

INCOMMENSURABILITY: TRUTH OR CONSEQUENCES?

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Frederick Schauer wants to bypass the question of whether the “incommensurability thesis” is true.¹ His question is whether it would be good to believe the thesis along some nonepistemic dimension (such as whether it is utility-maximizing). Eric Posner thinks we can explain why people affirm belief in incommensurability, quite apart from the truth of the thesis.² In this sense, both of their articles might just as well have appeared in a symposium on “Norms for Belief” or “Explanations for Normativity,” as in one on “Law and Incommensurability.” The claims that human beings possess free will, that judges are bound to decide according to law and have little or no room for the exercise of discretion, or that creationism is as much “science” as evolution, are all claims that might be addressed in the spirit of Posner and Schauer. We might, of course, ask, “Are these claims true?”—the standard philosophical question—or we could ask, à la Posner and Schauer, “Is it or would it be *useful* or *advantageous* to believe these claims?” What we might call the “truth-norm”—the norm that we should only believe what is true—is ordinarily the dominant norm in academic discourse. Even indirect utilitarians like John Stuart Mill and Henry Sidgwick accept, at bottom, the truth-norm: It is only because utilitarianism is *truly* the correct normative theory that, as a merely instrumental matter, they think it best if most people conducted their affairs by reference to nonutilitarian norms. By contrast, Schauer thinks that we can, or should, dispense with the truth-norm in thinking about incommensurability, and Posner thinks that we can explain belief in incommensurability without regard to its truth.

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¹ See Frederick Schauer, *Instrumental Commensurability*, 146 U. PA. L. REV. 1215 (1998).

² See Eric A. Posner, *The Strategic Basis of Principled Behavior: A Critique of the Incommensurability Thesis*, 146 U. PA. L. REV. 1185 (1998).

I. SCHAUER, SEMANTICS, AND TRUTH

Let us call "Epistemic Agnosticism" the view that norms for belief need not make reference to the truth-bearing features of propositions. Thus, we might say that one *ought* to believe certain propositions simply because doing so maximizes good consequences or because doing so satisfies a nonconsequential demand of reason. Let us call "Fictionalism" the view that one *ought* to believe certain *false* propositions because doing so maximizes good consequences or because doing so satisfies a nonconsequential demand of reason. Fictionalism is just a subset of Epistemic Agnosticism, though one that highlights the radical character of the position: For by this line of reasoning, even the *falsity* of a proposition is not an obstacle to the justification of belief.

I do not mean to impugn Fictionalism because of its radicalism. I am Nietzschean enough to recognize both that truth is a genuine property of propositions *and* that the *value* of believing true propositions is an entirely different question.³ I do think, however, that once we enter this realm of debate, we leave entirely behind philosophical questions *distinctive* of incommensurability, and we enter the realm of epistemology and speculative empirical social science.⁴

Schauer's article is clearer than Posner's about its irrelevance to the truth of the incommensurability thesis, and this is a virtue. Schauer speaks, even in the title, of "Instrumental Commensurability," and he is at pains to emphasize that "there is a nonnormative fact of the matter" about whether or not values are incommensurable.⁵ His fundamental point, however, is one about epistemology (what we *ought* to believe), not semantics (what words mean), and he only confuses issues, I think, by bringing on board certain baggage from the philosophy of language.

There is, first of all, a certain muddying of the philosophical waters in suggesting that Charles Stevenson's notion that certain predi-

³ On Nietzsche's views in this regard, see BRIAN LEITER, NIETZSCHE ON MORALITY (forthcoming 2000), and Brian Leiter, *Perspectivism in Nietzsche's Genealogy of Morals*, in NIETZSCHE, GENEALOGY, MORALITY 334, 351 (Richard Schacht ed., 1994) (rejecting the "Received View" of Nietzsche's perspectivism and arguing that Nietzsche's perspectivism still permits "modest objectivity" in answering our "mundane questions about truth and knowledge").

