SYMPOSIUM

LAW AND INCOMMENSURABILITY:
INTRODUCTION

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On February 6 and 7, 1998, a Symposium on "Law and Incommensurability" was held at the University of Pennsylvania Law School. The Symposium was organized by the *University of Pennsylvania Law Review*, and was funded by that body, by the Law School, and by the Institute for Law and Economics. The articles and comments from the Symposium were then edited for publication, and comprise this issue of the *University of Pennsylvania Law Review*. What follows is a short introduction to the Symposium issue.

What is incommensurability? And what is its significance for law? I here delineate, in a very brief and introductory way, the answers that the Symposium participants provide to these questions. As a thresh-

old matter, let me note that this Introduction focuses upon the in-commensurability of *options* or choices, and not the incommensura-bility of other items (such as values, goods, reasons, life-plans, and norms) that are sometimes described as "incommensurable." Al-though it remains an open philosophical question whether the in-commensurability of values, goods, and so forth can always be reduced to the incommensurability of options—and I mean to take no position on that question here—I think it fair to say that the arti-cles and comments in this Symposium *are* centrally concerned with options or choices rather than with other purportedly incommensu-rable items. Thus the focus of this Introduction.

What, then, does it mean to say that options or choices are in-commensurable? Roughly speaking, "incommensurability" means the absence of a scale or metric. But what, more precisely, nonmetricity involves can be fleshed out in a large number of different ways, as the existing philosophical and legal literature on incommensurability shows. I will distinguish three general and related senses of "incom-mensurability," and briefly summarize the Symposium articles with reference to these three. The incommensurability of options or choices might mean: (1) the *incomparability* of options or choices, such that no numerical ranking of the options in the order of their comparative worth is possible; (2) the failure of a particular kind of scale, such as a monetary scale or a consequentialist scale, to track the comparative worth of options; and (3) the fact that a *scaling procedure* (either a particular scaling procedure or any scaling procedure at all) is not the best procedure by which to choose among options. It bears emphasis that my summaries of the articles are selective and interpre-tive, meant simply to suggest how the articles might be seen to fit together into the overall Symposium, and certainly should not be taken as full, freestanding recapitulations.

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The incommensurability of options or choices, in one sense, means their incomparability. Two 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.[1]

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[1] This is certainly not the only possible definition of incomparability, *see* Ruth Chang, *Introduction*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 1, 4-7 (Ruth Chang ed., 1997) (offering a different definition), but it is suffi-

To use a now-famous example from Joseph Raz: 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.[2]

Incomparability, thus defined, is intimately related to the absence of a scale or metric. If a group of options includes one or more pairs of incomparables, then no ranking of the options in the order of their comparative worth is possible. (Take as given that the park and drink options are incomparable, in the above example, and try to assign the numbers 1, 2, and 3 to the three options, to represent their comparative worth. There is no way to do it! Numbers, or at least real numbers, are greater than, less than, or equal to one another, and so an assignment of real numbers to options can represent only the standard trichotomy of normative relations—"better," "worse," and "equal.") Thus, it is not surprising that the term "incommensurability" is used regularly to mean incomparability, and, specifically, that incomparability is a key topic of this Symposium. The authors who focus on incomparability are Ruth Chang, Lewis Kornhauser, Richard Craswell, Leo Katz, Eric Posner, and myself.

Professor Chang's article is entitled *Comparison and the Justification of Choice.* The article is a very general, and very powerful, analysis of what it takes for a choice to be justified. Chang's claim is that, unless some "positive value relation" obtains between two options, justified choice between the two is impossible. What is a "positive value relation," in Chang's mind? At a minimum, a "positive value relation" obtains between options if they are "comparable" in the sense of "comparability" I am using here—that is, if the options are better, worse, or equal with respect to the normative criterion or criteria bearing on choice.[3] Chang also means to leave open the possibility

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ciently close to the definition used by most of the Symposium participants that I frame my summary in terms of incomparability thus defined.

² *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 328 (1986).

