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INTRODUCTION: TWO VIEWS OF HUMAN NATURE

It seems that no matter which way one turns today there is a close connection between law and its contiguous disciplines. The link between law and economics is well established and dates back at least two generations, perhaps more. But the link between law and philosophy has grown apace in recent years. And too often, philosophy works at cross-purposes with economics in understanding law. One tension between the two disciplines revolves around the relationships among preferences, utility, and choice. For the lawyer/economist these are generally treated as nonproblematic conceptions. The preferences of individuals are usually regarded as stable and well behaved. They are also regarded as largely subjective and incapable of ready comparison across persons. When these preferences do shift, however, they tend to do so in a relatively predictable fashion, for example, with income or age. Utility is what people want when they choose among the alternatives available to them, whether they deal in the commercial or the social realm. The postulate of rational choice based on individual self-interest does require some modifications in the margins, but it certainly provides the basic orientation of the "law and economics" approach to the field.

The alternative view of human nature is not so tidy. Philosophers are not as quick in their willingness to find the simple regularities in human behavior that hold such appeal to economists. Concepts that economists treat as nonproblematic become problematic and contested when dissected by philosophers who are far less shy in their willingness to ask the question: what do you mean by...? The simple portrait of human behavior that underlies the

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* This Essay is a revised, reconfigured, and expanded version of the 29th annual William H. Leary Lecture delivered at the University of Utah College of Law on November 16, 1994.
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1. See, e.g., GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION passim (2d ed. 1971) (applying economic theory to issue of racial discrimination); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE passim (1981) (applying economic theory to issues such as defamation, right of privacy, and origin of state).
economic model is more examined than utilized, as in the work of Jon Elster. Preferences are often thought to be endogenous, adaptive, unstable, discontinuous, and capable of radical reformation based on upbringing or external circumstances. Rationality and self-interest often yield to far more variegated but less tractable accounts of human emotions and human behavior. And that hardy old standby—utility—is subject to intense scrutiny by those who believe that it is both too simple and too elusive to supply a full understanding of the mainsprings of human conduct.

These differences in orientation and approach on methodological issues cast a powerful shadow on questions of political theory, especially as the differences relate to the interaction between politics and markets. Economists who start with simple models of preference, rationality, choice, and self-interest utility do not necessarily become anarchists or uncritical devotees of laissez-faire economics. They conceive of a role for government in the protection of liberty and property, the enforcement of contracts, and the provision of public goods. But they frequently shy away from active government intervention of the sort associated with the New Deal and the modern welfare state. On the other hand, philosophers and their legal compatriots who take more critical stances on these issues tend to be more interventionist and see a larger role for government in the regulation of social and economic relationships.

The differences are not categorical, but they have become strong tendencies which express themselves over broad portions of the legal terrain. In this Essay, I address one such broad question: what role should the idea of incommensurability play in the organization of our thoughts about human behavior and social institutions? The topic is broad because those who believe that incommensurability is a large theoretical problem typically believe it is a mistake to think that conceptions of utility (and their kindred notions of satisfaction, happiness, and pleasure) adequately explain many of the most important nonmarket human interactions. Accordingly, they urge that citizens, courts, and legislatures resist the tendency to “commodify” certain relationships or to allow cash connections to intervene in certain social circumstances.

In one sense this Essay should be regarded as one answer to

this insistent challenge to the more focused form of utilitarian analysis. In my view there are many reasons why it is difficult for individuals and groups to make choices and for states to hit upon the optimal form of social regulation. Ordinary forms of uncertainty are endemic even in the most deterministic of models. Oftentimes the choices are discontinuous in some important way, rendering choice difficult even within a single dimension. Oftentimes individuals seek to maximize not only their own welfare but also that of their family and close friends. Once these difficulties are taken into account and given their due, the standard economic analyses (assume mutual gain in voluntary exchange, but net social loss from aggression and theft) are better able to account for the social responses that are ordinarily said to pose the most troublesome questions for traditional utilitarians.

The question of incommensurability is offered to explain the richness of human choice and behavior, but in practice it adds little to that schema. The standard utilitarian theory is robust enough to account for these complex cases yet simple enough to understand why they develop and what might be done about them. So in the end we are better off putting questions of incommensurability to one side than according them a central place in either philosophical discourse or legal theory.

The outline of this Essay, therefore, is as follows. In Part I, I explicate the ideal of incommensurability and its relationship to the similar yet distinct idea of subjective value. This idea is critical to standard forms of utilitarian theory and to notions of wealth, closely allied with but clearly distinguishable from utility. In Part II, I shift from explication to argument and insist that the common conundrums of choice are better understood within a traditional utilitarian framework which stresses the importance of uncertainty and marginal analysis. I pay special attention to the problems of discontinuous choices and the interdependence of utility between persons who are bound by blood or marriage. Part III then shifts the analysis from argument to legal rules. Section A explains how the utilitarian views just defended both justify the general principle of individual autonomy and account for the limited place for special privileges, such as those commonly found in tort law. Section B then extends the analysis to such diverse issues as vote selling, marriage, and medical ethics. In these diverse contexts, I defend the proposition that incommensurability does not explain how choices can be made and, indeed, makes the entire process of making choices seem largely incomprehensible.
I. INCOMMENSURABILITY AND UTILITARIANISM

Most discussions of incommensurability begin with a theoretical discussion and then veer off into particular cases. At the theoretical level, the fundamental question is whether or not choices between goods and between alternate courses of action are easily reduced to a common metric. To say that these choices are incommensurable means that the relevant choices lie in different domains—although it is never clear how many—such that it can be said "A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value."

As a working definition, this account makes sense because it seems quite clear that two elements fall in different domains if we cannot say that one of them is less than, equal to, or greater than the other. If these separate domains are possible, then it becomes difficult to find ways to "trade off" different commodities against each other. One corollary of this definition concentrates on the trade-off between certain goods or relationships and money. Thus, when it is said that certain goods are "beyond price" because of their intrinsic value, it is nothing more nor less than an assertion that they are incommensurate with money. Indeed, in some areas the proposition is put more strongly than that as if to indicate that the very idea of making precise comparisons across various types of human experiences is itself so troublesome and problematic, so difficult and counterintuitive, that we ought to abandon the enterprise altogether. Yet taking the position in that extreme form carries with it the prospect that all choices could be regarded as irrational because we do not know how to weigh the relevant goods and bads, pursued or avoided, and hence have no reason to prefer one course of action, one state of affairs, to another.

In some instances a softer argument is made which claims that while no precise trade-offs can be made across different kinds of

6. ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 8-9 (1993). Anderson appeals to the Kantian notion that "[i]n the kingdom of ends everything has either a price or a dignity. Whatever has a price can be replaced by something else as its equivalent; . . . whatever is above all price, and therefore admits of no equivalent, has a dignity." Id. (quoting IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 40 (James Ellington trans., 1981)). A distinctive and irreplaceable painting like the Mona Lisa has a price if put up for auction. Does it follow that it has no dignity?
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... goods and experiences, we nonetheless can make, through deliberation and discussion, some responsible choices about how people ought to live their individual or collective lives. Oftentimes the concern with incommensurability of values blends with an argument about commodification—the claim that certain domains of intimate personal association cannot survive in collision with a (cash-nexus) marketplace. Incommensurability also implies that certain collective goods cannot be evaluated by a prosaic cost/benefit analysis of the sort commonly applied to business decisions in an ordinary market-based firm. The bottom line is that most writers who treat incommensurability as an important philosophical value tend to favor, or at least tolerate, large measures of government intervention usually by a state that can make the kinds of comparisons that markets are said to miss.

