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Fake Incommensurability: A Response to Professor Schauer

by
JEREMY WALDRON*

I

Professor Frederick Schauer's article¹ raises the intriguing possibility that a view about the commensurability of values might be selected on some basis other than the truth about values and their commensurability. For example, even if we are fairly sure that the values embodied in the First Amendment are of the same kind as the values embodied in our assessments of social progress and economic efficiency, we might choose nevertheless to adopt the view that the values involved are quite different and that First Amendment values must not be balanced against considerations of progress or efficiency, but must be given absolute priority over those considerations. We should make this choice or selection, Professor Schauer says, in a frankly empirical and instrumental manner, on the basis of the consequences that would follow from one view or the other being generally believed.

II

Actually, I am not sure whether Professor Schauer's argument is about the consequences of getting people to *believe* certain things or about the consequences of getting them to *do* certain things. Towards the end of his article, Professor Schauer speaks about the consequences of fostering certain *beliefs* (i.e., about the consequences of certain views about commensurability being *believed*).² Who is doing the believing here, and who is fostering the beliefs, are matters I shall

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1. Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785 (1994).

2. *Id.* at 805-09.

return to at the end of my comments.³ At the beginning of the article, however, Professor Schauer states his case in somewhat different terms. He says that there is a distinction between the domain in which we think about what to believe, and the domain in which we think about what to do. And he asserts that his suggestion is entirely confined to the latter domain—the domain of practice and action.⁴

The ambiguity is easily explained. In the realm of practical life, we do not just do things; rather, we have *beliefs* about what we ought to do, and our actions are at least in part the upshot of those beliefs. I presume then that these practical beliefs—not just the actions—are the things we should be manipulating, according to Professor Schauer's suggestion.

But then there is a question about the dichotomy between truth and practice that dominates the first part of Professor Schauer's presentation. He says that for practical purposes we should believe that certain values are not commensurable, even if as a theoretical matter we believe that they are commensurable. What is the status of these theoretical beliefs—the ontological truth about values—with which our practical beliefs are being contrasted? Like many who toy with moral realism, Professor Schauer presents a picture in which (1) values exist as entities about which we can acquire certain kinds of theoretical knowledge, but in which (2) having acquired that theoretical knowledge, we then take the *further* step of deciding practically what is to be done (and what, in the practical realm, is to be believed) about these values.

In my view this picture is incoherent. To acquire objective knowledge about values is precisely to discover what is worth doing, what ought to be done. Theoretical beliefs about values *are* practical beliefs. If values exist objectively, they exist objectively in the practical realm, and knowledge about them is practical knowledge from start to finish. That is why John Mackie regarded objective values as "queer" sorts of entities: They would have to have "to-be-done-ness" built into them.⁵ We need not accept Mackie's view that this is an argument against the very idea of moral objectivity. But we do have to face the fact that the consensus in Western philosophy since Aristotle and certainly since Kant is that there is nothing to know about values that is not also knowledge about what to do; there is nothing to believe about values that is not also a belief about how to act.

3. See Part V *infra*.

4. Schauer, *supra* note 1, at 786-87.

5. J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 38-42 (1977).

I think, therefore, that Professor Schauer's suggestion would be better restated as follows:

Even if the truth about First Amendment values (for example) is that we ought to balance them against considerations of progress and prosperity, still maybe we should resolve not to balance them as we ought, because the consequences of so resolving will be better than the consequences of doing what the values themselves command.

Now that is perilously close to self-contradiction, certainly closer than Professor Schauer's initial formulation. But I agree with him that it is not necessarily a contradiction. We may know in advance that any attempt to do as we ought will result—through our bias or incompetence—in our *actually* doing what we ought not to do; so we may resolve instead to aim at doing what in strict truth we ought not to do, in the belief that this is most likely to result in our doing what we ought.

In other words the gap, which Schauer's proposal exploits, is not the gap between theoretical and practical belief, but the gap between what one takes oneself to be doing and what one ends up doing in fact. I agree with him that this gap can be significant, particularly in institutional contexts, where decision-procedures are so to speak hard-wired. The decision-procedure that it is right to hard-wire into a legal or political institution may not be the decision-procedure that a God or an archangel would deploy to deal with the cases with which the institution has to deal.

