This paradigm of reason, borrowed from mathematics and science, postulates that the goal of reason is convergence. But, as Stanley Cavell has eloquently argued, the point of moral practical reasoning need not be convergence, but may further values such as enlightenment, clarification, and taking responsibility.¹⁰³

When we deliberate about the divergent values and goals that can be realized by pursuing one career rather than another, we need not make a declaration about what is right, but about who we are or who we want to become, about what is important to us, and about what we find worthwhile in doing. One does not necessarily declare by becoming a clarinetist that this is the only life of value, or even that this is the best life (the life of greatest value) for oneself, let alone anyone else. Hopefully, by becoming a clarinetist, one is declaring that this is a life of value, that there is an ideal associated with this pursuit that one finds worthwhile and inspiring. The process of thinking about important life choices often involves not so much trying to determine what is right (even if just for me), but also trying to determine who I am and who I hope to become. Even if choices provide options that are genuinely incomparable, if the values associated with each option are completely different and have nothing in common with each other, one can still reason about each option in turn.

D. ATC Judgments

Even if I am correct that complex options almost always exhibit multiple values that can be evaluated and compared, and even if I am right that we often err in thinking that reason is only of value

103. See STANLEY CAVELL, *THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY, AND TRAGEDY* (1979).

if it guides us reliably and conclusively to best alternatives, ATC, I still must concede that these responses do not meet the skeptic's objections. Sometimes what we really need are ATC judgments that a single course of action is superior to all other available alternatives. In such a situation, everything else might be regarded as mental calisthenics or dilettantism. In a situation of this sort, where compelling reasons can be marshaled on behalf of at least two impossible alternatives, what can reason do to help make the best choice? Is reason helpless in the event the reasons in support of each alternative are incommensurable?

I believe reason can provide meaningful assistance in making even ATC judgments. To understand how, it will be helpful to consider the metaphors we might employ to understand what is involved in making ATC judgments. The defects of our primary metaphors generate considerable confusion in our attempts to understand what is involved in making ATC judgments. But there are less familiar metaphors that are far more helpful to understanding what is involved in reasoning about plural and conflicting values.

IV. INCOMMENSURABILITY IN THE LAW

A. *Plural and Conflicting Values*

The plural and conflicting nature of values may be more apparent in the law than anywhere else.¹⁰⁴ Judicial choices vindicate different values that are independently important. It is easy to observe situations where it is impossible simultaneously to realize all of the values that would be promoted through one choice or another.

The law also provides a good laboratory to explore many of the available approaches that exist for addressing the problems of incommensurability.¹⁰⁵ In law, choices are necessary. Judges do not have the luxury of engaging in endless on-the-one-hand, on-the-

104. See Sunstein, *supra* note 84, at 243-54 (citing examples from the law that suggest the incommensurability of value, including social differentiation, the religion clauses, broadcasting and free speech, and environmental protection).

105. See *id.* at 253-54 ("An especially large task for legal theory involves an adequate description of how choices are and should be made among incommensurable goods and an adequate account of appropriate kinds of valuation.").

other-hand analyses. They must choose and, in so choosing, certain values are promoted or vindicated while others are subordinated or sacrificed. Moreover, judges are expected to provide reasons for their choices, rooted in law, that can withstand public scrutiny. On one level, law is a social practice committed to the necessity of providing reasons that will be accepted by others as persuasive. It is surely true to an extent that, as Justice Jackson said, the Supreme Court is "not final because we are infallible, but we are infallible only because we are final,"¹⁰⁶ but surely we do not want to cede our judicial institutions into purely political bodies where all that matters is counting votes. Courts are in the business of making and defending ATC judgments. We expect judges to characterize issues properly, identify the right criteria for deciding a case, and then to apply those criteria correctly to the facts before them.

It may be illuminating to examine various theories of adjudication, attitudes, or approaches to judicial choice, as examples of various approaches or strategies for dealing with the problems of incommensurability. One way of evaluating different adjudicative approaches would be to examine the extent to which the approach deals sensitively and responsibly with the problems of incommensurability.

In the following two sections I discuss some of the primary metaphors we use, both in the law and in other situations of practical choice, to justify our choices as best, ATC. In Part IV.B, I suggest that our discussion of reasoning about incommensurables is dominated by two metaphors. The first one is the metaphor of maximization, the second is the metaphor of weighing and balancing. Each of these metaphors is common in the law; maximizing and balancing strategies are perhaps the two foremost approaches used in the rhetoric justifying judicial choices. I also suggest that these metaphors, although useful, have significant shortcomings in their ability to deal successfully with the problems of incommensurability.

In Part IV.C, I identify several other metaphors used in practical reasoning. These metaphors are also evident in the law and justifications of judicial choices as best, ATC I suggest that these metaphors may be more powerful and useful than the primary

106. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

metaphors of maximization and weighing and balancing that dominate judicial discourse.

B. Primary Metaphors for Reasoning About Incommensurables

1. Monism and Maximization

Monism is the belief that, with respect to a particular choice or type of choice, there is only one value that needs to be considered.¹⁰⁷ Maximization is an almost necessary corollary of monism: if there is only one relevant value, then it is difficult to imagine a persuasive reason for choosing any option other than the one that will maximize the realization of that value.¹⁰⁸

Monism in the law takes many forms. At the risk of oversimplification, monism is implicated any time an adjudicative choice is reduced to a single dimension.¹⁰⁹ For example, formalism and originalism each posit a single value that should be consulted in determining the outcome of a case. What the plain meaning of a statute is, or what the intent of the Framers actually was, may be difficult to discern, but if the adjudicative task is limited to a single

107. The most straightforward defense of monism is that there is only one value that matters. But there are a number of other reasons for adopting the use of a single value. It may be that practical choice is otherwise too imprecise and open-ended; utilizing a single value may be a way of simplifying choice. It may be that the proposed value does not exhaust the important values, but that its maximization will be a better surrogate for vindicating the wider range of important values than any other available option.

For a general defense of value monism and the complete comparability of value, see Donald Regan, *Value, Comparability, and Choice*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 2, at 129 (defending the propositions that in the final analysis "[t]here is one and only one sort of value that matters to practical reason," namely G.E. Moore's "good," and "[g]iven any two items (objects, experiences, states of affairs, whatever) sufficiently well specified so that it is apposite to inquire into their (intrinsic) value in the Moorean sense, then either one is better than the other, or the two are precisely equal in value"). For a responsive critique of maximization, see generally Stocker, *supra* note 31, at 196.