³ In Chang's view, I should note, there is always, ultimately, a single criterion or "choice value" that matters to a given choice. To the extent that multiple criteria bear upon choice, they do so insofar as they are contributory components ("contributory values") of a single underlying choice value. So, for example, the multiple criteria of pleasure, accomplishment, and friendship could bear on an individual's choice, but

(one that she has discussed at greater length elsewhere) that options can be incomparable in the here-defined sense, and yet still bear a positive value relation. For example, the options might be "on a par" or "roughly equal," which is a value relation beyond the standard trichotomy and yet one that, Chang has elsewhere argued, options conceivably might bear. But if options are not comparable, "on a par," nor bear some further positive relation, then no justified choice between the options can be made. Although some moral philosophers have argued that *noncomparative* considerations determine which choice is justified, and relatedly that the existence of positive value relations between options is unnecessary for a choice to be justified, Chang argues persuasively that these philosophers—whom she terms "noncomparativists"—are generally mistaken.

Chang's view is shared explicitly or implicitly by the other Symposium participants who address incomparability. None of us argues for the possibility of justified choice notwithstanding the absence of positive value relations between options. In fact, as I read the articles, each of us believes in, or at least takes as plausible, a comparativist view yet more robust than Chang's—namely, that *comparability* is a necessary condition for justified choice. On this view, *justified choice between incomparables is impossible,* and the incomparability of governmental options becomes a particularly interesting and pressing issue for legal scholars. For, if government must choose between incomparable options, and thus cannot justify its choice of one option over the other, will this not have important implications for the procedures and institutions by which that choice properly is made? As it emerges, the incomparability of governmental options is indeed the common problem with which Professors Kornhauser, Craswell, Katz, Posner, and I are all, in various ways, concerned.

Professor Kornhauser, in an article entitled *No Best Answer?*, argues both that governmental choices might turn out to be incomparable, and that incomparability at the level of governmental choice may have important institutional implications. Kornhauser's central idea is to link incomparability to the existence of multiple normative criteria (specifically, on Kornhauser's account, multiple values) that bear on the worth of options. Kornhauser explains that "integration conditions" will specify how the multiple values should be integrated into an admissible, all-values-considered ranking. (For instance, a

only insofar as these criteria all contribute to a single underlying choice value such as "well-being."

plausible integration condition will say that where every value ranks one option over another, an admissible all-values-considered ranking must do the same.) But if the correct integration conditions are too weak to produce a single, admissible, all-values-considered ranking, then—on Kornhauser's account—incomparability ensues. For example, option A might be better than option B on one admissible all-values-considered ranking, but worse on another. And Kornhauser points to two ways in which incomparability might specifically infect *governmental* choices: (1) an individual's options might be incomparable (in light of the multiple values that bear on that person's welfare), and this incomparability at the level of individual choice in turn might render incomparable the choices of a welfare-maximizing government; or (2) the government itself might pursue multiple values (for example, in the area of environmental regulation, the values of maximizing welfare, minimizing environmental harm, and preserving the federal fisc) such that the integration conditions on these multiple governmental values might be too weak to produce a single ranking. Finally, Kornhauser suggests that legislatures, rather than agencies or courts, are the best governmental institutions for choosing between incomparable options.

Professor Craswell, in *Incommensurability, Welfare Economics, and the Law*, is more skeptical than Professor Kornhauser about the existence of incomparability at the level of governmental choice. Craswell's argument can be sketched as follows. A governmental choice might affect a single individual, or it might affect multiple individuals. For a governmental choice affecting a single individual, the government is justified in choosing the option the individual herself would have chosen (more precisely, the option she would have chosen with appropriate information and without duress). Although the choice, *for the individual*, might have been a choice between incomparables, the individual would have selected an option, somehow, and in turn the better and justified option for the government is the option that (it predicts) the individual would have chosen. Since choosing in line with the individual's hypothetical choice is better for the government, and choosing the other way is worse, the choice *for the government* in the one-person case is *not* a choice between incomparables—or so Craswell claims.[4] As for governmental choices affecting multiple indi-

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[4] Craswell argues, importantly, that this analysis of the one-person case holds good not just on a subjectivist theory of welfare, but also on an objectivist theory. The subjectivist generally will want the individual's choice to be determinative of the government's; the objectivist will not, but cannot argue plausibly that the individual's choice

viduals, Craswell argues that the Kaldor-Hicks scale or some variant thereof normally provides a ranking of those options as better, worse, or equally good. Subjectivists about welfare should, Craswell suggests, be satisfied that the Kaldor-Hicks scale or some variant accurately tracks the comparative worth of the government's options; and although objectivists about welfare will not be thus satisfied, the objectivists have not yet developed a plausible, normative account of governmental choice.