⁴ I do not, of course, think that the realm of empirical social science is outside the realm of philosophy. See Brian Leiter, *Naturalism and Naturalized Jurisprudence*, in ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY (Brian Bix ed., forthcoming 1998).

⁵ Schauer, *supra* note 1, at 1223.

cates have "emotive meaning"⁶ and Philippa Foot's notion that certain predicates are "thick concepts"⁷ (involving an inextricable bonding of the descriptive and evaluative)⁸ show "that one need not reject the fact-value distinction nor subscribe to the central tenets of continental philosophy in order to recognize that descriptive sentences containing seemingly descriptive words arrayed in a seemingly descriptive semantic structure often mask statements and conclusions that are in important ways normative, evaluative, and prescriptive."⁹ It is certainly correct to observe that a central theme of twentieth-century philosophy has been that syntax, or grammatical form, is a poor guide to semantics, or meaning. And it is also surely correct that semantics can be parsed from one's metaphysics of facts and values. But it is misleading to embed this point in a discussion of Stevenson and Foot. For Foot *does* reject the fact-value distinction, and what is more, she thinks her point about the semantics of "thick" concepts undergirds that rejection.¹⁰ Similarly, Stevenson thinks (like R.M. Hare¹¹ after him) that the fact that one can parse, at the level of meaning, the descriptive from the evaluative shows precisely that the fact-value distinction is a viable one after all.¹² Schauer cautions that there are "important differences" between these claims,¹³ but "important"

⁶ *Id.* at 1220 (citing CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* 33 (1944)).

⁷ *See id.* at 1220-21 (citing PHILIPPA FOOT, *Moral Arguments, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 96 (1978)).

⁸ I leave aside H.L.A. Hart's "ascriptive language," *see id.* at 1221-22 (citing H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 *PROC. ARISTOTELIAN SOC'Y* (n.s.) 171 (1949)), which strikes me as simply a case of "thick concepts," the thickness of which is attributable to their institutional setting within the law. Even a Stevensonian emotivist could acknowledge that predicates, when embedded in certain institutional practices and their attendant norms, inextricably link descriptive and normative claims. Indeed, it is lack of attention to this latter point that seems to me to vitiate the argument in Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 *MICH. L. REV.* 1187, 1190 (1994) (arguing that concepts like "negligence" and "fraud" are thick or "blend" concepts, because they "blend description and evaluation").

⁹ Schauer, *supra* note 1, at 1222. Despite having taught a doctoral seminar this year on "The Continental Tradition," I confess to having no idea what "the central tenets of continental philosophy" are; indeed, I doubt there are any such things. I assume what Schauer has in mind are certain contemporary themes associated with postmodernist and deconstructionist writers about language. But these themes are absent from most of the major figures in the Continental tradition, like Hegel, Marx, Nietzsche, and Husserl.

¹⁰ *See* FOOT, *supra* note 7; PHILIPPA FOOT, *Moral Beliefs, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY, supra* note 7, at 110.

¹¹ *See* R.M. HARE, *THE LANGUAGE OF MORALS* (1952).

¹² *See* STEVENSON, *supra* note 6; CHARLES L. STEVENSON, *FACTS AND VALUES* (1963).

¹³ Schauer, *supra* note 1, at 1222.

seems to me an understatement: They are just different claims, reflecting opposing views of the semantics, purpose, and potentialities of moral discourse.¹⁴

More significantly, Schauer himself has reasons to want to stay away from the semantics of “commensurability talk,” since he has already committed himself to a cognitivist interpretation: He has told us, as noted above, that claims about commensurability are either true or false. So let us leave semantics out of it. The issue is what we should believe, not what words mean. Schauer himself suggests as much when he writes that “[t]he question is no longer only which of [commensurability or incommensurability] is true, but also which of these alternatives, if widely accepted, or if accepted by a certain cadre of public decisionmakers, would produce the best consequences, or the morally best world.”¹⁵ But here we have moved from semantics to epistemic states—for example, “acceptance”—and are discussing the norms governing these states, not the semantic content of symbols.