108. A number of issues will remain open, as the conflict between "act-utilitarianism" and "rule-utilitarianism" illustrates. See, e.g., J.J.C. SMART, UTILITARIANISM: FOR AND AGAINST 9-12 (J.J.C. Smart & Bernard Williams eds., 1973) (distinguishing rule-utilitarianism and act-utilitarianism and defending act-utilitarianism).

109. An adjudicative ideal may not be entirely monistic when it is recognized that certain questions will remain unanswered by an appeal to the ideal. To fill such gaps, even a monistic theory will need to provide an alternative basis for adjudicative choice.

inquiry, then judging is made much simpler.¹¹⁰ A judge need only determine which of the available options will best realize, or maximize, the value in question. Many other adjudicative theories have monistic ambitions, although sometimes they are unspoken. For example, and again at the risk of oversimplification, law and economics seeks to vindicate the value of efficiency or some similar value. Even theories that are often not thought of as maximizing theories, such as law and feminism, will become monistic if they are single-minded in looking to a certain type of value to justify outcomes.

By now, it should be clear why the metaphor of maximization as a justification for ATC judgments is problematic. The unsolvable problem with maximizing strategies is that it will usually be impossible to settle on which value should be maximized.¹¹¹ The problem of nonmetricity is solved by positing a value to serve as the appropriate metric for a choice. If the metric is accepted, debates and disagreements (real though they certainly will be) will revolve around issues such as whether it is possible to rank choices according to the metric in question or whether it is possible to assign numerical values to the differences between choices with respect to the degree that they vindicate a particular metric's value. The problem with monism, in general, and maximizing strategies as a natural extension of monism, is that it simply assumes away the problems of incommensurability.¹¹² For the choice in question,

110. To say the task is simple, or straightforward, is not to say that it is easy. Attempting to figure out what the original intent is, especially of old, general, and ambitious language, can be very difficult. For example, in the interpretation of the Religion Clauses of the First Amendment, originalist scholars have found considerable evidence in favor of both a separationist and an accommodationist reading.

111. See Wiggins, *supra* note 62, at 62.

Somehow, despite the intractability and uncertainty of the subject matter of choice, agents do arrive at judgments about what is worthwhile or what can or cannot be done in pursuit of what. And somehow, from out of all this, they arrive at shared, partly inexplicit norms of reasonableness—and they set standards, not fully verbalized, by which people of good sense and good character can live. If these norms are only misdescribed when they are seen as norms of maximization, then the thing philosophy had best do is to desist altogether from the attempt to identify that which is to be maximized. It must attend instead to the various ideas that give the however essentially contestable content of reasonable agents' conceptions of the good.

Id.

112. See Taylor, *supra* note 59, at 178 ("If our model is the possession of some metric for

a single value is posited as the only value that has decisive force with respect to that choice.¹¹³ In some instances, this is perfectly appropriate (e.g., which is the fastest route to grandma's house?), but in other instances we will be left with nagging doubts about the outcomes generated, because those outcomes do not take into account some—perhaps much—of what we find to be important about the choice.¹¹⁴

This is not to say that ATC judgments cannot be made and justified based upon a monistic maximizing strategy. For example, if we are trying to conclude which among several objects is heaviest, ATC, then a monistic maximizing strategy is indicated. Of course, nothing is added in the above example by adding the qualifier, "ATC." In most situations, agreement about the appropriate value to maximize will be impossible, because there is no value that subsumes all other values that are important to complex choices. Maximands such as happiness or utility take for granted the commensurability of value. In short, maximizing theories deal with the problems of incommensurability by assuming them away.¹¹⁵

actions, such as utilitarians claim to have, we will give up in despair. But if we turn to the way in which we articulate relative importance in our lives, we will see that we are not without resources.").

113. For a critique of making a certain good preeminent as a strategy for facilitating practical reason, see *id.* at 176 (arguing that "systematic priority leads to pragmatic absurdity").

114. See Frederick Schauer, *Instrumental Commensurability*, 146 U. PA. L. REV. 1215, 1215-17 (1998) (arguing that when we deem options commensurable by a particular scale (such as dollars), we may be inclined to undervalue considerations (such as the preservation of life, the environment, or endangered species) that are difficult to measure on that scale).

115. In response to maximizing strategies such as rational choice theory, David Wiggins has responded:

[I]nsofar as the commensurabilist cum maximizing account of individual choice is not deprived of all empirical content and all explanatory or predictive interest (a privation that can easily escape notice in the postpositivist or postlogical empiricist phase of social theorizing), no reason whatsoever has ever been given to believe it—neither in the shape of telling conceptual considerations (for these would depend on the demonstration, still lacking, that maximizing model furnishes the best way of characterizing a person's practical outlook or his springs of action) nor yet in the shape of empirical evidence. Indeed, in actual cases where a predictive or empirical theory is really needed and entrepreneurs also have something to lose by getting things wrong (e.g., in connection with the concern to make money by selling things that might be retailed at a profit), what we observe in the real world (or so I have been told by those who inhabit that part of it) is that nobody seriously proposes to make any distinctive use at all of rational choice theory or its modes of characterization of the springs of

Legal reasoning illustrates the limitations of maximizing strategies. In the context of statutory interpretation, for example, multiple reasons are almost always relevant. Plural and conflicting values will include text (e.g., plain meaning), intent (e.g., legislative history), purpose (e.g., goals sought or the mischief addressed), history (e.g., the context of the statute), structure (e.g., other provisions in the statute), other statutes (e.g., especially those involving the same subject matter or similar definitions), common law and other precedent (prior judicial decisions), background interpretive principles (canons of construction), settled expectations (e.g., longstanding interpretations), expert opinion (e.g., academic commentary), agency interpretations and rules, public values (constitutional or otherwise), and so on. There may be no definitive hierarchy among these values, although the reasons supporting one type of consideration will be more compelling in many contexts than the reasons supporting other considerations. Thus, for example, in a statutory case, textualist arguments will have great force in a context where the meaning of the text is clear, whereas arguments about intent or structure may have more force in a context in which a clear textual answer is not apparent.

Maximizing strategies are always suspect, although they may be justified. They are suspect because we anticipate that more than one value is at stake and the maximand does not adequately capture the range of plural and conflicting values that we deem important. A maximizing strategy may be justified when, with respect to a particular (or type of) choice, a single value is an appropriate maxim and, either because it sufficiently encompasses the values that are important to that choice, or because it stands as a reliable surrogate for those values.

action. In practice, the thing that is always deployed in the world of commerce is empirical phenomenology—or market research, to give it a more familiar name. This last is a modest, useful business, but it stands in no more need of the supposition that individual choices and the constraints on choices derive from the chooser's striving after a maximum than does advertising or any other method of persuasion on whose behalf market research can spy out the ground.