Professor Katz, in an article entitled *Incommensurable Choices and the Problem of Moral Ignorance*, offers a different kind of skepticism about incomparability. Katz makes an epistemic point: that truly comparable options may appear to be incomparable, given our normative ignorance. One illustration Katz provides is this: The option for a society of (a') introducing the automobile, with 55,000 accidental deaths a year, seems incomparable with the option of (b') sacrificing 1000 citizens a year to an evil deity, because the choice between the two options is difficult, while the choice between sacrificing 1000 citizens to the deity and (c') sacrificing 900 citizens is easy, and yet the choice between the automobile and sacrificing 900 remains difficult. This *seems* to be very much like the above-described choice among an afternoon spent (a) walking in the park, (b) enjoying a glass of scotch, or (c) enjoying a glass of port—since the small improvement from b' to c' fails to resolve our choice between those options and a', just as the small improvement from b to c fails to resolve the choice between those and a. But the appearance of incomparability is misleading in the automobile case, Katz claims, because the automobile option is truly better than the sacrifice of 900 (which violates a deontological constraint), and that option is in turn truly better than the sacrifice of 1000 (again violating a constraint). Our *epistemic* difficulties in ranking comparable options as better, worse, or equal—in this illustration, our epistemic difficulties in specifying the contours of deontological norms—must be kept distinct from true incomparability.

Professor Posner, like Professor Katz, makes a skeptical, epistemic point about incomparability. Katz's point, boiled down, is that our difficulty in comparing options is not reliable evidence of their incomparability. Posner's point, boiled down, is that the *statements* we make about the incomparability of options are not reliable evidence

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ought not be determinative when objective values run out and the individual is faced with a choice between incomparables.

of their incomparability. Posner's article is entitled *The Strategic Basis of Principled Behavior: A Critique of the Incommensurability Thesis.* Posner shows how statements about incomparability (and, relatedly, statements about the infinite valuation of goods) can emerge in a strategic equilibrium, in which individuals attempt to signal their status as "good types," who normally will not cheat in relationships. For example, individuals have an incentive to say that friendship or marriage is incommensurable with money (meaning either that the goods are incomparable with money, or that goods are infinitely valuable, compared to money), so as to garner the gains that flow from a reputation as a good friend or spouse—in particular, so as to induce a potential friend or spouse to start a relationship. Individuals seeking to communicate their identity as "good types" do *not* have an incentive to say, "A friendship or marriage is worth X," because such a statement is susceptible to being trumped by someone else's statement that "A friendship or marriage is worth $X + 1$." As a result, Posner shows, an equilibrium can emerge in which *everyone* makes statements of incommensurability quite independent of such statements being generally true. And this is the case, he suggests, not just for statements about the value of relationships, such as friendship and marriage, but also for statements about the value of other goods, such as the environment, that again may be uttered as reputational signals. (I might say, "The environment and money are incommensurable," so as to communicate to potential friends, landlords, colleagues, and other partners that I am a good type.) The upshot, Posner argues, is that the government should generally discount the incommensurability claims that citizens are prone to make, and take its options to be comparable.

Finally, in my own contribution to the Symposium, *Incommensurability and Cost-Benefit Analysis,* I argue for a position about the incomparability of governmental options that is different from Kornhauser's, but also different from Craswell's, Katz's, and Posner's. Craswell, Katz, and Posner are, in different ways, skeptical about the incomparability of governmental options. Kornhauser is less skeptical, and suggests that incomparability may have important institutional implications. My article is also less skeptical than Craswell's, Katz's, and Posner's about the fact of incomparability, but argues that incomparability, without more, does not have important institutional implications for government. Specifically, my article considers the implications of incomparability for cost-benefit analysis. Cost-benefit analysis (CBA) is a scaling procedure that is used mainly by adminis-

trative agencies and that ranks an agency's options by assigning each option a number equaling its net monetized benefits or costs, relative to a status quo option. CBA may end up ranking an option as better, worse, or equal to the status quo, when in fact the option and the status quo are (I am willing to assume) incomparable in light of the normative criteria bearing on governmental choice. The claim I attempt to defend in my article is that this kind of ordering "failure" by CBA is not really a failure at all. Incomparable options are, by definition, neither better nor worse than each other—and thus (without more) it is neither better nor worse for the government to choose between incomparables by flipping a coin, or by using a scaling procedure like CBA, as opposed to, say, remanding the choice between the incomparables to an elected body. Which procedure an agency should use and whether agencies rather than legislatures should be choosing at all depend on how agencies and their procedures perform in tracking the comparative worth of *comparable* options, not on the scope of incomparability.