I have nothing to add to Schauer’s interesting speculations about the consequences of believing or disbelieving in commensurability. I do note that some of Schauer’s scenarios explicitly involve Fictionalism, as when he writes that “[e]ven if there *are* incommensurables, . . . it might be best to assume that there *are not*.”¹⁶ I would, however, suggest that there is one further complicating factor absent from Schauer’s calculations. As long as we are in a consequentialist mode of reasoning about norms for belief, we also ought to factor in the consequences of abandoning the truth-norm in deciding what to believe about commensurability, or any other topic for that matter. Lack of commitment to the truth-norm must also surely have consequences, some no doubt pernicious. To talk in isolation about non-truth-based reasons for accepting incommensurability (or its opposite) is to bracket from the consequential calculation what may be the most serious consideration: namely, the consequences of deciding what to believe without regard to its truth.

II. POSNER, SPECULATION, AND STRATEGIES

Posner’s article is not, contrary to its title, “a critique of the incommensurability thesis,” where this thesis is understood (as it is by

¹⁴ Foot, after all, introduced the idea of “thick” concepts in the course of critiquing the noncognitivism of Hare and Stevenson. See, e.g., sources cited *supra* note 10.

¹⁵ Schauer, *supra* note 1, at 1225.

¹⁶ *Id.* at 1227.

all its philosophical proponents) as a thesis about the *truth* of incommensurability. Posner thinks otherwise only because of his mistaken supposition that the truth of the thesis turns on its explanatory fit with actual human behavior. This focus, in turn, is motivated by Posner's perception that, construed as a theory of behavior, the incommensurability thesis threatens the explanatory imperialism of rational choice theory. I confess to a failure of intellectual empathy at this point, since the empirical inadequacy of rational choice theory strikes me as yesterday's news.¹⁷ But my ambition in this modest comment on Posner's stimulating article is not to dethrone economics,¹⁸ but rather to examine the adequacy of his "strategic" approach to the incommensurability debate.

Posner claims that the incommensurability thesis "is a label attached to a social phenomenon: the tendency of many people to refuse to make tradeoffs in everyday life that are said to be demanded by the theory of rational choice."¹⁹ Let us assume—plausibly enough given the authors Posner cites²⁰—that this claim is not intended as a stipulative definition of the thesis. In that case, however, it is a misstatement of the thesis, for none of the philosophical writers on incommensurability takes the thesis to depend on its viability as a hypothesis in explanatory social science. Like most philosophical theses, the thesis that values are incommensurable appeals to our ordinary ways of thinking and talking about values, but not necessarily to our actual behavior. Of course, our concept of values may manifest itself in our behavior—as well as in our ideas and in our talk—but behavior is, in almost all cases, only defeasible (often easily defeasible) evidence as to the concept.²¹ The reasons why this should be so are suggested by Posner's own putative "counter-examples":

¹⁷ Empirical psychologists, for example, have established the existence of "preference reversal," thus undermining the core commitment of rational choice theory to the transitivity of preferences. See DANIEL M. HAUSMAN, *THE INEXACT AND SEPARATE SCIENCE OF ECONOMICS* 227-44 (1992).

¹⁸ For an immodest effort in this direction, see Brian Leiter, *Holmes, Economics, and Classical Realism*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* (Steven J. Burton ed., forthcoming 1998).

¹⁹ Posner, *supra* note 2, at 1186.

²⁰ Posner cites, among others, Elizabeth Anderson, Ruth Chang, and Joseph Raz. See *id.* at 1185 n.1.

²¹ Posner even concludes his piece with the concession that it "has not refuted the arguments advanced by philosophers who believe in the incommensurability of values. Instead, it has shown that the evidence on which they base their arguments . . . is susceptible to another interpretation." *Id.* at 1213. But Posner misconstrues the evidence, and his alternative interpretation is a nonstarter, as I discuss in the text.