Wiggins, *supra* note 64, at 63 (citations omitted).

2. *Weighing and Balancing*

The metaphor most often employed for understanding how we reason about complex practical choices involves images of weighing or balancing. We often hear someone say, "After weighing all the evidence, I think *x* is the best available choice." The problem with balancing metaphors is that they slip commensurability in through the back door. If values are incommensurable, they cannot successfully be weighed against each other. Weighing is a form of measurement that presupposes a common unit of measure. As John Finnis notes, efforts to weigh or balance incommensurables are senseless, "in the way that it is senseless to try to sum up the quantity of the size of [a piece of paper], the quantity of the weight of [a] book, and the quantity of the number six."¹¹⁶ Even complex and ingenuous weight metaphors do not escape this problem.

Michael Stocker has attempted to salvage weighing and balancing metaphors from such objections. Balancing plural values cannot be done, Stocker explains, "by a simple hinged beam balance or a sliding beam balance," for two reasons.¹¹⁷ First, "[w]e are concerned not only with the correct ratios among opposing elements—which a beam balance would show—but also with each of these elements being in its own proper place."¹¹⁸ Second, "the elements that must be balanced may well not be on a single continuum, but rather may be more orthogonally related."¹¹⁹

Stocker suggests that a solution to these problems lies in a balance that allows for many elements, each of which "can tip the balance pan in a different direction. Something like a pan suspended on a cord through its centre may do. Even this may be too simple. Perhaps we will need a sphere or a still higher-dimensioned object suspended at its centre."¹²⁰ Such a balance pan goes beyond a simple, hinged balance because not only can something heavy placed near the center of the pan be balanced by something lighter further from the center, but also a single weight at the same point can be balanced by an array of weights in

116. FINNIS, *supra* note 86, at 87.

117. STOCKER, *supra* note 12, at 148.

118. *Id.*

119. *Id.*

120. *Id.*

appropriate locations on the other side of the diameter.¹²¹ The complexities associated with a three dimensional balance would be even greater. Stocker claims that, unlike a simple hinged balance, "[o]ur pan is a device for comparing incommensurable values."¹²²

The problem with even this ingenuous metaphor is that all values still must be translated into a common currency, namely weight. The balance pan may help us understand how the utility of one activity can be weighed against other utilities, but it does not help us if there are activities whose value cannot be translated into the coin of utility. The nontranslatability or nonreducibility of values into the coin of other values is at the heart of the incommensurability problem. Incommensurables are incommensurable precisely because they cannot be translated into a common measure of value. Liberty and equality are incommensurable because neither of these values is reducible to the other, and the value of neither can be wholly expressed in terms of some other value such as utility. Metaphors of weighing and balancing are not inadequate because we have insufficiently complex conceptions of weighing, but because weighing presupposes that the values at issue can be reduced to a single unit of measure.

C. Alternate Metaphors for Reasoning About Incommensurables

1. Perception

Perception may provide a more illuminating metaphor for reasoning about plural and conflicting values than balancing. Consider the perception of color. The colors red, yellow, and blue are primary colors. These colors are incommensurable. These three colors are also incomparable. Red has nothing of either yellow or blue in it; yellow has nothing of blue or red; and blue has nothing of either red or yellow. These three colors are called primary because they are irreducible to each other, and because from these three colors, together with white (the theoretical absence of all

121. *See id.*

122. *Id.* at 149. Stocker continues, "And the comparability of incommensurables also seems to ensure the impossibility of an algorithm for discerning the best or even a good mix of values. Thus, we see the need for practical wisdom and why practical wisdom ineliminably involves judgment." *Id.* at 149.

color) and black (the theoretical presence of all color), it is possible to create every other color. For example, the secondary color green is a combination of yellow and blue; purple is a combination of blue and red; and orange is a combination of red and yellow.

Most colors that we encounter are, of course, combinations of the primary colors. Thus, we are able to make comparisons between them. We say, for example, that this green is bluer than that green, or this orange is redder than that one. We also make comparisons based upon whether a color is dark or light.

Just as most colors are complex combinations of other colors, I contend that most practical situations exhibit a variety of different values. Thus, when we evaluate situations involving alternatives that reflect plural and conflicting values, we can similarly evaluate those situations in terms of the component values.

There is another sense in which an analogy to the perception of color illuminates our consideration of plural and conflicting values. Color perception is a complex phenomenon involving three factors. The first factor is the perceiver. The human eye and brain have certain characteristics that enable us to perceive color as we do. When the apparatus of the eye or brain is defective, color perception is altered or impeded. The second factor is the object that is being perceived. The object itself partially determines our perception of it. The third factor is external conditions, most notably the presence and frequency of light. Our judgments about colors will be affected when any one of these three factors is varied. The perception of color is, thus, at once anthropocentric, objective, and relative—anthropocentric because our perception of a fire truck as red depends upon our own peculiar sensory apparatus; objective because, for example, redness may be an external, monadic property of a fire truck; and relative because the perception will vary according to the frequency and presence of light.¹²³

The analogy to color perception is relevant to practical deliberation because this activity is also a combination of similar factors. Our practical judgments are anthropocentric. For example, when I think you are brave, it is partially due to my own particular

123. Thus understood, the dichotomy often drawn between objectivity and relativity is false; a perception and, I will argue, a practical judgment can at once be objective and relative.

views about what constitutes bravery. In addition, the object that is being evaluated will partially determine our perception of it. My conclusion that you are brave will be partially due to who you are and your behavior. We view things as valuable partially because of the way we are and partially because of the way they are. As philosopher David Wiggins points out, "[w]e can desire [X] because it seems good *and* [X] seems good because we desire it."¹²⁴ External conditions also affect our understanding of the value in a certain activity. For example, the presence of a monetary incentive for your behavior may affect my evaluation of your bravery.

When we make judgments, our thought process is often more akin to an evaluation about color than an evaluation about which of two things is heavier. The color metaphor does not encourage us to make false commensurations. It also helps us recognize the anthropocentricity, objectivity, and relativity of value judgments.

