NO BEST ANSWER?

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INTRODUCTION

In the late 1960s, Ronald Dworkin first advanced the controversial claim that there is a right answer to every legal question.1 Debate over this claim generally has focused on the question of judicial obligation in "hard cases." When a promisor contests the validity of a contract, for instance, is it always the case that the contract is either valid or invalid? Or, is it possible that no right answer exists to this question? The controversy began with Dworkin's initial advancement of the claim,2 persisted through the publication of Law's Empire,3 and

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1 The claim first appears in The Model of Rules, in which Dworkin argues that judges have no discretion, but are under an obligation to decide the case correctly. See Ronald M. Dworkin, The Model of Rules, 35 U. CHI. L. REV. 14, 37 (1967), reprinted in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14, 36 (1977) (stating that a judge has no discretion, because "he is bound to reach an understanding, controversial or not, of what his orders or the rules require, and to act on that understanding"). The claim is repeated and, some say, modified throughout Dworkin's later philosophy. See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 146 (1985) (asserting that "law is not a matter of personal or partisan politics"); RONALD DWORKIN, LAW'S EMPIRE 266 (1986) [hereinafter DWORKIN, LAW'S EMPIRE] ("No aspect of law as integrity has been so misunderstood as its refusal to accept the popular view that there are no uniquely right answers in hard cases at law."); Ronald Dworkin, No Right Answer?, in LAW, MORALITY, AND SOCIETY 58 (P.M.S. Hacker & J. Raz eds., 1977).


3 See, e.g., John Finnis, On Reason and Authority in Law's Empire, 6 LAW & PHIL. 357, 357 (1987) (stating that Dworkin's book "overestimates practical reasoning's power to identify options as the best and the right"). Brian Bix provides a clear synopsis and evaluation of the "no right answer debate," though his discussion sometimes confuses
was then relegated, without resolution, from the mainstream legal literature to the literature on legal philosophy.

Recently, this debate has been revived in the context of conflicting values, rather than in the context of the validity of conflicting legal claims. The focus of debate thus has shifted from the existence of right answers in matters of principle to the existence of best answers in matters of policy. In these latter circumstances, the legal decisionmaker often must balance conflicting values; the "no best answer" thesis asserts that there is no best way to do this. Questions of the appropriate balance of conflicting values are omnipresent in public policy. Although on some accounts of adjudication these questions may arise in adjudication when a court seeks to determine the validity of a legal claim, \(^4\) they usually arise in the context of either administrative rulemaking or judicial review of agency actions. Courts, for example, have had to review decisions by the Environmental Protection Agency (EPA) to set standards for lead additives to gasoline, \(^5\) decisions by the Occupational Safety and Health Administration (OSHA) to set standards for cotton dust emissions, \(^6\) and decisions by the EPA and the Department of the Interior (DOI) restricting the above-ground use of pesticides containing strychnine. \(^7\)

When one turns from conflicts of rights to conflicts of value, the claim that a right answer exists is transformed into a claim that there is a best answer to every collective decision problem. This claim is often attributed to economic analysts of law, in general, and to advocates of cost-benefit analysis, in particular. Opponents of the claim generally rely on the literature in ethics that denies the existence of a best answer to many individual decisions. These opponents, however, too often simply adopt, without modification, the arguments for incommensurability in ethics to problems of law. In this Article, I argue that such straightforward adoption is inappropriate.

the incommensurability of values with the incommensurability of options. See BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 96-106 (1993).

\(^4\) Of course, Dworkin's theory of adjudication contends that policy plays no role in adjudication. In other theories, however, judges at least sometimes may invoke policy arguments in their decisions. See DWORKIN, LAW'S EMPIRE, supra note 1, at 410 (stating that "legislation invites judgments of policy [but] adjudication does not").

\(^5\) See Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) (en banc).


\(^7\) See Defenders of Wildlife v. Administrator, 882 F.2d 1294 (8th Cir. 1989).
To begin this analysis, one needs to understand the nature of the debate in ethics. Part I thus offers a characterization of this debate that identifies two distinct strands of the debate. Each strand leads to different consequences for the implications that incommensurability has for law. I identify these strands as "instrumental incommensurability" and "expressive incommensurability." The two Parts following Part I address the implications of each form of incommensurability for law. Part II considers the problem of instrumental incommensurability in the context of law. I suggest first that the case for instrumental incommensurability of values in law has not been adequately made. Subsequently, I accept, for purposes of argument, the claim that legal decisionmakers must choose in the face of instrumentally incommensurable values and ask what consequences these "choice" situations might have for legal decision. Part III investigates the relation between the expressive aim of action and the expressive aspect of law discussed in recent legal literature. The Article ends with a brief conclusion.

I. INCOMMENSURABILITY IN PRIVATE DECISION

Theories of practical reason differ in the role they assign to reason in an agent's choices. Rationalists assign reason a comprehensive role in decisionmaking; the agent is both instrumentally rational and ends-rational. Rationality identifies the ends that the agent ought to pursue and then dictates that she choose the option that best promotes her rationally given ends. In contrast, decision theory, as practiced by economists, requires only that the agent be instrumentally rational, in that she must choose the best means to further her subjectively endorsed ends.

Claims of incommensurability arose as a challenge to decision theorists and (consequential) rationalists. As the following discussion demonstrates, the incommensurability claim delineates two "substantive"—as opposed to instrumental—roles that reason may play in choice. First, as ends-rationalists claim, an agent's ends are subject to rational criticism on substantive, as opposed to merely coherence, grounds. At a minimum, then, reason would dictate that

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A large literature on incommensurability in ethics exists. See, e.g., Ruth Chang, *Introduction*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 1 (Ruth Chang ed., 1997) [hereinafter INCOMMENSURABILITY] (providing a clear guide to the issues). The restriction to "consequential" rationality is meant to leave open the possibility that nonconsequential considerations might provide reason to choose among options.
some ends not be pursued. Most strongly, reason might dictate which
ends ought to be pursued. Second, reason might constrain the way in
which the agent integrates her ends, whether or not they are ration-
ally mandated.

Decision theory constrains this integration in that it requires the
agent to have a complete and transitive all-values-considered order-
ing, generally called the agent's "preferences." A more stringent
integration-rationality would impose additional constraints on the
relation between an agent's underlying ends and her all-values-
considered ordering. On this account, then, a fully rational agent
would be required to integrate all her rationally defined ends into a
single, rationally defined, all-values-considered ordering, and to
choose the option that ranked highest on this ordering.

More generally, this analysis defines a three-dimensional classifi-
cation scheme for theories of prudence. The first dimension, that of
ends-rationality, addresses the extent to which the individual's ends
are rationally required. Integration-rationality, the second dimen-
sion, concerns the extent to which rationally required constraints on
integration restrict the set of admissible all-values-considered judg-
ments. The final dimension, instrumental rationality, mandates that
the agent adhere to her all-values-considered ordering.

Claims of incommensurability, when properly understood, chal-
lenge the ability of consequentialist reasoning to meet the demands
of integration-rationality. This characterization of the incommensur-
ability debate, however, requires defense because, on its face, the
incommensurability debate presents a bewildering set of conflicting
characterizations. This confusion has arisen for several reasons.
First, the scope of the incommensurabilist's critique varies. At times,
the claim of incommensurability encompasses only conflicts among
values (defined more precisely below9); at other times, the claim of
incommensurability encompasses not only conflicts among values,
but also conflicts between values and rights, or among rights.10 In this
Article, however, I restrict attention to the more circumscribed ques-

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9 See infra notes 15-18 and accompanying text.
10 See THOMAS NAGEL, The Fragmentation of Value, in MORTAL QUESTIONS 128
(1979), for an early article that raises the broad question of conflicts among different
types of consideration, such as values and rights. See also BIX, supra note 3, at 96-106
discussing incommensurability with respect to rights and options); Mackie, supra note
2, at 8-9, reprinted in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, supra note
2, at 164-65 (introducing the claim of incommensurability into the legal debates over
the right-answer thesis).
tion of conflicts among values alone. Second, as elaborated more fully below, authors writing about the conflict among values have adopted different definitions of incommensurability. Third, and most important, the incommensurabilists agree in their aversion to standard decision theory, but they disagree about the theory of value and rational choice that should underlie decisions. Different underlying theories of value have varying consequences for the implications of incommensurability and, sometimes, for one’s entire understanding of incommensurability.

In this Part, I adopt a distinction suggested by Elizabeth Anderson’s theory of value between the instrumental and expressive aims of choice. On her account, consequentialists admit only an instrumental aim of choice, as choices are meant to promote ends. For Anderson, however, choice may also (or instead) express the end rather than promote it. Claims of incommensurability, including Anderson’s, view incommensurability of value as problematic for this instrumental aim, but the different conceptions of value endorsed by the varying critiques imply different consequences and remedies to the problem.

Each of these two aims of action has an associated argument concerning incommensurability. I shall call these two arguments

11 I restrict the discussion in this way for two reasons. First, the recent debate over incommensurability in ethics has focused more on the narrower question of conflicts among values. Second, conflicts among rights or between rights and values seem to present very different issues than conflicts among values alone. Some of these differences become evident when one considers the different models that have been offered of rights. On some accounts, rights are constraints that preclude the correlative dutyholder from adopting specific actions. On other accounts, rights may play a more complex role in the agent’s practical reasoning.

This restriction, of course, has some costs. Conflicts among rights or between rights and values are endemic to legal decision. The argument of this Article thus is quite limited. The existence of best answers when values conflict does not imply the existence of right answers when rights and values or two rights conflict. For further discussion, see infra note 50.