The reason that people treat supposedly incommensurable options as though they were commensurable is that resources are scarce and choices must be made. . . . Lawyers, businessmen, movie moguls, politicians, and even ordinary people constrained by time and resources drop friends when the costs of maintaining the friendship become too high. People routinely risk or violate family relationships by accepting attractive job offers in distant locations. Individuals make implicit valuations of the environment when they choose detergents, buy paper products, recycle newspapers but not bottles, purchase large houses rather than small apartments, and litter. People pay for sex or for companionship, sometimes overtly and other times in carefully disguised manners, such as in the form of gifts. Artists and teachers become investment bankers when their pay falls below a certain level. Workers accept premia for risks, and agencies use these risk premia in order to calculate the costs and benefits of regulations.²²

But if “resources are scarce and choices must be made,” then that fact, by itself, defeats the behavioral evidence that we conceive values as commensurable. The explanation for the behavior is not that values are *really* commensurable, but that circumstances compel choices at odds with our concept of value. The point is not a deep one. If Sophie, with the Nazi soldiers at hand, must choose which of her children will live or die,²³ this hardly shows that she thinks the value of their lives can be ranked along some metric. So, too, the behavior of the agents and victims of capitalism is better explained by the dehumanizing circumstances in which they find themselves rather than by their tacit embrace of a philosophical thesis, that is, that values really are commensurable.

Clearing up this confusion actually vitiates, as far as I can see, the motivation for the rest of Posner’s argument: “People rationally make incommensurability claims in order to obtain strategic advantages in their interactions with others.”²⁴ Posner may have identified correctly *why* some people claim that values are incommensurable, but this is irrelevant to the question of whether or not values are incommensurable—just as the fact that politicians routinely invoke *moral* considerations on behalf of the policies they advocate is irrelevant to the question of whether or not these policies are moral. Politicians have *motivations*, to be sure, for claiming “morality” for their cause, but this observation is inapposite when asking, “Is their cause moral?”

²² *Id.* at 1188.

²³ See WILLIAM STYRON, *SOPHIE’S CHOICE* 483-84 (1976) (describing Sophie’s choice of her son over her daughter).

²⁴ Posner, *supra* note 2, at 1186.

The explanatory theory Posner offers is largely "speculative" in character, appealing not to any empirical results of social-scientific research, but to undocumented claims and assertions, whose main justification is that they conform "to the standard premises of rational choice theory."²⁵ This would be interesting, I suppose, if rational choice theory were empirically valid, but I have already noted my skepticism on that score. Yet, the sorts of claims the theory leads Posner to make will hardly reassure those who are uncertain about its validity. We are told, for example, that "[s]ome wives cheat on their husbands even though they know that their infidelity might be revealed and, if so, will injure the long-term health of their marriage; other wives do not cheat on their husbands because they do not want to risk their marriage."²⁶ But surely *some* wives cheat on their husbands because they *want* to endanger their marriage; and surely others cheat because they are bored and sexually unsatisfied, and make only short-term decisions, not long-term calculations; and still some others cheat because their husbands want them to because the husbands find it arousing; and still others do *not* cheat because they have no sexual desire for anyone else, or because they think it would be dishonorable to violate the marital oath. All of this psychological complexity vanishes when our speculative explanations must conform to the demands of rational choice theory.

Now these kinds of points are certainly quite familiar to proponents and critics of rational choice theory alike. Posner simply falls back on the standard refrain that the theory "abstracts out one element of human motivation in the hope of shedding light on" the phenomena in question.²⁷ The "light" mentioned must presumably be *predictive* light, and here again we find ourselves thrown back to an *empirical* question. To most noneconomist observers, the answer seems fairly clear. As Daniel Hausman, a sympathetic critic of economics, puts it, "the justification for a particular paradigm or research program . . . is success and progress, including especially empirical success and progress. Since economics has not been very successful and has not made much empirical progress, economists should be exploring alternatives."²⁸ Nevertheless, none of this uncertainty about the core animating assumptions surfaces in Posner's article—though in this regard his article is hardly anomalous for the

²⁵ *Id.* at 1192.