III

If we resolve to proceed as though two values really are incommensurable (whether because that is case, or because we think it is better to proceed in that way), what exactly are we resolving? We cannot know how to act as if two quantities are incommensurable unless we know what incommensurability in fact means.

In modern moral and political philosophy, the term "incommensurability" seems to have at least two meanings. I shall call these (surprise, surprise!) "strong" incommensurability and "weak" incommensurability.

Strong incommensurability is a radical and disconcerting prospect. It suggests that two considerations, *A* and *B*, figuring on opposite sides of a practical decision-problem might be genuinely incomparable. The true state of affairs might be as follows: It is not the case that *A* carries more weight than *B*, and it is not the case that *B* carries more weight than *A*, and it is not the case that they are of equal weight. This is the sort of incommensurability that can leave us

paralysed, not knowing what to choose. It is the stuff of tragic decisions: Agamemnon facing the choice between his daughter and his expedition; Sartre's friend facing the choice between his mother and the French Resistance; a young artist choosing between the paths of personal happiness or artistic accomplishment.

Of course, if the choice problem is acute enough, the agent's behavior will eventually reveal a preference for one consideration or another. However, the strong incommensurability thesis holds that such a preference reveals only a particular preference or choice in a particular situation. Different people will decide differently; the same person might decide differently on different occasions; and nothing much in the way of reasons can be adduced. Strong incommensurability implies that there is no basis in our knowledge of value to say that one decision rather than the other was the correct one. In fact, I do not think Professor Schauer is suggesting that the values implicated in constitutional adjudication are incommensurable or should be regarded as incommensurable in this strong sense. But it is important to isolate strong incommensurability as a distinct position, because the alternative—weak incommensurability—could not be more different in the type of decision making it commands.

Whereas strong incommensurability leads to agony and paralysis in the face of immiscible values, weak incommensurability is usually expressed in terms of a simple and straightforward priority rule. The claim that considerations A and B are incommensurable in this second, weak sense connotes that there is an *ordering* between them, and that instead of balancing them quantitatively against one another, we are to immediately prefer even the slightest showing on the A side to anything, no matter what its weight, on the B side.

The idea of an ordering, as the opposite of utilitarian-style weighing and balancing, can be explicated in at least three ways: trumping, side constraints, and lexical priority.

"Trumping"⁶ in bridge, for example, provides an interesting model of weak incommensurability. If diamonds are trumps, even the two of diamonds wins over the ace of spades. But the trumping model does not exclude quantitative considerations altogether. It suggests—helpfully, in my view—that there may be additional choices to be

6. The term is taken from Ronald Dworkin's jurisprudence. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*] ("Individual rights are political trumps held by individuals."); see also Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153 (Jeremy Waldron ed., 1984) [hereinafter Dworkin, *Rights as Trumps*].

made, and indeed weighing and balancing to be done, among the trumps themselves: If diamonds are trumps then I can over-trump your two of diamonds with the three of diamonds.⁷ For example, even if we think rights should trump values, “we may also think that some rights are more important than others,” and we will have to balance among rights—the trumps—themselves.⁸

A different idea, precluding balancing among the trumps, is Robert Nozick’s idea of side constraints.⁹ The best image for that is the rules of chess: One may not move one’s king into check even though such a move would have the advantage of minimizing rule-violations, such as movements of kings into check, in the future.¹⁰ The action is simply not to be done; and that is not the same as saying that its not being done is a very important value that we attempt to maximize.

A third model of weak incommensurability, closer in this regard to trumping than to side constraints, is John Rawls’s concept of “lexical order.”¹¹ The term refers to the organization of a dictionary. All the A-words (even “azonal” or “Aztec”) are to be listed before any of the “B-words” (even “baal” and “baba”). Similarly, if two or more principles are lexically ordered, then we are forbidden to consider the application of any given principle until we are assured that the demands of all principles prior to it in the ordering have been met.

In general the difference between strong incommensurability and weak incommensurability is this. In a case of strong incommensurability, the competing values cannot even be brought into relation with one another: They are genuinely incomparable in the practical realm, leaving us paralysed in the face of their competition. In a case of weak incommensurability—and this is why I call it “weak”—the values *can* be brought into relation with one another. We look at them both, we consider them, and we find an immediately discernible order. If free speech values trump prosperity values, then that is a fact about the relation between these values. Their lack of commensurability refers only to the absence of a common dimension of measurement that would allow trade-offs between them in either direction. But there is certainly a table or an order of priority, just as there is an order of suits in a bridge contract or an order of letters in an alphabet.