In sum, a number of the Symposium participants are engaged in a rich and important debate about the implications of *incomparability* for law—specifically, about the extent to which governmental choices are incomparable, and about the procedural and institutional upshots of that. It also bears note that this specific problem, a central focus of the Symposium, is only one aspect of the broader problem of law and incomparability. Incomparability might be relevant to law, independent of the incomparability of governmental choices. To give one example: It is arguable that, if the payment of money to a disappointed promisee in lieu of performance is incomparable with the promised performance, the proper contractual remedy is specific performance rather than money damages. The claim here is not that the government's remedial options, specific performance versus damages, are incomparable. Rather, the claim is that the government's remedial options are comparable but that the better option depends upon whether money and performance are incomparable for the promisee, in light of her interests and welfare. The problem of law and incomparability concerns not just whether governmental choices do or do not turn out to be incomparable, but more broadly whether incomparability in the world changes the comparative worth of the government's options—for example, by making one governmental option, rather than another, the better and justified option.

In turn, the problem of law and incomparability, narrowly or broadly defined, is just one aspect of the larger problem of law and

incommensurability. For as I shall now briefly discuss, "incommensurability" in a larger sense means not incomparability, but the failure of a particular kind of scale to track the comparative worth of options.

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Options are "incommensurable," in the second sense I briefly delineate here, if there is no scale of a particular kind that tracks the comparative worth of the options. For example, "incommensurability" is often used to mean the absence of a *cardinal* scale—a scale where the numbers assigned to options represent not just their order, but the differences in their worth, or the ratios of their worth, such that we can speak of the options realizing more or less of some "common unit" of worth. "Incommensurability" meaning the absence of a cardinal scale is *not* the same as incomparability. As a number of Symposium participants note, there can be a group of comparable options that can be ranked *ordinally* in the order of their comparative worth, even though no common unit of their worth exists. Or, incommensurability might be used to mean the absence of a *money* scale—for example, a scale that assigns numbers to options depending upon the cumulative amount that persons are willing to pay or accept for the options, relative to the status quo. Again, comparable options might easily turn out to be incommensurable by a particular money scale. Incommensurability might mean the absence of a *single-valued* scale—one that assigns numbers to options depending on how much of a single value the options realize. Or, to give a final illustration, incommensurability might mean the absence of a *consequentialist* scale—generally speaking, one that assigns numbers to options depending on the good consequences (for the chooser, or for the world at large) that the options produce.[5]

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[5] Ruth Chang has tried to persuade me that "the absence of a cardinal scale" is the most philosophically perspicuous definition of "incommensurability." A debate about incommensurability, relative to a consequentialist scale, or a single-valued scale, is likely to be a debate about the criteria bearing on choice: The "commensurabilist" position here is really just that good consequences, or a single value, are all that matters to the choice, while the "incommensurabilist" position is really just that other criteria (nonconsequentialist criteria, or other values) are relevant as well. By contrast, the question about cardinality remains an interesting and important one *within* a particular conception of the normative criteria relevant to the choice.

Nonetheless, I have defined the second variant of "incommensurability" in this more open-ended, and arguably less philosophically perspicuous, way—as the failure of a particular kind of scale to track the comparative worth of comparable options—so as to make sense of why, for example, anticonsequentialism, an opposition to money

It bears emphasis that, if options are comparable, there is always at least one scale that tracks the comparative worth of the options: namely, a scale that gives 1 to the best option, 2 to the next best, 3 to the next best, and so on. But talk of incommensurability among comparables is still kosher, as long as it is kept clear that what is meant by "incommensurability" here is the failure of a particular rule for assigning numbers to options, and not the failure of every such rule.