The philosophical target of these concerns with incommensurability is often some theory of utilitarianism. Utilitarianism is said to suffer from the insurmountable conceptual difficulty of seeking to reduce fundamentally diverse experiences and goods to a single dimension or metric—a process that allows choices to be made in an orderly and rational fashion. This Essay offers a qualified defense of the more traditional utilitarian position against this ostensibly rigorous philosophical position; it shows how the defense plays itself in general social theory, and finally it indicates where the choice of theory may make a difference in thinking about legal questions.


8. See, e.g., ANDERSON, supra note 6, at 8–9; Jack M. Beermann & Joseph W. Singer, Baseline Questions in Legal Reasoning: The Example of Property in Jobs, 23 GA. L. REV. 911, 977–84 (1989) (noting “externalities, distribution and bargaining power, binary choices versus industrial policy, and paternalism” justify government intervention); Sunstein, supra note 5, 818–53 (asserting government cannot remain “entirely neutral” about valuations). As Sunstein rightly notes, my own views have thus far been much more consistent with the Monist tradition. Id. at 792 n.38 (citing Richard A. Epstein, In Defense of the Contract at Will, 51 U. CHI. L. REV. 947, 956–57 (1984)).

9. “Different kinds of valuation cannot without significant loss be reduced to a single ‘superconcept,’ like happiness, utility, or pleasure.” Sunstein, supra note 5, at 784. For a debate on utilitarianism, see J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST passim (1973). Smart is for utilitarianism in his contribution, An Outline of a System of Utilitarian Ethics. Id. at 3–74. Williams is against in A Critique of Utilitarianism. Id. at 77–150.
A. Incommensurability Versus Subjectivity

Initially, it is important to note that the incommensurability theme resonates tightly with one strand of utilitarian thought which insists that all values should be regarded as subjective and personal to the individual who holds them. Nonetheless, there is a vital point that separates these two theories. Subjectivity finds its difficulty in making comparisons of utility or well-being across persons.\textsuperscript{10} Incommensurability tends to be concerned about the difficulties of making comparisons not across persons but across activities, even when conducted by the same person.

There is, moreover, a second critical difference between the traditional theory of subjective value (relied on by small government advocates) and the theory of incommensurability (usually invoked by their big government, or at least bigger government, opponents). The believer of subjective preferences holds that individual preferences are stable and coherent within persons and that efforts (such as those associated with Amartya Sen\textsuperscript{11} or Ronald Dworkin\textsuperscript{12}) to confound decisions based on these human characteristics are concerned more with exotic sideshows that are not frequently encountered in ordinary life.

It is commonplace for those who speak of subjective preferences to regard them as well ordered by the individuals who own them. This is not to say that the preferences are so rigid that the particular goods desired will not change as new information about their relative worth and value becomes available. But the translation of desire into particular goods or services tends to shift as relative prices shift or as the use of particular commodities or services shift. Thus, even though we might not be able to explain why certain individuals value certain goods, we can still say that ceteris paribus they prefer more of those goods to fewer, although after some point, additional utility from an additional unit of good will start to decline. It therefore becomes relatively easy to explain the relationship between changes in behavior and changes in the various quantities of available goods, even if some ultimate mystery surrounds the fact that certain goods have positive value in the first place. So understood, these changes can be easily correlated with well-known features of economic theory without depending on some psychologi-

\textsuperscript{11} Amartya Sen, The Impossibility of Being a Paretian Liberal, 78 J. Pol. Econ. 152 passim (1970).
\textsuperscript{12} Ronald Dworkin, Taking Rights Seriously passim (1977).
cal "ace-in-the-hole" to confound those regular arrangements.

Subjectivity claims that there is no responsible way that governments or indeed any neutral and impartial third parties can compare values across persons. At one level, it says that if one person likes vanilla and another likes strawberry, there is little we can do to broker the irreducible difference between them. One cannot persuade the first person that he ought to bend his taste to the will of the second person, let alone an entire society, who entertains preferences that he does not share. A more powerful version of this theory says that there is no collective means that allow social groups to decide a certain quantity of wealth is worth more to one person than to another, even if we accept some notion of a diminishing marginal utility of money. Since interpersonal comparisons of utility cannot be made, it follows that they offer no independent justification for various programs of income redistribution that might be undertaken by coercive state means. Such means all depend on the proposition that greater utility can derive from a smaller pie so long as its slices are more evenly distributed across its members. The same theory, however, does not prohibit private voluntary gifts from one person to another, for the presence of consent vitiates the need to justify coercive interactions. We may not be able to determine or quantify the determinants that encourage the gift, but the mere fact that it is made means that there is compensation, direct or indirect, not only to the person who received it, but also to the person who made it.

B. Utility and Wealth

Subjectivity does not, however, presuppose that individuals as decision-making units have any insuperable difficulty making these choices for themselves. The argument takes the following form. Individuals in the course of their lives reduce all components of choice to a single metric (which is why we call this problem one of incommensurability). They then decide which path to take based upon that course of action which maximizes the goals they wish to achieve. The only candidate worthy of consideration for this exalted status is "utility," which becomes a convenient placeholder for all forms of subjective satisfaction no matter how differently they are

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13. I recall my first lunch with Aaron Director at Stanford in the summer of 1972. He posed to this then-young neophyte the question of whether an additional rupee was worth more to a rajah or to an untouchable. He finished with the flourish that the rajah thought it was absolutely mad that the additional rupee was worth more to an untouchable and asked me how one could either disclaim or prove that proposition. In one sense this lecture is my partial answer to that question.
experienced as psychological states.

In making this observation, it is important to keep kindred conceptions distinct. Specifically, *wealth* is not what people use to place value on the decisions they make with their own lives. Indeed, individuals are quite happy to trade away wealth for happiness whenever they think that consumption of wealth is worth more to them than its preservation in physical or financial assets. Over some domains, to be sure, people will seek to make as much wealth as possible. They do this not because they believe it is a good in itself, but because they think the greater the level of wealth they acquire, the greater the level of subjective satisfaction they can obtain given their spending and investment choices within the budget constraints that wealth provides.

Wealth thus becomes the instrument through which utility is pursued. In those cases in which people believe that more wealth is a bad (or more commonly, a bad for their children) they are free to give it all away to someone else who can then figure out how to translate wealth into utility by the proper set of consumption and investment decisions. More wealth is valued because it always can be translated into more utility; it is an instrumental good but an instrument that can be pressed into the service of any end desired for its own sake. Toasters are not valued in the same way as wealth because their diminishing marginal utility sets in far sooner and goes far steeper than it does for wealth, which can be spread across many different types of commodities. It is for just that reason that folks are quite happy to give away excess goods (say, firewood or ice) that they cannot use or sell. But they will never give away "excess" money for the same reason. It always has some use, some positive utility.

II. THE UTILITARIAN APPROACH TO INCOMMENSURABILITY

A. Discontinuous Choices: Life at the Margin

It is now time to investigate the way in which this simple model of utility is able to account for some complicated issues of individual choice and social interaction. In light of the above discussion, there are no special difficulties raised by questions of individual

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choice: each person moves back and forth across the domains of wealth and utility as he or she pleases. Thus the strong utilitarian does not think that people go into fits of paralysis whenever they are required to compare goods that cross different domains of their social lives, no matter how rich and complex these choices might be.

It is important to note that "goods" here does not refer only to specific, standardized commodities that can readily be bought and sold on an organized market. For these purposes, "goods" also refer to relationships, experiences, and the intangibles of self-esteem and self-respect, to love and affection, to the things which it is commonly said "money cannot buy." The question is, how difficult is it to sort out a path among these alternatives when the constraints of scarcity—be it of dollars, time, or emotional energy—make it impossible to satisfy all wants (or needs) simultaneously?