Color perception, however, is not a perfect analogy for reasoning about incommensurables. Perception is different than reason. There is nothing akin to rules of formal and informal logic relating to color perception. If anything, perception seems more akin to intuition than to reason. The similarity between perception and intuition actually illuminates color perception as a metaphor for reasoning about incommensurables.

Upon closer examination, we may conclude that intuition plays a significant role in reasoning about incommensurables, a role that is analogous to the role perception plays in our experience and evaluation of colors. Of course, this is not to say that reasoning about incommensurables is simply a matter of intuition. After all, evaluating color is not purely a matter of perception.

Many philosophers have identified an important role for intuition in moral thinking. For example, some philosophers have spoken about moral insight, the ability to understand or perceive the morally correct course of action in a way that cannot be explained by adherence to a particular theory or set of rules. Intuition, as I am using the term, is not just a pre-rational hunch, nor is it divorced from reason. Intuitions differ from person to person, based in part upon factors such as experience, character, imagination, and

124. David Wiggins, *Deliberation and Practical Reason*, in *ESSAYS ON ARISTOTLE'S ETHICS* 239 n.7 (Amelie Oksenberg Rorty ed., 1980).

ability to compare and distinguish precedents. Reason plays a role in each of these factors. For example, a skilled doctor's intuitions about what certain symptoms mean will be different than the intuitions of a first-year resident. The moral intuitions of someone with a history of serious devotion to the problems of morality will not be the same as the intuitions of someone who has rarely given thought to ethical concerns. Further, we would expect the intuitions of a wise and experienced judge about the correct legal outcome of a difficult case to differ from the intuitions of his or her novice law clerk. In each of these cases, not only would we expect the intuitions of the expert to be different than those of the novice, we would also expect, generally, those intuitions to be better.

Although the realization that intuition plays a role in our evaluation of incommensurable values may not seem to tell us much about how to reason about incommensurables, it does offer one piece of practical advice. At times when we are faced with a difficult moral or practical choice, perhaps the most helpful action we can take is to seek out individuals with experience, sensitivity, and a good track record for dealing with situations of the type in question.

In sum, the metaphor of color perception highlights several important features of reasoning about incommensurables. Such reasoning is an interactive exercise, involving the objects under consideration, the circumstances under which those objects are evaluated, and the characteristics of the person engaged in reasoning. We should expect the character(istics) of the person engaging in the evaluation to have a large role to play in what conclusions will be reached.

2. Recipes

Another metaphor for understanding our pursuit of correct answers when reasoning about complex, practical choice situations involves the notion of a recipe.¹²⁵ This metaphor is an improvement

125. For a somewhat related discussion in the context of governmental choices, see Lewis A. Kornhauser, *No Best Answer?*, 146 U. PA. L. REV. 1599 (1998) (discussing "integration conditions" that specify how multiple values might be integrated into ATC rankings). See also Bruce Chapman, *Law, Incommensurability, and Conceptually Sequenced Argument*, 146 U. PA. L. REV. 1487 (1998) (discussing incommensurability of options relative to scales that integrate multiple criteria in certain standard ways such as tradeoff rates, privileging one

on maximizing and weighing or balancing conceptions of reasoning about incommensurables. ATC judgments will often implicitly rely on underlying recipes, theories, stories, myths, utopian visions, intuitions, or beliefs about which values should be combined in what proportions to achieve an ideal of the type under consideration.¹²⁶ Thus, just as baking a good cake will not be a matter of putting in as much of each ingredient as possible, reaching an ATC judgment will involve not an attempt to maximize as many of the relevant values as possible, but rather will involve an effort to find or fashion a solution that will result in the proper mixture of values in the proper quantities. There may also be analogies to matters of timing and technique that are relevant to following a recipe.¹²⁷

For example, when we compare two social arrangements, we have before us a complex combination of a variety of values in a variety of quantities and ratios. If we conclude that social arrangement Q has more liberty, and social arrangement R has more equality, we can still speak of an advantageous tradeoff, ATC, if the recipe of values, including, but not limited to liberty and equality, is better in one of the social arrangements. When we do this, however, we are testing the two options, Q and R, against some conceptual recipe of what constitutes an ideal social arrangement.¹²⁸ When the two options are compared with this recipe we may be able to make a judgment about which is better, ATC. This recipe becomes the

criteria over others, and lexically ordering criteria).

126. For a complementary account of practical reason, see Taylor, *supra* note 59, at 182-83 ("The view that I have been advancing is that we have potentially rich resources at our disposal to help us in such decisions [involving incommensurable goods]—ones that have tended to be ignored by modern moral philosophy. These include not only the articulation of goods and a sense of their relative importance, but also our sense of the shape of our lives, and how different goods fit together within it—their different places and times.").

127.

But even if we see a plurality of final ends of equal rank, we still have to *live* them; that is, we have to design a life in which they can be somehow integrated, in some proportions, since any life is finite and cannot admit of unlimited pursuit of any good. This sense of a life—or design or plan, if we want to emphasize our powers of leading here—is necessarily one.

Id. at 183.

128. This ideal need not be universal or utopian. It may be quite particular to the situation in which one finds oneself. The word "ideal" may be misleading if it suggests a very high level of abstraction or universal superiority. It may be less misleading to call the "recipe" a conception of the best possible outcome given the contingencies of a situation.

coin according to which P and Q are compared. And the more confidence we have in the composition of our recipe, the better equipped we are to make judgments about which option is better. Our claim, however, will not be that Q is superior to R simply, but rather that Q is superior to R, ATC, given some particular recipe for an ideal ATC outcome.¹²⁹

We can, of course, also reason about the composition of the recipe that we are using as the standard for an ATC judgment. When we do this, however, we will have to take some other value as a given for that piece of practical deliberation. For example, we might say this recipe for an ideal community is deficient because it restricts freedom more than another available alternative recipe. This may be a compelling argument against the first recipe, but only if we are right about the value of freedom, the coin of measurement for that piece of practical deliberation. For any practical deliberation, something will be taken as given, although that given can always be subject to subsequent evaluations.

3. *Chains and Cables*

A fourth helpful metaphor for reasoning about incommensurables is found in the distinction C. S. Pierce draws between a chain and a cable. Pierce argues that philosophy ought

to trust rather to the multitude and variety of its arguments than to the conclusiveness of any one. Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected.¹³⁰

129. Ronald Dworkin's ideal of law as integrity is an example of a recipe approach to adjudication. Dworkin posits two values, "fit" and "justification," realizes that it is not possible to maximize both, and suggests a recipe approach. To oversimplify, "fit" is backwards-looking and asks whether a proposed judicial choice has fidelity with what has come before; "justification," on the other hand, is a forward-looking value judgment about which option is best. As between two judicial choices, each of which satisfies some (unspecified) threshold of fit, the option that provides the best "justification" should be selected. See generally DWORKIN, *supra* note 4. One weakness in Dworkin's account is that there is an insufficient explanation of what it takes for an option to have the requisite amount of "fit." In other words, the appropriate recipe of fit and justification is insufficiently identified.