12 See ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 59 (1993).

13 Anderson’s view concerning the relation of the instrumental aim to the expressive aim and the importance of the instrumental aspect of choice is unclear. The instrumental aspect of choice has a central role in the discussion in Value in Ethics and Economics. See id. at 79 (“Both expressive and consequentialist (optimizing) logic seem to be indispensable to practical reason.”). In later work, however, Anderson appears to ignore or undermine this aspect of choice. See Elizabeth Anderson, Reasons, Attitudes, and Values: Replies to Sturgeon and Piper, 106 ETHICS 538, 538 (1996) (“My theory...holds that rational principles guide action by constraining what can be rationally intended and justify action by showing that it expresses rational intentions.”).
"instrumental incommensurability" and "expressive incommensurability." In Part I.A, I argue that the best interpretation of the core set of arguments concerning instrumental incommensurability introduces a third role for rationality—the specification of the conditions imposed on the integration of an agent's multiple ends. In Part I.B, I turn to the relation of the expressive aim of choice to discussions of incommensurability. Some discussion here is important because the applications of the incommensurability claim to legal settings appeal to expressive interests.

A. Defining Instrumental Incommensurability

Arguments for incommensurability begin with two observations: first, that agents pursue multiple values, and second, that these values sometimes conflict. When such conflict arises, the agent cannot (always) identify an option that best promotes her projects, all values considered. A "value" ($V$) for these purposes is a criterion for assessing "options." For most, if not all, purposes, these assessments are comparative. Hence, I am concerned with the associated value relation on options that has the structure of "better than (with respect to $V$)." This relation satisfies the two properties of completeness and transitivity: (1) (completeness) for any two options $A$ and $B$, either $A$ is better than $B$ in terms of $V$, $B$ is better than $A$ in terms of $V$, or $A$ and $B$ are equally good in terms of $V$; and (2) (transitivity) if, for any three options $A$, $B$, and $C$, $A$ is better than $B$ (in terms of $V$) and $B$ is better than $C$ (in terms of $V$), then $A$ is better than $C$ (in terms of $V$).\textsuperscript{15}

The relation "$A$ is incommensurable with $B$," however, applies not to values but to options; that is, to the choices available to an individual

\textsuperscript{14}This subpart summarizes the argument made in Lewis A. Kornhauser, The Hunting of the Snag: Evaluating Incommensurability in Ethics and Economics (July 25, 1995) (unpublished manuscript, on file with the University of Pennsylvania Law Review).

\textsuperscript{15}This definition of the value relation is both too weak and too strong. It is too weak because it does not obviously exclude rights as values. One might argue that a right classifies options into two classes: those that conform to the duty that is correlative to the right and those that breach that correlative duty. Actions that conform are then "better than" actions that violate the duty. The definition is too strong because it excludes any partial ordering under which some pairs are noncomparable.

Ruth Chang argues that the structure of value outlined in the text is too strong because it accepts the "trichotomy thesis," which she holds to be false. See Chang, supra note 8, at 4-5. Specifically, she believes that a fourth relation (in addition to better than, worse than, and equal to), on a par with, exists. See id. This value relation would then lead to violations of transitivity. In Chang's terms, one might see the argument in this subpart as one for the trichotomy thesis.
agent at a particular time.\textsuperscript{16} Two options, \(A\) and \(B\), are then said to be incommensurable if it is not the case that \(A\) is better than \(B\), \(B\) is better than \(A\), or \(A\) and \(B\) are equally good.\textsuperscript{17} In these circumstances, there is no best choice (all values considered) for the agent. Rationality does not tell her what to do.\textsuperscript{18}

Notice that, under this definition, incommensurability might arise whether or not each of the values that the individual endorses is rationally given. Moreover, under this definition, it is not clearly adequate to describe the agent’s failure to identify a best option as a failure of instrumental rationality. After all, for each value \(V\) that she

\textsuperscript{16} Some authors do consider the relation one that applies among values, asserting that incommensurability implies that value \(A\) and value \(B\) do not have fixed weights; one cannot say that \(A\) is always more important than \(B\) in evaluating particular outcomes. See, e.g., Richard Warner, Incommensurability as a Jurisprudential Puzzle, 68 CHI.-KENT L. REV. 147, 149-53 (1992) (illustrating this principle with an example in which the same offer is either accepted or rejected because of altered circumstances). The requirement of fixed weights of values is very stringent in the sense that it greatly restricts the set of admissible all-values-considered orderings of options. An agent might fail to satisfy this restriction, however, and still be able to compare all options \(A\) and \(B\). Since the agent is not choosing among values, it is not clear why she must be able to compare them. She has no need to rank values independent of the particular choices she must make. John Finnis equivocates over the domain of incommensurability. At times he seems to believe that two interpretations (that is, the options in this context) are incommensurable. See Finnis, supra note 3, at 375. At other times, he suggests that the criteria for evaluating interpretations are incommensurable because reason fails to identify fixed weights to assign to the criteria. See id. at 372-74.

\textsuperscript{17} See JOSEPH RAZ, THE MORALITY OF FREEDOM 322 (1986) (offering this definition of incommensurability). Ruth Chang defines this phenomenon as “incomparability.” See Chang, supra note 8, at 4. She reserves the term “incommensurability” for values that lack a cardinal scale. Most authors in the incommensurability literature adopt one or the other of these two definitions. Elizabeth Anderson, for example, adopts a definition of incommensurability as incomparability, though her understanding of the nature and consequences of it is embedded in a different theory of rational action, which emphasizes the expressive nature of many (or perhaps most) actions. See ANDERSON, supra note 12, at 55. Cass Sunstein employs a conception of incommensurability distinct from Raz’s. Although he fails to provide a clear definition, Sunstein seems to have the absence of a cardinal metric in mind. See Cass R. Sunstein, Incommensurability and Valuation in Law, 92 MICH. L. REV. 779, 795-812 (1994). Sunstein, however, does link his conception to the idea of expressivity. See id. at 780.

\textsuperscript{18} Raz at least argues that when incommensurability arises, rationality ends and the “will” begins. See Joseph Raz, Incommensurability and Agency, in INCOMMENSURABILITY, supra note 8, at 111-12. Anderson, however, may be offering a different conception of rationality, one that does not entail maximization and thus allows reason to guide the agent’s choice. Consequently, in some of her examples, she seems to deny that incommensurability implies that the agent is free to choose either option. See, e.g., Elizabeth Anderson, Values, Risks, and Market Norms, 17 PHIL. & PUB. AFF. 54, 61 (1988) (“[W]age differentials do not represent cash values people place on their lives, but rather reflect the risks people feel obliged to accept in order to discharge their responsibilities.”).
endorse, the agent can identify the option $a_0$ that best promotes value $V$. The agent, however, cannot identify an option $a^*$ that is best, all values considered. This failure may be characterized as a failure to know, all values considered, what she wants.

This account of incommensurability emerges most starkly if one adopts a completely rationalist view of practical reason. Suppose an agent has multiple ends, each of which is rationally given, and that she seeks to promote her ends as best she can. Instrumental incommensurability identifies one remaining problem for reason to resolve: Rationality also must determine the way in which an agent integrates her multiple values into all-values-considered judgments concerning which option to adopt.

Reason may be defeated in two distinct ways, each of which corresponds to a claim of incommensurability. *Radical* incommensurability will occur when reason specifies too many conditions on integration so that no integration of the agent's multiple values into a single all-values-considered order is possible. Less dramatically, *order* incommensurability will occur when reason specifies too few conditions on integration. In this event, many all-values-considered orders are rationally admissible; but no specific ordering or ranking of options is rationally required. The agent could not identify an option that was best, either "rationally" or "objectively." She could, however, identify an option that was "subjectively" best or "most wanted" by endorsing one of the rationally admissible orderings. This endorsement would commit her to "similar" choices in relevantly similar future situations.  

If incommensurability is radical, the agent faces a true dilemma; rationality implies that she cannot construct a coherent life plan from

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19 Raz does not state clearly to what an agent is committed after she makes a choice among incommensurable options. He discusses at some length an example in which an individual must choose a career, but he does not consider how the choice, once made, should affect the agent's future decisions. For example, would it be irrational for the agent to abandon that career after several months? *Cf.* Raz, *supra* note 17, at 332-33.

The structure of order incommensurability, however, does suggest that a choice between incommensurable options commits one to further choices. After all, one is choosing between different permissible orderings (or sets of orderings that agree on the choice before the agent).
her multiple goals. On the other hand, her situation is less troublesome if she faces order incommensurability; in these circumstances, she can form a coherent plan out of her multiple goals. Indeed, she can form a number of different coherent plans, each of which is rationally acceptable, but none of which is rationally required. Order incommensurability leaves her free to choose among the rationally permissible life plans.

Arguments concerning incommensurability have a formal structure that parallels the structure of arguments concerning the appropriate aggregation of interests of different individuals. In economics, Kenneth Arrow provided the seminal formal statement of this problem. He assumed that society, faced with a choice among many social alternatives, sought to construct a social ordering of these alternatives that depended only on the orderings over the alternatives of each member of society. Moreover, Arrow assumed that the preferences of individual I were not comparable to the preferences of individual J. This interpersonal "incommensurability," however, did not, on its face, preclude the possibility of integrating the orderings of all citizens into a coherent social ordering. The possibility of integration, Arrow's formulation suggests, will depend on what conditions are placed on this integration. Arrow identified four conditions and then proved that these conditions were logically inconsistent and, thus, that no social ordering could satisfy all four conditions. Much of the subsequent literature in social choice theory has debated whether the conditions imposed on integration by Arrow are appropriate ones or whether the integration could satisfy some other set of conditions.

The problem of incommensurability of values can be formulated in an analogous fashion. An agent has many values she wishes to promote. Each value orders the set of options she faces; that is, each value provides a complete and transitive "better than" relation over the options. If she wishes to integrate these different values into a single, all-values-considered ordering of options, then this all-values-considered ordering that does not violate one of the conditions on integration. If the agent were able to identify some set of conditions on integration that she considered more important than the others, she could form a partial ordering that conformed with those more fundamental conditions.