Stated in its abstract form, the problem is how does one maximize utility subject to some budget constraint? The abstract question sounds very hard, but here practice seems a better guide than theory. By ordinary observation we know that people constantly make decisions and are usually satisfied with them: a mother may stay an extra hour at work even though she will have to miss her ten-year-old's band concert, or she may come home early from an out-of-town trip to attend that same concert. The only way that one makes such choices is to ask whether on this occasion the family engagement is more important than the business engagement.

It is not always easy. Sometimes we resort to presumptions to order the choices. We tend to have greater willingness to favor family events that take place after working hours and business events that take place during working hours. But we also have rules that allow us to alter our schedules (and supply compensating time to the employer) for special situations—a wedding, a bar mitzvah, a baptism—that are regarded as milestones. Over the long haul, when we look at everyday life, the hard question is not why most of these choices are so difficult to make, but why they seem so easy to make. We all do it thousands of times in the course of a week, and while these choices sometimes require planning and thought, they do not require the kind of philosophical firepower that only the best and the brightest can supply.

The key, I think, to making (and understanding) these kinds of decisions is that we recognize the hopelessness of asking abstractly whether we value family more than professional attainments or a pristine environment more than a warm and safe home. The point is that we value both but value them in ways that make this question almost otiose. Valuations of goods never take place in the abstract but always take place at the margin. Oftentimes one can take
any large decision and break it down to a number of smaller ones. In all these situations one can estimate the types of resources available to serve the two ends in question. Then, for each unit of basic resources we allocate across those two activities, our utilities are equal until at the margin.

Looking at the world this way makes it clear that once the question is put (family versus work, environment versus home), it is as though we were asked to pick between only two points on the private indifference curve, \((a,0)\) or \((0,a)\)—the same amount of goods available in an all or nothing way to one of two activities or preference states, with no intermediate solutions. In practice, however, we are usually at a point where we have decided \((x, a-x)\), for \(x<a\). Typically we are close to the middle of the range \((0,a)\), given the soundness of our prior decisions. We are then asked to make one additional choice (perhaps because resources have come into or left our control, so the budget line shifts) and to allocate resources to either of the two activities in question. The choice is likely to be close because we are already in equilibrium or close to it. But we usually can do better or worse, especially if we are revisiting an allocation made some time ago. When we make lots of these decisions, we can be quite comfortable about the soundness of the overall process even if we have doubts, as we always will, about close decisions in individual cases. But then as marginal gain approaches marginal loss the incremental decisions do become more difficult (which is what the incommensurabilist, to use a horrid word, focuses on), but by the same token they become less important as well. There is less left to allocate and the values from the alternative choice are likely close.

This model also explains why some choices become very difficult to make. Suppose the choice is not whether to come home an hour early for a birthday party but whether to go overseas for six months to obtain large financial rewards or professional advancement, some of which can be used to improve the position of the family back home. Here the decision is far more difficult because the choices become more lumpy; we start to approach the \((a,0)\) versus \((0,a)\) state of the world. The choice is really one of either too much or too little of some desired good, and we therefore should expect the difficulties to be greater as we have to decide, under conditions of ever greater uncertainty, which deviation from some happy middle point promises the least loss in utility.

Alternatively, the question is whether a discontinuous shift is one that produces net gain to the individual or family that has to make it. One does not need any fancy theory of incommensurability to explain why these choices are hard. It is quite enough to note
that the structure of this choice deprives us of the effective benchmarks for marginal adjustments. There is no grand difficulty of choice between incommensurables that covers all choices across domains, be they large or petty. There is only a discontinuous set of choices that are hard for anyone to make. The point is no more difficult, or easy, than a business choice to enter into a merger, start a new product line, close down, or sue. The social situation leaves no middle ground, which is as hard with business decisions as it is with any others. Discontinuity, not incommensurability, is the culprit.

There is perhaps another way to state the basic difficulty with the set of relevant choices. The effort to place all personal choices in one box and all business choices in another box runs into two sorts of difficulties. First, these two domains are not likely to be watertight. There are many situations in which questions of employment give rise to affective arrangements. It is surely common, for example, for persons to provide generous pensions and bequests for a trusted companion or domestic servant. To argue for separation between the domains would be to indulge in oversimplification. The two domains overlap and are continuous. Yet we routinely make choices that mix and match these two impulses. Once again the difficulty comes not from disparate types of value, but from the hard choices inherent in all social situations.

Second, the same point can be made from the opposite side. Just how many separate domains are there? If we say that intimate personal relationships occupy one sphere and business relationships occupy another, what happens when there are close friendships with many people or lots of complicated business transactions? Is it possible to make choices between friend and friend or child and child? If these choices are incommensurate, then how can we prevent the ultimate fragmentation and disintegration of any and all comparisons between alternatives? The world will become disconnected in ways that once again do violence to ordinary perceptions of how people think and relate to each other. It is far easier to think of uncertainty and discontinuity as the driving variables, which can be of greater or lesser force, than it is to postulate some large but arbitrary number of separate domains over which choices are regarded as incommensurate.

B. Interdependent Utilities

The argument for incommensurability does more than insist on separate domains for choice. It often uses examples to indicate why it is odd, if not perverse, to seek to make certain kinds of comparisons. Thus, to take the familiar example offered by Joseph Raz and
embellished by Margaret Radin, posit that a man has been offered a job in some distant city which will pay $100,000 more per year than his current position. Taking the job, however, means that he will have to live separate and apart from his spouse. The question that Raz puts is whether his decision to take the position should be regarded as a judgment on his part that he prefers $100,000 to living together with his spouse. Raz finds this conclusion odd and does not think that anything can be inferred about the commensurability of values from the fact that the job has been taken (or turned down for that matter). Yet that conclusion in itself seems odd because we are then left without an explanation as to how that choice should be made at all or indeed as to the mental processes the man went through in making his choice.

So how then are these choices made? The question is as much descriptive as it is normative. To unpack both sides of the problem, the critical question is whether any modifications of the basic utilitarian approach can help respond to Raz’s unease. I think so. The first point here is familiar: no business and no family faced with these choices will simply treat the decision as a binary one—move or stay. Instead, to induce the move, the employer (old or new) may well do more than simply provide additional cash. The employer may try to arrange or pay for weekend visits in either direction or may agree to help the spouse find a job in the new location.

But these observations, however true, do not go to the heart of the difficulties with Raz’s example; rather, the central mistake in his analysis is an improper specification of the relevant utility functions. The correct way to handle this question is, in my view, not to relax any strong assumptions about utility as the ruler of the world but to enrich the model in what are, I believe, familiar ways. In dealing with certain kinds of commercial transactions, we can adopt a very lean model of individual self-interest. Each person entering into a transaction seeks only to gain for himself: it is normally not important to know that the buyer is a family man or the seller had a rocky divorce from her husband. The desirable effects from exchange all derive from the fact that each person receives, by subjective valuation, goods and services that are more valuable than those which are surrendered. The transaction produces gain all around, which is why it is socially encouraged and legally protected.

In contrast, family transactions do not usually take the form of simple exchanges, and the usual reason is that the parties who

15. See Raz, supra note 4, at 345–53; Radin, Compensation and Commensurability, supra note 7, at 65–66. Radin added the dollar figure which gives the example much of its bite. Id.
make the decision have interdependent utility functions, meaning the utility of one individual is positively or negatively influenced by the well-being of another individual. It is only if we assume such interdependence that we can explain why individuals routinely make gifts to their family members: the simple transfer of cash does nothing to increase the level of wealth in the world and has been mistakenly condemned as a "sterile transmission" on the ground that these transactions differ from productive commercial exchanges. But if the transactions were sterile, then the blunt truth is that no one would make them. It is only because the utility of the donor is increased by the enhanced wealth of the donee that the transaction makes sense from the point of view of the participants.