130. CHARLES SANDERS PIERCE, 5 COLLECTED PAPERS 157 (Charles Hartshorne & Paul

Rather than constructing arguments that resemble chains, we will generally be more successful if our evaluations involve the consideration of a multitude of related reasons and components that can be woven into a cable of cumulative strength.

Practical reasoning is a social practice that is committed to giving and defending reasons to justify and explain choices. Particular outcomes are defended and criticized on the basis of these reasons. The persuasiveness and import of reasons are in turn evaluated in terms of other values that are important. When making personal choices, convincing yourself may be sufficient, whereas in other contexts convincing others will also be important.¹³¹

This commitment to reason giving extends into the public realm and has implications for adjudication.¹³² As a social practice, adjudication is noteworthy for—and in fact may be defined by—its commitment to reason giving. The appellate judicial opinion is an extended argument that seeks to justify a conclusion, through reasons that will be found convincing. The reasons given are subject to scrutiny, by the parties, by other judges in dissenting and subsequent opinions, by academics, and others. We routinely speak of judicial conclusions being correct or incorrect. By this we mean that the reasons that were, or that could have been, marshaled on behalf of a particular outcome are or are not more compelling than the reasons that were, or that could have been, marshaled on behalf of the alternatives.¹³³

Weiss eds., 1934).

131. A related defense of legal reasoning involving strands rather than chains can be seen in Cass Sunstein's defense of "incompletely theorized agreements" in behalf of particular legal outcomes. See SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT*, *supra* note 5, at 35-61; Sunstein, *Incompletely Theorized Agreements*, *supra* note 5.

132. See STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 40 (1990) ("The conviction that other people should be treated reasonably, that the application of power should be accompanied by conscientious and open efforts to meet objections with reasons, is an important source of sustenance for liberal constitutionalism. This aspiration to public reasonableness helps explain and justify our commitment to the rule of law and to judicial review . . .").

133. See *id.* at 46 ("At the most basic level public justification has dual aims: it seems reflective justification (good reasons) but it also seeks reasons that can be widely seen to be good by persons such as they are . . . Public justification does not work down from a prior, purely philosophical standard; participants aim at a system of principles that all can see to be reasonable (not one that only a few will regard as true or best.)") (citation omitted).

4. *Practical Wisdom and Craft*

The best account of how we reason about incommensurable values is provided by Aristotle. The central idea of his practical philosophy is that it is possible to reach definite conclusions about what is right in specific cases without a universal theory. This conception of practical rationality stands in contrast to theories that attempt to establish scientific or axiomatic rule systems for determining how to act. As David Wiggins explains, a neo-Aristotelian approach to practical reasoning will recognize that, because values are plural and incommensurable, any theory that attempts to recapitulate or reconstruct practical reasoning must give up on the attempt to "treat the concerns which an agent brings to any situation as forming a closed, complete, consistent system."¹³⁴ Relevant considerations in practical choice situations make competing inconsistent claims on us. This, Wiggins argues, "is a mark not of irrationality but of *rationality* in the face of the plurality of ends and the plurality of human goods."¹³⁵ Wiggins questions the superiority of an axiom system for guiding practical rationality, as compared to a "long and incomplete or open-ended list of (always at the limit conflicting) *desiderata*?"¹³⁶ There is, Wiggins suggests, no reason to think that all moral concerns are reconcilable. Therefore, because moral concerns are plural and conflicting, we cannot expect to "lay down a decision procedure" for adjudicating in advance their competing claims.¹³⁷ Because of the plurality of values, there is "no real prospect of an ordinary scientific or simply empirical theory of all of action and deliberation as such."¹³⁸ Instead, we should be looking for what Aristotle provides—"namely, a conceptual framework which we can apply to particular cases, which articulates the reciprocal relations of an agent's concerns and his perception of how things objectively are in the world."¹³⁹

134. Wiggins, *supra* note 124, at 233.

135. *Id.*

136. *Id.* at 239 n.8.

137. *Id.*

138. *Id.* at 237.

139. *Id.*

A full account of practical wisdom and how it relates to reasoning about incommensurables and to adjudication is beyond the scope of this Article. Nevertheless, it may be helpful to identify several important features of Aristotle's account of practical wisdom and the implications of those features for reasoning about incommensurable values.

a. Virtues of Intellect and Character

Perhaps the most important, or at least the most distinctive, feature of Aristotle's views about practical wisdom is his belief that achieving good outcomes, in intellectual or moral life, is a result not only of intellect, but also of virtue. Aristotle distinguishes between intellectual virtues and virtues of character.¹⁴⁰ An ability to excel at theoretical reasoning, for example, depends upon intellectual virtue. Intellectual excellence can exist in a person with a defective character and does not depend primarily on life experience.¹⁴¹ Thus, we are familiar with evil geniuses, as well as extraordinarily young proteges who exhibit intellectual capabilities far beyond what we would expect of someone their age. Virtues of character, which Aristotle defines as habits that are developed through practice and discipline over time, in contrast, do not appear in fully developed form in the young.¹⁴²

Practical wisdom is unique among virtues in that it involves both intellect and character. It is difficult to exaggerate either the importance of this insight to Aristotle's understanding of practical wisdom, or how anachronistic this conviction will seem to many in our day and age.¹⁴³

What virtues in particular are involved in reasoning well about complex and conflicting values? Aristotle's answer is obscure. Anthony Kronman has argued persuasively that the two primary virtues of character that are relevant to practical reason are sympathy and detachment.¹⁴⁴ Sympathy enables us to examine each

140. See KRONMAN, *THE LOST LAWYER*, *supra* note 69, at 41-44.

141. *See id.*

142. *See id.* at 41.

143. *See, e.g.,* Eskridge & Frickey, *supra* note 69 (arguing that statutory interpretation is grounded upon practical reason, but silent about relevance of virtue).