7. See Jeremy Waldron, *Rights in Conflict*, 99 *ETHICS* 503, 513-15 (1989).

8. *Id.* at 514.

9. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 28-33 (1974).

10. I am grateful to Nicholas Denyer for this image.

11. See JOHN RAWLS, *A THEORY OF JUSTICE* 42-44 (1971).

IV

How do we establish the orderings or the priorities that are embodied in weak commensurability? Depending on the answer, we might divide weak commensurability (on any of our models) again into two parts: "intuitive" incommensurability and "reasoned" incommensurability.

If two values are intuitively incommensurable in the weak sense then we simply *see* that one of them is to have priority over the other. We say things like: "Any reasonable person can see that saving an innocent child from a painful death is to have priority over the preservation of the statue that has fallen on top of her," or "Any reasonable person can see that free speech trumps considerations of wealth-maximization."

If weak incommensurability is *reasoned* incommensurability, however, it is *not* something we simply *see*. Instead, it is something we argue towards. Rawls *argues* in favor of the lexical priority of basic liberties over the difference principle; he does not simply see it.¹² Dworkin *argues* in favor of the trumping force of free speech and sexual freedom over social and cultural values.¹³ Even Nozick argues about the grounds of side constraints.¹⁴ In all three cases, the arguments are partly formal and partly substantive. Rawls, for example, insists that lexical priority must be treated with caution:

[I]t presupposes that the principles in the order be of a rather special kind. For example, unless the earlier principles have but a limited application and establish definite requirements which can be fulfilled, later principles will never come into play.¹⁵

And his substantive argument for the priority of the basic liberties has to do with the contours of self-respect, and the comparative marginal insignificance of the considerations over which the basic liberties have priority.¹⁶ I could go on, if space permitted, to talk also about the elaborate structure of Dworkin's argument about personal and external preferences as the reasoned basis for his view about rights as

12. *See id.* at 541-48 (referencing the section titled "The Grounds for the Priority of Liberty").

13. *See* DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 6, at 274-78.

14. *See* NOZICK, *supra* note 9, at 30-33 (referencing section titled "Why Side Constraints?").

15. RAWLS, *supra* note 11, at 43.

16. *See id.* at 542-48.

trumps,¹⁷ and Nozick's argument about side-constraints, moral agency, and the meaning of life.¹⁸

The question I want to ask, however, is the following. When Professor Schauer says that it might be wise to act in constitutional law as though certain values or considerations were incommensurable, we know that he means weak incommensurability rather than the strong, paralyzing kind. He means to indicate either a trumping or a side-constraint model order of moral priorities.¹⁹ But is he saying that it is wise to act as though the considerations are intuitively incommensurable or as though they are rationally incommensurable?

He may respond: "It depends . . . depends, that is, on which view would be most useful in the circumstances." But I think the issue is too important to be dismissed in that way, for it raises interesting questions about the difference—if there *is* a difference—between the reasoned defense of a set of trumping or side-constraint priorities and the weighing or balancing that such priorities are supposed to preclude.

Often when people talk about *weighing* or *balancing* one value, principle, or consideration against another, what they mean is not necessarily Benthamite quantification but *any* form of reasoning or argumentation about the values in question. For example, when Dworkin develops his long elaborate discussion of external preferences and racial equality,²⁰ I am sure most ordinary people—most nonphilosophers and probably most lawyers and judges—would say immediately that he is balancing racial equality against social utility. Of course they would not say that if they only saw his conclusion—namely, that the right to racial equality is a trump. But they would say it if they saw his reasoning. And they would say the same about Rawls's reasoning for the priority of liberty in *A Theory of Justice*. It certainly looks like what most people would call balancing. There he is going on in casuistical fashion about various conditions for self-respect and the marginal value of economic and social advantages. It looks quite incompatible with what lay persons would regard as an unequivocal, no-nonsense, cast-iron, nonnegotiable, *trumps!*—god-damn it, commitment to absolute and inalienable rights. It looks like balancing, and I suspect that even most constitutional lawyers would

17. For an elaboration of the argument, see DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 6, at 232-38; Dworkin, *Rights as Trumps*, *supra* note 6, at 155-59.