²⁶ *Id.*

²⁷ *Id.* at 1200.

²⁸ HAUSMAN, *supra* note 17, at 279-80.

law-review literature applying economic analysis and rational choice theory.

The "one element of human motivation"²⁹ on which rational choice theory settles is, itself, revealing. Take Posner's rational-choice treatment of "principled" behavior. To be "principled" for this purpose is to be "a person who does not cheat in relationships, a cooperator."³⁰ Incommensurability claims, according to Posner, are supposed to be a species of "principled" behavior—a way of signaling to others that one is not a "bad type[]." ³¹ But all cases of putative allegiance to "principle" are purely strategic in character, a way of gaining certain advantages, of broadcasting a "reputation" that it is useful to have.

Now "principled" individuals, to be sure, are not likely to be found in great numbers in Congress, or in the national media, or on the faculties of elite universities, or in the upper echelons of leading corporations. And since these core institutions of capitalist society play the dominant role in shaping attitudes, values, and conduct in the society at large, it is perhaps not surprising to find academic apologists for capitalism asserting that "a person who claims to be principled is not being honest."³² Of course, from within the institutions whose agents have internalized market norms, this is surely correct. The mistake, obviously, is to treat the theory of agency that is adequate to *a particular socioeconomic form of organization* as adequate to human beings *as such*. Nelson Mandela was principled when he refused to compromise with his captors, even though it meant spending a third of his life in prison. Martin Luther King, Jr., was principled when his commitment to justice led him to increasingly vocal attacks on capitalism and the imperialist aggression in Vietnam, even though this discomfited the mainstream civil-rights establishment with its more modest agenda. The first whites to act against self-interest and campaign against apartheid in both South Africa and the United States were communists acting on principle. The legions of young people who left their jobs and college studies to fight, futilely, against fascism in Spain in the 1930s acted on principle. The history of the world is simply *replete* with examples of principled behavior, of

²⁹ Posner, *supra* note 2, at 1200.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1198.

behavior that sometimes cost principled actors everything, including their lives.

So Posner's argument actually suggests, to my mind, a very different question: What pathology of socioeconomic circumstances has led to an academic discourse in which statements like "a person who claims to be principled is not being honest"³³ are propounded and accepted uncritically? I do not doubt, for one moment, that there is any shortage of self-interested behavior in the world, and that this fact is central to any serious understanding of human affairs for the foreseeable future.³⁴ What I wonder about is how this latter observation, common to everyone from Thucydides to Marx, could become transmogrified into claims like "a rational person will sacrifice his reputation when the gains are sufficiently high."³⁵ Let us assume that "rational" is a purely *descriptive* term, for otherwise the claim is merely tautological (a "rational" person—that is, one who knows that one *ought* to sacrifice anything for sufficiently high gains—will sacrifice his reputation when the gains are sufficiently high). And let us assume, too, that "sufficiently high" gains are not measured along some metric commensurate with reputation, lest the claim also be vacuous. Given those assumptions, however, the claim is sheer nonsense. Yet it, and claims like it, defines a whole genre of legal and economic scholarship, a genre apparently impervious to reality and indifferent to empirical research. "People stigmatize others who too overtly desire money in order to represent, by comparison, their own immunity from being bought off or tempted to defect by a higher payoff."³⁶ But perhaps people stigmatize the overt pursuit of money because it is invariably associated with a coarsening of character and sensibility, a squandering of talent, an evisceration of the capacity for love, friendship, creativity, and other human goods? Posner's article is a veritable parade of these quite wild, speculative generalizations, of which the claims about incommensurability are but a small (and hardly the most implausible) subset. Why these claims would attract some of the brightest minds in the legal academy, and why they would find a forum in the most distinguished journals, is an even more compelling question, in my view, than the consequences of abandoning the truth-norm when debating incommensurability.

³³ *Id.*

³⁴ See Leiter, *supra* note 18.

³⁵ Posner, *supra* note 2, at 1198.

³⁶ *Id.* at 1206.

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