144. See KRONMAN, *THE LOST LAWYER*, *supra* note 69, at 66-74.

competing alternative in its best possible light; to treat it seriously; to see and feel its appeal in a real (if imaginary) way.¹⁴⁵ The ability to be detached allows us to move back and forth between alternatives, and to keep enough emotional distance so that we will not exaggerate the merits of a particular viewpoint because we are attached to it.¹⁴⁶

Sympathy and detachment are closely related to another element of character, what Kronman calls deliberative imagination, each of which is relevant to adjudication.¹⁴⁷ As Kronman puts it:

Deliberative imagination is the capacity to entertain a point of view defined by interests, attitudes, and values different from one's own without actually endorsing it. Every deliberative process in which a choice must be made among alternatives that cannot be arranged in a clear rank order of better and worse demands imagination in this sense. That is true whether the choice in question is first-personal (a choice concerning the direction and content of one's own life), third-personal (a choice that must be made by someone else, whom one is helping to advise), or adjudicative (where the point of deliberating is to choose among the conflicting claims of other persons). In each case deliberation requires a combination of sympathy and

145.

As I review the alternatives before me, I must attempt to feel with each of the selves I might become the special cares and commitments, attachments and aversions, that give the life of that possible future self its own distinctive shape. I must strain to feel the force of those internal norms that are the source of whatever appeal that life possesses, and make an effort to see the values associated with it in their most appealing light, which means from the point of view of one actually committed to them.

Id. at 70.

146.

A person who is faced, let us say, with a difficult choice between two careers must make an effort to see the claims of each in its best light and to feel for himself their power and appeal. At the same time, he must preserve a certain distance or detachment from them. From each imaginative foray into the possible future lives that his choices represent, he must be able to withdraw to the standpoint of decision, the position he occupies at present. . . . To ensure that he remains sufficiently detached to survey the alternatives from a vantage point different from any of their own internal points of view, it is necessary that he hold something in reserve even while making a maximum effort at sympathetic understanding.

Id. at 72.

147. *See id.* at 325-31.

detachment, those who lack these traits will display a characteristic deficiency of imagination.¹⁴⁸

b. Ends and Means

Aristotle stated that we do not deliberate about ends, but only about means.¹⁴⁹ In other words, practical reason consists of positing an end and marshaling the best reasons in support of it, and then positing an alternative end and marshaling the best reasons in support of that end. We cannot characterize a choice without reference to both the ends and the means. As Sarah Brodie has pointed out, choice involves a three-term relation of an agent, ends, and means.¹⁵⁰ As a result, we do not just evaluate acts, but also choices and the relationship between the agent, the means, and the end.

Some have mistaken Aristotle's doctrine of means and ends for a belief that reason has nothing to do with the determination of ends, but only with the calculation of how best to achieve ends that are selected on a basis other than reason.¹⁵¹ This almost certainly misconstrues Aristotle's views.¹⁵² There is no reason why the end that is posited for one practical deliberation cannot then be the subject of analysis on another occasion. Thus, to cite one of Aristotle's examples, although a doctor will not question whether to pursue health when acting as a doctor; it is possible for that doctor on another occasion to question whether health is an appropriate pursuit.¹⁵³

Legal realism makes a similar mistake. Realists often assert that judges choose outcomes based on extralegal considerations and then

148. *Id.* at 326-27; see also Scharffs, *supra* note *.

149. See SARAH BRODIE, *ETHICS WITH ARISTOTLE* 179-260 (1991) (analyzing Aristotle's discussion of practical wisdom); Wiggins, *supra* note 124, at 225.

150. See BRODIE, *supra* note 149, at 179-80.

151. Some commentators have suggested that Aristotle's distinction between virtues of character and intellect correspond with the ends/means dichotomy, with our character determining the ends we pursue and our intellect determining the best way to accomplish those ends. For a refutation of this view, see Wiggins, *supra* note 124, at 221-40.

152. See *id.*; see also Wiggins, *supra* note 62, at 62 ("For an Aristotelian, the idea that a self-contained part of the concept of rationality can be bitten off and studied in value-free fashion as the rationality of means, leaving the rest, that is ends, to the taste or formation of individual agents, is a delusion, and a gratuitous delusion at that.")

153. See Wiggins, *supra* note 124, at 225-27.

construct justifications or rationalizations to explain or justify their choices.¹⁵⁴ This does not seem to be an accurate characterization of most appellate adjudication.¹⁵⁵ It is true that a judge will posit an outcome (or end) and consider the best reason (or means) that can be marshaled on behalf of that outcome, but judges (at least when they are acting as judges, and we have reason to believe that most of them usually are) will also consider alternative outcomes and the best reasons that would justify each of the outcomes. A choice is not made until the various alternatives, which can be analyzed only when ends and means are evaluated together, are each considered and the judge reaches a conclusion that one of the available options is supported by better or more persuasive reasons than the other options.¹⁵⁶

Thus, adjudication is not an activity that usually consists of making a choice and then doing one's best to justify that choice. It is more akin to hypothesis-testing, subjecting various possible outcomes, or hypotheses, to the scrutiny of the various relevant arguments for and against, and then settling upon the outcome that is best supported by the available evidence.

c. Choice

Practical reason recognizes the reality of choice in situations of practical deliberation.¹⁵⁷ If monism is correct that there is only one value that ultimately matters, then rationality will compel a practical decision maker to seek and choose the option that will

154. For example, Robert J. Martineau argues that "[i]n understanding the significance of the appellate court opinion in the statutory construction process, the most crucial distinction is between the making of the decision by the judges on the panel to affirm or reverse, and the reasoned explanation of the decision given in the written opinion." Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 26 (1993). The written opinion is "a reasoned justification of the decision prepared after the decision is made. The principal purpose of the opinion is to make the decision appear consistent with the facts and the relevant statutory and judicial authority." *Id.* at 27.

155. See KRONMAN, *THE LOST LAWYER*, *supra* note 69, at 211-25.

156. See *id.* at 325-42.

157. Thus, practical reason rejects the view, usually associated with Langdell, that the law is a choiceless science akin to geometry. See *id.* at 170 (discussing Langdell's geometry of law); CHRISTOPHER C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (1871); CHRISTOPHER C. LANGDELL, *SUMMARY OF THE LAW OF CONTRACTS* (1880).

realize the most of that value. From this view, practical reason is entirely a matter of calculation. There will be no reasons to commend any other course of action over the one that maximizes the value that truly matters. Making any other choice will be irrational and will reflect either weakness of will, mental error, or a deliberate choice to do the wrong thing.