18. See NOZICK, *supra* note 9, at 48-51.

19. See Schauer, *supra* note 1, at 790.

20. See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 6, at 232-38.

describe it as Rawls's attempt to balance the importance of the basic liberties against the importance of social and economic considerations. (As I said earlier, very few people think only of the Benthamite calculus when weighing and balancing come to mind.)

So is this lay image of commensurability what Schauer has in mind? Is he suggesting that we should resolve, for practical purposes, to act as though the relation between free speech values (for example) and values associated with prosperity and progress did not even have to be thought through? That we should resolve to act as though the processes that ordinary people call "balancing"—but that we professionals call thinking through the order of priorities—was never to be engaged in?

Surely not. For one thing, if we were to pledge ourselves to such a self-denying ordinance against reasoning, how would we establish what kind of ordering to enforce—trumping, side constraints, or lexical priority? More importantly, how would we establish how to state the values that were being given priority, the details of their formulation, and their various exceptions and escape clauses—such as clear and present danger, fire in a crowded theater, and corn dealers as starvers of the poor?

It is no good responding that we should resolve to act as though there were to be no exceptions or escape clauses. The question would remain: No exceptions or escape clauses to what? How—apart from argument, apart from what most people would call weighing and balancing—would we go about pinning down the exact formulation of what there were to be no exceptions or escape clauses to? Certainly if we failed to pin down the exact formulation, then *that* indeterminacy would upset the instrumental priority immediately.

Since our values, even those with the highest moral priority, are not written in the sky, the task of formulating them is inescapable. In my view, that task cannot be undertaken without locating our formulations in regard to other competing values. We cannot state a free speech principle, for example, without reaching at least tentative conclusions on the many puzzle cases and controversies with which free speech is surrounded. If we were to avoid such argumentation altogether in the name of practical incommensurability, we would never be sure that the principle to which we were giving priority had even been stated correctly.

An example from Nozick's work will illustrate. The primary side constraint in Nozick's system is the prohibition against intentional aggression: No matter what one's aims, one is not to pursue them by

attacking others. But Nozick quickly acknowledges that the formulation of such a principle leads us to consider a range of difficult issues, such as self-defense.²¹ These issues require us in effect to think about the various reasons that may weigh *in favor* of attacking people in certain circumstances; in other words, they require us to engage in the sort of casuistry that laymen and lawyers commonly associate with a weighing and balancing process. Now someone might reply that self-defense is not aggression, and so considering whether self-defense is justifiable is not the same as weighing reasons for or against aggression. At a purely verbal level that may be so, but we are not permitted to reach *this* conclusion until we have actually done the reasoning. Whatever words we use, a consideration of the justifiability of self-defense, in relation to a general prohibition on aggression, involves thinking through the reasons there may be in favor of, as well as against, attacking or using force against others in certain circumstances. In this sense, the reasoned articulation of our moral principles and priorities inescapably involves what ordinary people might regard as weighing and balancing.

V

This brings me to an issue I mentioned right at the beginning. Professor Schauer says that a view about commensurability should be selected on instrumental grounds. Selected by whom? He says we should decide, on instrumental grounds, to foster beliefs of various sorts. Who is this "we," and how are "we" different from those among whom we are to foster these beliefs? Professor Schauer says, "It might be consequentially desirable to adopt or to inculcate incommensurability as a disposition."²² Desirable for whom? Inculcate among whom?

Professor Schauer acknowledges the question,²³ but he does not address it. In my view, this is a telling omission. In order to know what kind of belief in incommensurability to foster and among which values, and in order to know what sort of disposition to inculcate, the "we" of Professor Schauer's story have to engage first in the very process of reasoning that these beliefs and dispositions are supposed to preclude. "We" have to try and figure out the point at which free speech values must give way to social order values, otherwise we will

21. NOZICK, *supra* note 9, at 34-35.

22. *See* Schauer, *supra* note 1, at 807.