That is, she cannot construct an all-values-considered ordering that does not violate one of the conditions on integration. If the agent were able to identify some set of conditions on integration that she considered more important than the others, she could form a partial ordering that conformed with those more fundamental conditions.

See KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).

See id. at 23.

See id. at 9.

See id. at 59 (theorem 2).
considered ordering would identify a best option for her to choose, given her underlying values. The structure of the problem of incommensurability thus parallels the problem of collective choice. Consequently, two questions arise that parallel the two posed by Arrow in the context of social choice: First, what conditions should be imposed on the integration of values into an all-values-considered ordering over the agent's options? Phrased more strongly, what conditions does rationality require such an all-values-considered ordering to satisfy? Second, for a given set of conditions on integration, how many all-values-considered orderings are rationally admissible (or consistent with these conditions)?

As in the problem of social choice, there are three possible answers to this second question, each of which corresponds to a form of instrumental incommensurability: (1) There are no all-values-considered orderings consistent with the conditions on integration, an answer that corresponds to radical incommensurability; (2) there are more than one all-values-considered orderings consistent with the conditions on integration, an answer that corresponds to order incommensurability; and (3) there is exactly one all-values-considered ordering. In this last circumstance, no incommensurability arises unless construction of this all-values-considered ordering requires information not available to the agent, in which case practical incommensurability arises.

The resolution of the question of instrumental incommensurability thus depends on identifying the conditions that rationality requires on integration. Before addressing this question, note that,

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25 Notice that this formulation of the problem of incommensurability is neutral concerning the rationality of the agent's ends. The ends may be subjectively endorsed or rationally required. In either case, they must be integrated into a single, all-values-considered ordering. For a subjectivist about ends, then, the problem of incommensurability concerns the question of whether the agent can indeed construct a "preference."

26 The structures are not identical, and the problem of incommensurability may best be represented by a "single-profile" model of collective choice. See Kornhauser, supra note 14, at 7.

An incommensurabilist might argue that the conception of a "value," used in the text as supplying a complete and transitive order over options, is too stringent. She might argue, for instance, that, for some value \( V \), there exists at least one pair of options \( x \) and \( y \) such that \( V \) does not rank \( x \) and \( y \): It is not true that \( x \) is \( V \)-better than \( y \), \( y \) is \( V \)-better than \( x \), or \( x \) is \( V \)-indifferent to \( y \).

27 For further discussion of practical incommensurability, see Kornhauser, supra note 14, at 26-28, and infra text accompanying note 35.
contrary to the assertion of some advocates of incommensurability, the existence of an all-values-considered ordering does not imply that there is some single value (or supervalue) against which all options are assessed, just as the existence of a social ordering does not imply that there is some organic society that has this ordering. "Commensurability" does not imply a monistic theory of value.

Returning to the question of the conditions that rationality imposes on the integration of the agent's values into an all-values-considered ordering, we see that the parallel between the problem of collective choice and the problem of incommensurability breaks down. There is no reason to suppose that the conditions Arrow imposed on the integration of individual preferences into a social ordering are the conditions that rationality imposes on the integration of an agent's values into an all-values-considered ordering over her options. Indeed, there is reason to believe that these conditions will be different because the values endorsed by (or rationally required of) the agent may have more structure than the preferences of disparate individuals.

Rationality, however, does not appear to impose many conditions on the integration of an agent's values. One condition that seems plausible to impose is the Pareto condition. Consider two alternatives, x and y, that the agent faces. If each of the agent's values ranks x over y, then the Pareto condition requires that the agent rank x over y, all values considered. This condition seems plausible, but it is not

28 See Martha C. Nussbaum, Plato on Commensurability and Desire, 58 ARISTOTELIAN SOC'Y 55, 60 (Supp. 1984), reprinted in MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE 106, 110 (1990). Anderson also seems at times to endorse this position. See ANDERSON, supra note 12, at 46.

29 This claim holds even if there is one, and only one, all-values-considered ordering that integrates the agent's values into a single ranking. Furthermore, the existence of an all-values-considered ordering does not imply that "inter-value comparisons" can be made.

30 Specifically, Arrow's axiom—generally called the independence of irrelevant alternatives (IIA)—does not appear justified in the context of an integration of values. IIA restricts the informational content of the relations that will be integrated to order information only. It thus precludes using any cardinal information that might be embedded in some of the agent's values. IIA also precludes the agent from making "inter-value comparisons" so that she can say that a given improvement from the perspective of value V outweighs a given detriment from the perspective of value W.

31 Henry Richardson considers the Pareto condition (which he calls the "ordinal tracking" condition) in his discussion of incommensurability of value. See HENRY S. RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS 106-09 (1994). Richardson argues that the condition, in fact, is not rationally required. His argument, however,
very restrictive; it imposes no requirements on the integration of values when values conflict. Consequently, many different all-values-considered orderings will satisfy the Pareto condition. As no single, all-values-considered ordering is required by the Pareto condition, no single option may be rationally required. A classic instance of order incommensurability obtains. The agent rationally may endorse any one of a variety of rationally acceptable integrations of her values into a single, all-values-considered ordering. This position, of course, is perfectly consistent with the economist's view of individual decision.\(^2\)

It is difficult to identify other conditions that ought to be imposed on the agent's integration of values into a single, all-values-considered ordering. Some advocates of incommensurability have (implicitly) suggested a condition of neutrality that requires an agent to resolve a "pure" conflict between values \(V\) and \(W\) that is manifested in the choice between options \(x\) and \(y\) in a manner identical to a "similar" pure conflict manifested in a choice between options \(x'\) and \(y'\).\(^3\) The "purity" of the conflict requires that \(x\) and \(y\) not differ with respect to values other than \(V\) and \(W\) and that \(x'\) and \(y'\) not differ with respect to values other than \(V\) and \(W\).\(^4\) "Similarity" requires that the relative assessment of \(x\) to \(y\) with respect to \(V\) and \(W\) be identical to the relative assessment of \(x'\) to \(y'\) with respect to \(V\) and \(W\). I have argued elsewhere that imposing this condition of neutrality on integration is a priori implausible, although as a practical matter, an agent, faced with uncertainty about the consequences of her choice, may have neutrality imposed on her because she cannot ascertain the degree to which her choice will satisfy other values.\(^5\) She may be unable to identify her best option because the information necessary to inte-

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\(^2\) The economist generally takes the agent's preference ordering as given, and does not question its source. One might understand the challenge posed by incommensurability arguments as aimed at the possibility of the existence of a preference ordering. Order incommensurability, however, only shows that no single preference ordering is rationally required.

\(^3\) See Kornhauser, supra note 14, at 14-21.

\(^4\) But \(x\) may differ from \(x'\) (and \(y\) from \(y'\)) with respect to a third value \(U\).

\(^5\) Neutrality is defined in The Hunting of the Snag. See Kornhauser, supra note 14, at 14 ("Neutrality states that if each criterion ranks \(x\) to \(y\) in the same way that it ranks \(r\) to \(s\), then \(x\) is ranked above \(y\) all things considered if and only if \(r\) is ranked above \(s\) all things considered."). This argument suggests a third form of incommensurability: practical incommensurability. Practical considerations may make it impossible for the agent to make the judgments necessary for constructing the all-values-considered ordering, even though a unique ordering rationally integrates the agent's values.
grate her values (as required by reason), although available in principle, is unavailable in practice.

Another possible condition on integration is nondictatorship: that the all-values-considered judgments should not always correspond to the ordering of one specific value, regardless of the assessment of the other values important to the agent. This condition has more appeal in political philosophy than in ethical contexts. The nondictatorship condition arguably excludes a lexical ranking of values, whereby the agent thinks that satisfaction of value A is always primary and turns to value B only if, with respect to value A, she is indifferent among the best options. One can imagine, however, some sets of values for which a lexical ranking seems appropriate. Someone, for example, might value her health first. In assessing options, she would identify those that most promoted her health and choose among those on the basis of other values. The plausibility of nondictatorship as a condition on integration, then, will depend on the set of values to be integrated. Notice, however, that the imposition of both the Pareto and the nondictatorship conditions on integration still generally will leave more than one admissible all-values-considered ordering.36

The discussion thus far suggests two conclusions concerning incommensurability. First, the two conditions—nondictatorship and Pareto—that are candidates for restrictions on integration, together do not identify a unique integration of values for all possible sets of values. Thus, absent the identification of further conditions on integration, “rationality” will not identify a unique, all-values-considered ranking of alternatives. An individual will face order incommensurability and be free to choose from among several admissible integrations of her values.

Second, the discussion suggests that arguments concerning incommensurability cannot avoid some specification of the substantive theory of decisions. Recall that the plausibility of a nondictatorship condition of integration depends on the substantive values to be integrated.

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36 Suppose that there are three values, V, W, and X, and that the agent considers V lexically the most important. The all-values-considered ordering remains unconstrained by the two conditions on integration when the agent is indifferent with respect to V between two options and when W and X yield different rankings of the same two options.
B. Incommensurability and the Expressivity of Action

The discussion in the last subpart assumed that an instrumental aim motivates choice; that is, that individuals make choices to promote or further their ends. On this account, values are simply aims, or, perhaps, justified, desirable, or good aims. Rationality runs out in the face of this (instrumental) incommensurability because the individual’s ends are incompletely specified in the case of order incommensurability (so that the agent truly may choose among the admissible all-values-considered orderings) or inconsistently specified in the face of radical incommensurability (as no all-values-considered ordering exists).

Elizabeth Anderson argues that consequentialism errs in grounding its theory of practical reason in the instrumental aim of action, as action is not justified by its successful realization of the agent’s goals. Rather, on her account, action is justified when it expresses the agent’s (justifiable) intentions.\(^7\) In Anderson’s view, values do not necessarily rank states of affairs, actions, or indeed anything at all. Instead, values correspond to attitudes that the agent appropriately may adopt towards a person, animal, object, or other “bearer” of value.