Practical reason rejects the view that moral decision making consists of rational agents seeking to maximize some good or package of goods.¹⁵⁸ Instead, "The judgment that one course of action is better than another is arrived at . . . [through] the agent's preexisting conception (constantly informed and reshaped by circumstance) of the life that is good for a man to attempt to realize."¹⁵⁹

As a result, practical reason recognizes the reality of choice in a way that monism cannot. Choice may reflect our commitment to a particular recipe of values; may reflect a considered judgment about what kind of person we want to become; and may involve a belief that the choice made is correct, or the best available under the circumstances.¹⁶⁰

To say that judges have choices is in one sense uncontroversial; judges rarely are faced with only one alternative. To say judges have choice, however, is not to deny the distinction between following the law and legislating from the bench, nor that some choices are correct and others incorrect.¹⁶¹ Judges can and sometimes do exercise their discretion of choice poorly. Occasionally, judges will make a self-conscious choice not to follow the law, and can be fairly accused of legislating from the bench. Often, however, such choices can more accurately be characterized as situations in which a judge (perhaps mistakenly) finds more persuasive reasons that argue against implementing the plain textual meaning, intent, or purposes of a statute than the reasons that argue in favor of vindicating a statutory text.¹⁶²

158. See Wiggins, *supra* note 124, at 221-40.

159. David Wiggins, *Weakness of Will Commensurability, and the Objects of Deliberation and Desire*, in *ESSAYS ON ARISTOTLE'S ETHICS*, *supra* note 124, at 241, 261. This emphasis on the agent's conception of the good partially accounts for the large place reserved for character and disposition in Aristotle's ethical framework.

160. See Wiggins, *supra* note 124, at 221-40.

161. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

162. Judges that do not adhere to the express or probable directives of legislatures when

d. Creativity

Practical reasoning is a creative enterprise. Given that practical deliberation and choice does not involve the application of a single rule, or even a complex system of rules, it will be creative in nature.¹⁶³ Determining which considerations are relevant; analogizing precedents; attempting to envision the likely effects of various outcomes; organizing and presenting relevant reasons in such a way that they are persuasive (to ourselves or to relevant others) are all skills that take a great degree of creativity.

Adjudication, likewise, is a creative process. Multiple considerations and reasons compete for a judge's devotion. A judge will have to determine which among various arguments are most compelling; how precedents will be considered and applied; what analogies will be made; and the effect of the decision as a future precedent.¹⁶⁴ In short, reasons will be marshaled on behalf of possible conclusions.

e. Craft

Aristotle contrasts practical reason with craft. Judicial decision making actually combines features of both Aristotelean practical wisdom and craft. Insights from Aristotle's discussion of craft are quite apropos of judicial decision making.

Anthony Kronman draws upon the Aristotelean concept of craft. Kronman describes the once widely held, now largely forgotten, "idea that the law is a craft demanding a cultivated subtlety of judgment whose possession constitutes a valuable trait of character, as distinct from mere technical skill, and which therefore justifies the special sort of pride that the possession of such a trait affords."¹⁶⁵ What makes a carpenter a craftsman, as distinct from

interpreting statutes are often guilty of disregarding or failing to give their due to powerful arguments based upon democratic theory and sources of authority. *See, e.g., id.* (expounding upon the countermajoritarian difficulty).

163. *See* Wiggins, *supra* note 124, at 221-40.

164. *See* KRONMAN, *THE LOST LAWYER*, *supra* note 69, at 213, 315-28.

165. *Id.* at 295.

someone who happens to get something right, is the craftsman's knowledge of what he is doing and why he takes each step.

Kronman's description of the law, particularly the work of judges, as a craft draws heavily on Karl Llewellyn's analysis of appellate judging in his monumental work, *The Common Law Tradition: Deciding Appeals*. In response to the insufficiency of conceptions of law as a self-contained set of rules, Kronman writes:

Llewellyn's answer is that judges are constrained not only by doctrinal rules but also, and more importantly, by specific traditions of work and by the habits of thought and perception that an immersion in these traditions typically produces. . . . No matter how many choices the rules leave open, a judge whose task is to apply the law will be guided in his deliberations by what might be called the *ethos* of his office, by a certain ideal of judicial craftsmanship, and by the habits that a devotion to this ideal and long experience in attempting to achieve it tend to instill.¹⁶⁶

166. *Id.* at 213-14. As Llewellyn put it:

[B]asic to most of both the misconceptions and the cross-purposings of the realist controversy, was an absence everywhere of the concept of *craft*, of *craft-tradition*, of *craft-responsibility*, and of *craftsmanship* not as meaning merely the high artistry of God's gifted, but as including the uninspired but reliable work of the plain and ordinary citizen of the craft. The existence of a craft means the existence of some significant body of working knowhow, centered on the doing of some perceptible kind of job. This working knowhow is in some material degree transmissible and transmitted to the incomer, it is in some material degree conscious, it is to some degree articulate in principles and rules of art or of thumb, in practices and dodges or contrivances which can be noticed and learned for the easing and the furtherance of the work. A healthy craft, moreover, elicits ideals, pride, and responsibility in its craftsmen. And every live craft has much more to it than any rules describe; the rules not only fail to tell the full tale, taken literally they tell much of it wrong; and while words can set forth such facts and needs as ideals, craft-conscience, and morale, these things are bodied forth, they live and work, primarily in ways and attitudes which are much more and better felt and done than they are said. Now appellate judging is a distinct and (along with spokesmanship) a central craft of the law side of the great-institution of Law-Government. Every aspect of the work and of the man at work is informed and infiltrated by the craft. It is a tough craft, too; over a whole era it has survived a drift away into formalistic thinking and even believing. More, it has then also survived a degree of neglect of its conscious philosophy which could have choked a less hardy plant, and which remains a peril in the current crisis.

KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 214 (1960).

D. ATC Judgments Revisited

It may be helpful to gather together the threads of my argument. I have suggested that we can make rational comparisons in complex choice situations involving options that reflect plural and conflicting values. The problems of incommensurability are often exaggerated because of imprecise use of terminology and the confusion of importantly different concepts, such as incommensurability and incomparability. I have also suggested that needlessly pessimistic assessments of reason's abilities to provide guidance in practical choice situations are often based upon an obsession with ATC judgments. I have identified alternatives to ATC judgments, and have sought to clarify what an ATC claim really entails.