Incommensurability in the sense just described is the focus of Symposium articles by Gillian Hadfield, Alan Strudler, and Bruce Chapman. Professor Hadfield's article, entitled *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law,* concerns incommensurability relative to a consequentialist scale. Hadfield's claim is that certain contractual choices are best explained by an *expressive* theory of rational choice, rather than by the consequentialist theory standard in economics. The consequentialist theory posits that actors have stable preferences over states of affairs and rationally choose actions so as to maximize the fulfillment of those preferences (or, one might say, to maximize "good consequences"). By contrast, an expressive theory claims that actors rationally choose actions in order to express their rational, evaluative attitudes, such as love, respect, dedication, or self-reliance. Hadfield specifically examines three categories of contracts: surrogacy contracts, marital separation agreements, and spousal guaran-

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scales, and pluralism are all important strains in the legal literature on incommensurability. The anticonsequentialist "incommensurabilist" primarily is, or may be, opposed to the governmental use of consequentialist scales *because those scales are consequentialist,* not because the scales happen to be cardinal. (Indeed, I think it is far from clear whether, assuming for the moment that options are always comparable in light of their consequences, a cardinal, as opposed to merely ordinal, scale of good consequences exists.) Similarly, the opponent of governmental cost-benefit analysis is or may be primarily opposed to the use of money scales, not to the use of cardinal scales as such. (For example, as my own article shows, a utilitarian who believes in the existence of a cardinal scale of overall well-being still might be firmly opposed to money scales, given the differential welfare productivity of money between the rich and the poor.) And the opponent of single-valued scales is or may be primarily committed to pluralism, not to mere ordinality. My broad definition permits a legal scholar to label herself an incommensurabilist qua her opposition to consequentialist, money, or single-valued scales, rather than qua her beliefs about cardinality—as legal scholars indeed have done—without making a semantic mistake.

Of course, it still may be right that, *within* the broad definition of the second variant of incommensurability given here, the most philosophically perspicuous *version* is the absence of a cardinal scale. I do not mean to deny that, and am indebted greatly to Professor Chang for discussions on these matters.

tees. She describes how women may choose to enter into such contracts (and, indeed, rationally may be justified in doing so) in order to express their rational attitudes. And Hadfield argues that a contractual choice that is expressive, rather than consequentialist, should not be legally binding as such on the promisor. "She chose" or "he chose" is not, without more, a sufficient ground for binding the agent to that choice, when the choice was motivated and rationally justified on expressive grounds—this is Hadfield's central legal claim. There instead must be some further basis for legal enforcement, such as reliance by the promisee.

Professor Strudler, like Professor Hadfield, is concerned with incommensurability on a consequentialist scale. "Consequentialism" is, to be sure, a fairly open-ended concept and there are subtle differences in what "consequentialism" means in different contexts (for example, the difference between a consequentialist account of rational choice, which has some notion of good consequences for the individual actor, and a consequentialist account of morality, which has some notion of good consequences overall). But as long as these subtleties are kept in mind, it is worth noting that "incommensurability" and anticonsequentialism often are linked in the philosophical literature, and that in this Symposium both Professors Strudler and Hadfield advance variants of anticonsequentialism. Strudler's concern is with the law of fraud. In an article entitled *Incommensurable Goods, Rightful Lies, and the Wrongness of Fraud,* Strudler asks why certain lies—lies by sophisticated negotiators about their reservation prices—are not legally actionable as fraudulent. The answer, Strudler shows, is that such lies do not violate deontological constraints; specifically, they do not interfere with autonomy or constitute unfair treatment. If they did, the lies would be morally wrong and perhaps legally actionable. The options of lying versus not lying are, in general, incommensurable on a consequentialist scale, in the sense that a consequentialist scale generally fails to track the comparative moral worth of these options. Which option is morally better, and better justified, is not just a function of the overall good that the option produces, for the very point of deontological constraints is to render certain options morally wrong notwithstanding their good consequences overall. In turn, the incommensurability of lying versus not lying on a consequentialist scale has potential import for the content of fraud law. If we use a consequentialist scale in deciding which lies are morally, and perhaps legally, wrong, we will overlook some wrongdoing.

Strudler's article shows particularly clearly how incommensurability, in the second sense sketched here, is different from incommensurability in the first sense of incomparability. Strudler's claim is not that the options of lying versus not lying are incomparable. Rather, the claim is that the lying option is (sometimes) morally worse than not lying, because lying (sometimes) violates a deontological constraint, and that a scale or decision-procedure that fails to incorporate deontological concerns will (sometimes) mischaracterize the morally worse option as morally better, or equal.