There is, of course, a major dispute as to whether the executory enforcement of these promises should be allowed, especially when they are made in writing. But, for our purposes, the legal question of enforcement is the sideshow. The main point is that these promises are frequently given and usually performed even though they are not enforceable. And that reliable practice is followed for a reason: the indirect benefit that the donor obtains from the gift. That benefit is not based on any implicit promise of a reciprocal transaction in the future—which would really be a sterile transaction because it would frustrate the goal of wealth transfer. Rather, the benefit arises because utility of the donor is enmeshed with that of the donee.

That same form of interdependence operates in the more prosaic examples already considered. In the band concert example, the mother comes home early to attend the concert, even though it is a net inconvenience to her, because she derives some benefit from the satisfaction that her action produces in her son and in the other members of her family. The statement that these utilities are interdependent does not necessarily imply that there is a one-for-one substitution of satisfactions and pleasures. In principle, it is conceivable that the mother would weight the gains to her son more heavily than any gains to herself. In practice, the biological approach to the subject, which stresses the importance of inclusive fitness in figuring out behaviors in nature, takes the opposite posi-

16. The expression itself dates to 1884. CLAUDE BUENOIR, PROPRITÉ ET CONTRAT 487 (2d ed. 1924). For a compelling account of the weaknesses of this view of the world, see Andrew Kull, Reconsidering Gratuitous Promises, 21 J. LEGAL STUD. 39, 49-64 (1992).

17. For a case denying the enforcement, see Dougherty v. Salt, 125 N.E. 94, 95 (N.Y. 1919) (holding written note made by deceased aunt to her eight-year-old nephew unenforceable). For a defense of the limited view of enforcement, see Melvin A. Eisenberg, Donative Promises, 47 U. CHI. L. REV. 1, 8-18 (1979).
tion and assumes that in the mother's utility function the well-being of the son counts half of what it does to the son. Within complicated human settings, figuring out the exact weights that the welfare of other family members and friends have in one person's utility function is no easy business, and it may well be that the ratio varies across and within social groupings. But while it is difficult for outsiders to accurately determine all the elements that go into the utility calculus of a given individual and how those elements are weighed, it is far less difficult for any person to act on some rough-and-ready sense of interconnectedness in his or her own life.

This last point helps give some clear focus as to why Raz's intuitions are incomplete. In dealing with a familial situation, he stressed the question of incommensurability of values but ignored the more important and pressing question of interdependent utility functions. The most obvious rejoinder to his example is to ask why a utilitarian has to be committed to the view that the husband who takes the job values the $100,000 more than living with his wife. The more instructive way to put the question is to ask why did the husband and the wife want the extra $100,000? The only possibility that seems implicit in Raz's statement of the question is that the husband will take that money and spend it all on himself. On that view, the husband wins because $100,000 is greater than the loss of companionship that he receives, while there is no compensation for the wife's loss of his companionship.

Any such account seems incorrect. I think that there are very few marriages, and certainly very few good marriages, that work in this egoistic fashion. One way to formalize the notion of love is to say that people take into account the welfare of their loved ones in making their own decisions. In Raz's example, it is quite inconceivable to me that the husband would make that decision unilaterally without consultation with and without the participation and consent of the wife. It is also quite inconceivable to me that if he did decide to take the job he would simply treat the extra $100,000 as his own

18. W.D. Hamilton, The Genetical Evolution of Social Behaviour, 7 J. THEORETICAL BIOLOGY 1 passim (1964). The basic proposition propounded by Hamilton is that self-interest in nature is not that of the individual but of the gene line. The adult that cares only about itself will never reproduce, so nature selects strongly for parents that care about offspring. The optimal level of caring is to discount the utility of the offspring by the degree of genetic connection. Children have one-half their parents' genes, so their discount rates 50% of the parents. Cousins have only one-fourth the genes in common, so the discount rate reduces their place in the utility function to 25%. The actual level of interconnection depends not only on these ratios but also on the level of benefit that a given unit of assistance provides, and that diminishes as children become older and more self-sufficient.
money, not to be shared with her in any way.

Instead, lots of other possibilities come to mind. First, it may well be that the money is needed in order to send children through private schools or college or even to fund the cost of expensive medical treatment. More happily, the extra money could be used to secure the down payment on a second home that both husband and wife would enjoy. The interdependence of utility therefore leads to a sharing of the wealth within the family that is created by the relationship.¹⁹

Once that point is stressed and made clear, it becomes impossible, even under the standard utilitarian view, to ask the question of whether we can infer that the husband, by taking the job, values $100,000 more than he values the company of his wife. The right way to ask the question is, has the couple made other side transactions, present or future, so that the increment in wealth produces gains in utility to both of them in a fashion consistent with family affections and family obligations?

There is nothing about the calculus of utility that requires it to be wedded to a strong theory of individual self-interest; a good deal about biology and psychology indicates this version of the world is contrary to the fundamental facts of human experience. The best explanation of Raz’s example is, of course, that it is impossible to infer from the husband’s decision to accept the job that he values the $100,000 more than the companionship of his wife. It may well be that the only correct conclusion is that the couple had greater need for the money than for the companionship and made the right choice.

All of the examples that I have thus far considered follow the usual pattern and follow a very simple model involving a choice between two alternatives, much like the choice between guns and butter in a two-goods economy. But that simplification hardly hurts the overall analysis here when we extend it to choices between many goods or across many different domains of social life. I see little if any difficulty in recognizing that individuals have a market basket of goods a through n over which they can allocate their wealth and that these goods often have very different characteris-

¹⁹. The point is often missed. See UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 1993, at 16. The study seeks to estimate the well-being of men and women by looking at the differences in their wages without taking into account any level of income or wealth distribution within marriage. Id. It is as though husband and wife lived in different houses, ate at separate restaurants, and only took separate vacations. For my criticism of that study, see Richard A. Epstein, Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages, 92 MICH. L. REV. 2456, 2465–68 (1994).
tics. But so long as the units of wealth are small, the pain associated with choice is manageable.

As before, the easy choices are quickly made while the harder choices are those which by definition have little consequence for the overall level of subjective utility that individuals derive from the choices they make with the goods and human capital at their disposal. As before, the discontinuous choices become the more difficult ones for the same reasons. Likewise the question of interdependent utilities does not disappear as the array of choices becomes larger, even though these interconnections make the task of decision and description far more difficult. In short, there is nothing about the model that seems to fly in the face of ordinary human experience. If all this is correct, then the basic insistence on the incommensurability of values seems misplaced as a philosophical matter: the utilitarian theory is more sophisticated than the critics suppose, and once these complexities are taken into account the theory loses much of its counterintuitive feel.

III. LEGAL IMPLICATIONS

A. Autonomy and Privilege

The above conclusions are relatively straightforward. Comparisons across different domains can be and often are made. In many cases these comparisons are difficult because there is uncertainty about the outcome of key decisions. In other cases they are difficult because the choices are sharply discontinuous, so the decision to move in one direction forecloses the decision to move in a second direction. And in still other cases the choices are difficult because the actor is concerned not only with his own utility but also with the utility of others with whom the actor shares close affective ties. But these problems arise whether one is choosing between two jobs or two possible mates. And the decisions can be made, obviously with lower reliability in a choice between a job and a mate, if matters become so stark. It is the elements of uncertainty or discontinuity and interdependence that make these choices so difficult. It is not a question of spanning two different domains of value that cannot be reduced to a common metric. The difficulties we confront in our everyday life arise because we strive more often than not to reach rational accommodations. They do not arise because that rational pursuit is elusive or transitory.