I have also argued that even ATC judgments can be meaningfully made and rationally defended. I have suggested several metaphors that help us understand what is involved in deliberation and choice. Using the metaphor of color perception, I suggested that such judgments are anthropocentric, objective, and relative, and that, just as perception plays a role in our evaluation of colors, intuition plays a role in moral judgments. Using the metaphor of underlying recipes, I suggested that reaching ATC conclusions may not be a matter of maximizing one value, or even a list of values. We can evaluate competing alternatives against a complex recipe. We can also evaluate competing recipes in terms of other criteria, although there is no ultimate ground on which we can rest a proof that one recipe is better than all others. Using the metaphor of the cable and chain, I suggested that reasoning about incommensurables resembles the accumulation of mutually-reinforcing strands, rather than the construction of a logical chain based on deductions or calculations of a single value.¹⁶⁷

How then will a neo-Aristotelian conception of practical reason answer the question: "Which is the best alternative in this situation, ATC?" The answer will not be entirely satisfying, especially when answered with a high degree of generality. It is:

167. See Taylor, *supra* note 59, at 183 ("Real ethical life is inescapably led between the one and the many. We cannot do away either with the diversity of goods (or at least so I would argue against modern moral theory) or with the aspiration to oneness implicit in our leading our lives. I would argue that Aristotle knew this, and it is another one of those basic insights of his that we moderns have spend too much time forgetting.") (footnote omitted).

"This course of action is superior to all the alternatives because the reasons supporting it are more compelling than the reasons supporting any other alternative."¹⁶⁸

The protests will be immediate and vociferous: This answer merely begs the question! What will count as a better reason, especially if values are incommensurable? This question is not without an answer, which this Article attempts to provide, although that answer in turn will be deemed by some to be insufficient because it does not provide an axiom system to verify that our results are correct.

Once the reasons for and against a particular practical choice are explained in a persuasive and coherent way, there will often be a high degree of agreement that one outcome is correct. Even when a consensus does not exist, it may develop over time. What counts as a persuasive reason, of course, will depend upon a community of listeners who share enough beliefs and commitments that particular reasons will be mutually recognized as having force (although there need not be exact agreement about the relative force of each reason).¹⁶⁹

168. David Wiggins' conclusions about what it means to be rational are similar. [R]ationality in an agent is the disposition, episodically exercised (and occasionally no doubt not exercised), to prefer (and to persist in the preference for) an act or a belief or an attitude in the light of the standards of evaluation and normative ends and ideals that it is the substantive work of evidential, axiological, moral, and whatever other reflection to determine. The rich fabric of reason and reasonableness is not to be confected from the thin threads of plain consistency, or from any elaboration of such materials. . . . It is the existence of such knowledge that makes it possible, as Aristotle puts it, for the decision to lie in perception, that is, for the decision to depend on the exercise of judgment in confrontation with some actually given particular situation. . . .

Wiggins, *supra* note 64, at 65.

169.

What then, with regard to reason and rationality and reasonableness, is the business of philosophy? Surely, to participate in the critique of *reasons*, and to do so in a manner at once participatively engaged yet alert to the need to step off the treadmill, to stand back or to lower the level of optical resolution and look harder in search of scale, shape, and outline. The standards of reasonableness that philosophy can articulate from the critique of lived experience, or by reflection upon the claims that each value makes upon thought, feeling and appetite, will be a distillation from practical knowledge, knowledge not exhausted by the verbalized generalizations or precepts of either agent or theorist.

Wiggins, *supra* note 64, at 65. I would add that the role of law professors in critiquing the

Being correct in practical matters is not, however, merely a matter of convincing the most people. One reason is because practical wisdom—the ability to reason well about practical matters—is neither a universally shared, nor equally developed virtue of intellect or character. Thus, it is not enough to say that an outcome is correct because it has marshaled majority support.¹⁷⁰

Our practical judgments must, therefore, remain somewhat tentative. The possibility that better reasons will come to light that cause us to reassess our conclusions must remain open. A commitment to practical reason entails a commitment to ongoing, though not incessant, assessment of our convictions and subjection of our judgments, choices, and reasons to the light of new circumstances and new information, experience, and arguments.

What if practical reason still seems woefully inadequate and indeterminate? We would do well to recall Isaiah Berlin's denunciation of "[s]ingle-minded monists, ruthless fanatics, men possessed by an all-embracing coherent vision," who are unable to "know the doubts and agonies of those who cannot wholly blind themselves to reality."¹⁷¹ After all, what reason do we have to expect more out of an ethical theory of rationality? David Wiggins powerfully makes the point:

I entertain the unfriendly suspicion that those who feel they must seek more than all this provides want a scientific theory of rationality not so much from a passion for science, even where there can be no real science, but because they hope and desire, by some conceptual alchemy, to turn such a theory into a regulative or normative discipline, or into a system of rules by which to spare themselves some of the torment of thinking, feeling and understanding that can actually be involved in reasoned deliberation.¹⁷²

work of judges could be almost identically described.

170. See POSNER, *supra* note 69, at 113 ("To equate truth with consensus would imply that the earth once was flat, and now is round; that the sun used to revolve around the earth but now the earth revolves around the sun.").

171. BERLIN, *supra* note 46, at lv.

172. Wiggins, *supra* note 124, at 237; see also POSNER, *supra* note 69, at 73 ("Miscellaneous and unrigorous it may be, but practical reason is our principal set of tools for answering questions large and small. Maybe our only set.").

CONCLUSION: REASONING ABOUT INCOMMENSURABLES

In this Article, I have attempted to walk a path that rejects the romantic view that reason is anemic and weak in the face of plural and conflicting values, as well as the totalitarian conception of reason as offering an axiomatic method for maximizing a single supreme value, or weighing and balancing multiple values. Rather, I have tried to articulate and defend a conception of practical reason that enables us not only to reason meaningfully about incommensurable values, but also to engage in ATC judgments that can rationally be defended as better or worse than alternatives.

We should not expect convergence regarding important practical questions; this is because, in part, the things we care most deeply about are different, and the values they manifest are incommensurable.

Confronted with plural and conflicting values, and the accompanying problems of incommensurability, pessimism about reason's gifts is an understandable, if misguided, response. The intractability of practical difficulties, the cacophony of competing voices, the variety of our points of view and life experiences, and the shrillness of much of what passes as public discourse, contribute to our sense of hopelessness and helplessness. The temptation to reduce public reason giving and justification, including adjudication, to politics is seductive.

We must not be seduced however. Concluding that reason is helpless in the face of incommensurable values is not only romantic, it is also mistaken. Reason can and does guide practical deliberation and choice, and we do not necessarily act in error when we consider some alternatives, and the reasons that support them, better than others.