From this perspective on value, instrumental incommensurability appears unproblematic. Consider, for example, an agent who wishes to further two goals, A and B, when the option that best promotes A does not best promote B. Reason and rationality do not run out in the face of incommensurability because choice serves not only to further one’s ends (or values), but also to express them. Thus, although, on Anderson’s account, options may be instrumentally incommensurable, the choice of one option might have different expressive significance.\(^8\) Rationality then might dictate the choice of one option over the others as the most rationally expressive of the individual.

This account of rational action provides a dramatically different account of conflicts of value and the problems of choice, in which the agent must choose which attitude to express towards a bearer of value, such as a person. The agent then must choose the action that

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\(^7\) See Anderson, supra note 13, at 538 (arguing that “rational principles guide action ... and justify action by showing that it expresses rational intentions”).

\(^8\) Anderson asserts that individuals may sometimes act to promote values, see, e.g., Anderson, supra note 12, at 22, but she does not clarify why they should do this, given the expressive nature of value.
best expresses the relevant attitude. Although Anderson believes that her theory of value and practical reason dissolves the problem of (instrumental) incommensurability, it is not clear why similar problems do not arise within her theory. Although the agent need not rank all her options on Anderson's account, she must be able to choose rationally among them. How should an agent make comparisons among diverse options? Anderson's rational attitude theory of value suggests that difficulties of comparison might give rise to "expressive" incommensurability for at least three distinct reasons. First, the agent might adopt more than one mutually exclusive attitude towards the valued person. The agent, for instance, might have reason both to admire and to abhor the person. Second, the agent's available options might provide different and incompatible ways of expressing the same attitude. Third, to the extent the agent under Anderson's theory has reason to promote a specific value, promotion of that value might conflict with the expression of that or some other value. I shall refer to this complex of potential problems as "expressive incommensurability."

The consequences of these two distinct accounts of rational action for law and public decisionmaking—instrumental incommensurability and expressive incommensurability—are investigated in the next Parts.

II. INSTRUMENTAL INCOMMENSURABILITY IN LAW

With the understanding of instrumental incommensurability in ethics outlined in Part I.A, I begin to consider whether legal decision, understood here instrumentally—that is, as the social pursuit of specified aims—faces a comparable problem. I proceed in three stages. First, I discuss two different conceptions of the set of values that judges or administrative agencies must integrate. Obviously, one's understanding of the set of aims that law pursues will affect one's assessment both of the difficulties posed by instrumental incommensurability for legal decision and, as argued in Part I.A, of the set of conditions to be imposed on their integration. Second, I consider whether the conditions on integration of legal values are identical to the conditions that rationality imposes on the integration of individual values. After all, the nature of the problem of incommensurability, if any, will depend on the set of conditions that one imposes on integration of legal values. Third, I accept, for purposes of argument, that instrumental incommensurability arises in legal decision. I then ask what implications this has for the law.
A. The Nature of Legal Values

Judicial and administrative decisions present more than one conception of the legal values that decisionmakers must weigh and integrate into a final judgment concerning the evaluation of options, all legal values considered. On one account, suggested particularly by some administrative decisions, the decisionmaker must consider the effect of each potential policy on each individual member of society. In this context, the decisionmaker's problem appears closer to the problem of collective choice as formulated by Arrow than to the problem of instrumental incommensurability raised by moral philosophers. In other contexts, the decisionmaker must consider social values that have a standing more or less independent of individual members of society. In this context, one reasonably might treat society as an individual, making the decisionmaker's problem directly parallel to the problem of instrumental incommensurability facing an individual seeking to integrate her personal values into an all-values-considered ordering of alternatives. These two conceptions of social value present two different sets of problems to the public decisionmaker. In the first case, the problem of instrumental incommensurability will arise indirectly, if at all. In the second case, the problem of instrumental incommensurability, will arise directly, if at all.

1. The Maximization of Social Welfare and Indirect Instrumental Incommensurability

Consider first the problem presented by a decisionmaker who seeks to aggregate the welfare of every individual. This problem often arises in administrative decisions when an administrative agency must evaluate the effects of different policies on the social welfare, understood as the welfare of the individuals within the society, but the same problem could also arise in the context of adjudication. Regardless of the context, the decisionmaker faces a set of complex problems.

First, the decisionmaker must develop an account of individual well-being. This conception of well-being might be objective or subjective, or some mixture of the two; that is, the decisionmaker might understand the welfare of an individual as deriving either from the promotion of values that the individual rationally is required to promote, and that are hence objective, or from the promotion of values that the individual herself endorses. Next, the decisionmaker must determine the all-values-considered ordering of each individual. Generally, the decisionmaker constructs these individuals' orderings
rather than observes them directly. Consequently, the decisionmaker must determine what values each individual endorses and what conditions on integration are required (or endorsed by that individual). In this process, the decisionmaker may (indirectly) confront order incommensurability. This confrontation would introduce, under both objective and subjective conceptions of well-being, indeterminacy into the construction of the well-being of each individual. After all, the decisionmaker might select a different all-individual-values-considered ordering than the individual herself would have selected. Thus, if society must choose between two options, \( x \) and \( y \), for which the agent admits both an ordering that considers \( x \) superior to \( y \) and one that considers \( y \) superior to \( x \), the decisionmaker's choice of an admissible ordering that differs from the choice the agent herself would have made might lead to a significant difference in the social choice.

Once the decisionmaker has constructed the individual conceptions of well-being, she must aggregate them into a conception of social welfare. Again, she must identify the appropriate set of conditions to impose on this aggregation. Clearly, the set of conditions will depend on the decisionmaker's conception of individual well-being. For example, if the decisionmaker adopts a conception of cardinal, interpersonally comparable well-being, then, in principle, she should be able to construct a social welfare function. In practice, however, the decisionmaker may lack sufficient information to construct these rich all-individual-values-considered orderings. This lack of information will be particularly pressing if the decisionmaker adopts a subjective conception of individual well-being.

If the decisionmaker adopts a conception of individual well-being that forecloses cardinal, interpersonal comparisons, or if her information base is insufficient to construct anything richer than an ordinal index of individual well-being, the decisionmaker will confront the problems posed by Arrovian social choice. One should perhaps understand the procedures of cost-benefit analysis that allow the decisionmaker to infer an individual's willingness to pay for various policy options within this context of informational paucity. The decisionmaker has adopted a subjective view of individual well-being and now must attempt to infer each individual's conception of well-being from publicly available information.

After the decisionmaker has adopted some procedure for identifying the welfare of each individual, she then must confront the problem of social choice. What procedure should the decisionmaker
adopt to integrate the effects of a policy on different individuals? Generally, alternative policies will benefit some individuals and harm others. How should these benefits and harms be weighed against each other? One common resolution of these questions is to perform a cost-benefit analysis that simply sums each individual's willingness to pay for a particular project into an aggregate evaluation of the option.\(^9\)

To summarize, when the public decisionmaker seeks to maximize social welfare, she will face indirectly the problem of instrumental incommensurability whenever the individuals whose welfare she seeks to maximize face problems of incommensurability.

2. Social Values and Direct Instrumental Incommensurability

Consider now the second conception of social value, in which the decisionmaker regards society as a coherent entity with values of its own. This approach emerges in some administrative decisions and many judicial decisions; the agency or the court personifies “society” and attributes values to it that are distinct, or treated as such, from the values of individuals within society. Often these values are identified by the authorizing legislation or through the practice of constructing “legislative intent” from the statute and other legal materials. For example, in the regulation of hazardous waste, a court might identify three goals that it should pursue: maximizing social welfare, minimizing the production of hazardous waste, and preserving the federal fisc in the clean-up of contamination caused by hazardous waste.\(^40\) Alternatively, one might understand judicial obligation generally—that is, in common-law and constitutional adjudica-

\(^9\) Cost-benefit analysis relies on a subjective conception of individual well-being defined in terms of ordinal preferences. Both this conception of well-being and the particular implementations of it that constitute the different techniques of cost-benefit analysis are subject to criticism. For a general introduction, see Lewis A. Kornhauser, *Constrained Optimization: Corporate Law and the Maximization of Social Welfare*, in *The Jurisprudential Foundations of Corporate and Commercial Law* (Jody Kraus & Steven Walt eds., forthcoming 1998). For examples of critiques of cost-benefit analysis by incommensurabilists, see *Anderson*, *supra* note 12, at 191-97 (criticizing cost-benefit analysis because it assumes all risks are distributed appropriately by market mechanisms), and Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1, 43-89 (1995) (critiquing cost-benefit analysis and President Clinton’s regulatory reforms). Much of their critique does not rely on incommensurability.

tion as well as in statutory interpretation—as requiring judges to construct, from the legal materials of their community, an attractive account of the community’s “interests” and concerns.\(^{41}\)

In these instances, social welfare is not constructed explicitly from the aggregate welfare of all individuals within a society, but rather is taken as an independent value (measured perhaps by some proxy such as growth in GNP, unemployment, or inflation) and weighed against other social interests. Once society has been personified and multiple values have been attributed to it, the legal decisionmaker must integrate the various values into an all-(social-)values-considered ordering.\(^{42}\) The conditions that ought to be imposed on this integration are considered in the next subpart.

**B. Conditions on Integration of Social Values**

The prior subpart distinguished two conceptions of social values that would require integration. One conception corresponds to the problem of social choice and the aggregation of the welfare of different individuals. I have just argued that, under this conception of social values, the question of instrumental incommensurability arises in the construction of the conceptions of individual well-being that are to be aggregated. The incommensurability critique, as applied to legal decision, also draws on the expressive view of individual action rather than the instrumental view. The next subpart addresses these questions. In this subpart, I restrict attention to the question of extending the claims of instrumental incommensurability from the individual context to the legal context, in which social values are assumed to be distinct from the values of individuals and which therefore personifies society.