The question that now arises is whether these conclusions about the nature and structure of individual preferences should influence the choice of legal rules. I think the initial point of departure is that the choice of these rules should not be regarded as "nat-
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ural" in the sense that they represent self-evident truths or in the sense that they cannot be denied save on pain of self-contradiction. Rather, the point is quite simply this: if the structure of human choice hews to the relatively undramatic paths that I think it follows, then the question is, what legal regime is likely to do best by the individuals whom it governs?

The basic ingredients for these choices are several. It is indispensable that the values in question be regarded not as incommensurate, but rather as subjective. Oftentimes an individual can decide that on a particular occasion she will put the additional hour of work ahead of attending the band concert. Yet another person, when faced with the identical situation, might make exactly the opposite choice. To call the value preferences involved in this case subjective does not mean the two parties are incapable of rational argument over who was right and who was wrong. It could well be that one person could persuade the other that he made some mistake in weighing the two alternatives that could lead to a modification of belief and practice for future occasions. Instead, the idea of subjectivity in this case means that if the two parties continue to hold their disagreements after they have engaged in discussion about them, neither can be condemned as making an irrational or arbitrary choice. The more humdrum conclusion is that the two persons attach different weights to the different outcomes so each maximizes utility in accordance with her own lights. The choices that each face are commensurate for the person but not easily transferred across persons.

Situations of this sort are extraordinarily common in all walks of life, so the issue is, what legal principle, as a first approximation, best responds to the types of differences implicit in a system that regards choices in different domains as commensurate for a person but not easily commensurate or comparative across persons? Although there is no necessary connection, I have little doubt that persons who are drawn to this subjective view of human valuation and choice are likewise attracted to the legal principle that accords (again as a first approximation) pride of place to the principle of individual autonomy. By that principle, each person has complete and exclusive control over those decisions that govern the use of her own body and the course of action for her own life.

That principle collides with the economic definition of externality, which accords that lofty status to any action of A that alters, up or down, the utility of B—a definition which is not only precise but overinclusive for any principle of legal involvement.\(^\text{20}\) If

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20. For a longer discussion of the question, see Richard A. Epstein, The Harm
we were to take a legal position that disallowed all actions that have negative externalities for others and sought to treat that as a generalizable moral norm, then the consequence would be complete paralysis (an externality imposed on all, by all, as a consequence of the legal rule) from which everyone would emerge the loser. Seeking to respect all (but only) negative externalities by the legal system leads to a place where there is no decision for individual choice or personal self-control, a result that is wholly inconsistent with our ordinary intuitions about autonomy and self-control.

So to avoid that situation we run to a world in which autonomy allows us to impose negative externalities on those with whom we refuse to deal but not on those upon whom we inflict force. (I put aside the cases of misrepresentation that are covered by the general theory and which can be incorporated later.) The point is that the belief in subjective values then correlates into a universe in which we erect, with some tugging at the margins, separate domains in which we are all masters. Within that domain of choice, each of us can maximize our utility functions across incommensurables and imponderables as we see fit. We do not have to explain our choices to others, although we are free to do so if we like and to ask for their advice and assistance if we choose. The principle is one that is perfectly universal, save for qualifications about infants and incompetents that need not trouble us here. A system of strong individual rights is a correlative of our belief that interpersonal comparisons of utility are hard to make but comparisons between human endeavors can and should be made in each instance by the person most affected by the choice.

Adoption of this framework also has one powerful social advantage: it reduces the stresses placed on the operation of a legal system. Thus, all of the relevant choices are made within the individ-

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Principle—And How It Grew, 55 U. TORONTO L.J. 369 passim (1995), which explores the limitations of the harm principle as it is developed by John Stuart Mill.

'The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise.

What happens, one might ask, when something goes wrong? The answer is that I may "sue" myself and count myself the winner and the loser from any suit. But because my net recovery will be zero and my litigation costs will be positive, I will never avail myself of this happy opportunity. The problems of mistake and error are all internal to the person and hence do not generate any form of legal liability. The folks who make the mistakes are left not only to bear the costs of error but also to internalize the gains from wise decisions. The strength of the autonomy position lies in the way it fosters responsible decision making over life's choices.

The autonomy principle is then capable of sensible extension in at least two different ways. First, where two autonomous individuals agree to some exchange of goods or services, normally the terms of that exchange should be respected. A given commodity or service might have a fixed wealth in the world at large but be subject to different subjective values. The purpose of an exchange is to move goods and services from persons who value them least to those who value them most. The office of the legal system is to offer security for those exchanges so that parties can perform today secure in the knowledge that the legal system will assist them in the effort to procure return performance tomorrow. The ability to make exchanges thus expands the scope of autonomous decision making and leaves two persons instead of one better off.

In dealing with the question of exchange, it is once again important to recognize that it has both a broad and a narrow meaning. In its narrower sense, "exchange" refers to transactions that involve property, services, cash, and credit. The relations between the parties are often said to be at "arm's length," and the entire question of interdependent utilities can safely be ignored both in trying to plumb the motivations of the particular parties and in explaining their gains and losses. But the idea of exchange can be used in a broader fashion so that it covers affective relations between persons who share a bond, social or biological, that antedates the exchange in question. The only requirement is that the parties both prosper according to their subjective lights even though there are no obvious equivalents in wealth for the commodities so exchanged. But, for our purposes, marriage, gifts, and charitable transactions can expand utility for all relevant parties no matter what their effect on some obviously monetized version of wealth.

The second clear implication of this system is protection against invasion of one's own space by another. Taking one's property without consent is an action which surely cuts into one's space, and while it produces gains for one and losses for another, it will rarely produce gains for both parties. Worse still, there is no natural gov-
error that limits the process of aggression to those cases where the gains to the winner exceed the losses imposed on the loser. It follows that the principle of autonomy calls not only for the expansion of human freedom but also for the creation of parallel limitations on human actions so that all are required to mutually renounce the use of force (and its handmaiden, fraud) against other persons.

Within the framework of this theory, it is easy to see which become the hardest cases. Generally speaking, those cases involve one person who is given a "privilege" to invade the space of another without consent. We can see why this result is disfavored—because it presupposes that one individual is allowed to make choices that limit the scope and behavior of another. Yet because there is enough knowledge of the approximate regularity of human tastes and sentiment, in some extreme conditions our sense of empathy suggests that some general suspension of the autonomy principle will work over the long run for the benefit of all participants in the system at large.

The cases of privilege are designed to respond to these limited situations. Just such a privilege arises when persons are allowed to use the property of others in time of necessity, or when individuals are allowed to say something defamatory in response to a request for information from one who has an interest, often as a prospective employer, cotenant, or teacher of the person about whom the reference is given. These cases are difficult because they sanction an invasion of the space of another which in normal circumstances should be respected absolutely under the autonomy principle and do so precisely because the net gain from the deviation is, in utilitarian terms, its sole justification. But no matter how one slices the point, the recognition of these common law privileges presupposes, as a realm of individual autonomy does not, a venture into the world of interpersonal comparisons of utility which the basic system does not try to make.

How then are these comparisons made? Here I think that the process of choice adopted by the common law is one worthy of emulation by the students of philosophy: it is a case where law can illuminate philosophy, where philosophy confounds the law. The first question to ask is, what happens if we deny the privilege? People can die at sea; fires can spread with impunity; no one can give a


positive reference about an employee, because all negative referenc-
es (which make positive references positive) are strongly prohibit-
ed.23

We must ask whether this is a world in which autonomous
individuals would choose to live. And it is here that the autonomy
theorist introduces another move to ground her own views of the
world. While we believe it is difficult for any individual to make
utility comparisons between persons, it does not follow that we have
no information about the internal preferences of other individuals.
All human beings evolved under the same sort of pressures, and
those pressures lead to a certain rough convergence of tastes. Indi-
viduals will usually agree about those things which they regard as
good and bad, which is why we can speak with a straight face about
a law for the sale of goods, with both senses of the term intended.
The reason we allow trade is that we know that the intensity of
these preferences can vary. But while that intensity does vary in
everyday situations, the closer one moves to the core of life-and-
death situations, the more uniform the preferences across individu-
als.