Professor Chapman, in *Law, Incommensurability, and Conceptually Sequenced Argument*, focuses on the incommensurability of options relative to scales that integrate multiple criteria in certain standard ways. Given multiple criteria for ranking options, a decisionmaker might, standardly, try to integrate the criteria by: (1) specifying fixed tradeoff rates between the criteria, such that the number assigned to each option is some weighted sum of the number of units of each criterion that the option realizes; (2) selecting one criterion, and ignoring the others; or (3) ordering the criteria in lexical order, with criterion $C1$ used to rank options, $C2$ then used to break ties between options that are equally good under $C1$, $C3$ used to break ties under $C2$, and so on. Chapman argues that, sometimes, none of these standard techniques is appropriate. Instead, the multiple criteria might need to be "conceptually sequenced," and Chapman gives as an example a law school committee that chooses three incoming students for scholarships by, first, ranking all the students with respect to the criterion of financial need, then ranking the ten neediest students with respect to the criterion of scholarly ability, and, finally, ranking the five most scholarly of these ten with respect to community service. The criteria of financial need, scholarly ability, and community service all combine to determine which students get the scholarship—but not by fixed tradeoffs, a monistic ranking, or a lexical scheme. More generally, Chapman claims, a "conceptual sequencing" of this sort is embodied, and justifiably so, in the choice procedures that adjudicatory bodies employ—specifically, Chapman suggests, in the doctrines of tort law, contract law, and criminal law.

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Incommensurability in a third sense means neither incomparability nor the failure of a particular scale to track the comparative worth of options, but rather the fact that a *scaling procedure* (either a particular scaling procedure or any scaling procedure at all) is not the best

procedure by which to choose among certain options. By "scaling procedure," I mean a choice procedure in which numbers are assigned to options, and the agent then chooses that option with the highest number. Incommensurability in this third sense, it must be stressed, is conceptually distinct from incommensurability in the first two senses. To say that two options are incomparable (the first sense of "incommensurable") is to say that, truly, they are not better, worse, or equally good in light of the normative criteria relevant for choice between the options. But it still might be best for the agent—best, in light of those very same criteria—to use some scaling procedure as the mechanism for choice among a group of options that includes the pair of incomparables, if, for example, other choice procedures are too expensive, and the scaling procedure tracks with sufficient accuracy the comparative worth of those options that *are* comparable. Similarly, to say that a particular scale S does not track the comparative worth of options (the second sense of "incommensurable") is to say that some option assigned a higher number by S is not truly better than some option assigned a lower number or that two options numbered equally by S are not truly equal in worth. But, again, even if "incommensurability" in this sense obtains, it is a *further* question whether the agent should use S as a procedure for choice among the options. Scale S might be both cheap and, in general, sufficiently accurate, such that it is best for the agent generally to employ S as his choice procedure, notwithstanding local inaccuracy.

This distinction—between facts about how options compare, and facts about the procedures we should use in choosing among them—is discussed by a number of the Symposium participants. It is, for example, a partial focus of Strudler's article, and of my own article. And the distinction is addressed in detail by Frederick Schauer's contribution to the Symposium issue, entitled *Instrumental Commensurability*. Professor Schauer emphasizes that the question which procedure is best for some cohort of decisionmakers to use—and more generally, the question which belief, disposition, attitude, or presumption is best for that cohort to hold—is a different question from the truth of incomparability, or the truth of "incommensurability" in the second sense I have delineated. Schauer asks us to suppose, for example, that some of the options the cohort must confront are incommensurable. Even so, a belief, disposition, etc., in incommensurability, on their parts, will have various costs; for example, it may incline the decisionmakers against doing the hard epistemic work needed to discover which option is better. On the other hand, such a belief,

disposition, etc., will have various benefits: for if the cohort believes that the options are commensurable by a particular scale (for example, by a dollar scale), they may be inclined to underweight the considerations (for example, the preservation of life, the environment, or endangered species) that are difficult to measure on that scale. Further, Schauer claims, it is *these* higher-order costs and benefits, not the sheer fact of incommensurability, that determine which belief about commensurability, disposition to commensurate, etc., is the best for the cohort to hold. Although Schauer does not deny that incommensurability is *relevant* to the question which belief, disposition, etc., is best for the cohort to hold, Schauer's view (I take it) is that this fact is relevant just insofar as it changes the costs and benefits of having beliefs about commensurability, dispositions to commensurate, and so on.[6]