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\(^{41}\) Dworkin has argued for an understanding of judicial obligation that requires the pursuit of integrity. The value of integrity personifies the community and attributes a political philosophy to that community. See [*Dworkin, Law's Empire, supra* note 1, at 176-224 (introducing the concept of integrity); id. at 225-399 (considering its implications for theories of common-law adjudication and statutory and constitutional interpretation, respectively)].

\(^{42}\) As the hazardous waste example suggested, many of the “social values” implicated might be understood as proxies for different aspects of the well-being of individuals. Thus, a statutory direction to balance concerns about the health and safety of the population with employment and other “productivity” costs is probably grounded in a desire to maximize social welfare. Aggregate measures of health and safety and of economic activity, however, are easier to observe than the well-being of each individual.
In the discussion of instrumental incommensurability in ethics in Part I, I argued that the key question concerns the set of conditions on integration of values that one ought to impose on the individual. This question remains central in the legal context. Note, however, that the same conditions need not be imposed in the personal and the legal contexts. Indeed, one would expect them to differ: The nature and aims of legal decisions differ radically from the nature and aims of individual decisions. One consequently would expect that the conditions imposed on the integration of legal values would differ from those imposed on the integration of an individual’s values. If one accepts that different conditions on integration might apply to the two problems, then one need not anticipate the same answer to the question of instrumental incommensurability. Legal decisions might present problems of instrumental incommensurability, though individual decisions do not (or vice versa). Alternatively, the nature of instrumental incommensurability might differ in the two contexts. There then will be no straightforward argument from the instrumental incommensurability of individual values to the instrumental incommensurability of legal values.

What conditions are plausible to impose on the integration of independent social values? Recall that Part I identified, in the context of individual decision, two plausible conditions on integration: the Pareto and the nondictatorship conditions. The Pareto condition remains plausible in the legal context. If each social value regards a social option $x$ as better than social option $y$, then society should regard option $x$ as better than $y$, all social values considered. Similarly, as in the individual context, one might imagine sets of social values for which the condition of nondictatorship seems plausible. Thus, the set of conditions on the integration of social values would seem to be at least as large as the set of conditions on the integration of individual values.

It remains difficult, however, to identify additional conditions on integration in the legal context. Legal decisions differ from individual decisions in important respects. For example, legal decisions are subject to requirements of equality and impartiality, although it is difficult to translate these requirements into specific conditions on integration.

At least two different interpretations regarding equality and impartiality present themselves, and these point to conflicting conclu-

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43 See supra notes 31-36 and accompanying text.
sions concerning instrumental incommensurability in legal decision. First, one might regard equality and impartiality not as conditions on integration, but as restrictions on the set of values that the legal system might adopt or pursue. After all, equality and impartiality exclude certain considerations—for example, the names of the individuals—as irrelevant to legal decisions. This exclusion restricts the set of values that society may pursue. If this restriction sufficiently reduces the set of values to be integrated, one might expect fewer conflicts to arise and hence greater success in achieving some integration of all legal values into a coherent, all-values-considered legal judgment. In this circumstance, then, one would expect radical incommensurability to be less likely in the legal context than in the individual context.

In contrast, one might interpret equality and impartiality as imposing additional conditions on integration. After all, on some moral theories, equality requires an equal "weighting" of individuals, suggesting that it constrains the integration of different values. If the set of conditions on legal integration strictly includes the set of conditions on individual integration, then the set of rationally admissible integrated orders will be smaller, making radical incommensurability more likely in the legal context than in the individual context.

This discussion suggests two conclusions concerning instrumental incommensurability in law when the decisionmaker must integrate a set of social values that is distinct from the welfare of individuals. First, the case for the importance of instrumental incommensurability remains to be made. One cannot determine whether any incommensurability—radical or order—exists without specifying the conditions that must be imposed on the integration of social values. Second, as in the individual context, progress on the debate requires substantive moral and political argument. One must specify both the values that the law must pursue and the conditions on integration that must be imposed.

C. The Implications of Instrumental Incommensurability

The structure of legal decisionmaking differs across branches of government. In particular, legitimate decisions in different branches impose different criteria of "rationality." As a consequence, instrumental incommensurability is more problematic for some branches than for others. Specifically, one might understand legislation as the appropriate forum for the resolution of the irreconcilable conflicts of
values raised by the presence of (instrumental) order incommensurability.¹⁴

The model legislator, unlike the model judge, need not rationalize her decision. She may defend it as merely an appropriate decision rather than as one rationally required. Indeed, one might argue that legislatures were created to resolve conflicts of interest and value when rational argument cannot provide such a resolution.¹⁵ The implication of instrumental incommensurability then will depend on the extent to which one believes that the legislature is required to act consistently over time. Recall that, in the context of (individual) order incommensurability, the resolution of a conflict within one set of options might have implications for the resolution of conflict among other sets of options. The extent to which this implication transfers to the legal context will depend on one's theory of law in general and of legislation in particular. For example, Dworkin's emphasis on integrity suggests that a legislature may be required to resolve conflicts among social values consistently across decision contexts.⁶ In contrast, interest-group theories of legislation suggest

¹⁴ This seems to be the position of John Gray. See John Gray, Agonistic Liberalism, 12 SOC. PHIL. & POL'Y 111, 114 (1995) ("Since [agonistic liberalism] recognizes that incommensurabilities may break out even in the heart of liberal ideals of liberty and equality, it rejects the legalist model that dominates recent liberal thought . . . in favor of a political model . . ."). Justice Scalia apparently has adopted a similar position of deference to the legislature with respect to the balancing of conflicting interests in constitutional adjudication. See Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (urging the abandonment of the "balancing" approach in negative Commerce Clause cases, leaving "essentially legislative judgments to the Congress"). The issue in Bendix concerned the application of the dormant Commerce Clause. The balancing of interests involved in this decision might be understood as raising questions of instrumental incommensurability. Most constitutional balancing tests, however, involve conflicts of right or conflicts of right and value, both of which have been put to one side in this Article. Scalia, however, also eschews balancing tests, though he does not defer to the legislature, when constitutional adjudication requires the comparison of rights and interests. See 44 Liquormart Inc. v. Rhode Island, 116 S. Ct. 1495, 1515 (1996) (Scalia, J., concurring) (sharing "Justice Thomas's discomfort with the [balancing] test" in the commercial speech context).

¹⁵ This view of legislation certainly follows from an interest-group model of legislation. It may, however, appear to contradict the assumptions underlying civic republican understandings of legislation. On the other hand, even a civic republican might admit that deliberation would not resolve all conflicts. In this circumstance, the procedure of majority rule without a need to justify publicly the outcome would seem to serve the end of resolving otherwise irreconcilable conflict.

⁶ See DWORKIN, LAW'S EMPIRE, supra note 1, at 217.
that such consistency is both unlikely to occur and perhaps undesirable.\textsuperscript{47}

The conclusion that conflicts among incommensurable values should be resolved legislatively is peculiarly unappealing to most advocates of incommensurability, as it rests on the claim that rationality cannot resolve problems of order incommensurability and, hence, that the judiciary, as the forum of reasoned decision, is inappropriate. Since these advocates generally want to defend the legitimacy of judicial decision in areas involving health and safety, such as environmental policy, they wish to preserve the claim of incommensurability, to reject the decision rules offered by economic analysis of law,\textsuperscript{48} and to assert that reason nevertheless can resolve these conflicts. This position leads them to the expressive view of rationality.

Turn now to the consequences of instrumental incommensurability for courts. These consequences might vary with the nature of the adjudication, that is, whether it is adjudication under a statute, the common law, or the Constitution. Consider first the question of statutory interpretation. Here the court acts pursuant to a statute that articulates the values that the adjudicator must take into account. One might argue that, if these values are instrumentally incommensurable, then the legislature, and the statute itself, should specify the way in which conflicts among these values should be resolved. Alternatively, one could argue that the courts should adopt a particular resolution of the conflict, to which they must adhere until the legislature acts to overrule them.\textsuperscript{49}

One might argue that the implications of instrumental incommensurability are no different for common-law adjudication. After all, the legislature can preempt common-law rules announced by a court. When the courts confront a conflict of values in the course of common-law adjudication, one might contend that they should invite


\textsuperscript{48}See Cass R. Sunstein, Incommensurability and Kinds of Valuation: Some Applications in Law, in INCOMMENSURABILITY, supra note 8, at 234, 245-53 (providing good examples of this position); Sunstein, supra note 17, at 782 (hoping "to show some distinctive ways in which economic analysis of law . . . miss[es] important commitments of a well-functioning legal system . . . [and] to establish that a surprisingly wide range of legal disputes can be illuminated by an understanding of incommensurability and diverse kinds of valuation"); see also Warner, supra note 16 (accepting the allocation of the decision to the judicial branch and asking only how this decision is to proceed).

\textsuperscript{49}Notice that the situation for administrative agencies parallels that of statutory interpretation. The legislature has specified the criteria with which the agency is to decide.
the legislature to resolve that conflict. Alternatively, the courts could follow a clear and consistent procedure for the resolution of these conflicts, thus subjecting the judicial resolution to potential legislative scrutiny.

Consider, finally, the problem of constitutional adjudication. Recall first that the discussion here is limited to conflicts of values, not to conflicts of rights or conflicts between rights and values. This restriction limits, but does not eliminate, the domain over which instrumental incommensurability will have consequences. Questions of federalism and of separation of powers generally present conflicts of values rather than conflicts of rights. The incommensurability here cannot be resolved by referral to the legislature; nor does referral to the amendment process, given its difficulty, seem appropriate. The courts must resolve these conflicts themselves.