The payoff is clear in the necessity cases. There are few individ-
uals who do not honor the Hobbesian principle: first preserve life.
The problem is only that where the preservation of life is not at
stake, we do not have any occasion to see that principle operate.
But whenever arguments of necessity are invoked, we are close to
the core of survival and hence can infer confidently that virtually no
individuals prefer the sanctity of their own property to the possibili-
ty of using the property of another to escape imminent peril. We can
and should require some measure of compensation to make sure
that the party whose property is sacrificed to the rescue is not left
the worse off for his pains.24 But we should recognize that the mar-

1788) (finding citizen not entitled to compensation for property seized by order of
Congress and subsequently captured by British).

We find, indeed, a memorable instance of folly recorded in the 3 vol. of
Clarendon's History, where it is mentioned, that the Lord Mayor of London,
in 1666, when that city was on fire, would not give directions for, nor con-
sent to, the pulling down forty wooden houses, or to the removing the furni-
ture, &c., belonging to the lawyers of the temple, then on the circuit, for
fear he should be answerable for a trespass; and in consequence of this
conduct, half that great city was burnt.

Id. The privilege of public necessity would obviate the problem. See Francis H.
Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests of Property

(holding dock owner could recover damages from steamship company whose captain
ket values necessarily involved are only an imperfect proxy for the subjective losses: better small deviations from the ideal than large ones. We accept the principle faux de mieux and are proud of it.

The regularity of utility functions across persons allows us to be secure on questions of sign even if there is some doubt on questions of slope. Stated otherwise, we know the direction of preferences even if we are not sure of their intensities. In extreme cases we are willing to make the judgments that call for deviations from the autonomy principle.

We can go one step further, for in other instances privileges are allowed even though nothing close to survival is at stake. Take, for example, the privilege that attaches to defamatory references in the context of employment. There is no question that the false statement of fact about another individual constitutes an actionable wrong. It is also clear that within the reference context the prima facie wrong frequently is not justified by the consent of the victim who may not even know that discreet inquiries about his competence and integrity have been made. Nor could it be said that the defamatory statements are made in self-defense, for once again the uninformed plaintiff is hardly a threat to the diligent reference. The privilege exists even though the plaintiff himself has not done any wrong that would (under strong autonomy principles) call for the forfeiture of the prima facie right.

Whence then the invocation of privilege? Here the basic argument is that the creation of a privilege for false but honest statements (one defeasible only by proof of malice) works ex ante to the benefit of the party whose action is barred by the privilege. Thus in many employment contexts, the question is who will be selected as a new dean or key executive. To ask individuals whether inquiries can be made about them is to make the entire position off limits. Persons who fear repercussions of public inquiry will often refuse to allow references to be examined because they can no longer preserve any form of deniability. The rule that protects these persons against malicious gossip should hardly interfere with the effort to gain honest information about potential candidates. To keep the privilege robust, the requirements for proof of malice cannot be eroded: the falseness of the statement can never be grounds for inferring that it was made with malicious intent. This privilege too thus requires a good set of utilitarian instincts about the limits of the autonomy principle. The durability of the principle is strong evidence that the older common law rules found, partly by experi-
ence and partly by hunch, the right balance.

B. Specific Legal Prohibitions

The principle of subjective value leads to a reasonably coherent view of the way in which the legal system ought to be organized to protect individuals in making their sovereign choices. The question is whether introducing some notion of incommensurability across domains of value adds much to our understanding about the way legal rules are, or ought to be, put together. My claim is that the answer to this question is no.

In dealing with this question I shall not cover the full range of topics on which the subject can be raised but will consider only three issues: vote selling, sexual relations, and life and death decisions in the medical context. Initially it is clear that these three topics cover very different portions of the spectrum. Only the vote-selling question asks about the interaction between politics and markets as those questions are ordinarily understood. The question of marriage and sex is normally thought to lie astride the uneasy boundary between economic and affective relationships—whereas questions of refusal of medical treatment, voluntary euthanasia, and organ transplantation pit claims for individual autonomy against social claims of the protection of life which is regarded as "sacred" in terms congenial to Immanuel Kant.

In all three cases my approach is the same. I think the common utilitarian framework works as well as any we can devise to address these problems. That framework typically asks about the limitations that should be imposed on individual choice (normally a good for the actor who makes it) in virtue of two kinds of constraints: those which influence the process of choice, such as incompetence and fraud; and those which address the welfare of third parties, the question of externalities.

The different responses generated to these problems do not depend on the need to develop some form of "plural" theory. Rather, the different responses turn on the relative importance of the various problems to be addressed, which shift from context to context. For example, externalities are more important in the voting case than in the marriage-contracting case and more important in dealing with prostitution than in dealing with prenuptial agreements. Both kinds of issues hover uneasily over various medical ethical problems. The only common feature of these areas is that ideas of incommensurability and commodification tend to divert us

25. See ANDERSON, supra note 6, at 1-16.
from, rather than lead us to, the appropriate answers. Consider then the individual cases.

1. **Vote Selling**

Let us start with the question of whether it is right or wrong for candidates who run for public office to sell votes. A concern with incommensurability could say that vote selling is wrong because there is a rigid separation between the political regime in which participation matters and the market regime in which dollars operate as though they were votes. The point is forcefully put by Sunstein:

Vote trading is objectionable in part because it would allow inappropriate concentration of political power in the hands of a few. The prohibition therefore overcomes a collective action problem. But perhaps the ban on vote trading also stems from a concern about kinds of valuation. If votes were freely tradable, we would have a different conception of what voting is for—about the values that it embodies—and this changed conception would have corrosive effects on politics.\(^{26}\)

Here Sunstein makes both the externality argument and the incommensurability argument. But what does incommensurability add? The argument has little to do with the indecency of an exchange of money for votes (such transactions often take place with the sale of shares in a corporate context). Nor does it have much to do with the risk that poor people will sell votes too cheaply, as if the practice were all right if the prices could be maintained above a certain floor. The practice is dangerous even if rich people sell their votes or if poor people seek professional advice to help calculate the correct price.

The source of the concern has to do with the recurrent problems of externality which in turn come from the insufficient specification of property rights. Thus the prospective office holder who buys votes does so with the expectation that he can recoup his costs by looting the public treasury, which costs his sellers less than he pays them, for it is the rest of the public that pays the full price of the transaction. Similarly, if an officer sells votes to a favored con-

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26. Sunstein, *supra* note 5, at 849 (footnote omitted). The first explanation for the prohibition on vote trading is within the standard economic tradition, and Sunstein cites my paper for the proposition. *Id.* at 849 n.269 (citing Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 984–88 (1985)). But why do we then need the second half of the explanation? It seems quite reasonable to suppose that widespread theft would have "corrosive effects" on politics. In many cases the specific utilitarian explanation leaves open the question of what is added by the intuitive appeal to incommensurability.
stituency, he is again selling the property of others for private advantage. Vote selling therefore is part and parcel of a range of theft transactions when the sale of the vote is linked by a theory of self-interest to the use to which it is put. Once again the idea of incommensurability is only invoked to explain a set of legal responses that are better explained on other grounds.