The distinction between scales and scaling procedures is illustrated, in a very different way, by Richard Warner's contribution to the Symposium, entitled *Does Incommensurability Matter? Incommensurability and Public Policy.* Professor Warner's focus is on what he terms "reason-excluding commitments." A reason-excluding commitment is a commitment not to consider or entertain a gain with respect to some normative criterion (call it *C2*, the "excluded" criterion) as a reason to accept a loss to another (call it *C1*, the "excluding" criterion). Warner gives the example of a revolutionary who refuses to consider or entertain the prospect of monetary gain to himself (*C2*) as a reason to betray the revolution (*C1*). The revolutionary's identity *as a revolutionary*, Warner suggests, is constituted by this reason-excluding commitment. Similar reason-excluding commitments will bear upon public policy. Warner invites us to imagine a citizen who is committed to funding the schools (*C1*) and will not consider or entertain tax savings (*C2*) as a reason not to fund them. In this kind of case, Warner claims, the government itself ought not choose among its options (here, funding versus not funding the schools) by comparing the losses to *C1* with the gains to *C2*, because to do so would ignore and devalue the citizen's reason-excluding commitment.

Note that a reason-excluding commitment is, conceptually, a constraint on choice procedures. In particular, a reason-excluding com-

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[6] The same kind of analysis can be run the other way, Schauer explains—on the assumption that options are truly commensurable by a particular scale—and a parallel analysis can be developed contrasting the question, "Is *incomparability* true?" with the question, "What beliefs, dispositions, etc., with respect to incomparability, are best to hold?"

mitment entails that the agent not choose among options using a scaling procedure that employs tradeoffs between $C2$ and $C1$. This constraint on the citizen's use of a tradeoff-employing scaling procedure in turn constrains the governmental use of such procedures—or so Warner argues. But it is at least conceptually possible that the citizen and, derivatively, the government are thus procedurally constrained *even though* the comparative worth of the citizen's options are, indeed, accurately tracked by the tradeoff-employing scale. It could (1) be better for the citizen to realize some gain to $C2$ in exchange for a loss to $C1$, even though (2) it is better for the citizen not to consider or entertain such a possibility. To be sure, Warner hardly means to claim that (1) actually obtains. My point here is simply that reason-excluding commitments, as I understand them, are constraints on procedures and thus directly concern incommensurability in the third sense, not incommensurability in the first or second senses I have tried to delineate.

Finally, Jason Johnston's article, like Professor Warner's, is focused on incommensurability in the third sense rather than the first or the second. Professor Johnston's article is entitled *Million-Dollar Mountains: Prices, Sanctions, and the Legal Regulation of Collective Social and Environmental Goods*. As the title suggests, Professor Johnston's central concern is whether a pricing regime, as opposed to a regime of sanctions, should be used to regulate access to collectively owned environmental goods. For example, Johnston asks, should the government impose civil and criminal sanctions for causing the extinction of an endangered species, as it currently does, or should it instead charge a price for access to this "resource," such as a fee per individual animal killed? Johnston identifies a number of related and subtle considerations against a pricing regime, such as the following. Prices would be difficult to set, because an individual citizen might not have an incentive to be sincere in revealing her money valuation of the collective resource. The collective agency would have an unfortunate incentive to increase the use of the resource and thereby increase its budget. Under a sanctioning regime, members of the collectivity have a stronger incentive to monitor use of .the resource and report violations to the agency. And, relatedly, formal sanctions under this regime will be backed up by informal, reputational penalties, while no parallel informal mechanism will help to enforce the pricing regime.

As I understand them, Johnston's arguments here are *institutional.* His claim is not that the options of conserving versus destroying the

resource are incomparable; nor that it is, even in theory, impossible to set a true money price for the resource such that the willingness to pay *that* price by users would track whether or not the resource should be conserved; but rather that, in practice, a pricing regime will fail because the information needed to set prices is difficult to elicit, agencies are corrupt, and other such institutional difficulties obtain.

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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. Most centrally, we need to ask whether governmental choices are incommensurable, by various scales (such as money scales, cardinal scales, single-valued scales, or consequentialist scales), or downright incomparable, and relatedly, what scaling procedures government ought to employ in deciding among options. This is a problem addressed, in different ways, by many of the contributions here. More widely, we need to ask whether the incomparability of options, or their incommensurability by particular scales, changes the justified content of law—for example, whether, as Professor Hadfield suggests, the incommensurability of a contractor's choice by a consequentialist scale bears on the legal enforceability of that choice. This Symposium addresses both the central question, and the wider one, and in so doing makes a large contribution to the burgeoning literature on law and incommensurability.