III. INCOMMENSURABILITY AND THE EXPRESSIVE ASPECT OF LAW

The discussion in Part II accepted the premise that both individual and legal decisionmaking are goal-directed. Agents, whether public or private, strive to promote their aims. In that context, the analysis of instrumental incommensurability has relevance. In Part I,

50 Several reasons argue for the consideration of conflicts among rights, and between rights and values distinct from conflicts among values. First, most discussions of rights assume that rights (and duties) have a nonmaximizing logic. The analysis of conflicts among considerations of practical reason that conform to a maximizing logic is apt to differ drastically from an analysis of conflicts among considerations that do not conform to such a logic. Similarly, analyses of conflicts between maximizing and nonmaximizing elements of practical reason are unlikely to be informed by discussions of instrumental incommensurability.

Second, the nature of conflicts among rights will depend upon one's conception of rights. On a conception of rights as constraints on action, conflicts of rights will arise only if right $R$ prohibits act $A$ and right $R'$ prohibits act $A'$. Such contradictions should be rare. More likely, each of two rights will offer competing reasons for action, and the decisionmaker will have to reconcile the rights (or the reasons that justify the rights) to determine what action is appropriate. Discussion of incommensurability of rights does not seem to be helpful in this context.

Third, the analysis of incommensurability may vary with the context. Is the conflict among rights or between rights and values? Are the rights in conflict instrumentally or intrinsically valuable? Even when rights are instrumental, however, and we justify the rights in terms of the extent to which they promote some underlying values, the nature of the analysis is apt to be more complex than a "simple" integration of values.

51 For an insightful discussion of the relevance of the philosophical literature on incommensurability to this issue, see Frederick Schauer, Commensurability and Its Constitutional Consequences, 45 HASTINGS L.J. 785, 786 (1994).
however, I argued that philosophical discussions of incommensurability have two different sources. The problem of instrumental incommensurability arises from a consequentialist theory of value. Some critics of consequentialist practical reason, however, rely on a non-consequentialist theory of value and of action.

Various authors in the legal literature have drawn on this second strand of the incommensurability literature. For these legal scholars, as for the moral philosophers who adopt this critical stance, the central thrust of the critique of consequentialist theories of practical reason is not instrumental incommensurability, but the articulation of an alternative, expressive theory of rationality and a concomitant expressive theory of action. Elizabeth Anderson’s account of this expressive theory has been the most influential among legal scholars. In this subpart, I briefly consider some problems that beset the transfer of this account of individual action to the public sphere. As will become clear, the difficulties discussed have little to do with the idea of incommensurability.

Recall that, on Anderson’s account, valuation entails the possession of a complex attitude toward the valued object. Value judgments assess the appropriateness of the attitude held by the individual towards the object. Rationality, on this view, consists in the “expression” of appropriate attitudes toward individuals, animals, the natural world, and other objects of value. Rational action thus expresses the appropriate attitude to people and other objects of value. Appropriate expression requires both attention to the ideals and aspirations of the individual, and conformity to the relevant social norms for expression of value. The expressive theory of action thus considers the individual’s action as an expression of that individual’s character and attitudes.

How does this understanding of individual decision apply to public decisionmaking? Although the legal literature on the expressive functions of law now has grown to sizable proportions, that literature

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52 Most notably, see Sunstein, supra note 17, at 780.
53 See ANDERSON, supra note 12.
54 See id. at 4.
55 See id. at 18.
has not extended explicitly the ethical theory to the public domain. Rather, the legal literature focuses on the "expressive function" and "social meaning" of law without adequately specifying these concepts. In particular, the literature has not attended sufficiently to the idea of public action.

In this Part, I try to clarify the expressive aspect of law. The discussion has three parts. First, I discuss two different interpretations of what it means for the law to be expressive. One interpretation sees "legal expression" as instrumental, simply another means by which to promote social ends. The other interpretation understands "legal expression" to be intrinsically desirable. Second, I comment on the mechanisms of expression available to the law. This discussion suggests that the expressive theory of action concerns not expression per se, but rather the notion that the content of a legal norm must display the values and justifications that underlie the norm. Third, I suggest several difficulties in the elaboration of this notion that link the content of a legal norm to the values underlying it.

A. The Meaning of Expressiveness

The legal literature employs two distinct conceptions of "expressiveness." The first conception interprets "expressive" as "educative." Law might serve to inculcate certain values into the citizenry by "expressing" these values in its law. This conception of expressiveness is consistent with an instrumental view of law that understands law as a tool for the "guidance" or control of behavior. The policymaker has some aims she seeks to pursue, and she might pursue these aims through law in a number of ways. Economic theory, for example, suggests three different forms that this instrumental pursuit might take: (1) The policymaker might use legal rules to alter the incentives faced by individual actors; (2) the policymaker might use legal rules to change the information on which the agent acts; and (3) the policymaker might use legal rules to alter the preferences or desires

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57 Anderson herself is an exception. See Anderson, supra note 18, at 195-203 (discussing the ethical implications of cost-benefit analyses). Her discussion of cost-benefit analysis, however, combines criticisms of cost-benefit analysis that do not rely at all on her ethical theory with ones that apply the theory to law without attention to the context of public decision. For a catalogue of some standard objections to cost-benefit analysis, see Kornhauser, supra note 39.

58 I put to one side a question central to the discussion of Part I: What values does the law pursue? I shall assume that the law endorses a set of public values attributable to the community as a whole.
on which the agent acts. The "expressive aspect of law," understood as an educative, instrumental function, might refer to either of these latter two mechanisms that affect the agent's information or her preferences.

This understanding of expressiveness, however, accepts an instrumental, rather than expressive, aim of action. It raises two questions, neither of which is informed by Anderson's account of rational action. On the one hand, it presents strategic questions to the policy-maker. Is the best way to promote the social value by altering the incentives to the agents? Altering incentives simply requires setting the appropriate price on conduct, but that price need not "transparently" express the value that the policymaker promotes. Or would it be more efficacious to "educate" agents? Here the norm must indeed express something.

On the other hand, one might ask whether incommensurability plays any role in the analysis of this educative conception of the expressiveness of law. Suppose a policymaker faces a choice that implicates two values U and V. On the educative conception of expressiveness, this policymaker faces an instrumental choice in which one option might promote one value in an expressive manner at the expressive expense of the other value. Another option might promote V in a nonexpressive way and have detrimental effects, both expressive and consequential, on U. If these options are not comparable, the noncomparability sounds in instrumental incommensurability rather than expressive incommensurability.

The second conception of expressiveness regards the expressive aspect of law as distinct from the instrumental function. The expression of a value through the legal system has an intrinsic value, regardless of its consequences. That is, the content of a legal norm is important not because of its consequences on behavior of private individuals or public officials, but because it embodies the value expressed in the norm. This notion, though it accords more closely with the idea underlying Anderson's ethical position, is less plausible in the public than in the private context. I develop this notion further in Part III.C below.

For more on this framework of instrumental analysis, see Lewis A. Kornhauser, *Interest, Commitment, and Obligation: How Law Influences Behavior*, in *JUSTICE AND POWER IN SOCIOLEGAL STUDIES* 208 (Bryant G. Garth & Austin Sarat eds., 1998).
B. Legal Means of Expression

Under either interpretation of legal expression, the mechanism of expression requires elaboration. To begin, notice that the legal system offers numerous means for the "expression" of values. Most of these means of expression endorse, extol, or identify a value without requiring specific conduct.

Consider the manner in which a legislature may express values. Much substantive legislation contains some prefatory sections that articulate the purpose of that legislation.\(^6^0\) In addition, on some occasions, the legislature may simply endorse a value without creating substantive duties. This "aspirational" legislation has little or no consequence. It simply endorses a particular goal without establishing a right or, perhaps, even an institutional procedure of implementation.\(^6^1\) Alternatively, the legislature might designate a particular building or location as a national historical landmark.\(^6^2\) Such legislation has consequences for patterns of land ownership and uses that are ancillary to its primary, expressive intent. The primary purpose and effect of this type of legislation, however, is the expression.

The executive branch also has various devices available for the direct expression of values and attitudes. The President, for example, often issues proclamations that express the views of the United States and endorse various values.\(^6^3\)

Finally, consider the judiciary. At least in some legal systems, the judiciary deploys powerful and significant expressive resources that extend beyond the mere application or interpretation of legal norms. In common-law countries generally, and in the United States in particular, the judicial opinion provides a medium through which aspira-

\(^6^0\) See, for example, the first section of the Clean Air Act, 42 U.S.C. § 7401 (1994), or the initial sections of the Solid Waste Disposal Act, 42 id. §§ 6901-6902.

\(^6^1\) See, for example, the Full Employment and Balanced Growth Act of 1978, 15 id. §§ 3101-3152, which grew out of the Humphrey-Hawkins full employment bill of 1976. This statute creates no enforceable rights and establishes a minimal number of procedural requirements. It consists largely of exhortations concerning the importance of full employment and balanced growth.


\(^6^3\) For example, a LEXIS search in the file "presidential documents" identified some 90 presidential proclamations issued during 1997. Search of LEXIS, Genfed Library, Presdc File (May 13, 1998). A few of these had legal effect in the sense that they were required to invoke some statutory or treaty provision. Most, however, simply "proclaimed."
tional values can be expressed in detail, though the content of the operative norm announced in a judicial opinion is much narrower. Indeed, the opinion will explain and justify why the conduct required (or prohibited) by the announced legal rule differs from the conduct to which individuals (or the state) should aspire. The opinion thus can express support for a specific value while simultaneously announcing an operative norm that apparently runs counter to that value. Thus, judicial expression of particular values need not take the form of an operative norm that explicitly expresses that value. Operative norms need not, as a matter of logic, be transparent in this sense; arguably, though, some areas of law or some specific rules do require this transparency.64

The existence of incommensurable values has few consequences for the deployment of these expressive resources by the state. Whether values are incommensurable, in an expressive or instrumental way, or fully “commensurable,” the state may wish to express its values through one or more of these devices. If expressive incommensurability is to have significant consequences for public decisionmaking generally, and adjudication in particular, it must have consequences for public action, here understood as the announcement (or implementation) of a legal rule. When a public decisionmaker faces a conflict among social values, the content of the obligation of some private or public individual or entity must be determined by the “expressive aspect of law.” Advocates of an expressive aspect to law must be concerned not simply with the public expression of social values, but more dramatically with the content of operative norms that manifestly express these social values in some way.