The difference in approach, moreover, should have important implications when the inquiry is carried to the next stage: what forms of regulation, if any, should govern participation in political elections? One issue is the question of political campaign contributions. The subject is one of immense complexity, even if we put aside the hard questions of the First Amendment that have plagued this area since the difficult decision of the United States Supreme Court in Buckley v. Valeo.27

While concern with the nature and character of politics points to a vague sense of deserved uneasiness, it does little to capture the complexities of the problem. Once the issue is redefined in terms of property rights and public trusts, some connections can be more easily established. I will mention only one here. Votes are but one way to allocate political power. Vested rights under a constitution are a second. Where the latter are weak, then the pressure on the former is likely to be intense: the political process is all too capable of redirecting wealth from disfavored to favored groups. There is a greater willingness to spend money on vote buying or on political influence because there is more to be gained from holding public office. One unrecognized strength of a strong system of property rights is that it reduces the incentives to buy votes or influence elections and thus eases a problem that can never quite be made to disappear. The important point is that focusing on the public choice dynamics gives a handle on what should be done and how it should be treated. Simply sticking with concerns of incommensurability of politics and markets captures the seeds of discontent, but it does little to advance the descriptive inquiry of how and when vote selling or political influence will take place and even less to indicate the structural changes that will lead to a cure.

2. Marriage, Sex, and Money

Let us begin with the question of how it is that money can change the nature of relationships between persons. In dealing with this question, a great deal is made of the notion of commodification, especially by Margaret Radin.28 It is her position that introducing cash into certain kinds of relationships “commodifies” them and thus destroys their essential character. Her concern with commodification builds on the common sense observation that exchanges of cash for winter wheat make perfectly good sense but that money cannot buy love or friendship—that the sense of companionship within families and with intimates is soiled if money is introduced into the equation as a reason for giving or denying benefits or favors. Acts of generosity and sympathy simply cannot be reduced to terms of dollars and remain acts of generosity or sympathy. The absence of a market exchange is constitutive of the relationship itself. The point is one that can be made by persons on all sides of the political spectrum with equal good judgment and force.29

I applaud everything about this basic observation. The question is, does it tell us what ought to be done? Here it is critical to recall the central theme of the earlier portion of this Essay. It is one thing to have a strong intuition about how quantities should and should not be balanced. It is quite another thing to translate that intuition into a set of legal prohibitions. It is useful again to call on Mill and the Harm Principle, for while he will use force to prevent harms to others, he is quite insistent that it should not be used to aid in individual self-improvement. An individual’s own welfare is not sufficient warrant for legal intervention.30 On questions of whether money corrupts relationships, there is no reason for taking that next step. If one introduces cash into the arrangement then the element of pure friendship is gone. But that is something that the parties can fully understand as moral agents without legal compulsion. One can be friends with an exercise coach or a manicurist even though you pay her cash for the services rendered. People can be

28. See Radin, Market-Inalienability, supra note 7, at 1855–77; see also Sunstein, supra note 5, at 812–18 (arguing we do not believe value of relationships can be monetarily defined).

29. For liberal versions of the argument, see Radin, Market-Inalienability, supra note 7, at 1855–77, and Sunstein, supra note 5, at 813–18. See also NUSSBAUM, supra note 3, at 106–24. For a libertarian argument with the same slant, see, e.g., Lloyd R. Cohen, Increasing the Supply of Transplant Organs: The Virtues of a Futures Market, 58 GEO. WASH. L. REV. 1, 24–36 (1989) (advocating limited market for organ transplants).

30. MILL, supra note 20, at 69.
close friends with their business partners and perhaps even their lawyers. There are business friendships that can be described as such.

Even in familial relationships the two elements often cohere. Young married couples often have to decide whether they wish to put their assets into joint or individual accounts or both. The decision depends in part on the wealth of the parties, their economic prospects, and, more subtly, their expectations that the marriage will last and how it will be conducted. But these decisions are made usually with some degree of rationality. In some cases, especially with second marriages when there are children by previous marriages, the financial elements are still more prominent. The parties can mix and match the affective with the financial and do so all the time when they sign prenuptial agreements that call for specific levels of cash support during life and after death. And I do not think that it would be absurd, say, for a woman of limited means to decline to marry a well-off man who announced in advance that he would provide her at most a pittance on his death. It may well be that monetary arrangements change the nature of the social relationship, but it is hard to see how these changes should lead to a change in views about the legality of what goes on.

To take the most extreme example of this position, what happens when money becomes the only element that is offered to induce an exchange of sexual favors? At one level it is clear that prostitution is different from an intimate relationship based solely on mutual love and affection. Indeed, to most the transformation is so tawdry that they would not wish to engage in the transaction at all. But to others that transformation may well be what is desired. It is a way to have physical gratification without emotional commitment, without nagging phone calls, and without anguished regrets. Those people who think that the relationship is degrading have a simple remedy: they do not engage in sex for money, ever. They can act on their concerns with incommensurability or commodification and keep out of that market. The ideal of freedom of contract is not a celebration of mutual exchanges for cash; it is a celebration of voluntary association on whatever terms and conditions the parties to the transaction see fit.

All this is not to say that we do not have any objections to prostitution as a social relationship. I can think of at least three points that are of real concern. First, sometimes prostitution involves a breach of the marriage relationship—a contract—and the legal nature of the relationship helps one to understand what is at stake. The marriage vows require each partner to forsake all others. Prostitutes often know that their clients are married, and their
services are supplied in secret and in violation of an existing relationship. The law of inducement of breach of contract seems to cover this situation quite nicely. It may well be that criminal sanctions should not be imposed, and perhaps legal sanctions (for breach of a legal obligation) may be inappropriate on many occasions, although a decision to divorce because of adultery is surely comprehensible to me, even in a no-fault jurisdiction.

Second, prostitution, like promiscuous arrangements generally, also raises questions of harm to third persons through the medium of sexually transmitted diseases—diseases which can impose enormous costs on innocent (and deceived) partners, not to mention the social costs that follow. Some effort to control these costs is directed to genuine questions of externality inherent in the nature of the relationship. Third, I think that corruption of minors is a separate but nonetheless not unimportant concern.

In sum, I think there are good reasons why the standard framework of analysis gives rise to concerns with the cash nexus without having to broach incommensurability. It of course will not handle the full range of problems, for there are persons who have moral objections to persons who with the consent of their spouses engage in prostitution or other sexual relations with third parties. But those objections are not based on any concern with incommensurability. They are based on theological and moral conceptions of what it is to live, or not to live, the good life.

3. Medical Ethics

Let me mention one other area—medical ethics—where the idea of incommensurability has had undesirable social consequences. Medical ethics offers an ideal laboratory for a discussion of both subjectivity and incommensurability because it deals with the most personal and difficult decisions and transactions at the borderland of life itself. Even standard views of freedom of contract tread warily in this area because the question of individual competence is always thrown into sharp relief as persons are forced to make the most difficult of decisions just when their cognitive and physical capabilities ebb. The strength of the contractual model of mutual exchange is also thrown into doubt, for the commodities people have to buy and sell and the choices they have to make come in areas where they have not ventured before.

(a) Consent and Disclosure

The response to these difficulties has been schizophrenic at best. On one end of the spectrum lie powerful rules to strengthen
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the autonomy principle. The most notable of these are the rules on informed consent whose fundamental purpose is to require the physician to lay out in generic terms the costs and benefits of certain medical decisions, coupled with other regimes (such as internal review boards) that support the transfer of information between physician and patient. There are two things that drive this remorseless push to information transfer. One is that the ignorance of patients about the relevant considerations must be taken into account before any responsible decisions can be made. But second, and equally important, is that information transfer is necessary in a system that respects the subjective preferences of individuals. When the choice is between the risk of incontinence without an operation and of sexual dysfunction with it, the only person who possesses the fine-grained sensibilities to make that choice is the patient. He or she may seek the advice and the counsel of others and would be foolish to proceed without extensive consultation so long as time permits. But while there is always something to quarrel with on the point of technique, this basic mission of the law seems consistent with the preservation and advancement of the autonomous choices of individuals.