23. *See id.* at 805 ("[T]he 'we' gets tricky here . . .").

not be in a position to know whether to include a "fire in the crowded theater" exception in the disposition we are fostering or not. "We" have to figure out when a prohibition on the use of force against others gives way to a privilege of self-defense, otherwise we will not know which principle of nonaggression—the familiar one of criminal law or a pure pacifist principle—to inculcate in the "them" who are the beneficiaries of our instrumental manipulation.

So first, we have to do this. First we have to figure out an order of priorities. And then, when we are finished, we will have a nice firm conclusion that we can then select or inculcate among the others (and perhaps also among ourselves).

Putting it in this way reveals a central difficulty in Schauer's proposal. In the circumstances of human life, we will never be done figuring these things out. That is what we do in constitutional jurisprudence, in constitutional litigation, and in legislatures too, at least some of the time. New situations arise—new combinations of old circumstances, or new moral and political sensibilities. Those situations come into politics and before courts because our old order of priorities no longer seems so compelling, at least to some among us. We have to figure out on a recurring daily basis what to do about these things, how to balance various considerations in order to arrive at an order of priorities—a form of weak commensurability—that will serve for the time being.

There is no final word about rights or anything else, from either legislators, judges, or philosophers. The things we want to prioritize in moral and political life—the side constraints we want to enshrine, the suits we want to make trumps—are the subject of constant controversy and interpretation, vision and revision.²⁴ What is more, the "they" of Schauer's proposal—the persons in whom "we" might try pragmatically to inculcate a belief in incommensurability—are the very people who are having to do the arguing, litigating, and legislating in the course of which our priorities are being worked out.

There is a fearful tendency among those who favor the inculcation of beliefs on grounds other than their truth to work implicitly from the premise that there is in every society a small elite—people like us, philosopher-kings—who can see more clearly than the rest of the population what the effects would be of certain beliefs being held, and who can therefore be relied on to choose the appropriate beliefs

24. See Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 28-36 (1993).

for inculcation on the basis of that insight. Professor Schauer's proposal has much in common with what Bernard Williams has called "Government House utilitarianism"—the idea that there are in certain societies (for example, colonial societies) "two classes of people, one of them a class of theorists who could responsibly handle the utilitarian justification of nonutilitarian dispositions, the other a class who unreflectively deployed those dispositions."²⁵ I am not saying that Schauer's own background values are utilitarian. Structurally, however, his proposal has much in common with those "indirect" utilitarian theories that distinguish the ultimate truth in morality from the rules and dispositions that would best serve that ultimate truth, so far as most people are concerned.²⁶ And it seems to suffer from all the difficulties—whether "Government House" elitism or, if the class model is rejected, a sort of moral schizophrenia—to which indirect utilitarianism is heir.

In the end, however, the threat of elitism as such does not bother me. The only credible elite for the purposes of Professor Schauer's proposal, which is after all intended to be germane to issues of weighing and balancing in constitutional law, is a judicial elite. But since judges in our system adopt views in response to adversarial argument, it is inconceivable that there could be any mode of argument among judges that was not shared by lawyers, and thus by litigants, and thus in population at large. If the judges know the truth about incommensurability, then it will be hard to keep it from the rest of us, whatever the instrumental advantages of doing so may be.

My main worry about Schauer's "we"—we who are supposed to know in advance what beliefs about incommensurability to inculcate among "them"—is that this notional division of labor blurs a proper sense of what is really going on in moral life. Though we cherish our moral absolutes, our trumping priorities, our side constraints, and our unyielding principles, it is remarkable how much of moral, political, and constitutional life is taken up with thinking these things through again and again, formulating and defending them in different terms, adding new exceptions and taking others away, and arguing—always arguing—about exactly *what* it is that we hold most dear. The fluidity of this realistic picture of moral argument is not supposed to discredit the notion of incommensurability—certainly not weak, reasoned incommensurability. But it does discredit, I think, Professor Schauer's

25. BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 108 (1985).

26. The best known recent example of "indirect" utilitarianism in moral philosophy is R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD, AND POINT* 44-64 (1981).

suggestion that we could ever know what moral beliefs or dispositions to inculcate on a basis that precluded any further reasoning, consideration or revision. Moral life is not like that. Even when we are most adamant in our principles, we find ourselves—as rational beings—doing the sort of reasoning and weighing of contrary considerations that a belief in incommensurability is commonly thought to preclude.