C. Suiting the Action to the Word: The “Transparency” of Legal Norms

The prior two subparts argue that the expressive aspect of law might be understood in instrumental terms, an understanding implicit in the discussion of the expressive function of law, or in terms of

64 A further complication in the idea of the law’s expressiveness is ignored, that is, that lawyers are the primary audience of legal texts. They are consequently the only individuals likely to form a conception of the values expressed by the law through the explicit formulation of those texts. Ordinary citizens are more likely to “hear” legal expression indirectly, either through secondary texts such as newspaper accounts or books with some legal content, or through their experience of the administration of law. Drug dealers in Washington Square Park, for example, probably have a dramatically different view of search and seizure law than do lawyers.
the moral quality of public action. In this subpart, I suggest that this latter understanding is problematic. A different formulation of the moral quality of action may present this view of the expressive aspect of law more plausibly and suggest some of the complications it presents: To what extent must the value that justifies or grounds a legal rule be embodied “transparently” in the content of the legal rule? Consider, for example, rules concerning capital punishment. An expressive argument for a rule barring capital punishment presumably would contend that no society that permits capital punishment appropriately values life. This claim must rest on the expressive, rather than the instrumental, consequences of the rule—that is, the claim must be true even if capital punishment is very effective in reducing the number of homicides in the society.

This example suggests that for a legal norm to be expressive, it need not promote the value that justifies the norm; rather the norm must in some way display the value that justifies it. The meaning and implications of the claim that a norm displays its justification on its face is extremely elusive. Part of the difficulty arises because any theory of law surely will assume that law serves important, instrumental purposes. A full theory, then, not only would articulate the circumstances in which law would have solely an expressive aspect, but also would explain the nature, extent, and circumstances of the tradeoffs between instrumental and expressive purposes.

This discussion does not pretend to offer a full theory. Rather it hopes to show some of the difficulties that an adequate theory must overcome to give content to the claim that a norm display its justification on its face. As the meaning and implications may vary with different types of legal norms, the discussion proceeds through consideration of three different classes of legal rules: (a) rules that impose obligations on private individuals; (b) enabling rules like contract and corporate law; and (c) rules that concern public action or public officials.

Consider first legal rules that impose primary obligations. As an example, consider the formulation of a legal rule to reduce air pollution. Any such norm will have a complex justification because society has complex attitudes towards air pollution. On the one hand, society disapproves of air pollution because of the harm it causes to the environment and to the health of individuals. On the other hand, society implicitly or indirectly values air pollution because it is an unavoidable by-product of modern industrial processes, and the entire way of life of society depends on these processes. Put differ-
ently, the justification of the rule must balance a number of considerations or values. For example, the more stringent the restriction is, the more costly the norm will be and the greater the burden on economic activity. On the other hand, the more stringent the restriction, the greater the benefits to the environment and to the health of the surrounding population. Similarly, different formulations of the norm will result in different distributions of air pollution and economic activity. The policymaker presumably should consider these distributional effects in its formulation of the norm.

The complexity of the underlying justification for the norm suggests several difficulties with the demand that the norm "display its justification on its face." Most obviously, the norm does not promote a single value or identify some value as preeminent. It reflects some resolution of a conflict among values. This resolution may have been instrumental and context-specific. After all, each possible formulation of the legal rule reflects some different balance among the competing concerns. The way in which these formulations strike that balance will depend on the nature of the pollutant that the law regulates, the technologies of production that generate the pollutant as a side-effect, and the distribution of political forces affected by these various formulations. In general, the final formulation of the legal rule will be less than ideal. So, the norm might control inputs to the production process; it might, for example require the use of low-sulfur fuels. Alternatively, it might control emissions at the point of emission rather than the actual atmospheric pollution level. Reading the justification for the norm from its face then will be difficult.

Two additional points bear mentioning. First, the text greatly simplifies the policy problem. Any regulation will have a large number of effects on economic activity. For example, some formulations of the norm will induce producers to shift production to a process that either emits different pollutants into the air or discharges pollution into the water or as solid waste. A purely consequentialist analysis would have to consider these effects.

Second, Anderson has argued that it is inappropriate, in a cost-benefit calculation, to "trade-off" economic effects and harms with environmental effects or effects on the health of individuals. See ANDERSON, supra note 12, at 141-67. Economic effects, however, include effects on the health and well-being of individuals. Those who lose their jobs because of costly regulations surely suffer a harm that merits some consideration in the formulation of a norm.

This difficulty is not specific to the example discussed in the text but applies generally to any primary obligation. Consider, as a second example, accident law. Do the rules of negligence governing accidents that cause personal injury endorse or undermine the idea that an individual has a right to bodily integrity? On one account, these rules endorse that right because they ensure that negligent actors must compensate victims for the injuries caused. To the contrary, however, these rules undermine
One might argue that the “form” of the legal rule, and not its content, provides the mechanism that displays the justification of the norm. To continue the emissions control example, one might consider at least three different forms in which the norm might be cast. The policymaker might tax emissions, subject emissions to a civil penalty, or subject them to a criminal penalty. Suppose, for purposes of argument, that the actual tax or penalties are set such that the behavioral consequences of the three formulations are identical. As each of these forms expresses a different attitude towards the act of emitting pollution, the amount of the tax would differ from the size of the criminal penalty. Indeed, one would expect the criminal penalty to be less onerous than the tax if the behavioral effects are identical. The message from the different legal formulations thus is mixed. The imposition of the criminal sanction signals greater social disapproval of the polluting activity. On the other hand, though the tax permits the emission, the higher tax payment suggests that emission is a more serious harm. It thus seems unclear which form an expressive theory of action requires.

Now consider enabling regimes. These sets of rules do not directly impose obligations on private individuals. Rather, they facili-

the idea that an individual has a right to bodily integrity both because nonnegligent invasions of bodily integrity go uncompensated and because the fact of compensation gives each individual an option to cause the harm at the price set by the prevailing legal rule.

In addition, the difficulty in interpretation sometimes arises because the behavior of the agents deviates from that mandated by the legal norm. The meaning of the norm then will depend on whether one “reads” it from its textual embodiment or from the behavior of agents. On the difficulties of identifying the legal “order,” see Lewis A. Kornhauser, *A World Apart? An Essay on the Autonomy of the Law*, 78 B.U. L. REV. (forthcoming 1998).

67 These three “forms” are not exhaustive. The policymaker might institute a marketable-permit scheme that one could regard as an enabling regime like those discussed below. Of course, this marketable-permit scheme also would be sustained by criminal or civil penalties.

68 Presumably, the criminal sanction carries with it more stigma than the civil sanction, while the tax simply prices the emission of the pollutant. To the extent that individuals seek to avoid social stigma, a lower fine would be necessary to induce the same level of emission. Note that the discussion ignores the problem that either the tax or the fine would be borne by a corporation.

69 The discussion in the text suggests a more general question. Does the expressive theory of law ever require that a particular legal form, say the criminal sanction, be imposed? Must the criminal sanction be used, for example, to regulate homicide? Clearly there are consequentialist reasons to use the criminal sanction. Must the moral condemnation of homicide, however, be supplemented by a legal condemnation? Indeed, to some extent, the legal condemnation seems parasitic on the moral condemnation.
tate the accomplishment of certain actions by private individuals. In some cases, these acts could not be accomplished in the absence of these rules. So, for example, the rules of contract law or of inheritance give power to individuals to commit themselves to perform certain acts in the future, and to control the distribution of their assets after death, respectively. These bodies of law, however, seem instrumental as well. That is, the acts facilitated by the laws of contract and inheritance are ones that the state wishes to promote. The state does not endorse any of the specific acts undertaken; rather, the institution is simply understood as generally desirable.

Some enabling regimes seem to have been created to facilitate the ability of individuals to express certain relations. Marriage law, for example, does not so much permit individuals to accomplish some action; rather, it permits individuals to make some statement about their relationship. Again, however, it is not clear that the state, in permitting individuals to make this statement, is itself endorsing that statement. The situation is complicated by the fact that the availability of marriage laws is not necessary for the individuals to make that statement because religious forms of marriage exist.

Finally, consider legal rules that concern public action or public officials. Many constitutional rules prohibit the government from taking certain actions. Often these constraints are justified in terms suggesting an expressive theory. For example, in Shaw v. Reno, the Court disapproved of a North Carolina redistricting plan because it included a "bizarrely" shaped district in order to ensure another congressional district that contained a majority of African Americans. Justice O'Connor argued that the shape of the district ex-

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70 One can make and keep promises in the absence of the legal rules of contract. Indeed, economic exchange based on promise arises in the absence of clear or effective rules of contract. Similarly, individuals manage to control the distribution of their assets after death, even when the laws of the country in which they reside officially deny that power.

71 Marriage also triggers a variety of legal consequences concerning taxation, claims to property on the death of a spouse, and obligations to support the other spouse and children of the marriage. Individuals thus also may have instrumental reasons for marrying (or for not marrying or divorcing). These legal consequences arguably should be considered as ancillary to the expressive aspect of the availability of the institution.

ressed a "message of exclusion." Justice O'Connor invoked a similar argument in an Establishment Clause case.

Two distinct justifications for the recognition of these expressive harms are possible. One of these justifications is clearly grounded in a consequentialist, rather than an expressive, theory of action. The other has a more ambiguous ground.