(b) Euthanasia

With questions of consent and disclosure out of the way, the harder question is how broad is the domain over which these autonomous choices run? And on this question the legal materials are far less coherent. On one side of the line, there are those choices regarded as exclusively within the province of the individual—whether to take or refuse treatment and which among many types of treatment to take. Universally, these questions are regarded as falling into the patient’s province, even though a committee of twenty bishops and physicians think that the patient has made the wrong choice. It is easy to opt out of the medical establishment if


32. The reference to the 20 bishops comes, somewhat out of context, from the famous passage of Learned Hand in Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911). "If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were mutual mistake, or something else of the sort." Id. This (presumptive) celebration of the objective intention has its parallels of course in the law of informed consent, where the question of causation, for reasons of proof, is generally said to be objective and not subjective. See Canterbury, 464 F.2d at 791. But, lest the conflict between subjective and objec-
your will is strong enough to do so.

So now what happens when the question is not refusal to take treatment but the insistence that there be assisted suicide or euthanasia? Here the rhetoric starts to change; no longer is it a question of whether subjective choices matter. Now it is as though these transactions should not be allowed at all (heaven forbid if done for money). The choices between life and death are now regarded as sufficiently sacred (and hence incommensurable) that we take it out of the domain of individual choice and put it in the area of collective consciousness. The net effect is a powerful set of prohibitions on choice, even though it is easy to imagine why some persons who suffer terrible pain from terminal or chronic illness would think that they are better off dead than living a life of hell for themselves and their families.33

Questions of information and incompetence surely remain here, but these are not of a different order of magnitude from those which arise in cases of refusal to receive treatment where the autonomy principle reigns supreme. In both cases the right response should be, it is your life, and we now have good reason to believe that you are not acting out of caprice, whim, depression, or ignorance when you decide to end suffering, spare relatives continued stress, and save the public fisc wasted expenditures. But once again the stark nature of the choice and the sacred nature of the interest is said to prevent it from taking place. Would that we allowed conventional views of autonomy and exchange to govern the hard cases just as it does the easy ones!

(c) Sales of Organs

The same curious ambivalence toward autonomy can be found in other areas. One of the most heavily mooted questions of medical ethics is whether individuals should have the right to buy and sell human organs. The argument against that position is often expressed in terms of the incommensurability of organs necessary for human life and hard cold cash.34 In one sense the case for prohibitive views of interpretation cloud the overall picture, the first test is to assure that the two coincide whenever possible. It is not to choose between them, especially in medical matters.


tion against organ sales has to be wrong: if the two elements were truly incommensurable, then no private individuals could settle upon trade terms that they regarded as mutually advantageous because they could not make the necessary types of comparisons for themselves. Yet the very insistence upon the ban on organ sales between strangers (as opposed to donations, typically within families) has its bite precisely because these exchanges could and would take place if the prohibitions were removed. Given that stark reality, any broad philosophical claim that the trade-off could not be made is falsified by the fact that such trades would take place.

So the ultimate question then turns out to be somewhat different: should these trades be allowed when they are to the satisfaction of both parties? One possible argument is that the commodification of body parts is so odious that we do not allow these private valuations to contaminate the moral universe in which the rest of us live (as though the support for the prohibition were universal). But it is important to make two general points about arguments of this sort.

First, the standard account of subjective value and voluntary exchange yields a very different story. The typical person who seeks to obtain an organ transplant is in a condition of necessity. The individual who is asked to part with that organ may well be moved by connections of blood or marriage or by notions of sympathy. However, that person may well be a stranger to the party in need. No matter which kind of relationship one deals with, it is clear that any system of voluntary donation (especially voluntary donation from a living donor) imposes a heavy wrench upon the donor. The inability to convert these donations into exchanges means that there will be some systematic reluctance to make those exchanges that work for the advantage of both parties to the transaction—one of whom stands in risk of death.

In this context, the claim of commodification seems quite hollow. One person stands the risk of death. The other stands the risk of losing a kidney that in few cases could lead to medical complications and in rare cases to death. I have no question that the loss of life is a far greater risk than the loss of a kidney. But the latter is no trivial risk at all. The refusal to allow compensation therefore places too great a demand on altruism and family pressure because it makes it impossible for a side payment to offset, at least in part, the risks borne by the party who surrenders the kidney. The consequences are predictable from basic economics: frequent public appeals for desperately needed organs, but little increase in overall supply. The refined moral concerns with commodification and incommensurability do nothing to suspend ordinary laws of supply.
and demand or to ease the shortages that could be reduced if a well-functioning market were allowed to exist. The usual accounts of subjective evaluation lead us down quite a different path from the preoccupation with incommensurability.

Second, the ban on the sale of organs is not necessarily incorrect even if the appeals to commodification and incommensurability are overstated. One could well make arguments that the transaction itself invites so much fraud and advantage taking that the total ban is needed to counter these common evils of the contracting process. But a claim of that sort is very hard to make out in its categorical form. It is first necessary to show that the possibility of free entry on both sides of the market, the use of third-party intermediaries as agents and brokers, and the possibility of lesser restrictions (certain waiting periods, only certain people eligible to participate, etc.) are unable to deal with the vast bulk of the abuse without destroying the entire industry.

Once the point is put in this fashion, then any philosophical fascination with incommensurability in connection with sales of organs should quickly fade, for these arguments gain their power precisely because they appeal to the familiar utilitarian concerns with error costs associated with the enforcement of contracts. Whatever the detractors may say, no utilitarian thinks that the mutual benefits from exchange are likely to be preserved when fraud, incompetence, and sharp dealing occur as a matter of course. As that is the case, then the ultimate question is not philosophical but empirical. Is the certainty of these dangers so great that the ban on organ sales should be imposed before any form of the market is allowed to develop? It is at this point that the close connection between the libertarian and utilitarian traditions begins to assert itself.

When the legal system dwells on incommensurability, it becomes a prisoner of its own convoluted rhetoric and, by failing to understand the strengths of human character, falls prey to its weaknesses. There simply is not enough generosity to overcome the heavy private costs associated with providing organs that are of far greater value to their recipient. What is needed is to ignore the distinctive features of organ transplants and to stress again the fundamental point of the orthodox theory: voluntary exchange results in mutual gains from trade. The rest is merely commentary.

CONCLUSION

This Essay has focused on a paradox of both economic and philosophical thought. Oftentimes, principles that seem to represent the greatest level of naïveté in fact represent the greatest level of
sophistication. Thus, in the effort to manufacture multiple levels of analysis, the entire model becomes too complicated for its own good, either in descriptive or in normative terms. To give a homely comparison, the game of chess with thirty-two pieces on sixty-four squares is simple relative to the complicated three-dimensional versions of the game that fertile minds can invent. But it is the simpler game that allows for the deeper thought and for the more complete analysis.

So it is with legal problems. The constant effort to bring to the fore every bit of psychological and behavioral ambiguity results in the use of models that are too nuanced and too complex for their own good. In dealing with ordinary exchanges, there is no moral theory of promising that does as well as the simple economic explanation for the practice: it facilitates gain from trade—a positive sum game—and thus exploits the important and systematic differences between utility and wealth. In dealing with aggression and theft, we need look no further than our concern with negative sum games. To give an explanation for this same practice becomes far more difficult in a world in which questions of commodification and incommensurability flit in and out of the picture only to blur the fundamental distinction of all civilized life—that between coercion and exchange.

In the end, I think the single great danger that lurks in a constant appeal to philosophical notions of incommensurability is that it undermines the presumption of liberty and puts in its place a presumption of state power over individual choices. The utilitarian conceptions of subjective value that I have defended here do a far better job of explaining both the use and the limitations of individual choice and contractual freedom. It is for that reason that they should be jealously defended and socially preserved.