Consider first the argument that has a more ambiguous ground. It concerns the district-appearance claim made in Shaw. In an excellent article, Richard Pildes and Richard Niemi contend that these district-appearance claims cause an expressive harm. They argue that the district’s shape undermines faith in the "legitimacy of structures of political representation." This harm occurs because the districting process and the resulting shape of the district have a social meaning that may reinforce or undermine other social norms. Thus, to avoid inappropriate government affirmation or rejection of some social norm, the Court must police the process of districting.

Pildes and Niemi do not articulate the danger that arises from governmental interference with the social meaning of some social practice. On the one hand, they might simply think it undesirable for the government to undertake action that expresses or may express the illegitimacy of the process that created the norm. On this account, it is wrong for the government to draw bizarre district lines in a manner that suggests illegitimacy, even when those bizarre district lines are the best (or, less strongly, an appropriate) means to promote another important social value. This conclusion that the consequences of the unwelcome expression are irrelevant, however, surely requires some argument.

Alternatively, one might understand their argument as resting on consequentialist grounds. After all, a reason to object to the en-

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73 See id. at 646-47 ("In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] ... voters' on the basis of race." (alteration and omission in original) (quoting Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960))).
74 See Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711-12 (1985) (O'Connor, J., concurring) (stating that a law that singles out Sabbath observers for favorable treatment sends a message that the state endorses a particular religion to the detriment of others). I thank Chris Eisgruber for calling this case and his own reflections on it, and on the Establishment Clause, to my attention. See Christopher L. Eisgruber, Political Unity and the Powers of Government, 41 UCLA L. REV. 1297, 1307 n.31 (1994).
76 Id. at 493.
endorsement (or undermining) of some social norm is that the social
norm in question has bad (or, correspondingly, good) consequences.
A second argument, suggested both by Justice O'Connor's opinion in
Shaw\(^7\) and by a dissent of Justice Blackmun in an Establishment
Clause case,\(^8\) makes this consequentialist argument somewhat more
explicit. Both Justices contended that the expressive harm in ques-
tion tended to create or sustain factions in the population, and
viewed this factionalism as undesirable.

Other legal rules that concern government action may raise addi-
tional questions. Consider again a legal system that eschews the use
of capital punishment.\(^9\) Assume as before that there is no conse-
quentialist argument for this restriction; that is, that capital punish-
ment would reduce the number of homicides.

Pildes and Niemi's argument of expressive harms does not seem
to apply here. The use of capital punishment does not undermine
some social norm. One might offer instead two related arguments,
each of which refers to moral arguments for deontological constraints
on action. According to these arguments, although an action may have desirable consequences, it may remain wrong for the individual
to undertake it. For example, it might be generally desirable to kill a
healthy, innocent person in order to use his body parts to save several
others, yet deontological constraints would prohibit such action.\(^80\)

The first argument contends that the state should be personified
and that the deontological constraints that apply to individuals
should be extended to the personified state. Obviously, this argu-
ment requires extensive elaboration to overcome objections to per-
sonification. The second argument contends that the deontological
constraints apply not to the state, but to the public officials who must
implement the law. This argument also requires extensive elabora-

\(^7\) See Shaw, 509 U.S. at 647-48, 657-58 (discussing the potential ramifications of
race-based districting and warning that racial classifications may balkanize the popula-
tion).
\(^8\) See Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 23 (1993) (Blackmun, J.,
dissenting) (stating that "the union of church and state in pursuit of a common
enterprise is likely to place the imprimatur of governmental approval upon the favored
religion, conveying a message of exclusion to all those who do not adhere to its
tenets"). Again, Eisgruber's article called this source and argument to my attention.
See Eisgruber, supra note 74, at 1298.
\(^9\) Note that one might regard the proscription on capital punishment as a primary
obligation of citizens because it limits the sanctions that the state may impose for
breach of those violations.
\(^80\) For an elaboration of this deontological position, see 2 F.M. KAMM, MORALITY,
MORTALITY 143-204 (1996).
tion as it raises complex issues concerning the relationship between public and private morality.  

CONCLUSION

This Article has addressed two questions: (1) What is the debate in ethics concerning incommensurability?; and (2) what implications does this debate in ethics have for public decisionmaking? Given the complexity of the issues and the length of the argument, a brief summary of the answers to these questions may be useful.

To the first question, I have provided a complex but, in some respects, optimistic answer. First, I distinguished two strands to the claim that individuals confront incommensurable options. These strands correspond to distinct theories of value and pose different challenges to consequentialist theories of practical reason. The first strand argues from within a consequentialist tradition. I demonstrated that this strand was best formulated as a claim about the conditions that rationality imposes on integrating an agent's values into a single, all-values-considered ordering. From this perspective, I argued that, in fact, rationality imposed at most two conditions on such an integration and that, consequently, there would be many all-values-considered orderings that satisfied these rationality constraints. As a consequence, rationality would not fully determine the individual's choices, even if her ends were rationally given.

The second strand of the incommensurability debate in ethics relies on a nonconsequentialist theory of value. It suggests that, even if options are not comparable in a consequential sense, reason can still guide the individual's decisions because rationality will identify the option that best expresses the individual's values and commitments. This argument seems insufficiently developed in the literature in two respects. First, it does not articulate adequately the relation between the instrumental and expressive aims of action. Second, it does not address questions of expressive incommensurability: How does the individual resolve conflicts either among values, each of which is best expressed by different options, or between the expressive and instrumental aims of actions? Nevertheless, this theory of value has had significant influence on the debates in the legal literature.

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81 For a discussion of these issues, see, for example, THOMAS NAGEL, Ruthlessness in Public Life, in MORTAL QUESTIONS, supra note 10, at 75.
My answer to the second question had two parts, corresponding to the two strands of debate. To each part I offered an equivocal answer. Regarding the first strand, I made four claims concerning instrumental incommensurability. First, I suggested that instrumental incommensurability might enter into public decisionmaking in two different ways. It might enter indirectly when the policymaker pursues an objective of maximizing some social welfare function. In this context, instrumental incommensurability would arise when the policymaker constructed the index of each individual's well-being. On the other hand, instrumental incommensurability would enter directly if the policymaker attributed to society as a whole a set of multiple social values.

Second, I claimed that, if instrumental incommensurability plagues the individual agent, then it also presents a problem for a decisionmaker who seeks to maximize social welfare. The decisionmaker must reconstruct each agent's all-individual-values-considered ordering of options. Yet, when the agent faces order incommensurability, there may be no way for the public decisionmaker to infer which admissible ordering the agent would choose.

Third, I argued that, when the policymaker pursues several social values, the truth of the claim of (direct) instrumental incommensurability in public decisionmaking is independent of the claim of instrumental incommensurability in individual decisionmaking. This argument results from the observation that there is no reason to suppose that the conditions on the integration of social values into an all-social-values-considered ordering are the same as those imposed on the integration of individual values into an all-individual-values-considered ordering.

Fourth, I suggested that when direct instrumental incommensurability exists, the legislature is the appropriate institution to resolve the conflict. Arguably, delegation to the legislature should also be used to resolve problems of indirect instrumental incommensurability. In the case of indirect incommensurability, however, the legislature cannot resolve the problem by reconstructing each agent's all-individual-values-considered ordering; rather, it must announce the procedure to be used by courts or administrative agencies. Alternatively, one might argue that indirect incommensurability requires public decisionmakers to seek the participation of the individuals affected by the proposed government action.

The discussion of the application of the second strand of the incommensurability debate to public decisionmaking focused not on
incommensurability, but on the implications of an expressive theory of action for public decisionmaking. Unfortunately, these implications are difficult to extract from the legal literature because that literature employs an ill-defined notion of an expressive aspect of law. Both the notion itself and its relation to the expressive theory of action are obscure.

In seeking to clarify these ideas, I distinguished two senses of the expressive aspect of law. One aspect simply attributes causal power and significance to the articulation of values in legal texts and legal norms. This sense of expressiveness is not problematic, but consequentialist, rather than expressive, theories of value are adequate to understand and use it. The second way in which law might have an expressive aspect has two elements. First, it attributes intrinsic value to the expression. It is important that a particular social value be expressed regardless of its causal consequences. Second, the expression must be manifest in the legal norm itself and not simply articulated as a reason for a norm. Arguments that, for example, the state ought not to impose capital punishment as a sanction for homicide, even if it would reduce the number of homicides, rely on this notion of expressiveness.

To investigate this latter notion of expressiveness, I considered its relevance to understanding expressive issues raised by three classes of legal norms: primary obligations, enabling regimes, and norms regulating the government or public officials. From this discussion, two issues arose. Often, the relevant sense of expressiveness turned out to be the causal, rather than the intrinsic, one. When an expressive theory of value does seem relevant, the argument for its extension to the case of public decisionmaking confronts two related obstacles. Specifically, one must contend either that the state should be treated as a person in the analysis of deontological constraints on action, or that there is no discontinuity between private and public morality.

The argument of this Article thus suggests that the application of the insights of the incommensurability debate to public decisionmaking has not been, nor is likely to be, fruitful. The questions that plague public decisionmaking raise issues significantly different from those presented in individual cases. The question of instrumental incommensurability turns on the conditions one believes appropriate to impose on the integration of values, and the number and nature of values to be integrated. I argued, however, that neither the social values nor the conditions on the integration of social values are apt to
be identical to those implicated in individual decision. I argued further that theories of individual rationality that rely on the expressive aim of action are neither sufficiently developed nor directly relevant to an understanding of the expressive aspect of law.

The overall argument thus suggests that the legal literature on incommensurability raises a series of complex foundational issues that beset public decisionmaking. The concept of incommensurability, however, has not proven particularly useful in resolving these issues. Rather than pursue the claims of incommensurability, legal scholars might more fruitfully address these issues directly.